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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000733-MR

LORI HASSLER APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-001420

RESULTS BY DESIGN, LLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Lori Hassler appeals from a judgment based upon an adverse jury verdict in her claim for damages allegedly incurred in services provided her by appellee Results By Design, a weight loss and fitness spa. Hassler argues that the trial court erroneously entered directed verdicts on key issues, erred in several evidentiary rulings, and impermissibly allowed the jury to consider

assumption of the risk, which in combination deprived her of a fair trial. Finding no reversible error in any of the issues presented, we affirm.

Hassler has suffered from diabetes since she was nine years old. In May 2011, Hassler's endocrinologist, Dr. Mary Self, warned her that her failure to attempt to control her diabetes had resulted in deterioration of her kidney function to the point that she had now required treatment by a diabetic kidney specialist. Dr. Self indicated that Hassler needed to begin medication for diabetic kidney disease and stressed that it was "absolutely unacceptable for [her] to continue with this level of control."

Approximately one week after being informed that she had stage III chronic kidney disease, Hassler contacted Results by Design to begin a training regimen in the hope of "toning up" for her daughter's upcoming wedding. Hassler listed her goals on intake paperwork as a tighter abdomen, muscle definition in arms, and more energy. Although she answered "yes" to whether she had a family history of diabetes, when asked to list any other medical conditions not previously mentioned, Hassler stated that she had a previous hysterectomy and that she had four abdominal surgeries. She did not list her lack of diabetic control or her recent diagnosis of stage III kidney disease. The trainers put together a coordinated exercise program, nutritional plan, and dietary supplementation (vitamins) regimen. After approximately six weeks on the plan, Hassler was hospitalized

with acute kidney failure, requiring extended dialysis and eventually a kidney transplant.

Hassler subsequently initiated this litigation by filing a complaint alleging: 1) that Results by Design (Results) was operating an unlicensed health spa as defined in Kentucky Revised Statute ("KRS") 367.900; 2) that she was injured through Results' negligence; 3) that Results committed consumer fraud; and 4) that she was damaged by Results' illegal practice of medicine. At the conclusion of the presentation of her case, the trial court granted Results' motion for a directed verdict on Hassler's claims based on consumer fraud and the illegal practice of medicine. The jury ultimately returned a verdict in favor of Results finding no breach of its duty to Hassler or that its actions were a substantial factor in causing her injuries.

Hassler advances several arguments to support her contention that the judgment based upon that verdict must be set aside: 1) that the trial court erred in allowing Results to introduce a signed waiver and release it into evidence; 2) that the trial court erred in failing to redact from that release language which implied Hassler had assumed the risk of her injuries; 3) that the trial court erred in refusing to submit a "health spa" standard of care in the jury instructions; 4) that the trial court erred in directing a verdict in favor of Results on Hassler's claim predicated on the unauthorized practice of medicine; 5) that the trial court erred in directing

the verdict on Hassler's claim that Results violated the Kentucky Consumer Protection Act; and 6) that the trial court erred in refusing to admit on redirect examination evidence of any standard of care applicable to health spas or personal trainers. We perceive no reversible error in any of these contentions.

Our analysis commences with Hassler's arguments concerning introduction of the waiver and release she signed prior to beginning the regimen suggested by Results. In so doing, we note that we review evidentiary rulings under the abuse of discretion standard. *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (citing *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004)). "The test for an abuse of discretion 'is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id*. (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). Considering the waiver and release in that light, we cannot say that the decision to admit the waiver was arbitrary, unreasonable, or unfair.

As Hassler correctly asserts, the trial court concluded that the waiver was void and unenforceable as a matter of law. However, it nevertheless permitted the waiver to be introduced as bearing on her comparative fault. Results insists that introduction of the waiver was proper in defense of Hassler's claim that Results breached its duty of care in allowing her to undertake the exercise and supplement regimen. In our view, the proper inquiry is whether introduction of the

waiver was relevant in aiding the factfinder in its decision-making function. As our Supreme Court explained in *Webb v. Commonwealth*, 387 S.W.3d 319 (Ky. 2012):

> According to KRE 401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "[R]elevance is established by any showing of probativeness, however slight." *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999).

Id. at 325. We are convinced that the trial court properly concluded that while the waiver and release was unenforceable, it nevertheless provided relevant evidence as to Results' alleged breach of its standard of care and as to whether Hassler exercised ordinary care for her own health.

Of particular pertinence to Hassler's claims, the waiver emphasized the importance of seeing a physician prior to beginning the exercise and supplementation regimen:

> Because physical exercise can be strenuous and subject to risk of serious injury, Results by Design Fitness, LLC urges you to obtain a physical examination from a doctor before any exercise equipment or participating in any exercise activity.
>
> . . . .
>
> Any recommendation for changes in diet including the use of food supplements, weight reduction and/or body building enhancement products are entirely your responsibility and

> you should consult a physician prior to undergoing any dietary or food supplement changes.

We view the warnings set out in the waiver and release as directly bearing upon Results' duty of care to Hassler prior to her commencing the suggested regimen, as well as upon Hassler's duty to exercise ordinary care for her own health. It was not clearly unreasonable for a jury to conclude that a person with Hassler's knowledge concerning the state of her health did not exercise ordinary care in failing to heed Results' warning to consult a physician prior to commencing the suggested regimen. In *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, 299 (Ky. 2015), our Supreme Court made clear that in negligence actions whether a person acted with ordinary care for his own safety is an appropriate inquiry and that "what constitutes reasonable conduct will always be dictated by the circumstances a person encounters." *Id*. The waiver in this case had a bearing on that inquiry and was relevant in assisting the jury in its determination of comparative fault.

Hassler also complains that the waiver contained highly prejudicial language which impermissibly allowed the jury to apply the doctrine of assumption of the risk to her claim. The allegedly inflammatory language reads as follows:

> You (each member, guest, and all participating family members) agree that if you engage in any physical exercise or activity, or use any club amenity on the premises or off premises including any Results by Design Fitness, LLC, sponsored event, you do so **entirely at your own risk.** . . . . You agree that you are voluntarily participating in these activities and use of these facilities

> and premises **and assume all risks** of injury, illness, or death.

Hassler correctly asserts that with the advent of comparative fault the doctrine of assumption of the risk is no longer viable in negligence cases. However, we are not persuaded that the introduction of the unredacted waiver and release caused the jury to improperly assess Hassler's claim.

Regarding the import of the waiver and release, the trial court gave the following admonition:

> This is not a waiver as a legal matter. The language in there may or may not be important. That's for you to decide. It is the language that was part of this document that the parties agree was signed by this witness. It does not have the effect of being a waiver as a matter of law. And that's not anything for you to be concerned about. That's a decision that the judges make and the legislature and whoever else. For our purposes, that language is something you absolutely may be able to consider and give it whatever weight that you think is appropriate, but you may not consider it as having the legal authority or legal effect of waiving liability.

Hassler insists that the admonition was insufficient to cure the prejudice suffered by introduction of the waiver. We disagree.

Kentucky law is clear that there are only two circumstances in which the presumptive efficacy of an admonition can be questioned: (1) upon a showing that there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the

inadmissible evidence would be devastating to the defendant, or (2) upon a showing that the question was asked without a factual basis and was "inflammatory" or "highly prejudicial." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003). The allegedly objectionable evidence in this case was offered not for the purpose of proving Hassler had assumed the risk of her own injuries, but rather to demonstrate that Results informed her before she undertook the regimen that there were health risks involved in undertaking the regimen and that an ordinarily prudent person with Hassler's known medical condition would have consulted a physician before proceeding with the program. Hassler failed to show the requisite "overwhelming probability" that the jury was unable to follow the court's admonition or that there was a "strong likelihood" that the effect of the admission of the waiver was "devastating." Because Hassler failed to rebut the presumption that the admonition cured any potential prejudice, any error in failing to redact the allegedly objectionable language was effectively cured by the trial court's admonition.

Hassler next argues that the trial court erred in refusing to give an instruction allowing the jury to find that Results made false representations in violation of Kentucky statutes. Hassler contends that because the trial court found Results to be a "health spa," it was bound to adhere to the legal standards

applicable to health spas. In particular, Hassler maintains that she was entitled to an instruction based upon the following prohibition contained in KRS 367.920:

> (2) Health spas shall be prohibited from making any material misrepresentation to current members, prospective members or purchasers of membership contracts regarding:
>
> . . .
>
> (c) Results obtained through exercise, dieting, or weight control programs[.]

This statutory provision also forms the basis for Hassler's consumer fraud claim upon which the trial court granted a directed verdict in favor of Results. Because the two arguments are intertwined, we will consider them together.

In order to prevail on her fraudulent misrepresentation claim, Hassler was required to demonstrate: "a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." *United Parcel Service Company v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999) (citing *Wahba v. Don Corlett Motors, Inc*., 573 S.W.2d 357, 359 (Ky. App. 1978)). Our review of the record convinces us that Hassler was able to establish only that there was a material representation: that Matt Thoma represented he was a certified strength and conditioning coach. Contrary to Hassler's argument, she failed to provide any testimony demonstrating that in her brief initial meeting with Thoma he made any material representation

that was demonstrably false. There was testimony indicating that Thoma was attempting to instill confidence in his ability to provide strength and conditioning training, but there was no testimony to support the contention that he pointed to his certification to show that Results could safely carry out the nutrition and vitamin supplementation services. Nor was there evidence indicating that Thoma's representations were demonstrably false and were known to be false when he interviewed Hassler prior to her beginning the program. Because Hassler failed to establish all the requisite elements of fraudulent misrepresentation, the trial court properly granted a directed verdict on Hassler's consumer fraud claim at the close of her evidence.

Which brings us back to Hassler's claim that she was entitled to an instruction based upon KRS 367.920(2). Because there was insufficient evidence to support an instruction on material misrepresentation, the trial court did not err in refusing the requested instruction.

Hassler also insists that the trial court erred in granting a directed verdict on her claim that Results was engaging in the unauthorized practice of medicine. In granting Results' motion, the trial court stated: "I don't think there's anything they did that comes even close to the practice of medicine. . . I do not see this as being a close call." We agree with the trial court's assessment.

Hassler did not expect Results to treat her diabetes or diabetic kidney disease; rather, she intended that Results assist her in meeting her goals of having a tighter abdomen, muscle definition in arms, and more energy. Nor was there any evidence that Results attempted to do anything other than help her improve her overall fitness and health. Further, as Results correctly points out, KRS 311.560(1) speaks solely in terms of "persons" engaging in the unauthorized practice of medicine:

> Except as provided in subsection (2) of this section, no **person** shall engage or attempt to engage in the practice of medicine or osteopathy within this state, or open, maintain, or occupy an office or place of business within this state for engaging in practice, or in any manner announce or express a readiness to engage in practice within this state, unless the **person** holds a valid and effective license or permit issued by the board as hereinafter provided.

(Emphasis added.) Results, an LLC, is the only defendant in this case. On that basis alone, we are convinced that the trial court properly disposed of the unauthorized practice claim. However, there is absolutely nothing in this record from which one could conclude that Results was in any way attempting to treat Hassler's diabetes. In fact, the uncontradicted testimony was that the supplementation protocols suggested to Hassler would have been the same whether she had underlying diabetes or not and were intended to help with fat loss. This testimony, coupled with the evidence that Results expressly urged Hassler to

consult a physician prior to undertaking the regimen, is more than adequate support for the trial court's decision to direct a verdict on her unauthorized practice claim.

Finally, we find no error in the decision of the trial court to limit the scope of evidence Hassler could introduce on re-direct examination. Our Supreme Court has made clear that "[i]t is within the sound discretion of the trial court to regulate the order of presentation of proof during a trial." *Fraser v. Miller*, 427 S.W.3d 182, 184 (Ky. 2014) (citing *Commonwealth, Dep't of Highways v. Ochsner*, 392 S.W.2d 446, 448 (Ky. 1965)). *Fraser* further instructs that "[t]he test to determine if the trial court abused its discretion is to ask whether its decision was 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id*. (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999)). The former Court of Appeals described rebuttal evidence as evidence that "tends to counteract or overcome the legal effect of the evidence for the other side." *Reserve Loan Life Ins. Co. v. Boreing*, 157 Ky. 730, 163 S.W. 1085, 1087 (1914). Applying these principles to the evidence Hassler sought to introduce, we cannot say the trial court abused its discretion in regulating the order of presentation of proof. Evidence relating to the standard of care applicable to health spas and personal trainers could and should have been introduced as part of Hassler's case-in-chief.

The *Fraser* court emphasized that our civil rules require the party with the burden of proof to "first produce evidence and should 'exhaust his evidence before the other begins.' CR 43.02(c)." The rule thereafter "further permits the trial court to allow the parties to rebut evidence 'for good reasons in furtherance of justice.' CR 43.02(d)." 427 S.W.3d at 184. Nothing in the trial court's exercise of its broad authority to control the conduct of trial proceedings can be said to be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." The proper time to introduce evidence concerning the standard of care applicable to health spas and personal trainers was as part of Hassler's case-in-chief. The trial court did not abuse its discretion in limiting the scope of re-direct examination.

Accordingly, finding no reversible error in any of the arguments presented, we affirm the judgment of the Jefferson Circuit Court.

L. THOMPSON, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS WITH RESPECT TO THE INTRODUCTION OF THE WAIVER AND WILL NOT FILE SEPARATE OPINION.

BRIEFS FOR APPELLANT:

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