[Cite as *Kelley v. Ryan*, 2010-Ohio-1514.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

CHAD A. KELLEY,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-07-104
	:	O P I N I O N
- vs -		4/5/2010
	:	
MARSHA P. RYAN, Administrator, Ohio Bureau of Workers' Compensation,	:	
	:	
Defendant-Appellee,		
	:	
and		
	:	
COCA-COLA ENTERPRISES, INC.,		
	:	
Defendant-Appellant.		

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CV71147

Fox & Fox Co., L.P.A., Bernard C. Fox, 2407 Ashland Avenue, Cincinnati, Ohio 45206, for appellee, Chad A. Kelley

James M. Carroll, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for appellee, Marsha P. Ryan, Administrator, Ohio Bureau of Workers' Compensation

Thompson Hine LLP, M. Scott Young, 312 Walnut Street, 14th Floor, Cincinnati, Ohio 45202, for appellant, Coca-Cola Enterprises

POWELL, J.

{¶1} Defendant-appellant, Coca-Cola Enterprises, Inc. (Coca-Cola), appeals from the decision of the Warren County Court of Common Pleas entitling plaintiff-

appellee, Chad A. Kelley, to participate in workers' compensation benefits. For the reasons outlined below, we affirm.

{¶2} On July 12, 2007, Kelley, an account manager with Coca-Cola, attended a mandatory corporate kick-off event celebrating the release of its new product, Coca-Cola Zero. As a part of this team-building event, which was attended predominately by managers and supervisors, all of the Coca-Cola employees in attendance, including Kelley, were encouraged to canoe down a three-mile stretch of the Little Miami River.

{¶3} Following a presentation conducted by John Whitaker, the Coca-Cola sales center manager, Kelley, along with a fellow co-worker, paddled down the river without incident. Thereafter, upon making the short journey, Kelley got out of the canoe, walked up the embankment to the parking lot, and waited for the bus to arrive to take him back to his vehicle. However, while Kelley waited for the bus, a number of Coca-Cola employees, including Whitaker, who was in charge of the entire event, were seen "splashing," "tipping" canoes, and "getting everybody wet."

{¶4} A short time later, Whitaker, who was soaking wet at the time, walked up the embankment towards Kelley and said, in a joking manner, "you don't look very wet." In response, Kelley informed Whitaker that he was "not getting in the water," and that "it will take more than you to get me in the water." Interpreting Kelley's response as a challenge, Whitaker, as well as Marcus Hall, a Coca-Cola distribution manager, grabbed Kelley and tried to pull him down the embankment and into the river. According to Kelley, when their efforts proved futile, Hall "grabbed [him] and slammed [him] to the ground" causing him to injure his neck. As a result of this incident, Kelley was treated for a cervical dorsal strain and a herniated disc.

{¶5} On August 8, 2007, Kelley filed a workers' compensation claim. However, after his workers' compensation claim was denied by the Industrial Commission, Kelley

appealed to the Warren County Court of Common Pleas. Following a two-day trial, the jury returned a verdict in favor of Kelley entitling him to participate in workers' compensation benefits. Coca-Cola now appeals from this decision, raising two assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT JUDGMENT SHOULD BE REVERSED BECAUSE IT ERRED, AS A MATTER OF LAW, BY INSTRUCTING THE JURY TO RETURN A VERDICT FOR PLAINTIFF WHERE THE JURY FOUND THAT PLAINTIFF'S ALLEGED INJURIES WERE PROXIMATELY CAUSED BY HORSEPLAY THAT PLAINTIFF INSTIGATED OR VOLUNTARILY PARTICIPATED."

{¶8} In its first assignment of error, although not particularly clear, Coca-Cola argues that the trial court erred by instructing the jury that even if it found Kelley instigated or participated in horseplay that proximately caused his injury, he was, nonetheless, still entitled to participate in workers' compensation benefits so long as Coca-Cola acquiesced or consented to that horseplay, as such an instruction was contrary to law. However, despite Coca-Cola's assertion, an exception to the general rule prohibiting one from participating in workers' compensation benefits applies where the employee "is injured by horseplay commonly carried on by the employees with the knowledge and consent or acquiescence of the employer." *Indus. Comm. of Ohio v. Bankes* (1934), 127 Ohio St. 517, 522; *Masden v. CCI Supply, Inc.*, Montgomery App. No. 22304, 2008-Ohio-4396, ¶23; *Caygill v. Jablonski* (1992), 78 Ohio App.3d 807, 816-817; *Meager v. Complete Auto Transit, Inc.* (Mar. 4, 1992), Montgomery App. No. 13062, 1992 WL 41831, at *2. Therefore, because the jury instruction provided by the trial court fairly and correctly stated the law applicable to the evidence presented at trial, we find no error in the trial court's decision to provide the jury with such an instruction.

Wozniak v. Wozniak (1993), 90 Ohio App.3d 400, 410. Accordingly, Coca-Cola's first assignment of error is overruled.

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT'S JUDGMENT SHOULD BE REVERSED BECAUSE IT ERRED IN DENYING [COCA-COLA'S] JUNE 29, 2009, MOTION TO EXCLUDE ALL OF THE TESTIMONY OF BARRY STALEY, MD."

{¶11} In its second assignment of error, Coca-Cola argues that the trial court erred by not excluding *all* of Dr. Barry E. Staley's video taped deposition testimony. Specifically, Coca-Cola claims that because Dr. Staley mistakenly testified that Kelley was treated by a neurosurgeon when, in fact, he was not, the trial court should have excluded his entire video taped deposition for being "inherently unreliable and inadmissible." We disagree.

{¶12} It is well-established that decisions regarding the admissibility of evidence are within the broad discretion of the trial court. *Octa v. Octa Retail, L.L.C.*, Fayette App. No. CA2007-04-015, 2008-Ohio-4505, ¶32; *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. In turn, absent a clear abuse of discretion, a reviewing court may not overturn a trial court's decision to admit or exclude relevant evidence. *Butler Cty. Joint Vocational School Dist. Bd. of Edn. v. Andrews*, Butler App. No. CA2006-10-245, 2007-Ohio-5896, ¶58. An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶13} After a thorough review of the record, we find no error in the trial court's decision not to exclude *all* of Dr. Staley's testimony. While it may be true that Dr. Staley

mistakenly believed Kelley was treated by a neurosurgeon for his injuries,[1] this does not, without more, make his *entire testimony* so unreliable that the trial court's decision to admit the remainder of his testimony amounts to an abuse of discretion.[2] Therefore, because we find the trial court did not abuse its discretion by not excluding *all* of Dr. Staley's deposition testimony, Coca-Cola's second assignment of error is overruled.

{¶14} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

1. Instead of being treated by the neurosurgeon, the record indicates that Kelley was treated by the specialist's licensed nurse practitioner.
2. The trial court did, however, exclude "all references" to the neurosurgeon and his practice group.