COURT OF APPEALS OF KENTUCKY

NO. 1999-CA-002262

LISA BURGESS and
JEFF BURGESS

APPELLANTS

v.

JUDY TAYLOR

APPELLEE

* * * * * * * * * *

RESPONSE OF APPELLEE, JUDY TAYLOR
TO BRIEF OF APPELLANTS,
LISA AND JEFF BURGESS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Honorable William T. Donnell and Jan G. Ahrens, Counsel for Appellants, 32nd Floor, 400 W. Market Street, Louisville, Kentucky 40202, Judge Judy McDonald, Eleventh Division, Jefferson Circuit Court, 700 W. Jefferson, Louisville, Kentucky 40202 and the Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 20th day of March, 2000 and I hereby certify that the Record on Appeal was not withdrawn by the undersigned.

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COUNTER-STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

I.
FACTUAL CIRCUMSTANCES

This appeal results from a suit brought by Appellee, Judy Taylor (hereafter "Taylor") against Lisa Burgess, Jeff Burgess, (Appellees), Kenny Randolph[1] (hereafter "Randolph") and Eugene Jackson (hereafter "Jackson") (R.A. 1-6.) Appellee does not accept Appellants' Statement of the Case.

The suit results from an arrangement known in the 'horse business', as a 'free-lease arrangement'. (R.A. 1080-1998.) Judy Taylor, the titled owner of two horses (Poco and P.J.) arranged for the horses to be cared for at the Burgess' farm in Indiana in exchange for allowing the Burgess' the opportunity to ride them and/or breed P.J. (T.T. 4/14/99, 11:25,11:14:20-11:43; R.A. Deposition Judy Taylor, 8/23/96 (hereinafter Depo. Taylor), p. 5, line 14-p. 7, line 4; p. 66, line 15-p. 68, line 8, p. 69, line 22-p. 70, line 24). Unfortunately, the Burgess' never intended to act as free-lessees, but rather, planned in advance of obtaining possession, to covertly sell the horses as soon as possible. (Video depo. of Lisa Burgess[2], R.A. Deposition of Lisa Burgess (hereinafter Depo. L. Burgess) 604; T.T. 4/15/99, 12:07:20.) Mrs. Taylor, as the titled owner, who merely sought to place the horses in a home wherein they would be ridden in exchange for their ongoing care, never transferred title or ownership of the horses to the Burgess'. Eugene Jackson, an individual generally referred to as a 'killer-buyer' in the horse slaughter industry

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[1]The Complaint against Kenny Randolph, an Indiana resident, and Eugene Jackson, was dismissed on jurisdiction and venue grounds, respectively. That dismissal is presently on Appeal before this Court in No. 1999-CA-000944.

[2]Excerpts from the Deposition of Lisa Burgess were played for the jury on April 15, 1999 beginning at 10:14:52. No video counter appears on the Trial tape. While the video taped deposition is not lengthy, the trial record contains several 'false starts' for which Appellee apologizes to the Court. Nevertheless, this taped deposition is one of the most telling pieces of evidence showing why the jury awarded punitive damages to Appellee. Lisa Burgess repeatedly lies in the deposition, but does such a poor job of lying, anyone viewing same would clearly be 'outraged'.

(T.T. 4/14/99, 12:11), purchased the horses from the Burgess' on September 6, 1994 (T.T. 4/16/99, 14:13:47), within less than one week after the Burgess' took possession of the horses.

A week (4/14/99, 12:14:10-12:15:31) after her horses were taken by the Burgess' from Jefferson County to Indiana, Judy Taylor contacted the Burgess' to make arrangements to visit them (Video Depo.of L. Burgess, 4/14/99, 10:14:52) - just as she and the Burgess' had earlier agreed. (4/14/99, 11:35:45-11:36:30/12:01:35.) The horses had already been sold to Jackson by that time. The Burgess' refused Appellee access to the horses and denied having possession of the horses claiming they were given to an acquaintance whose name was unknown. (Video Depo. of L. Burgess, T.T. 4/14/99, 12:15:49-12:18:15; R.A. 317-323; Depo. Taylor, p. 71, line 12-p. 76, line 23; Depo. L. Burgess, filed 3/11/99, p. 7, line 19-p. 8, line 2; T.T. 4/15/99, 12:17:50-12:19.)

The Burgess', after refusing for some time, finally gave the Appellee the name (T.T. 4/14/99, 12:18:15-12:23:19) of the *"acquaintance"*, i.e., Kenny Randolph (R.A. Depo. Taylor, p. 77, line 23-p.80, line 11) and then instructed Randolph to lie to Appellee when she telephoned him. (T.T. 4/15/99, 12:19-12:19:37; R.A. 317-323; Depo. L. Burgess, p. 8, lines 3-18.) The Burgess' told Randolph to lie and tell Appellee her horses, P.J. and Poco, were with Randolph, living happily at his farm, when in fact, P.J. and Poco had been sold to slaughter-buyer, Eugene Jackson. Randolph did exactly as told. (Video Depo. Kenny Randolph, T.T. 4/15/99 beginning at 15:43:36[3]; Video Depo. L. Burgess, 4/19/99, beginning 10:14:52.) When Appellee telephoned Randolph, he recited this concocted story (Video Depo. Kenny Randolph, T.T. 4/15/99, 15:43:36) as instructed and thereby caused Appellee further delay in learning the true whereabouts of P.J. and Poco. At the time of the telephone conversation, Appellants, of course,

[3]As with the Video Deposition of Lisa Burgess, the Video Deposition of Kenny Randolph played at trial does not contain a tape counter. However, the portions of the Video deposition played at trial were not lengthy and are well worth reviewing.

knew Eugene Jackson had purchased the horses (Video Depol. Kenny Randolph, T.T. 4/15/99, 15:43:36; T.T. 4/15/99, 12:17:50) and that they would be sold for slaughter. (Video Depo. L. Burgess, T.T. 4/15/99 beginning 10:14:52.) Thus, Randolph and the Burgess' not only sent P.J. and Poco to their deaths, but actively prevented Appellee from intercepting and preventing such a fate.

As a result of the telephone conversation with Randolph (T.T. 4/14/99, 12:23:19; 12:26:30), wherein he corroborated his possession of the horses, but refused to provide their exact location, Judy Taylor traveled alone, throughout isolated country roads and farm roads in Indiana, subjecting herself to any number of potential dangers. (Depo. Taylor, 8/23/96, p. 77, line 23; p. 80, line 11.) She was, of course, unsuccessful in locating the horses.

After Randolph's refusal to advise Judy Taylor of the location of the horses, numerous contacts were made with the Burgess' and Randolph by third parties attempting to assist Appellee, including an Indiana police detective (T.T. 4/15/99, 12:22:17, R.A. 1172), a Virginia humane investigator, Victoria Coomber (T.T. 4/14/99, 12:26:40), and a president of a local humane association, Sharon Mayes. (T.T. 4/14/99, 12:24:23.) The Appellants either lied or stonewalled all efforts to locate the horses.[4]

At no time did Appellee intend to make a gift of her horses to the Burgess' who were, in effect, 'strangers' to her.[5] (T.T. 4/14/99, 11:28-11:30.) Appellee had cared for Poco since he was a baby (14 years) and P.J. since the moment she was born (13 years). Appellee had no children and these two animals were to her, her babies. Appellee's only thought in placing Poco and P.J. with the Burgess'

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[4]Although he lied to several people, including Appellee initially, Kenny Randolph ultimately confessed to the Indiana police that the horses had been sold for slaughter to Appellee, Eugene Jackson, a known killer-buyer, and Randolph had agreed with the Burgess' to lie to Judy Taylor about their whereabouts. (R.A. video Depo. of Kenny Randolph.)

[5]Appellee's brother was acquainted with the Burgess' and recommended them to Appellee as 'horse people'. Appellee contacted Appellants based on that recommendation, but was not personally acquainted with Appellants.

was so they could have 'room to run' and a better life. It had become increasingly difficult for Appellee (T.T. 4/14/99, 11:39:30) due to the onset of Muscular Dystrophy (Myasthenia Gravis), to care for them as they deserved. This also followed her husband's decision to divorce Appellee and his vacating of their marital residence.

Nevertheless, until the day the horses were taken by the Burgess', Appellee made sure they received the care they needed. (T.T. 4/14/99, 11:34:40.) Appellants' statement that Appellee had not fed the horses the day before Appellants took possession of the horses, is untrue. (T.T. 4/14/99, 11:38:20-11:39:40.)

The Burgess' took the horses knowing how important they were to Appellee and how much they meant to her. (T.T. 4/14/99, 11:34:40; 11:36:35-11:37:49.) Lisa Burgess even commented (T.T. 4/14/99 11:51:40-11:52:37; 11:59:31-12:00;25; 12:00:40-12:01:23) that she felt like she was taking a member of Judy Taylor's family and she was assured by those present, she was indeed, doing just that. (T.T. 4/14/99 11:52:37-11:53:06.)

Unbeknownst to Judy Taylor, and her family and friends who were gathered at her home to see the horses off, the Burgess' had brought a woman with them (T.T. 4/14/99, 11:49:40-11:50) who was intent upon buying one of the horses. (Video Depo. L. Burgess, T.T. 4/13/99 beginning 10:14:52.) Obviously, this information was not disclosed to Appellee, nor to her family and friends. It was, of course, part of the Burgess' intentional, ongoing scheme to defraud Judy Taylor by taking her horses, assuring Judy they would be in loving hands and returned to her if they could not be kept by the Burgess' - when all the while, the Burgess' intended to sell the horses.

When the Burgess' picked up the horses, Judy Taylor sent with them their feed, hay, bridles, brushes, etc. (T.T. 4/14/99, 11:46:50-11:51:40), as well as, a complete and detailed medical history kept

by her from birth and their individual American Quarter Horse Registration certificates. (T.T. 4/14/99, 12:04:35-12:05:30.) Judy Taylor did not *"sign over"* or endorse the registration documents to the Burgess' and she remained the titled owner of the horses until their deaths. (T.T. 4/14/99, 12:05:457-12:08:21; 12:10:00-12:11; R.A. Plaintiff's Tr. Exhibits 4 and 5.)

After this suit was filed, Burgess' claimed various excuses which required the Burgess' to divest themselves of the horses. The excuses ranged from medical problems with the horses, to fear for their children's lives (T.T. 4/15/99, 12:09:20-12:10:20), property damages (T.T. 4/15/99, 12:08:07-12:09:11, 12:08:07), and then finally, they just didn't need that many horses. (See Video Depo. L. Burgess, T. T. 4/14/99, 10:14:52.) The Burgess' testimony was unconvincing and (T.T. 4/15/99, 12:22:17-12:23:27) they appeared on the stand, to be the liars they are. (T.T. 4/15/99, 12:25:17-12:31:58). Whatever their fabricated excuse for selling the horses, the one question they had no satisfactory answer to, was for what reason they did not simply return the horses to Judy Taylor. (T.T. 4/14/99, 12:22:52, 12:10:34-12:10:59.)

During the trial, evidence was produced that Eugene Jackson sold the horses for slaughter to Ryan Horse Company, a major slaughter-buyer in the United States, *infra*. However, the horses' ultimate fate was not the issue before the jury. Contrary to Appellants' 'red herring' argument about horse slaughter, Appellee's permanent deprivation of her horses, Poco and P.J. (tortious conversion) as a result of the fraudulent scheme was the true issue before the Court.

The jury in this case, following a five day trial, awarded damages as follows:

(1) $1,000 breach of contract[6];

(2) $50,000 outrage; and

[6]From an evidentiary standpoint, this figure ($1,000) represents the market value, i.e., the meat value, of the horses for slaughter purposes as this is the sum received by the Burgess' from Jackson.

(3) $75,00 punitive damages.

Appellants thereafter, filed a Motion to Amend, Alter and Vacate, a Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial. Those motions were denied by the trial Court's Order entered September 1, 1999.

II.

A.
APPELLEE'S RESPONSE TO APPELLANT'S ARGUMENT RE: OUTRAGE

Initially, Appellants' claim (Appellant's Brief, pp. 3-8) their conduct was not outrageous and they should have been granted a directed verdict. Appellants neglect to cite this Court or Appellee, to any portion of the record wherein such a motion was made before the trial Court. Thus, it cannot be readily determined that this issue was properly preserved for Appellant review. (CR 76.12(4)(c)(iv).) Appellants attempt to support their claim in this Section of their Brief by (1) re-argument of the merits of Appellee's case contrasted with appellants' *"spin"* on the defense offered; and (2) reliance on the dissenting opinion in *Craft v. Rice, Ky., 671 S.W.2d 247 (1984)*. Appellants also review fact specific Kentucky case authority in an effort to support their arguments (pp. 4-7). This review is not dispositive or even helpful as Appellants simply ask this Court to substitute its determination of the type of conduct which exceeds the bounds of decency for the jury's verdict which made that finding. Neither of their arguments are persuasive on their own merit, but just as important is the fact that Appellants agreed to and failed to object to the very jury instruction for the tort of outrage which resulted in the verdict they now seek absolution from.

The Appellants also submitted a jury instruction for the tort of outrage and acknowledged same as appropriate before this Court. (T.T. 4/19/99, 9:56 a.m.) Appellants represented to the trial Court their

Appellant assumes the second portion of the above statement should read, *"knew or should have known her emotional distress would be a logical and natural consequence of their conduct."* If such is the allegation, it is easily refuted by the *Craft, supra* principal that where one intended his specific conduct and knew or should have known, that emotional distress would be a logical and natural consequence the element of reckless conduct as required by the tort of outrage is satisfied. Thus, even when specific intent to do emotional harm is lacking, if a tort feasor's acts *"are of such a nature that it may reasonably be inferred that they were motivated by...wantonness or recklessness, or from the entire want of care or attention to duty or great indifference to the person, property or rights of another,...recklessness may be imputed."* W.S. Hayes, Kentucky Jurisprudence, Torts, §11-2, p. 304.

The trial Court is obligated to instruct the jury on issues raised in the pleadings and supported by the evidence. Appellants, of course, now claim the trial Court should not have instructed the jury on the tort of outrage even though Appellants' submitted the instruction and agreed to the two modifications made to same. Appellants' erroneous argument in effect, is that the jury should not have believed the Appellee's testimony, nor that of the witnesses she called. (See Appellants' Brief, A(b), (c) and (d), pp. 8-12).)

However, the jury chose to consider and believe Appellee's evidence and the trial Court properly instructed the jury since the trial Court must instruct on the issues raised in the pleadings and supported by the evidence. In fact, if there is any evidence to sustain a civil litigant's theory of the case, it is to be submitted to the jury. *Risen v. Pierce, Ky., 807 S.W.2d 945 (1991).* Furthermore, the credibility of witnesses and the weight and value to be given to their testimony are questions for the jury. *Hendrickson v. Commonwealth, 282 S.W. 1060 (1926).* In this case the jury made its

assessment and entered a verdict according to the trial Court's instructions.

B.
APPELLEE'S RESPONSE TO APPELLANTS' CLAIM RE: PUNITIVE DAMAGES

Section B of Appellants' Brief contains several disjointed claims, most of which are now being newly asserted on appeal:

(1) *"...The trial court should have never* [sic] *sent the issue of compensatory and punitive damages under the tort of outrage to the jury."* (Appellant's Brief, p. 12.) No support, either statutory or case law is offered by Appellants. Furthermore, this argument was never presented to the trial Court prior to submission of the Instructions to the jury. Appellants' brief contains no reference to the record as required by CR 76.12(4)(c)(iv);

(2) Likewise, Section B of Appellants' Brief also contains an alleged error that *"...an award of punitive damages for outrageous conduct is a duplicative award of damages* [and] *this Instruction should never have been given to the jury."* Appellants' fail to provide any reference to the record indicating the argument or objection was made which would properly preserve this issue for appeal;

(3) Appellants then assert the damage award was excessive and should have been reduced by the trial Court; and

(4) Finally, Appellants' allege the trial Court erroneously denied their motion for a new trial because they claim the damages were excessive, contrary to law and a result of errors occurring during the trial. (Appellants' Brief, pp. 12-13.) These conclusory statements are then discussed in Appellants' Brief, pp. 13-19.

What is not contained anywhere in Section B of Appellants' brief, is the necessary compliance with CR 76.12(4)(c)(iv) which is completely disregarded. This Court has provided practitioners with

ample warning of this mandatory requirement. In Elwell v. Stone, *Ky. App., 799 S.W.2d 46, (1990)* this Court found:

> *"What is most disturbing about this appeal is appellants' complete disregard of CR 76.12(4)(c)(iv) to the effect that a brief must contain:*
>
> 'An *"ARGUMENT"* conforming to the Statement of Points and authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner'.
>
> *The purpose of the rule is set out in 7 Bertelsman and Phillips, Kentucky Practice, CR 76.12(4)(c)(iv), Comment 4 (4th ed. 1989 PP), wherein the authors point out:*
>
> 'The new amendment makes it mandatory that an attorney cite to the record where the claimed assignment of error was properly objected to or brought to the attention of the trial judge. This amendment is designed to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal.'
>
> *About a year and a half after the effective date (January 1, 1985) of the rule, Chief Justice Stephens, writing for the majority in* Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947, 950 (1986), *in reversing this Court in part, emphasized the necessity of compliance when he wrote:*
>
> 'It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court. *Combs v. Knott County Fiscal Court, [283] Ky. [456], 141 S.W.2d 859 (1940)*; CR 76.12(4)(c)(iv) (1/1/85). This clearly has not been done in the case at bar and the Court of Appeals erred in concluding that it had been.
>
> This tribunal assumed the Supreme Court meant what it said for we wrote through Judge Dunn in *Massie v. Persson, Ky. App., 729 S.W.2d 448, 452 (1987):*
>
> *"CR 76.12(4)(c)(iv) in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (Citations omitted).""".*

For example, all errors raised by Appellant regarding the punitive damages Instructions, were made post-Judgment. As stated above, Appellants assert the punitive damage verdict is in 'violation of Kentucky's statutory law, due process and is a duplicative award of damages'. (Appellants' Brief, p. 15.) These arguments may or may not have merit, but they were each made after the trial Court instructed the jury on the law and after Appellants failed to offer those objections to those instructions. Nor did the Appellants advise to the trial Court prior to entry of the Judgment of their theory that the guidance contained in *"KRS 411.186 should have been included in the Instruction to the jury."* (Appellants' Brief, p. 16.) The Court will note that the Appellants' Brief contains no reference to the Record on Appeal, or Trial Tape, indicating any location wherein these new arguments were preserved for appeal. The reason, of course, is because these arguments were all made post-Judgment.

Appellants repeated reliance on the dissenting opinion (Appellants' Brief, p. 16) as contained in *Williams v. Wilson, Ky., 972 S.W.2d 260, 276 (1998)*, to support their claim that the punitive damage verdict is violative of due process, is likewise, a 'post trial' argument Appellants failed to make before instructions were given to the jury. There is no reference to this argument pursuant to CR 76.12(4)(c) contained in Appellants' Brief. While Appellants engage in significant constitutional analysis of the 'constitutional pre-requisites for a permissible award of punitive damages', such arguments, first advanced post-trial, should not now be considered by this Court. This Court has stated it will not search a record for testimony wherein no reference to the transcript is furnished. This Rule applies to the failure of a party to cite the Court to counter numbers of an untranscribed tape to support his position. When an appellant fails to provide this Court with the appropriate references to so a proper review may be conducted, this Court has held it will assume the jurors were

Appellants' counsel: *"That's fine."* (T.T.,4/19/99, 9:55)

When specifically given a further opportunity to object to the instructions, Appellants' counsel failed to do so. (T.T. 9:56.) In fact, when Appellee pointed out that a punitive damages instruction should not now require clear and convincing evidence as the standard of proof, Appellants' counsel stated, *"I'm surprisingly going to agree with Ms. Brophy on that...."* (T.T., 4/1/9/99, 10:12). Finally and immediately prior to the jury being empaneled, Appellants stated they *"object to the instructions as tendered...."* but stated nothing further as to any specific reason therefore, which vague objection is not sufficient for preservation of error. (T.T., 4/19/99, 12:26.)

Pursuant to CR 51, all objections to jury instructions must be made before the case is submitted to the jury. This is true if the party is dissatisfied with any phrase or portion of the instruction. *Harris v. Thomas, Ky., App., 497 S.W.2d 422 (1973).* Objections to instructions may not be made for the first time in a motion for post-trial relief such as, a judgment notwithstanding the verdict. *Scudamore v. Horton, 426 S.W.2d 142 (1968)*; *Buchannan v. Brown, Ky.458 S.W.2d 765 (1970)* (likewise, propriety of a jury instruction cannot be raised for the first time in a motion for a new trial). However, this is exactly when Appellants' first made the arguments they now bring to this Court.

The reasons behind CR 51, as stated in Clay's Kentucky Practice, pages 458 and 459, are as follows:

> *"One important purpose of this requirement is to limit the use of a general objection as a device in securing a subsequent reversal, when the court may well have obviated the error if its attention was directed at the proper time to the particular matter about which the party may subsequently complain or appeal. This is in line with an underlying objective to these Rules to secure the best possible trial at the trial court level rather than in the Court of Appeals, which latter type of practice was all too prevalent under the Civil Code.*

...the trial court should receive every assistance in fairly submitting the proper issues to the jury....It is not an undue burden to require attorneys to specify the nature of their objections to instructions since they are in the best position to comprehend the legal theories that underlie their lawsuits." Sams v. Sigmond I. Kerd Co., Ky., 280 S.W.2d 515, 516 (1955) quoting Clay, Kentucky Practice, pp. 458-459.

Fairness to the trial Court and to the parties requires that objections be specific enough to bring into focus the precise nature of the alleged error. *Sams,* at 516. The trial attorney *"should not be permitted on appeal to claim an abortive trial to which he has materially contributed by failures as a result of inadequate preparation, to assist the trial judge past the pitfall to error."* *Kentucky Border Coal Co., Inc. v. Mullins, Ky. App., 504 S.W.2d 696, 698 (1974).*

In a similar situation, albeit a criminal case, the Court provided further rational or the underpinnings for Appellee's position herein.

"[2] [3] Hopper contends that as RCr 9.54(1) places a duty upon the court to instruct the jury on the law of the case it was incumbent upon the court to give an instruction on involuntary manslaughter, even though no effort was made by him to secure such an instruction. Should we follow this line of reasoning, RCr 9.54(2) would become a nullity. The trial court would be charged with the duty of giving instructions covering each and every possible facet of the case with the ever-present danger that the sufficiency of the instructions would be attacked for the first time upon appeal. Elimination of the possibility of this unseasonable delay in attacking the instructions is the very heart of the goal achieved by RCr 9.54(2), as amended. It is now the duty of the accused to assure himself that the jury is properly instructed at the time of submission. If the instructions do not meet with his approval, then he must timely offer other instructions or make known to the trial court his objection to those given, together with the grounds supporting his objection. Hopper failed to observe the mandate of RCr 9.54(2). Consequently, he did not preserve for appellate review any objection to the instructions given by the trial court." (Hopper v. Commonwealth, 516 S.W.2d, 855, at 857.)

And consider *Commonwealth v. Collins, 821 SW2d 488 (Ky. 1992)*, in accord:

"This Court has also held that the tender of requested instructions and an argument on behalf of these instructions is not sufficient to preserve an issue of failure to give instructions for appellate review. Evans v. Commonwealth, Ky., 702 S.W.2d 424 (1986). *The plain language of RCr 9.54(2) states that tendering instructions is permissive by use of the word "may" and not mandatory. However, the language of*

> *this rule is equally clear that in order to preserve the giving or failure to give an instruction as error for appeal, it is mandatory that an objection be made prior to the Court instructing the jury and further that the objection must be stated specifically together with grounds upon which the objection is made."* (Commonwealth v. Collins, 821 S.W.2d 488, at 492.)

Thus, Appellants' belated objections submitted for the first time after entry of the Judgment and not properly preserved for appeal, should not be sustained or even considered by this Court. Even the vague and unspecified objection that Appellants *"object to the instructions as tendered"* (T.T., 4/19/99, 12:26) will not preserve the error as no party may assert an error in the Court's instructions unless he has adequately presented the position to the trial judge. An objection must specifically identify the matter to which counsel objects and the grounds. *City of Davison Springs v. Reddish, Ky., 344 S.W.2d 826 (1961); CR 51(3)*; and see *Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459 (1990)* (where neither party objects to a given instruction there is no issue for an appeal of the jury instruction); *Volvo of America Corp. v. Wells, Ky. App., 551 S.W.2d 826 (1977)* (as the manufacturer did not argue that the instruction on the measure of damages was erroneous in the trial court, it was bound by the instruction); *Miller v. Quaife, Ky., 391 S.W.2d 682, 684 (1965)* (where appellant made no objection to the Instructions given and further the Instruction tendered by him does not point up the claimed error he is not in a position to complain now); and *Scaggs v. Assad, Ky., 712 S.W.2d 947 (1986)* (plaintiff's failure to object to the contributory negligence instruction when entitled to a comparative negligence instruction waived plaintiff's right to appeal on the issue of comparative negligence.)

C.
APPELLEE'S RESPONSE TO APPELLANTS' ARGUMENT RE: A NEW TRIAL

Appellants' claim the trial court erred when it failed to grant a new trial (Appellants' Brief, pp. 21-

25) for two reasons, (1) a continued 'implication' that the horses were slaughtered, and (2) the admission of hearsay. Both of these are intertwined in that Appellants' claim Appellee implied, but did not prove her horses were sold for slaughter for human consumption. To the contrary, Appellee did prove her horses were soled for slaughter for human consumption and did so not by 'hearsay', but by the testimony of the principals involved in the sale, i.e., Lisa Burgess, Eugene Jackson and Jason Ryan. Appellee will discuss each issue below.

Appellant claims Appellee offered inadmissable evidence that her horses were slaughtered. Appellant cites this Court (Appellants' Brief, p. 21, footnote 2) to Appellees' opening statement and closing argument in support of this claim. Opening statements and closing arguments, of course, are not evidence and thus, could not qualify as such. Had Appellants believed serious error occurred, a prompt motion for mistrial would have been in order. Appellants cite us to no such request for relief from the trial Court. *Louisville R. Co. v. Masterson, 29 Ky. L.R. 829, 96 S.W. 534 (1906).* (A motion for mistrial should be made at the time the error and resulting prejudice occur); *Morton v. Commonwealth, Ky., 817 S.W.2d 218 (1991)* (a party claiming entitlement to a mistrial must ask for such to preserve the error).

In addition to Appellants apparent failure to seek a mistrial, Appellants also failed to seek by a motion *in limine*, preclusion of any reference to the subject matter they now claim was so prejudicial. Had Appellants brought this issue to the trial Court's attention, this claimed error would have been properly preserved. KRE 103(d). It was not.

Furthermore, it was Appellants' grueling *voir dire* of the prospective jury panel which first

brought this issue to the jury's consideration.[7] As stated in the footnote, Appellees asked the jury panel two questions while Appellant questioned, argued and even berated one perspective juror on this very issue. For example, Appellants questioned the panel about the sale of cattle and horses for slaughter for food, whether panel members were opposed to eating horses; why certain individual jurors believed it inappropriate to eat horses, but acceptable to eat cattle and pigs; whether it is in appropriate for other countries or cultures to eat horses, whether United States citizens should or should not slaughter horses in this country for shipment abroad; whether any panel member had a 'problem' with such an activity; whether if Appellants owned horses which were eventually slaughtered, that would impact the panel's feelings about them; if Appellants' attorney sold a horse for slaughter, would the jury think 'less of him'; and when one juror indicated some discomfort (T.T. 4/13/99, 12:37) after repeated questioning, Appellants' counsel questioned her as to whether she was *"fit to sit"* on a jury where horses were slaughtered. Appellants' counsel did not stop there, however. He continued to question the panel about the horse-slaughter business in the United States and whether such a business was inappropriate. And ultimately, asked the panel 'if you were to hear horses are routinely sold for slaughter in the United States and Lisa and Jeff Burgess somehow sold horses for slaughter, could you be fair, would you feel uncomfortable about that?' (T.T. 4/13/99, 12:33-12:43.) One is reminded of the old adage about unringing a bell because after Appellants' *voir dire*, every panel member was well aware horse slaughter was in some form or fashion, a part of the case.

Instead of filing even one motion *in limine*, before the trial Court while the case was pending almost four years, Appellants themselves jumped with both feet into the issue of horse slaughter -

[7]Appellee asked two questions in *voir dire* relating to this issue: (1) whether any panel member had ever sold a horse for slaughter for human consumption or (2) eaten horse meat. (T.T. 4/13/99, 11:52). Appellants delved into the issue for over ten minutes. (T.T. 4/13/99, 12:33.)

not by mere implication as they accuse Appellee (Appellants' Brief, p. 21) but by direct and at times, caustic questioning of the jury panel regarding the panel's thoughts and feelings on the issue of horse slaughter. If Appellants did not believe sufficient evidence existed to support the conclusion the horses were slaughtered, Appellants had a duty to bring the matter to the trial Court's attention by motion *in limine* before Appellants in effect, opened the flood gates.[8] See e.g., *O'Bryan v. Hedgespeth, 892 S.W.2d 571, 574 (1995)* (wherein Plaintiff's motion *in limine* once denied, was found to have preserved Plaintiff's objection for appeal thus, allowing plaintiff to delve into the issue in full without waiving his objection.) Appellants seem to ignore the fact this is a civil case and there were no surprises or smoking guns. Appellants were free to 'test' the sufficiency of every piece of evidence before the trial Court by motion *in limine*. They did not do so, but rather, waited until Judgment was entered and then cried 'foul'.

Appellants then argue that the testimony of Victoria Coomber prejudiced the jury (Appellants' Brief, p. 21.) Ms. Coomber's testimony is included in Appellants' Appendix. Other than the blanket assertion of prejudice, Appellants offer no explanation of how or why Victoria Coomber's testimony supposedly prejudiced this jury to such an extent Appellants were entitled to a new trial.

Next, Appellants state no credible evidence that the horses were slaughtered, was offered. Appellants neglect to mention that several witnesses - even some quite hostile to Appellee, testified to such. For example, Kenny Randolph, friend of and co-conspirator of Appellants, testified Appellants sold the horses to Eugene Jackson, a known Killer-Buyer, for slaughter. See also the Video Deposition of Kenny Randolph played at trial, (4/15/99, 15:43:36), wherein Kenny Randolph describes in detail his conversation with Jeff and Lisa Burgess wherein the Burgess' told him they

[8]Appellants failed to follow the correct procedure in requesting a motion *in limine* pursuant to KRE 103.

were looking for a buyer to sell Poco and P.J. for slaughter and that by the time Judy Taylor called him, he knew they had already been sold for slaughter.

Lisa Burgess testified she tried to sell Poco to two people and when the 'deal' fell through, she called Eugene Jackson and told him to 'come get the horses' she wanted them off her property and that one was crippled and the other one mean. (See Video Depo. L. Burgess played at trial 4/13/99 beginning 10:14:52; 4/15/99 12:12-12:12:51.)

The jury also had the opportunity to view the testimony of Eugene Jackson, a known killer-buyer. Jackson, who testified he has been in the horse business for 45 years claims he has a reputation for selling *"good, gentle, broke family horses"* and when he buys a horse for re-sale to the public he examines the horses thoroughly. He testified he did not examine Poco and P.J., at all. (T.T. 4/16/99, 14:41.) Eugene Jackson admitted he purchased the horses believing Lisa Burgess' representation that one was crippled and the other was mean. (T.T. 4/16/99, 14:14:48.) Eugene Jackson admitted he sells horses for slaughter, but only sells horses for slaughter if they are crippled or mean. (T.T. 4/16/99; 14:28:11-14:28:56.)

Although Jackson had an interesting lapse of memory when it came to when and to whom he sold the horses (T.T. 4/16/99, 14:46:10-46:50), his first story, i.e., that he sold them for auction was resoundingly disproven by his records, as well as, the records from the auction. (T.T. 4/16/99, 14:5:23.) In actuality, Jackson's records proved that instead of selling the horses the following week at the auction where he would expect to receive a higher price if purchased as a riding horse, Jackson contacted Ryan Horse Company, one of the nation's largest horse slaughter companies and sold the horses the following day to Jason Ryan. (T.T. 4/16/99, 14:17:26.) And, although Lisa Burgess had given Jackson the registration papers for the horses (T.T. 4/16/99, 14:35:43-14:44:14), Jackson never gave those registration to Ryan Horse Company because he knew the horses were slaughter bound and

no one would be purchasing those two horses for riding horses. Furthermore, Jackson told Victoria Coomber in September, 1994, that he had sold the horses - not through auction, but to Ryan Horse Company.[9]

Appellants' final argument regarding *"the admission of hearsay testimony"* (Appellants' Brief, pp. 23-25) is unclear. Apparently, the argument is that the testimony of one witness to a conversation (i.e., Victoria Coomber or Sharon Mayes) cannot refute or differ with a second witness' recollection of the same conversation, e.g. Appellants' Brief, pp. 23-24:

> *"...Ms. Coomber was allowed to testify that Eugene Jackson told her he had sold the horses to Jason Ryan for slaughter (R. Tape of 4/16/99: 12:46:08-49:45). Yet both Jason Ryan and Eugene Jackson both* [sic] *testified that* [sic] *they did not know where the horses went. Id. At 15:17:00-15:26:01; 14:37:25-34. In fact, several times during Mr. Jackson's testimony, Appellee's counsel used the previous heresay evidence to challenge Mr. Jackson's own testimony. For instance, when Mr. Jackson said that he believed he told Vicky Coomber and Sharon Mayes he bought the horses from Lisa Burgess, Appellee's counsel discredited that testimony by the use of the previous heresay testimony. Id. At 14:19:00-39:50. In fact, Appellee's counsel challenged Mr. Jackson stating that two parties had already testified that he had said he did not know Lisa Burgess, and asked if these people testified incorrectly. Id. At 14:26:39-50. Mr. Jackson answered by saying that five years had passed since that conversation and he wasn't entirely sure of the conversation. Id."* (References omitted.)

Appellants cite no authority which precludes the questioning of a hostile witness' recollection of a conversation with another witness who has already testified, when both witnesses testify to their recollections before the jury. Contrary to Appellants' assertions, a previous witness' testimony in Court, is not hearsay because it is not an 'out of Court statement'. However, Appellants rightfully view the testimony as evidence that Mr. Jackson lacks credibility. While we have no way of knowing, one might presume the Jury viewed the testimony in the same light as Appellants now do,

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[9]No doubt his efforts at 'memory lapse' as well as, his difficulty in hearing and reading were not lost on the jury since he seemed miraculously cured of those problems when questioned by Appellants' counsel.