

RENDERED: MARCH 20, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000711-MR

MILLER ENTERPRISES, LLC

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 13-CI-00973

CITY OF SHEPHERDSVILLE; LAZY RIVER
NORTH, INC.; VICTOR WOOD; DIANA WOOD;
TIFFANY EWING; CHARLES E. CAVE; JACQUIE
CAVE; JOAN FRENCH-SCHLAGETER; JAMES
R. HATFIELD; RICK TALBOTT; AND JOANN
TALBOT

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

CLAYTON, CHIEF JUDGE: Miller Enterprises, LLC (Miller) appeals from a Bullitt Circuit Court order entered following a jury trial. Miller brought a civil action against the City of Shepherdsville (City) claiming the City was negligent for failing to issue a building permit and drainage plan approval for the construction of an apartment complex. Miller argues that the jury was erroneously instructed, that expert testimony was improperly excluded, and that Miller was entitled to a directed verdict. We affirm.

In 2012, Miller sought to buy a tract of land in the City with the intention of developing a multifamily apartment complex on the property. Before making the purchase, Miller contacted the City to ensure the property had the correct zoning classification, R3 (for multifamily residential use), for this type of development. Brenda Weidekamp, a Deputy City Clerk, sent Miller both an email and a letter on City letterhead, stating that the City of Shepherdsville Zoning Maps indicated the property at issue was zoned R3. Miller purchased the tract of property shortly thereafter, on August 14, 2012.

Meanwhile, several City residents had contacted their councilperson, Faith Portman, expressing disapproval of the development. Apparently, the property had been rezoned from R1 (single family residential) to R3 in 1977. Portman asked Weidekamp to provide a copy of the 1977 ordinance rezoning the property. Weidekamp was unable to find such an ordinance and became concerned

that an ordinance was required to effectuate a valid zoning change in 1977. She contacted the City Clerk who advised her to consult City Mayor Scott Ellis. Ellis was uncertain about the issue and decided to submit the matter to the City Council. At the next Council meeting, before Ellis could raise the matter, an audience member raised Miller's application. The Council voted to submit the issue of Miller's proposed development to the Planning and Zoning Commission. Miller was not notified of the meeting and was not present.

Miller filed a complaint against the City alleging negligence for failing to accept the application for a building permit or to issue it.¹ The matter was never submitted to the Commission and no permit was ever issued.

Following a bench trial, the trial court concluded as a matter of law that the rezoning of the property from R1 to R3 in 1977 complied with the law at that time, which did not require an ordinance. The trial court also held that a factual issue remained regarding whether Miller ever submitted an application for the permit and drainage approval and, if an application had been submitted, whether appropriate filing fees had been paid. Further, a factual issue remained regarding what, if any, damages were appropriate.

¹ Several area property owners (Victor and Diana Wood, Tiffany Ewing, Charles E. and Jacquie Cave, Joan French-Schlageter, James R. Hatfield, Rick and Joann Talbott) and Lazy River North, Inc., intervened as defendants in the lawsuit. Their claims were dismissed by the trial court and they are not parties to the present appeal.

The trial court acknowledged that under the Claims Against Local Governments Act (CALGA), Kentucky Revised Statutes (KRS) 65.200 *et seq.*, the City was not liable for “[t]he issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization[.]” KRS 65.2003(3)(c). The trial court also noted, however, that the statute is not to be “construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.” KRS 65.2003(3). The court found that while the granting of an application for a permit may be discretionary, accepting an application is a ministerial duty. The trial court then outlined the factual conflict which it determined would necessitate a jury trial:

The evidence produced by testimony of Mayor Ellis shows that the Mayor has no role in the issuance of a building permit in the City of Shepherdsville unless asked. George Miller testified that he tendered an application for a building permit to Margaret Hodge and Mayor Ellis said he could not accept the application. If the trier of fact finds this to be true an application was tendered and Defendant City of Shepherdsville declined to accept the application.

Weidekamp testified that when Miller brought the application to her he was instructed to hold onto the application until the City Council gave her direction. If the trier of fact finds this to be true[,] no application was tendered as she stated she did not deny Miller the opportunity to file an application for a building permit. She just wanted him to wait until the [City] Council had made a decision on how to proceed and none was later

submitted. Ellis testified that Miller tried to give him the application for the building permit but Ellis told him he could not take it because there were questions about the zoning. If the trier of fact finds this to be true no application was tendered.

Based on the discrepancy in testimony this Court finds there is a material issue of fact to be decided. Did the Plaintiff submit a building permit application to the City of Shepherdsville and if Plaintiff submitted a building permit application, did the City refuse to accept the application?

The case went to trial and the jury found in the City's favor. This appeal by Miller followed.

Miller's first argument concerns the wording of the jury instructions. Miller tendered proposed jury instructions on March 14, 2018, several days prior to trial. The instructions stated in relevant part as follows:

INSTRUCTION NO. 2

Did Plaintiff Miller submit a building permit application to the City of Shepherdsville?

If Plaintiff Miller submitted a building permit application, did the City refuse to accept the application?

INSTRUCTION NO. 3

Do you find that the Defendant City of Shepherdsville failed to notify the Plaintiff, Miller Enterprises, LLC, of the outcome of its action?

INSTRUCTION NO. 4

Did the City of Shepherdsville fail to respond to any building permit application submitted by the Plaintiff, Miller Enterprises, LLC?

Miller tendered amended jury instructions five days later.

They stated in relevant part as follows:

INSTRUCTION NO. 2

If Plaintiff Miller attempted to submit a building permit application, did the City refuse to accept the application?

INSTRUCTION NO. 3

Did the City of Shepherdsville fail to timely and correctly act upon the application?

INSTRUCTION NO. 4

Do you find that the Defendant City of Shepherdsville failed to notify the Plaintiff, Miller Enterprises, LLC, of the outcome of its action upon the building permit application?

Having reviewed the instructions tendered by the parties, the trial court presented its own draft instructions following the close of the City's evidence. The trial court's pertinent instruction provided as follows:

You will find for the Plaintiff if you are satisfied from the evidence all of the following:

(a) That George Miller submitted an application for a building permit to the City of Shepherdsville by tendering a building permit application to its agent

Margaret Hodge; or Mayor Scott Ellis; or Brenda Weidekamp, and

(b) That the Defendant City of Shepherdsville, through its agent Margaret Hodge; or Mayor Scott Ellis; or Brenda Weidekamp refused to accept the application for building permit tendered by George Miller, and

(c) That the Defendant City of Shepherdsville, through its agent Mayor Scott Ellis; or Brenda Weidekamp failed to exercise ordinary care by refusing to accept the application for building permit tendered by George Miller, and

(d) That the conduct of the Defendant, through its agent Margaret Hodge; or Mayor Scott Ellis; or Brenda Weidekamp in refusing to accept the application was the direct and proximate cause in Plaintiff incurring the damages herein.

The trial court invited counsel to note objections to these instructions on the record. The following exchange took place:

Trial Court: All right, counsel, you've had an opportunity to see the court's initial draft of instructions?

...

Counsel for Miller: Yes, Your Honor.

Trial Court: Anything from the Plaintiff?

Counsel for Miller: Your Honor, on behalf of Plaintiff, I would request that Instruction Number 3b, when it talks about "refuse to accept the application," that there be in the alternative, "accept, act upon, or advise the applicant of the results of."

Trial Court: All right. What other changes?

Counsel for Miller: That's all, Your Honor.

On appeal, Miller argues that the trial court erred in using the conjunctive “and” rather than the disjunctive “or” between the lettered subsections of the instruction. Miller contends that the jury was thereby improperly limited to rendering a verdict for the plaintiff only if it found all the enumerated violations of Miller's rights occurred. The City contends that this argument is unpreserved. We agree.

Kentucky Rules of Civil Procedure (CR) 51(3) provides that “[n]o party may 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.” “The underlying purpose of CR 51(3) is to obtain the best possible trial at the trial court level by giving the trial judge an opportunity to correct any errors before instructing the jury.” *Storm v. Martin*, 540 S.W.3d 795, 800 (Ky. 2017) (quoting *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 162-64 (Ky. 2004)).

In *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 690 (Ky. App. 2009), the appellant tendered proposed instructions but failed to object to the trial court's final written instructions. The Court held “the failure to

specifically object to the final written instructions means the objection . . . has not been properly preserved for our review.” *Id.* “[I]f the appellants were not satisfied with any phase or portion of the instructions the time to speak was before they were given to the jury.” *Harris v. Thompson*, 497 S.W.2d 422, 431 (Ky. 1973) (citing CR 51). “While a party generally may preserve instructional error by tendering to the trial court a correct formulation of the jury instruction, he may not at the same time sit idly by during the jury instruction conference and create the appearance of acquiescence to erroneous instructions.” *Smith v. Commonwealth*, 370 S.W.3d 871, 875 (Ky. 2012).

Applying these principles, we conclude that the objection to the use of the word “and” rather than “or” in the instructions was unpreserved. The fact that Miller tendered its own instructions does not constitute a comprehensive objection to all subsequent instructions. The parties were provided ample opportunity to raise specific objections to the trial court’s proposed instructions. Miller did not take advantage of this opportunity and consequently the specific objection may not be raised for the first time on appeal. Miller does not request palpable error review under CR 61.02.

Next, Miller argues that the trial court erred in excluding the testimony of Lee Miller, a principal owner of Miller Enterprises and a licensed attorney, who was prepared to testify about the City’s constitutional due process

obligations. Counsel for the City asked Ellis whether he was aware of any rule or ordinance that would require the City to give Miller notice of the City's actions at the Council meeting. Ellis replied that he was not. Later, when Lee Miller was being examined, Miller's attorney asked whether, based on his legal background, he was familiar with the protections of due process. Counsel for the City objected on the basis that Miller was being asked for his expert opinion as an attorney yet had not been disclosed as an expert witness. Counsel for Miller argued that the witness was an attorney and the defense had raised the issue. The trial court sustained the objection on the grounds there had been no pretrial disclosure of Miller as an expert witness.

Our standard when reviewing a question of admissibility of evidence is whether the trial court abused its discretion. *Johnson v. Commonwealth*, 105 S.W.3d 430, 438 (Ky. 2003). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Ellis's testimony that he was unaware of any rule or ordinance that would require the City to give Miller notice was not a legal opinion regarding due process requirements; it was a straightforward reply to a question of fact. He was not being asked to opine as a legal expert about due process rights in general or about whether the existence of a rule or ordinance would afford Miller such rights.

Thus, his testimony did not “open the door” to expert testimony by Miller. Miller was not disclosed as an expert in the plaintiff’s pretrial disclosures. Under these circumstances, the trial court did not abuse its discretion in refusing to allow the testimony.

Finally, Miller argues that the trial court’s own findings compelled a judgment in favor of Miller on the question of negligence and should have left only the amount of damages as a question to be submitted to the jury. Miller claims that the trial court had already established during the bench trial that the City violated Miller’s due process rights when it found the City had failed to give Miller notice of the City Council meetings at which the building permit was discussed.

The fact that the City did not give Miller notice of the Council meetings does not equate to a finding by the trial court that Miller’s due process rights were violated. In its order following the bench trial, the court found that an audience member at the Council meeting brought up the issue of Miller’s application and the Council immediately voted to submit the issue to the Planning and Zoning Commission without notice to Miller. The trial court made no conclusion regarding whether this action constituted a violation of Miller’s due process rights.

Later, in addressing the City’s motion for a directed verdict at the jury trial, the trial court expressly stated that there was no reason for Miller to get notice

of the Council meeting because a group of citizens at the meeting unexpectedly decided to send the matter to the Planning and Zoning Commission without any formal request, petition, or lawsuit to challenge the zoning or to seek rezoning. Miller made no motion for a directed verdict at the close of its evidence and it is unclear how the argument regarding the alleged due process violation was preserved for our review.

Miller further contends that the question of whether the City “accepted” a building permit application from Miller was conclusively resolved by two letters admitted into evidence at trial. Miller claims the letters prove Miller tendered the application to the City through the mail. The letters are dated April 23, 2014, and August 5, 2013. They were sent by George Miller directly to Mayor Ellis after the Mayor refused to accept Miller’s application for the building permit. These letters were considered by the jury. We would be overstepping our role “by presuming to reweigh the evidence in the jury’s stead.” *Baston v. County of Kenton ex rel. Kenton County Airport Bd.*, 319 S.W.3d 401, 406 (Ky. 2010). Furthermore, Miller’s view of the import of these letters was never brought to the trial court’s attention by means of a motion for a directed verdict.

For the foregoing reasons, the order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dennis J. Stilger
Louisville, Kentucky

BRIEF FOR APPELLEE CITY OF
SHEPHERDSVILLE:

Mark A. Osbourn
Louisville, Kentucky