NO. 95CI 04726

JEFFERSON CIRCUIT COURT
ELEVENTH DIVISION

JUDY TAYLOR

PLAINTIFF

vs.

LISA BURGESS, ET AL

DEFENDANTS

* * * * * * * * * *

PLAINTIFF'S RESPONSE TO MOTION OF DEFENDANTS BURGESS TO AMEND, ALTER OR VACATE, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL

Comes the Plaintiff, Judy Taylor, by counsel, and makes the following Response to the Motion to Amend, Alter or Vacate, Motion for Judgment Notwithstanding the Verdict and Motion for New Trial made by Defendants Burgess.

INTRODUCTION

I.

Defendants, Jeff and Lisa Burgess, filed their Motion to Amend, Alter or Vacate, Motion for Judgment Notwithstanding the Verdict and Motion for New Trial claiming the following basis:

(1) The evidence did not justify submission of the case to the jury under the tort of outrageous conduct;

(2) The award of damages for the tort of outrage was excessive; and

(3) The award of punitive damages in addition to the award of compensatory damages is contrary to some unspecified rudimentary concept phrased as *"double recovery"*.

Plaintiff will respond to each claim below

II.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION
RE: OUTRAGE

Initially, Defendants claim, page 2, Section A(1), the award of damages for outrage was excessive, contrary to law and violative of due process. Defendants attempt to support their claim by (1) re-argument of the merits of Plaintiff's case verses their *"spin"* on the defense offered; and (2) reliance on the dissenting opinion in *Craft v. Rice, Ky., 671 S.W.2d 247 (1984)*. Neither of their arguments are persuasive on their own merit, but just as important is the fact that Defendants agreed to and failed to object to the very jury instructions regarding the tort of outrage which resulted in the verdict they now seek absolution from.

The Defendants, of course, submitted a jury instruction for the tort of outrage and acknowledged same as appropriate before this Court. (Video trial tape, 4/19/99, 9:56 a.m., hereinafter T.T.) Defendants claimed their tendered instruction came *"...straight from Palmores."* (T.T. 9:57:04.) When Plaintiff then indicated to the Court Defendants' instruction included *"intentional"* conduct, but not *"reckless"* conduct as required under *Craft* (T.T. 9:58) this Court after reviewing the *Craft* case specifically stated to Defendants' counsel, *"It is intentional or reckless. Any question Ms. Ahrens that it is intentional or reckless?"* Defendants' counsel replied, *"I don't believe so."* This Court went on to state, *"so it is acceptable to insert, adopting your* [Defendants' instructions]*...to insert...or Defendants knew or should have known that their conduct would result in emotional distress..."* (T.T. 10:02.) Defendants' counsel then states, *"I don't necessarily disagree* [with that].... " (T.T. 10:04.)

Defendants next requested the Court insert the phraseology, *"severe emotional distress"* with which request this Court complied and Defendants' counsel then stated he did not disagree that the

tort of outrage standard is based on a preponderance of the evidence. (T.T. 10:11.) Subsequently this Court decided to include a punitive damages instruction in both the fraud instruction, as well as, the outrage instruction and make the punitive portions exclusive of one another. (T.T. 10:15.) No specific objection was offered by Defendants to this Instruction.

The trial Court is obligated to instruct the jury on issues raised in the pleadings and supported by the evidence. Defendants, of course, now claim this Court should not have instructed the jury on the tort of outrage (Defendants' Memo., p. 2 and pp. 9-11). The argument in effect, is that the jury should not have believed the Plaintiff's testimony, nor that of the witnesses she called. However, the jury chose to consider and believe Plaintiff's evidence and this 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 this Court's instructions.

III.

PLAINTIFF'S RESPONSE DEFENDANTS' MOTION ER: PUNITIVE DAMAGES

In a similarly misguided argument, now Defendants assert the punitive damage verdict is in 'violation of Kentucky's statutory law, due process and is a duplicative award of damages'. These arguments may or may not have merit, but they are each made after this Court has instructed the jury on the law and after Defendants failed to offer those objections to those instructions. Nor did the Defendants advance to this Court on April 19, 1999, their new theory that the *"proof embodied in*

KRS 411.186 should have been included in the instruction" (Defendants' Memo., p. 15).

Defendants repeated reliance on yet another dissenting opinion (Defendants' Memo., 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 Defendants failed to make before instructions were given to the jury. While Defendants engage in significant constitutional analysis of the 'constitutional pre-requisites for a permissible award of punitive damages', such arguments, first advanced post-trial, cannot now be considered by this Court.

Quite simply, Defendants failed to object to this Court's instruction with respect to the punitive damages award. Defense counsel stated, *"I don't necessarily disagree with this* [instruction tendered by Plaintiff on punitive damages standard/requirements]". (T.T. 9:476:08.) Plaintiff then specifically stated the applicable standard presently (post Wilson v. Williams, Ky., 972 S.W.2d 260 (1998)) to be that of 'gross negligence or recklessness' (T.T. 9;49) to which Defendants' counsel replied, *"okay I can agree with that."* This Court then proposed to counsel the inclusion of one instruction on punitive damages in the instruction on fraud, as well as, one punitive damages instruction within the outrage instruction. Defense counsel replied, *"I can go along with that."* (T.T. 9:50.)

Later, Defendants' counsel stated he objected to the language of the punitive damages instruction *"...because nobody knows what the law is...."* (T.T. 9:53). This Court then stated it would instruct the jury to consider whether the *"...Defendants acted with reckless disregard...you may in your discretion award punitive damages above fraud damages..."* (T.T. 9:54.)

Defendants' counsel: *"Do the factors go out as well?"*

Court: *"Yes."*

Defendants' counsel: *"That's fine."* (T.T. 9:55)

When specifically given a further opportunity to object to the instructions, Defense counsel failed to do so. (T.T. 9:56.) In fact, when Plaintiff pointed out that a punitive damages instruction does not require clear and convincing evidence as the standard of proof, Defendants' counsel stated, *"I'm surprisingly going to agree with Ms. Brophy on that...."* (T.T. 10:12). Finally and immediately prior to the jury being empaneled, Defendants 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. 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).

The reasons behind CR 51, as stated in *Clay*, 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 tye 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.

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 reasoning or underpinnings for Plaintiff'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:

> *"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, Defendants' belated objections submitted here for the first time, cannot be sustained or even considered by this Court. Even the vague and unspecified objection that Defendants *"object to the instructions as tendered"* (T.T. 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 91977)* (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 (1965)*; 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.)

In summary and as has been clearly demonstrated above, Defendants' belated objections cannot now be considered by this Court. Defendants newly advanced claims of error, first raised post-judgment, likewise, are untimely. Plaintiff respectfully requests this Court enter the attached Order overruling Defendants' motions herein.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on this the 23 day of June , 1999 to

Ms. Jan Ahrens
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KATIE MARIE BROPHY

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* * * * * * * * * *

ORDER

Motion having been made and the Court being otherwise sufficiently, advised,

IT IS HEREBY ORDERED AND ADJUDGED,

1. That the Motion of Defendants, Lisa and Jeff Burgess, to Amend, Alter or Vacate, their Motion for Judgment Notwithstanding the Verdict and their Motion for a New Trial, are hereby overruled.

This is a final and appealable Order and there is no just cause for delay in the entry of same.

_____
JUDGE

DATE: _____

cc: Katie M. Brophy
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