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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001155-MR
AND
NO. 2005-CA-001252-MR

ROBERT HENRY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 04-CI-00037

ALLEN COUNTY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

HENRY, JUDGE: Robert Henry appeals from a jury verdict and judgment in favor of Allen County as to Henry's wrongful termination suit against the county. Upon review, we affirm.

BACKGROUND

The facts of this case, as revealed at trial, are as follows: Henry was employed by Allen County as a part-time dog

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

warden. On Saturday, November 1, 2003, Patrick Dean – a Scottsville, Kentucky resident – called the Allen County dispatcher and reported that a dog was being dragged down the road by a truck driven by Lonnie Douglas. In response to the report, the Allen County sheriff's department dispatched two deputies. Henry was also dispatched to the scene because the report involved an allegation of animal cruelty. Henry and the two deputies investigated the matter and found that Douglas had several hunting dogs – including one that had been injured. Douglas admitted that it was his practice to leash the dogs to his moving truck in order to exercise them. The injured dog in question had apparently fallen and sustained a number of abrasions and severe scrapes during one of these sessions. The injuries were not life-threatening.

Henry consequently wanted to take the injured dog to a veterinarian for treatment and to confiscate Douglas's remaining dogs; however, Douglas refused to release any of his dogs to Henry's custody. Later that day, Henry advised his immediate supervisor, Jimmy Marsh, of what had happened. In turn, Marsh advised Johnny Hobdy, the Allen County Judge-Executive. None of the men were sure if they had the legal authority to confiscate Douglas's dogs, or at least the non-injured ones. Hobdy ultimately gave Marsh instructions that Henry was to take the injured dog to the veterinarian for medical treatment, but that

he was not to confiscate the other dogs until they could confer with the Allen County Attorney about the situation on the following Monday, November 3rd. Henry denies ever being given instructions by Marsh not to take the other dogs, but he was aware that a meeting on the matter with the County Attorney was set for that Monday.

In the meantime, Henry followed the advice of Andy McDowell, an animal control officer in neighboring Warren County, and returned to Douglas's farm on Sunday, November 2nd, to take all of the dogs into custody. Henry drove the injured dog to the veterinarian for treatment and lodged the other dogs in the animal shelter. After the dogs were confiscated, Henry told Marsh what he had done. Marsh subsequently told Hobdy, who – upon hearing the news – called Henry and fired him for not following the "chain of command" and ignoring instructions. After his discharge, Henry filed a "cruelty to animals" complaint against Douglas. Douglas was prosecuted and found guilty.

On January 30, 2004, Henry filed a verified complaint against Allen County in the Allen Circuit Court claiming that his discharge was in violation of the Kentucky Whistleblower Act contained in Kentucky Revised Statutes (KRS) 61.101 to 61.103. Specifically, Henry contends that he was discharged because he reported Douglas's criminal activity, and that his actions are

considered protected under the Act. Allen County denied this allegation, contending that it discharged Henry for a legitimate non-discriminatory reason. The case was tried before an Allen County jury for three days beginning on March 9, 2005. The jury found for Allen County, and a judgment reflecting the jury's verdict was entered on March 16, 2005. Henry's subsequent post-trial motion to alter, amend, or vacate the verdict was rejected in an order entered on May 10, 2005. This appeal followed. On appeal, Henry raises seven separate grounds for relief. We address each ground in turn.

ARGUMENTS

I.

Henry first argues that it was an abuse of discretion for the trial court to allow Allen County Attorney William P. Hagenbuch, Jr. to participate as counsel on behalf of the county at trial because he called Hagenbuch to testify as a witness. On October 28, 2004, Henry filed a motion asking the trial court to recuse Hagenbuch from the case due to his participation in the criminal prosecution of Lonnie Douglas; the court heard and denied the motion on November 16, 2004. Henry subsequently filed a motion in limine on February 24, 2005 again asking the court to exclude Hagenbuch as an attorney for Allen County because:

> ... he will be a witness called by the Plaintiff. Attorney Hagenbuch's testimony is very important, because he knows that Lonnie Douglas threatened to sue the County for taking possession of his dogs, his knowledge of the criminal warrant and complaint issued against Lonnie Douglas, his knowledge of who made the decision to return Lonnie Douglas' dogs to him, and his conversation with Ann Chynoweth. Attorney Hagenbuch cannot be both a witness and an advocate for Allen County.

Once again, the court denied the motion - this time following a lengthy evidentiary hearing on the first day of trial. However, the court did allow Henry to call Hagenbuch as a witness. On appeal, Henry again argues that Hagenbuch "should not have acted as an advocate for Allen County and as a witness."

Kentucky Supreme Court Rules (SCR) 3.130-3.7(a) provides that a lawyer generally "shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." In cases where this rule comes into play, a trial court must take special care to balance a party's right to be represented by counsel of his or her own choosing versus prejudice to the opposing party's case. Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 558 (Ky. 2001), citing SCR 3.130-3.7(a), Comment (4) ("[A] balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the

lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client.").

With this said, however, the disqualification of counsel "is a drastic measure which courts should be hesitant to impose except when absolutely necessary." Id. at 560, citing University of Louisville v. Shake, 5 S.W.3d 107 (Ky. 1999). Of particular note here, "the showing of prejudice needed to disqualify opposing counsel must be more stringent than when the attorney is testifying on behalf of his own client, because adverse parties may attempt to call opposing lawyers as witnesses simply to disqualify them." Id. The opposing party must prove that (a) counsel's testimony is important to his proof at trial; (b) it is probable that counsel's testimony will conflict with that of other witnesses; and (c) the information obtained from counsel is unattainable from other sources. Id. We review a trial court's decision as to a motion to recuse or to disqualify an attorney for abuse of discretion. See 7 Am.Jur.2d Attorneys at Law § 204 (1997).

At the evidentiary hearing, Hagenbuch testified that he had no involvement in the events leading up to Henry's discharge, and that he did not learn of Henry's firing until he

talked to Hobdy on Monday, November 3, 2003. He also indicated that he did not give his legal opinion that Allen County lacked the authority to confiscate Douglas's healthy dogs until after Henry was fired. He further indicated that he recused himself from the criminal prosecution against Douglas upon learning that Henry was contemplating suing the county. The trial court ultimately held that Hagenbuch had no important information regarding Henry's discharge, that Henry offered no evidence that would contradict Hagenbuch's testimony, and that Henry had not established that the information to which Hagenbuch would testify was unobtainable from other witnesses. The court also noted that the county had "more than an academic interest" in having Hagenbuch as a representative because it more than likely had no insurance coverage to cover a potential punitive damages award. As noted, the court consequently denied Henry's motion to disqualify Hagenbuch as counsel, but allowed Henry the option of calling him at trial as a witness.

After reviewing the parties' briefs and the record, we do not find that the trial court abused its discretion in ruling in this fashion. The court gave ample consideration to Henry's position and heard testimony from two witnesses before reaching its decision. Moreover, we are skeptical that the jury was "confused" by Hagenbuch's status as a witness and attorney given that he did not take an active role as an advocate in front of

the jury; instead, his involvement at trial appears to have been limited to arguing over jury instructions out of the jury's presence. Our case law is clear that disqualification of an attorney under SCR 3.130-3.7 should only occur when "absolutely necessary." Zurich, 52 S.W.3d at 160, citing Shake, supra. We simply do not believe that the court abused its discretion in finding that such a necessity was nonexistent here.

Henry also argues that Hagenbuch should have been disqualified pursuant to SCR 3.130-1.9, which deals with situations where attorneys may have a conflict of interest relating to a former client. Henry specifically contends that Hagenbuch was his "representative" in the context of Lonnie Douglas's criminal prosecution because he was the complaining party at the beginning of that proceeding. Henry also raised the argument at the evidentiary hearing that Henry's former status as an Allen County employee precluded Hagenbuch's representation of Allen County at trial here due to a conflict of interest.

In reviewing the record, however, it appears that although Henry raised this general "conflict of interest" argument during the evidentiary hearing, the trial court instead based its ruling entirely on SCR 3.130-3.7. We cannot find that Henry ever asked the court to specifically address his SCR 3.130-1.9 contention before Hagenbuch testified at trial. Our

case law is well-established that a failure to insist on a ruling or admonition from a trial court when an objection is made as to a particular matter operates as a waiver of that issue for purposes of appellate review. Hayes v. Commonwealth, 175 S.W.3d 574, 596 (Ky. 2005), citing Bell v. Commonwealth, 473 S.W.2d 820, 821 (Ky. 1971); Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002), citing Bell, supra. We similarly believe that Henry has failed to preserve any conflict argument here by failing to insist upon a ruling on this point at the trial level.

With this said, however, we also note that Henry has provided us with nothing in terms of substantive legal authority to support his theories as to there being an attorney-client relationship between Hagenbuch and himself, nor any evidence to suggest that he was ever a "client" of Hagenbuch while in his capacity as a dog warden in Allen County, with the exception of a general citation to SCR 3.130-1.9. Indeed, Hagenbuch testified that he had never been involved in a suit involving the Allen County Animal Shelter, and that he had never consulted with Henry about the facts of this case. Consequently, we again conclude that the trial court did not abuse its discretion in failing to disqualify Hagenbuch on these grounds.

II.

Henry next argues that it was an abuse of discretion for the trial court to include the word "may" in its punitive damages instruction instead of the word "shall." We disagree. The instruction in question reads as follows:

> If you have answered 'YES' to the question on Instruction No. 2 and 'NO' to the question on Instruction No. 3 you may, in your discretion, award to the Plaintiff as punitive damages such sum, if any, as you believe will punish the Defendant for its conduct and discourage such conduct in the future.

While we question whether this issue is even properly reviewable given that the jury did not ever reach the issue of punitive damages in its determination, we nevertheless consider it because it is easily resolvable.

While it is true that the Kentucky Whistleblower Act allows for the awarding of punitive damages, see KRS 61.103(2); KRS 61.990(4); Commonwealth Dept. of Agriculture v. Vinson, 30 S.W.3d 162, 165 (Ky. 2000), our courts have long held that "[i]t is the well-settled rule in this and in almost all jurisdictions that punitive damages are not recoverable as a matter of right, but that their allowance rests entirely in the discretion of the jury." Hurst v. Southern Ry. Co. in Kentucky, 184 Ky. 684, 212 S.W. 461, 462 (1919) (Citations omitted); see also Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) ("The jury's decision as

to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion."). As our predecessor court noted in Neely v. Strong, 186 Ky. 540, 217 S.W. 898 (1920):

> The rule is that an instruction which permits the recovery of punitive damages should designate the elements in the act complained of which the jury must believe from the evidence to exist to warrant their imposition and to direct the jury that, if it believes that such elements existed in the act complained of, it may, in the exercise of a sound discretion, impose punitive damages not to exceed the sum, in all, of the damages claimed.

Id., 217 S.W. at 901 (Emphasis added) (Citations omitted).

The instruction in question clearly complies with this well-established authority and the long-standing premise that punitive damages are inherently discretionary. Indeed, our predecessor court has held that it is error for a trial court to give an instruction to a jury mandating an award of punitive damages in the event the grounds for such an award existed instead of leaving the matter to the jury's discretion. Louisville & N.R. Co. v. Logan's Adm'x, 178 Ky. 29, 198 S.W. 537, 538 (1917) (Citation omitted). We also note that Henry's own proffered jury instructions reflect these principles of law,

despite his arguments to the contrary.[2] Accordingly, his argument must be rejected.

III.

Henry next contends that the trial court erred in conducting its own questioning of witness Jimmy Marsh, his immediate supervisor at the animal shelter, as to what instructions Marsh actually gave him on Saturday, November 1st concerning the confiscation of Lonnie Douglas's dogs. As noted by Allen, however, Henry failed to make any sort of contemporaneous objection to this questioning or any motion to strike the answers resulting therefrom at trial. "As there were no objections made, the trial court was not given the opportunity to pass upon the merits of these allegations which are not properly preserved for review. We must therefore decline to consider this challenge." Gray v. Commonwealth, 979 S.W.2d 454, 457 (Ky. 1998), overruled on other grounds by Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002); see also Charash v. Johnson, 43 S.W.3d 274, 278 (Ky.App. 2000). In any event, Kentucky Rules of Evidence (KRE) 614(b) grants trial courts the

[2] "Jury Instruction No. 2" of Henry's "Amended Jury Instructions," offered on March 8, 2005, reads – in relevant part – as follows: "If you find for the Plaintiff, Robert Henry, under Jury Instruction No. 1, and if you are further satisfied from the evidence that the Defendant ... acted towards the Plaintiff, Robert Henry, with reckless disregard, you may in your discretion award punitive damages against the Defendant[.]" (Emphasis added).

authority to interrogate witnesses,[3] and from our review of the record we do not believe that the trial court abused this authority here. Consequently, Henry's assertions in this respect must again be rejected.

IV.

Henry next argues that the trial court failed to properly instruct the jury on Allen County's burden of proof under the Kentucky Whistleblower Act. In order to demonstrate a violation of KRS 61.102, an employee must establish four specific elements:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

Davidson v. Commonwealth, Dept. of Military Affairs, 152 S.W.3d 247, 251 (Ky.App. 2004), citing Woodward v. Commonwealth, 984 S.W.2d 477, 480-81 (Ky. 1998). "The employee must show by a preponderance of evidence that 'the disclosure was a contributing factor in the personnel action.'" Id., citing KRS

[3] Specifically, KRE 614(b) provides: "Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party." We also note that KRE 614(d) allows for objections to a court's interrogation to "be made out of the hearing of the jury at the earliest available opportunity." As noted, no such efforts were made here.

61.103(3) & 61.103(1)(b). Once this burden is met, "[t]he burden of proof is then on the state employer 'to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action.'" Id., citing KRS 61.103(3).[4]

After reviewing the instructions tendered to the jury, we must reject Henry's argument. "Instruction No. 2" asks the jury whether "the Plaintiff made a good faith report of an actual or suspected violation of State or Local law to an appropriate authority" and whether "the Plaintiff's good faith report was a contributing factor in the decision to terminate his employment." If the jury answered "Yes" to this inquiry (which it did not do), it was instructed to then move on to "Instruction No. 3," which asks: "Do you believe that the Defendant has shown by clear and convincing evidence that the Plaintiff's good faith report of an actual or suspected violation of State or Local law was not a material factor in the decision to terminate the Plaintiff's employment?" We believe that said instructions clearly and appropriately reflect the burden-shifting elements set forth in KRS 61.103(3) and Davidson. As the jury found that Henry did not meet his burden

[4] KRS 61.103(3) reads as follows: "Employees filing court actions under the provisions of subsection (2) of this section shall show by a preponderance of evidence that the disclosure was a contributing factor in the personnel action. Once a prima facie case of reprisal has been established and disclosure determined to be a contributing factor to the personnel action, the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action."

of establishing by a preponderance of evidence that his "disclosure was a contributing factor in the personnel action," there was no need for it to consider the question of whether Allen County had established by clear and convincing evidence that the disclosure was not a material factor in the decision to fire him. Accordingly, we must conclude that no error exists here.

V.

Henry next argues that it was error for the trial court to remark to the prospective jurors during voir dire that defense counsel's wife was from Allen County. Again, however, Henry failed to make any objection or voice any requests for relief at the time this remark was made. Accordingly, the issue is not preserved for our review.

VI.

Henry next contends that the trial court erred in allowing Andy McDowell's deposition testimony to be read to the jury when McDowell was unavailable to testify and efforts to secure his live testimony by Henry were unavailing. As noted above, McDowell was the animal control officer in Warren County from whom Henry sought advice about taking Douglas's dogs. The deposition was originally conducted during the discovery process by Allen County. The use of depositions at trial is covered by Kentucky Rules of Civil Procedure (CR) 32.01, and any decisions

by a trial court relating to such use are left to the court's "reasonable discretion." See Phelps Roofing Co. v. Johnson, 368 S.W.2d 320, 324 (Ky. 1963).

Henry specifically contends that "[i]t was an abuse of discretion [for the trial court] to not order Andy McDowell to testify live at trial." However, from our review of the record, it appears as if no request for such an order was ever made by Henry or anyone else, and that it was Henry himself who chose to read parts of the deposition to the jury. Moreover, Henry has again cited us to nothing in terms of legal authority in support of his argument, as is required by CR 76.12(4)(c)(v).[5] Instead, his argument is nothing more than a recitation of his failed personal efforts to secure McDowell's presence at trial. We also note that while the subject heading of Henry's argument suggests that he claims further error in the fact that Allen County was allowed to read its deposition questions and answers to the jury before his, nothing in his actual argument itself addresses this claim. We therefore decline to address it. Consequently, we again find that the trial court did not abuse its discretion as to this issue.

[5] CR 76.12(4)(c)(v) provides, in part, that an appellant's brief shall contain "[a]n '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...."

VII.

Henry finally argues that the jury panel was tainted by a juror's communications regarding the case. Specifically, he contends that his counsel was informed by another client that juror Johnna Michelle Marr talked about this case at her place of employment, and that Marr was involved in another potential "whistleblower" situation at the time the case was being tried. Although Henry claims that this argument was preserved in his pre-trial motions in limine and in his post-trial motions, we do not find from our review of those motions nor the post-trial motion hearing that this is even remotely the case. Indeed, it does not appear that this argument was ever presented to the trial court, and it is not otherwise contained or supported in the record; instead, it is a matter raised for the first time on appeal.

While this fact, in and of itself, does not prevent us from considering a claim of juror misconduct, see CR 61.02; Deemer v. Finger, 817 S.W.2d 435, 437 (Ky. 1990), we also note that we have been provided with no supporting documentation or evidence – particularly affidavits - on appeal to substantiate Henry's claims. Accordingly, even if we were to review Henry's argument under a "palpable error" standard – which we have not been asked to do – we do not believe that we have been given enough information to meet this heightened standard. Put more

succinctly, we believe that we have been provided with nothing of substance upon which to base a claim of error.

We further note that from our review of Henry's motion to alter, amend, or vacate the judgment, the only claim for error relating to voir dire reads as follows:

> The last jurors that were on the jury did not completely answer the prior questions presented by the Plaintiff in [voir] dire. It was an abuse of discretion to not call more jurors, so the Plaintiff was not pressured to accept the jurors that did not answer many of the prior questions before the question regarding $650,000.00 damages.

However, we again note that Henry failed to raise any sort of objection to the number of potential jurors, nor their failure to fully answer all of the proffered questions during voir dire. We further note that Henry appears to have withdrawn this claim of error at the post-trial hearing on his motion to alter, amend, or vacate the verdict. The claim is therefore not preserved for our review, and all of Henry's contentions in this respect are rejected.

CONCLUSION

Having found no grounds for vacation or reversal as to any of Henry's appellate claims, we need not consider the issues set forth in Allen County's cross-appeal. Accordingly, the jury verdict and judgment of the Allen Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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