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**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 1999-CA-000214-MR

LOUISVILLE WATER COMPANY

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE ANN SHAKE, JUDGE  
ACTION NO. 97-CI-001627

BEVERLY KAY PHELPS, AS ADMINISTRATOR  
OF THE ESTATE OF DANNIE PHELPS, JR., AND  
LAWRENCE M. CASON, AS ADMINISTRATOR OF  
THE ESTATE OF LAWRENCE MICHAEL CARSON, JR.

APPELLEES

OPINION  
AFFIRMING IN PART AND REVERSING IN PART  
\* \* \* \* \*

BEFORE: GUDGEL, CHIEF JUDGE; BARBER, AND COMBS, JUDGES.

BARBER, JUDGE: Lawrence Michael Cason, Jr., a 19-year-old driver, and Dannie R. Phelps, II, his 18-year-old passenger, were killed on February 17, 1997, when the car in which they were riding crashed into a barricaded construction site where the Louisville Water Company ("LWC") was working. According to toxicology results, Cason's blood alcohol was 0.129 and Phelps' was 0.130. The Cason and Phelps Estates ("Appellees") filed suit against the LWC, and Protection Services, Inc., the company which provided signs and barricades to the LWC, seeking compensatory

and punitive damages. The jury returned a verdict in favor of the Plaintiffs on their claims against LWC and Protection Services, Inc., in the amount of \$150,000.00 for loss of earning power and \$5,317.00 for funeral expenses to the Cason Estate, and \$150,000.00 for loss of earning power, and \$15,340.53 for funeral expenses to the Phelps Estate. The jury apportioned causation as follows: LWC 55%; Protection Services, Inc., 10%; Cason 25%; Phelps 10%. The jury also awarded punitive damages against the LWC in the amount of two million dollars, and punitive damages against Protection Services, Inc., in the amount of \$325,000.00. By judgment entered November 6, 1998, the trial court ordered that the Cason estate recover \$1,085,424.35 from the LWC and \$178,031.70 from Protection Services, Inc., and that the Phelps estate recover \$1,090,937.29 from the LWC and \$179,034.05 from Protection Services, Inc.

The LWC appeals. According to LWC, Protection Services, Inc., paid the judgment against it and did not pursue an appeal. We are asked to decide: (1) Whether a municipal corporation can be liable for punitive damages; (2) Whether the decedents' reckless conduct bars recovery of punitive damages; (3) Whether the jury should have been instructed that a finding of malicious or willful action by the LWC was a prerequisite to an award of punitive damages; (4) Whether the award of punitive damages is excessive and violates due process; and (5) Whether the trial court erred in its rulings regarding evidence of subsequent remedial measures.

Appellant contends that the LWC is a municipal corporation and, as such, cannot be liable for punitive damages.

In its January 11, 1999 opinion and order ruling on various post-judgment motions, the trial court states that the ". . . Louisville Water Company is a municipal corporation. . . ." Nevertheless, Appellees assert that "LWC is not in any way, shape or form a municipality or a municipal agent." We disagree. In Barber v. City of Louisville, Ky., 777 S.W.2d 919 (1989), our Supreme Court held that the LWC was an agent of the City of Louisville. In Board of Education of Jefferson County v. Louisville Water Co., Ky. App., 555 S.W.2d 587, 588 (1977), this Court stated that:

The Louisville Water Company was incorporated pursuant to Chapter 507 of the Acts of the General Assembly of 1854 and operated as a private corporation until 1906 when the General Assembly adopted an act, now codified as KRS 96.230-.310, which changed its status to an agency of the City of Louisville.

Louisville Water Co. v. Wells, Ky. App., 664 S.W.2d 525 (1984), relied upon by Appellees, also held that the LWC was an agency of the City of Louisville. The issue in Wells was whether the LWC was a "city" as used in KRS 337.010(3)(e). The statute exempted "cities" from paying prevailing wages on public works projects. This court held that the language of the statute did not include agencies. The court explained that if "the exclusion is to be broadened to cover such public authorities and agencies of governments, the legislature will have to make the change. If the General Assembly truly desires to broaden the exclusion, exemptions could be simply provided for all 'public authorities' . . . ." Id. at 527.

LWC notes that there is no published Kentucky decision directly addressing whether punitive damages can be awarded against a municipality. LWC submits that KRS 65.2002, enacted in 1988 as part of the Municipal Tort Claims Act, is a good indicator of the Legislature's intent. LWC contends that under KRS 65.2002 cities and municipalities may not be assessed punitive damages and that the same logic is true with regard to this case. We agree, but need not extend the statute by analogy, because it applies.

KRS Chapter 65.200-65.2006 is entitled, "Claims Against Local Governments." KRS 65.200 is the definitional section for KRS 65.2001 to 65.2006. KRS 65.200(3) defines "local government" as "**any city incorporated under the law of this Commonwealth, the offices and agencies thereof**, any county government or fiscal court, any special district or special taxing district created or controlled by a local government." (Emphasis added.) As noted above, the LWC is an agency of the City of Louisville pursuant to statutory law as well as judicial construction.

KRS 65.2001(1) provides:

Every action in tort **against any local government** in this Commonwealth for death, personal injury or property damages proximately caused by:

- (a) Any defect or hazardous condition in public lands, buildings or other public property, including personality;
- (b) Any act or omission of any employee, while acting within the scope of his employment or duties; or
- (c) Any act or omission of a person other than an employee for which the local government is or may be liable

**shall be subject** to the provisions of KRS 65.2002 to 65.2006. (Emphasis added.)

KRS 65.200(1) defines "Action in tort" as "any claim for money damages based upon negligence, medical malpractice, intentional tort, nuisance, products liability and strict liability, and also includes any wrongful death or survival-type action." Clearly, this action is an action in tort against a local government subject to the provisions of KRS 65.200-65.2006.

KRS 65.2002 is entitled, "Amount of damages recoverable against local governments" and provides:

The amount of damages recoverable against a local government for death, personal injury or property damages arising out of a single accident or occurrence, or sequence of accidents or occurrences, shall not exceed the total damages suffered by plaintiff, reduced by the percentage of fault including contributory fault, attributed by the trier of fact to other parties, if any.

KRS 65.2002 does not provide that punitive damages are recoverable against a local government. The damages recoverable under the statute are compensatory -- for "death, personal injury or property damages" -- not to exceed the total damages "suffered by plaintiff," reduced by the percentage of fault attributable to other parties. "Punitive damages are not 'damages sustained' by a particular plaintiff. Rather, they are private fines levied by civil juries to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future. [citations omitted]."In Re Air Crash Disaster at Gander, 684 F. Supp 927, 931 (W.D. Ky. 1987). "The general rule

today is that no punitive damages [against a municipality] are allowed unless expressly authorized by statute." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 261, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). KRS 65.2002 does not expressly authorize punitive damages.

Appellees contend that Williams v. Wilson, Ky., 972 S.W.2d 260 (1998), "states that immunizing parties from liability for punitive damages based upon municipal status is unconstitutional." We disagree with Appellee's reading of Williams. Williams involved the constitutionality of KRS 411.184 which established a new legal standard for punitive damages, departing from the common law standard of gross negligence. The issue was whether the statute had actually changed the common law of Kentucky, as it existed prior to the adoption of our present Constitution, in violation of the jural rights doctrine. The Supreme Court declared KRS 411.184(1)(c), the provision defining malice, to be unconstitutional. Williams did not involve the issue of *municipal liability* for punitive damages.

Appellees assert that under Happy v. Erwin, Ky., 330 S.W.2d 412 (1959), "it makes no difference whether LWC is a private corporation . . . or a municipal corporation." Happy involved a motor vehicle accident between an individual and a firefighter driving a City of Mayfield fire truck en route to a fire in the City of Murray. At issue was the constitutionality of a statute exempting city officers and employees from personal liability in the use of fire apparatus. Happy did not involve the issue of a *punitive damage award* against a municipality.

Appellees attempt to persuade us that punitive damages are "a common law right" which cannot be abrogated by the Legislature or this Court without offending the Constitution. Any constitutional challenge to a statute requires notice to the Attorney General before entry of judgment. KRS 418.075; CR 24.03; Allard v. Kentucky Real Estate Com., Ky. App., 824 S.W.2d 884, 887 (1992). There is no indication that the Attorney General was notified. It does not appear that the issue was properly preserved for review. Moreover, "municipal immunity from punitive damages was well established at common law by 1871 . . . ." Fact Concerts, 453 US 247, 263 (1981).

Fact Concerts dealt with the issue of whether a municipality may be held liable for punitive damages under 42 U.S.C. §1983. The Supreme Court examined the common law with respect to municipal liability for punitive damages:

By the time Congress enacted what is now §1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question. ***It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages.*** ***Indeed the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation.*** [citations omitted]. Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions. [citations omitted].

(Emphasis added.)

Id. at 259-260.

Appellees have not convinced us that punitive damages were recoverable against a municipality under Kentucky common law. KRS 65.2001(2) provides, in pertinent part:

Except as otherwise specifically provided in KRS 65.2002 to 65.2006, all enacted and case-made law, substantive or procedural, concerning actions in tort against local governments shall continue in force. **No**

***provision of KRS 65.2002 to 65.2006 shall in any way be construed to expand the existing common law concerning municipal tort liability as of July 15, 1988 . . .***

(Emphasis added.)

In light of the foregoing, we reverse the judgment with respect to the punitive damage award against LWC. It is not necessary to address the remaining issues pertaining to the punitive damage award.

LWC contends that the trial court erred in its rulings on subsequent remedial measures. “[A]buse of discretion is the proper standard of review of a trial court’s evidentiary rulings.” Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000). Following the accident, additional traffic control equipment was delivered to the work zone. LWC’s motion in limine to exclude this evidence under KRE 407 was denied by the trial court. The court’s October 20, 1998 order reflects that “Louisville Water Company’s Motion to Exclude Evidence of Subsequent Remedial Measures is overruled; such evidence is admissible to show whether Louisville Water Company or Protection Services, Inc. exercised control over the signage.”

KRE 407 does not require exclusion of evidence of subsequent measures “when offered for another purpose, such as proving ownership, control, or feasibility of precautionary

measures, if controverted, or impeachment." LWC argues that the issue of control between LWC and Protection Services, Inc., is not the type of control contemplated by the rule. Robert G. Lawson, Kentucky Evidence Law Handbook, §2.45 (3d ed. 1993) states, "the language of KRE 407 plainly indicates that the list of exceptions in the rule is illustrative, rather than exhaustive." Appellees contend that the "issue of who controlled the traffic control devices and signage . . . [was] vehemently contested, . . . ." We agree with Appellees that the trial court was in a better position to evaluate the matter. We find no abuse of discretion.

LWC also contends that the trial court erred in denying its motion for a mistrial, after an LWC employee was asked about placement of a flashing arrow board at the accident scene. Absent manifest error or abuse of discretion, a trial court's denial of a motion for mistrial cannot be disturbed on appeal. Gould v. Charlton Co., Ky., 929 S.W.2d 734 (1996). A mistrial is an extreme remedy which should only be granted where a fundamental defect in the proceedings will result in manifest injustice, and the prejudicial effect can be removed in no other way. In most instances, the prejudicial event can be rectified by a curative admonition. Id. We are not persuaded that the event complained of resulted in manifest injustice which could not be cured. Further, Appellees assert that LWC failed to preserve the issue by refusing the admonition offered by the trial court. LWC does not dispute this fact in its reply brief.

Thus, the judgment is affirmed in regard to the trial court's denial of LWC's motion for mistrial, as well as the

denial of LWC's motion to exclude evidence of subsequent remedial measures. The judgment is reversed with respect to the punitive damage award against LWC.

ALL CONCUR.

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