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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002227-MR

VINLAND ENERGY OPERATIONS, LLC
AND MAJEED SAIEDY NAMI — APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 07-CI-01409

JANICE ENGLE — APPELLEE

OPINION
VACATING
AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Vinland Energy Operations, LLC, and its owner, Majeed Saiedy Nami, appeal a jury verdict rendered in Laurel Circuit Court, including punitive damages, in the amount of nearly $1 million in favor of Janice Engle in this hostile work environment and retaliation case brought pursuant to Kentucky

Revised Statute (KRS) Chapter 344 and common law battery. After oral argument and upon review of the record and briefs, we vacate and remand.

FACTUAL BACKGROUND

Janice Engle began working for Vinland Energy Operations, LLC, in May 2007, via a temporary placement agency, the Job Shop. After working temporarily for Vinland for two weeks, she was permanently hired at Vinland by Sandy Smith. Engle worked at Vinland for only five months and was thereafter terminated. She contends that she was subjected to a hostile work environment and was battered by Majeed Saiedy Nami, the owner of Vinland; that she was retaliated against for reporting the sexual harassment; and that she suffered emotional distress, humiliation and embarrassment as a result of Nami and Vinland's actions. Consequently, she filed a complaint in Laurel Circuit Court. After a jury trial that lasted less than six hours with only about one hour of proof by Engle, the jury returned a verdict in her favor after Engle of nearly $1 million.

At trial, Engle testified as to the facts that resulted in her claims against Vinland and Nami. According to Engle, the first time she met Nami, she was introduced to him by Vinland's office manager, Jade Schnabel, while in the company's kitchen. Engle extended her hand to shake Nami's. Engle testified that in response, Nami stated, "Let me introduce myself properly." She claims he reached around and grabbed her butt. Engle pushed him away and told him to quit. She testified that he attempted to reach her again, but she again pushed him away. Engle testified that Julie Vigeant and Schnable were both present when this took

place. According to Engle, Nami then went over to Vigeant and grabbed her butt with both hands and had his hands all over her while Vigeant attempted to push him away. Schnable was not deposed nor called to testify at trial. Vigeant testified at trial that she did not recall these incidents.

Engle testified that on another day, she witnessed Nami in the office of Vinland's mapping manager, Lesa Gilbert. Engle saw Nami rubbing Gilbert's shoulders. Engle was seated on a backless stool in the same office. She testified that as Nami was leaving Gilbert's office, he walked around Engle's desk and slapped her on the butt. Engle testified that she pushed Nami away and told him to stop. Gilbert testified at trial that she did not recall these incidents.

Engle testified that she complained to Gilbert about Nami's behavior and asked Gilbert what to do in regard to it. Engle testified that Gilbert's response was "don't make such a big issue out of it, he does it to all the females."

On another day, Nami came into where Engle and Vinland's receptionist, Amber Hendricks Shaw, were working. Engle testified that Nami placed his hand on Shaw's stomach, jiggling it, and asked "can I f*** that off for you?" Engle testified that this comment offended her. Shaw did not testify at the trial.

Engle testified to another occasion when Nami came into her office area with a group of businessmen. She testified that Nami walked over to her and grabbed her left breast and asked "why aren't they growing." Engle responded by

saying "excuse me?" Nami repeated his statement. Engle testified that she was offended by this.

Engle testified that she then complained about Nami to Vinland Land Development Supervisor, Rob Conley. According to Engle's testimony, Conley's response was "don't make an issue out of it." Approximately two weeks after Engle

spoke to Conley, she was terminated at a meeting with Conley and Sandy Smith.

Nami owns Vinland but does not operate it. He owns other business entities and was only at the Vinland facility occasionally. During his testimony, he denied all of Engle's claims of sexual harassment and battery.

The jury returned a verdict in favor of Engle, which in total, was nearly $1 million, and the court awarded her attorneys' fees. Vinland and Nami filed a motion for judgment notwithstanding the verdict, which the trial court denied. They now appeal. Additional facts relevant to the issues on appeal will be set forth as the claims are reviewed.

STANDARD OF REVIEW

We review a decision on a JNOV for clear error. *Moore v. Envtl. Constr. Corp*., 147 S.W.3d 13, 16 (Ky. 2004). In reviewing the evidence presented to the jury, all reasonable inferences are drawn as most favorable to the verdict returned by the jury and the trial court's decision must be upheld if a reasonable person could not have found as the jury did. *Id*. Additionally, our review must be tempered by keeping in mind that

> [i]n ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985).

The majority of Vinland and Nami's claims on appeal regard the judgment entered in this case and the trial court's denial of their JNOV motion. They argue the evidence was lacking to support a number of Engle's claims, even under the high standard necessary to prevail on a JNOV motion. Before we review the merits of the sufficiency of evidence issues, a review of the record causes this Court to pause to determine if all of the issues are properly preserved. Regarding sufficiency of the evidence claims, Vinland and Nami cite to the directed verdict motion their trial counsel[1] made at the close of Engle's case and the JNOV motion.[2]

> [Appellees] can only prevail on an insufficiency of the evidence claim if preserved through a motion for a JNOV, which in turn must be predicated on a directed verdict motion at the close of all the proof. A mid-trial directed verdict motion alone, like the one made and relied on in part now by [Appellees], is insufficient to preserve an insufficiency of the evidence claim. *Baker v. Commonwealth*, 973

[1] For the sake of clarity, we note that appellate counsel is different from trial counsel.

[2] Vinland and Nami also cite a motion to dismiss to meet their preservation burden. However, a motion to dismiss will not meet the necessary standard on a sufficiency of evidence argument.

> S.W.2d 54, 55 (Ky.1998) ("A defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence, in order to be preserved for our review.").

Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 926 (Ky. 2007).

Regarding a directed verdict motion,

> CR 50.01 states that "A motion for a directed verdict shall state the specific grounds therefor." The primary purpose of the Rule is to fairly apprise the trial judge as to the movant's position; and also to afford opposing counsel an opportunity of arguing each ground before the judge makes his ruling. The attention of the trial judge can thus be focused on possible reversible errors, which might otherwise be obscure with only a general motion for a directed verdict. In the absence of a statement of the specific grounds for a motion for a directed verdict, this Court normally will not consider the question of the *denial* of the motion. Clay, CR 50.01; 5 Moore's Federal Practice, Par. 50.04 (2nd Ed.1951).

Carr v. Kentucky Utilities Co., 301 S.W.2d 894, 897 (Ky.1957); *see also Lucas & Hussey Loose-Leaf Tobacco Warehouse, Inc. v. Howell*, 320 S.W.2d 613 (Ky. 1959); *Whitesides v. Reed*, 306 S.W.2d 249, 250 (Ky. 1957); *Gulf Oil Corp. v. Vance*, 431 S.W.2d 864, 865 (Ky. 1968) (record must show the specific grounds stated in the motion for a directed verdict).

Accordingly, a generic motion for directed verdict will not properly support a JNOV based on specific claims of insufficiency of evidence. Vinland and Nami were obligated to raise explicit sufficiency of the evidence claims in regard to the causes of action Engle relied upon. If they failed to do so or failed to raise specific arguments before the trial court, they denied the trial court "the opportunity to pass on the issue[s] in light of all the evidence." *Schoenbachler v.*

Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1988)). And, "[a] new theory of error cannot be raised for the first time on appeal." *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999) (citations omitted).

We outline the above after reviewing Vinland and Nami's preservation statement as relying on trial counsel's motion for directed verdict made at the end of the Engle's proof. Vinland and Nami do not cite for preservation of their argument the motion made by their counsel at the end of all proof.[3] Nonetheless, even if we consider it, our disposition of this matter is unchanged.

At the end of Engle's proof, trial counsel for Vinland and Nami made an oral motion for directed verdict, which was based *solely* on a lack of proof regarding whether *the number of touching incidents and conduct* at the workplace amounted to hostile work environment, *as it related to the corporate defendant*, Vinland. No other basis was given for the motion for directed verdict; Vinland and Nami's trial counsel did not make any arguments relating to any other claims or elements regarding hostile work environment. At the end of the proof in the case, trial counsel for Vinland and Nami stated that she "renew[ed] [her] motion for direct verdict." That was the extent of her argument for directed verdict. Consequently, pursuant to well-settled law and the rules of civil procedure, the

[3] CR 76.12(4)(c)(v) requires that Appellants properly state where they have preserved the issue, and case law is abundantly clear that we are not obligated to search the record to locate where an issue may have been preserved. *See Phelps v. Louisville Water Co*., 103 S.W.3d 46, 53 (Ky. 2003); *Robbins v. Robbins*, 849 S.W.2d 571, 572 (Ky.App. 1993). However, given the brevity of the trial, the motion for directed verdict made at the close of trial was easily located by the Court.

only issue that was properly presented to the trial court for a ruling, and therefore the only issue preserved for our review in regard to sufficiency of evidence, is the evidence in regard to whether Nami's conduct, *i.e., the number of touching incidents and comments,* created a hostile work environment for liability as it related to the corporate defendant, Vinland. No other sufficiency of the evidence claims are properly preserved and therefore have been waived.[4]

ANALYSIS

1. Whether the evidence was sufficient to present a jury issue on Engle's hostile work environment claim.

The first issue raised on appeal is whether the standard for hostile work environment was satisfied by the evidence presented at trial. Vinland argues that Engle did not establish that Nami's conduct was severe and pervasive as to be actionable. Consistent with Title VII of the 1964 Federal Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), the Kentucky Civil Rights Act, KRS Chapter 344, prohibits sexual harassment in the workplace that results in "a hostile or abusive work environment."[5] *Ammerman v. Bd. of Educ., Nicholas County*, 30 S.W.3d 793, 798 (Ky. 2000). The Kentucky Civil Rights Act is similar to the federal act,

[4] Consequently, the issues raised in Appellants' brief that are based on a lack of sufficiency of the evidence claim, which are not preserved for review include: (1) whether Engle's termination was causally connected to the alleged harassment, *i.e.,* retaliation; and (2) whether Engle should have been allowed to hold Nami personally liable for retaliation. Accordingly, facts relevant to these issues are not referenced in this opinion.

[5] To establish successfully a prima facie showing of a cause of action predicated upon hostile work environment based on sex, a plaintiff must demonstrate that "(1) she is a member of a protected class, (2) she was subjected to unwelcome sexual harassment, (3) the harassment was based on her sex, (4) the harassment created a hostile work environment, and that (5) the employer is vicariously liable." *Clark v. United Parcel Serv., Inc*., 400 F.3d 341, 347 (6th Cir. 2005).

so the Kentucky Act should be interpreted consistently with federal law. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992). Accordingly, Kentucky courts routinely rely on federal case law when evaluating civil rights claims. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 801-02 (Ky. 2004). For a sexual harassment claim based upon a hostile work environment to be actionable, the United States Supreme Court has set forth the requirement that the environment must be sufficiently severe or pervasive as to alter the conditions of the plaintiff's employment and create an abusive working environment. *Meritor Saving Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405 (1986); *see also Abeita v. Transamerican Mailings, Inc.*, 159 F.3d 246, 251, n.5 (6th Cir. 1998) (quoting *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997)). Kentucky's Supreme Court has explained this standard as follows:

> [H]ostile environment discrimination exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [*Williams v. Gen. Motors Corp*., 187 F.3d 553, 560 (6th Cir.1999) (citing *Harris v. Forklift Sys, Inc*., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993))]. Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." [*Carrero v. New York City Hous. Auth*., 890 F.2d 569, 577 (2d Cir.1989)].

Ammerman, 30 S.W.3d at 798.

Circumstances that may be figured into this analysis include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. However, "offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in 'the terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 2283 (1998).

The harassment must be both objectively and subjectively offensive as determined by the totality of circumstances. *Harris*, 510 U.S. at 23, 114 S.Ct. at 371; Thus, the conduct must both create an "objectively hostile or abusive work environment" and cause the victim to "subjectively perceive the environment to be abusive." *Harris*, 510 U.S. at 21, 114 S.Ct. at 370. Regarding the latter element, "'if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no . . . violation.'" *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 273 (6th Cir.), *rehearing and rehearing en banc denied* (2009) (quoting *Williams*, 187 F.3d at 566) (quoting *Harris*, 510 U.S. at 21-22, 114 S.Ct. 367)); *see also Black v. Zaring Homes, Inc.,* 104 F.3d 822, 826 (6th Cir. 1997). Thus, sexual harassment must alter the conditions of the victim's employment to be actionable. *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405; *see also Meyers*, 840 S.W.2d at 821. However, the Sixth Circuit has made clear that the victim does not have to "prove a tangible decline in her work productivity; only 'that the harassment made it more

difficult to do the job.'" *Gallagher*, 567 F.3d at 274 (quoting *Williams*, 187 F.3d at 567) (quoting *Davis v. Monsanto Chemical Co*., 858 F.2d 345, 349 (6th Cir. 1988)).

On review of a motion for directed verdict, "the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party." *Meyers*, 840 S.W.2d at 821 (quoting *Brown Hotel Co. v. Marx*, 411 S.W.2d 911 (Ky. 1967)). The question of whether a work environment is hostile and the conduct is severe and pervasive is a question of fact. *Meyers,* 840 S.W.2d at 821-22.

> In reviewing this issue of evidential sufficiency the appellate court must respect the opinion of the trial judge who heard the evidence. It is significantly more difficult to overrule such a finding, sustained by the trial judge, than it would be to point out that some simple fact, an element of proof which need not be evaluated, is missing from the proof. We are not in the same position, or as good a position, as was the judge who sat through this trial to decide whether the jury could reasonably find "severe or pervasive" sexual harassment from the evidence presented.

Id. at 821-22.

Harassment involving "an element of physical invasion" is considered more severe than harassing comments alone. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 334 (6th Cir. 2008) (quoting *Williams*, 187 F.3d at 563). In *Williams,* the Court found that harassing sexual comments and one act of touching contained an element of physical invasion, raising a question of fact for the jury. *Williams*, 187 F.3d at 563.

Embedded in Vinland's contention that Engle did not present sufficient evidence of a hostile work environment is an argument that there was no testimony that Nami's conduct made it more difficult for Engle to do her job, *i.e.,* that it impacted or altered the terms of her employment. Based upon the evidence at trial, we are inclined to agree. But, as noted *supra*, the motion for directed verdict was only made in reference to whether the number of touching incidents and conduct by Nami in the workplace was sufficient to sustain a hostile work environment claim. The motion did not include whether there was evidence that Nami's conduct impacted or altered the terms of Engle's employment. We believe this illustrates the type of issue that the Court in *Carr* referenced when it cautioned that general motions are insufficient and that motions should be argued so that the "attention of the trial court can . . . be focused on possible reversible errors, which might otherwise be obscured . . . ." 301 S.W.2d at 897. Here, the motion for directed verdict did not raise sufficiency of the evidence regarding this issue. Consequently, the trial court was not given the opportunity to rule on it; therefore, it is not properly before this Court.

Moreover, the instructions in this matter never required the jury to consider, as an element of Engle's hostile work environment claim, whether Nami's conduct impacted or altered the terms of Engle's employment. Even under the bare bones instructions rule followed in Kentucky, the necessary elements of the cause of action should be included. For example, in *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky. 2005), a civil rights case, the

Court reviewed whether the instructions were proper. The instructions given in *Lumpkins*, 157 S.W.3d at 604-05, included:

> You will find for the Plaintiffs . . . under this Instruction, if you are satisfied from the evidence that in the course of the Plaintiffs' employment with the Defendant . . . , the Plaintiffs were subjected to racial harassment by the Defendant . . ., by and through its agents, severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive, and that the Plaintiffs subjectively regarded as hostile or abusive.
>
> In determining whether the work environment was hostile or abusive, you may consider any of the following factors:
> a. the frequency of the conduct or behavior;
> b. the severity of the conduct or behavior;
> c. whether the conduct or behavior was physically threatening or humiliating; OR
> d. whether the conduct or behavior unreasonably interfered with the Plaintiffs' work performance.
>
> The instructions given by the trial judge followed the "bare bones" rule. They clearly convey the standard enunciated in *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), that the hostile work environment discrimination must be severe or pervasive and more than episodic. The Kentucky practice of "bare bones" instructions applies to all litigation including civil rights cases. The concept permits the instructions to be "fleshed out" in closing argument. *See Rogers v. Kasdan*, 612 S.W.2d 133 (Ky. 1981).

In the case at bar, the given instructions did not "convey the standard enunciated in *Harris*." *Lumpkins*, 157 S.W.3d at 605. The jury was not instructed on whether Nami's alleged conduct interfered with Engle's ability to perform her work. There were no objections made to the jury instructions to preserve it.

And, even if this Court agreed that the bare bones instructions given were sufficient, trial counsel was obligated to flesh them out during closing arguments. *Id*. (citing *Rogers*, 612 S.W.2d 133) ("The concept permits the

instructions to be 'fleshed out' in closing arguments.") In trial counsel's closing argument, no reference was made to Engle's evidence or testimony, or lack thereof, regarding whether Nami's alleged conduct interfered with her ability to do her job.

Regarding Vinland's argument that Engle's co-workers witnessed Nami's conduct and interpreted it as merely joking around, this was a credibility issue for the jury to decide. Even so, "[h]umor is not a defense under the subjective test if the conduct was unwelcome." *Williams*, 187 F.3d at 566.

Nami's alleged conduct toward Engle was overtly physical and, in addition to exhibiting physical contact of a sexual nature with other workers in Engle's presence, his actions were accompanied by blatantly sexual comments. This alleged conduct clearly establishes an element of physical conduct, combined with sexual comments, sufficient to submit the hostile work environment claim to the jury. Consequently, Vinland's sufficiency of the evidence claims fail.

2. Whether the court erred in allowing evidence of Nami's alleged prior acts.

Vinland and Nami next argue that the trial court incorrectly admitted evidence regarding Nami's prior alleged acts of sexual harassment. Presumably, this argument is in reference to Casey Sutton and Julie Osborne, about whom Engle's counsel questioned Nami. Neither Sutton nor Osborne worked with Engle at Vinland. Apparently, the only basis for allowing in this testimony was that Engle's counsel represented to the trial court, prior to seating the jury, that Osborne had filed suit against Nami for sexual harassment and that Sutton had informed

Engle's counsel that Nami had sexually harassed her. Vinland and Nami argue that the trial court erred in allowing in this testimony under KRE[6] 404(b).[7] However, trial counsel did not object under KRE 404(b); rather, counsel objected to this testimony as being unduly prejudicial under KRE 403.[8] Trial counsel's having failed to object under KRE 404(b) and the trial court's not having been given an opportunity to rule on a KRE 404(b) objection, this objection was not properly preserved. *See Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky.1998) (citing *Harrison v. Commonwealth*, 858 S.W.2d 172 (Ky. 1993)) (Error is not preserved if the wrong reason is stated for the objection.). Hence, we will not review this argument "for the simple reason that on this appeal [an] altogether different theor[y is] advanced for the first time why the lower court should have [not] permitted this evidence to be introduced." *Lewis v. Commonwealth*, 318 S.W.2d 857, 859 (Ky. 1958).

3. Whether the trial court erred regarding allegations surrounding Nami's nationality.

Vinland and Nami argue that the trial court abused its discretion in allowing Engle's counsel to question Nami about his national origin. On this, a review of the trial reveals that Engle's counsel only asked Nami if he was born in

[6] Kentucky Rule of Evidence.

[7] KRE 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

[8] Counsel did file a motion in limine prior to trial to exclude other alleged incidents of sexual harassment by Nami. However, this motion was based on hearsay and KRS 403. Nowhere was a KRE 404(b) objection presented to the trial court.

Iran, to which there was no objection. Consequently, this issue was not properly preserved.[9]

Alternatively, this argument is waived. On direct examination of Nami, defense counsel herself asked Nami the same question.

4. Whether the trial court abused its discretion in allowing questions referencing Nami's financial condition and whether the damages were excessive.

Nami and Vinland next argue that the court erred by allowing questions regarding Nami's financial condition. We agree.

Engle presents two arguments in response: (1) that the objection is not preserved; and (2) that this evidence was admitted for purposes of impeaching Nami's credibility as a witness. We find fault with both responses.

Vinland and Nami argue that the trial court erred in allowing Engle's counsel to question Nami regarding whether he paid $7 million for an airplane and whether Vinland was for sale for $25 million. In Engle's brief, she references the line of questioning regarding whether Vinland was for sale for $25 million and argues it is not preserved, as there was no objection to the question. We agree regarding the questions of whether Vinland was for sale for $25 million; trial counsel did not object to these questions. Thus, this objection is waived.

However, regarding questions about Nami's purchasing an airplane for $7 million, defense counsel did object at trial. In a footnote in Engle's brief, she cites

[9] Vinland and Nami's trial counsel did file a motion in limine to exclude articles in Engle's exhibit list, regarding Iranian culture and the treatment of women. It is not clear from the record whether the trial court ruled on this. Nonetheless, Engle's counsel did not attempt to present any of this evidence on these issues during the trial.

to the trial proceedings and states that "Appellants waived any objection to this issue during the trial. At the bench hearing, Appellants' counsel advised the trial court 'I will let him testify that the plane is not worth seven million bucks.'" This Court watched this bench conference and notes that defense counsel chuckled in making this remark as if being somewhat sarcastic in a lighthearted manner, not as if to waive this objection. Thereafter, counsel stated that the reference was extremely prejudicial, as if to show that Nami had "an extremely deep pocket." Moreover, the trial court ruled on the objection. Accordingly, Engle's argument that it is waived is lacking in all merit.

We also disagree with Engle's statements in her brief regarding the reasons why questioning Nami regarding the airplane was proper, *i.e.,* as being responsive to Vinland and Nami's lack of profits and bad economy (a "poverty defense") and to impeach Nami's credibility. Rather, at the point in the trial when Engle's counsel questioned Nami regarding whether he paid $7 million for an airplane and defense counsel objected, no reference whatsoever had been made to Nami's answers during his deposition regarding the airplane. Engle cannot offer a different theory on appeal than the one presented to the trial court of why the evidence was admissible. *See Lewis,* 318 S.W.2d at 859.

Furthermore, at the bench conference regarding defense counsel's objection, Engle's counsel argued specifically that he had "*a battery claim and punitive damages are available and it will help [him] get to [Nami's] net worth*." Engle's counsel did not argue in any way that this questioning was being used to rebut a

"poverty defense" or for impeachment purposes.[10] And, over defense counsel's objection, the trial court admitted the testimony upon finding it was relevant "in light of the punitive damages claim."

"It has been the law of this Commonwealth for [over] one hundred years that in an action for punitive damages, the parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation." *Hardaway Management Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998) (note omitted) (citing *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 764 (Ky. 1974); *Givens v. Berkley*, 108 Ky. 236, 56 S.W. 158 (1900)); *see also Singer Sewing Mach. Co. v. Dyer*, 160 S.W. 917, 918 (Ky. 1913); *White v. Piles*, 589 S.W.2d 220, 222 (Ky. App. 1979). Kentucky's highest Court has specifically held that evidence of a party's financial condition is inadmissible in a case where punitive damages might be recovered. *Givens*, 108 Ky. 236, 56 S.W. at 159. A case should be tried on the merits without reference to the wealth or poverty of the parties. *White,* 589 S.W.2d at 222 (citing *Southern-Harlan Coal Co. v. Gallaier*, 240 Ky.106, 41 S.W.2d 661 (1931)).

Whether to admit evidence is reviewed for an abuse of discretion. A trial court's evidentiary rulings amount to an abuse of discretion if they are unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d. 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d

[10] In fact, the issue of whether Engle's counsel's questioning of Nami regarding whether he had purchased an airplane for $7 million was to impeach Nami's credibility was never presented to the trial court.

941, 945 (Ky. 1999)). Here, the trial court's ruling was not supported by the law of the Commonwealth regarding the introduction of the financial condition of the parties. Accordingly, it was clearly an abuse of discretion.

Engle argues, however, that Vinland and Nami have not shown that the introduction of this evidence affected the outcome of the trial. We disagree and will evaluate this in light of Vinland and Nami's claims that the damages were excessive.

Under KRS Chapter 344, the measure of actual damages for sexual harassment is emotional distress and humiliation. "[E]vidence of [discriminatory harassment] alone is not the standard by which to evaluate damages: there must be evidence of actual humiliation and embarrassment." *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). "Although medical evidence is not necessary in order for a plaintiff to be compensated for emotional distress, 'damages for mental and emotional distress will not be presumed, and must be proven by "competent evidence."'" *Betts v. Costco Wholesale Corp*., 558 F.3d 461, 472 (6th Cir. 2009) (quoting *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) (quoting *Carey v. Piphus*, 435 U.S. 247, 263-64 & n.20, 98 S.Ct. 1042, 1052-53 & n.20 (1978))).

While we are highly reluctant to take a verdict from the jury, the amount awarded herein--based on Engle's evidence-- appears excessive. The law is well established that damages must be proportional to compensate the injury *actually suffered*. *Moore v. KUKA Welding Systems*, 171 F.3d 1073, 1082 (6th Cir. 1999).

In Kentucky, punitive damages are not recoverable under KRS Chapter 344. *See Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 138 (Ky. 2003). Thus, it was the duty of the jury to evaluate the evidence Engle presented regarding the emotional distress, humiliation and embarrassment she actually suffered and to compensate her in accordance.

The evidence Engle presented on the emotional distress she actually suffered was extremely weak as compared to the verdict rendered for such. And, as to Engle's termination, even if it was in violation of the civil rights law, that alone "does not rise to the level of 'extreme and outrageous conduct'." *Benningfield v. Pettit Envt'l., Inc*.,183 S.W.3d 567, 572 (Ky.App. 2005) (quoting *Godfredson v. Hess & Clark, Inc*., 173 F.3d 365, 376 (6th Cir.1999)).

Certainly, the allegations made against Nami are outrageous. But, remarkably Engle's testimony fell short of the subjective reaction that one might have reasonably expected and failed to show emotional distress so severe that damages of $850,000 was within "the maximum damages that a jury could reasonably find to be compensatory for [Engle's actual injuries]."[11] *Coleman v. Tenn.*, 998 F.Supp. 840, 849 (W.D. Tenn. 1998) (citing *Jackson v. City of Cookeville*, 31 F.3d 1354, 1359 (6th Cir. 1994)).

[11] Engle received $500,000 for past and future embarrassment, humiliation, mental anguish and emotional distress on her claim of hostile work environment. Although we did not review the merits of the issue of retaliation (because it was not preserved), we note that Engle received $300,000 for past and future embarrassment, humiliation, mental anguish and emotional distress for this claim. And, on her battery claim, Engle received the maximum amount requested ($50,000 for pain and suffering, emotional distress, humiliation and embarrassment and $100,000 in punitive damages).

It is imperative to keep in mind here that there is both an objective and subjective component to sexual harassment. And under an emotional distress claim, the *actual distress suffered* must be severe. Certainly, these are jury issues. But, a review of Engle's testimony reveals only that she stated that she was "offended" and "shocked" by Nami's actions. She did not testify whatsoever to any embarrassment, humiliation, mental anguish or emotional distress. She did not seek counseling and only spoke to her parents about the issue, and that was only after she was terminated.[12]

We find guidance on this issue from the federal courts. In *Betts*, terminated African-American employees sued alleging discriminatory termination and racially hostile work environment. 558 F.3d 461. One plaintiff, Thomas, received $10,000 for emotional distress. Regarding the actual emotional distress she suffered, Thomas testified that she was "upset" and "disappointed" that she lost her job and stated that she felt "smacked in the face." *Id.* at 471. The Sixth Circuit held that these generalized comments were not enough to support an award for emotional distress.

[12] The parties have cited to unpublished cases that do not meet the criteria for citation under CR 76.28(4)(c). We pause to note in particular that Engle cited to the unpublished case of *Kentucky Lottery Corp. v. Riles*, 2007 WL 1785451 (Ky. App. June 8, 2007) in support of her argument that the damages are not excessive. The proposition for which Engle quoted *Riles* is taken out of context. Engle quoted *Riles* as follows: "We find this type of 'mental damage' claim is well within the general purview of the jury, both with regard to its existence, intensity and also with regard to proper compensation for it." Regarding this statement, the Court was not engaging in a review of whether the damages were excessive. Rather, the Court was examining a claim under CR 35 and whether the trial court erred in refusing to allow a mental health examination of the plaintiff. Consequently, the statement quoted from *Riles* was in reference to the Court's determination that a mental health examination was not required to prove damages.

In the *Betts* opinion, the Sixth Circuit reviewed other cases in making its determination. In particular, the Court reviewed *Erebia v. Chrysler Plastic Prod. Corp*., 772 F.2d 1250 (6th Cir. 1985), regarding whether the evidence was sufficient on an emotional distress claim arising out of a hostile work environment case. The *Betts* Court noted that in *Erebia*, the following was held to be insufficient evidence to sustain the jury's emotional-distress award:

> [the] plaintiff's only proof of emotional harm consisted of his statements that he was "highly upset" about the slurs and that "you can only take so much." His conduct in complaining to management on a regular basis also demonstrated a high level of concern.

Betts, 588 F.3d at 742 (quoting *Erebia*, 772 F.2d at 1259).

Engle's general statements that she was offended by Nami's actions are somewhat analogous to that which the Sixth Circuit found to be insufficient to justify the jury's awards for emotional distress. Damages must be proportional to the injury actually suffered. *Moore*, 171 F.3d at 1082. Here, given Engle's evidence, or should we say lack thereof, the damages were not proportional to the injuries she suffered. This combined with the trial court's abuse of discretion in allowing the testimony relating to Nami's wealth warrant setting aside the judgment and ordering a new trial.

5. Whether the jury was properly instructed to permit the award of punitive damages.

A new trial is warranted, and we could view Vinland's and Nami's argument that the jury was not properly instructed regarding punitive damages as moot. We will, however, briefly review this issue. For the sake of clarity, the only

punitive damage instruction given was related to the cause of action for battery; a punitive damage instruction was not given relating to Engle's civil rights claims, as Kentucky law does not allow this. *See McCullough*, 123 S.W.3d at 138.[13]

Before submitting the instructions to the jury, the trial court specifically asked trial counsel for both parties if there were any objections to the instructions. Both answered in the negative; hence, trial counsel did not object to the court's jury instruction on punitive damages.[14] Consequently, this issue is waived and not reviewable on appeal. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 689 (Ky. App. 2009); *see also* CR 51(3).

6. Whether the CR 60.02 motion is properly before the Court.

Vinland and Nami argue that the trial court erred in denying their CR 60.02 motion. Without going into the merits of the motion, it is not properly before this Court.

[13] Vinland did submit a written objection in the record, prior to trial, regarding a punitive instruction being given to the claims arising under KRS Chapter 344. As noted, *supra*, the trial court did not present a punitive instruction relating to KRS Chapter 344.

[14] Appellate counsel states that the trial court accepted Engle's proposed jury instruction over trial counsel objection, but appellate counsel fails to state where this was preserved in the record. Although we are not required to search out the record, we have reviewed the trial several times and did not locate any objection to the jury instructions. Rather, as noted *supra*, neither counsel objected to the trial court's proposed instructions.

After Vinland and Nami filed a notice of appeal, they filed a CR 60.02 motion.[15] Pursuant to CR 60.04,[16] they filed a motion with this Court to hold the appeal in abeyance pending the trial court's ruling on their CR 60.02 motion. They thereafter filed in this Court a "Notice Mooting Motion to Hold in Abeyance. . . ." In this notice, they informed the Court that the trial court entered a final order denying their CR 60.02 motion. The appeal was returned to the active docket of this Court. Vinland and Nami included the denial of their CR 60.02 motion as an issue in their prehearing statement, and the parties briefed the issue. Vinland and Nami did not, however, file a notice of appeal or amend their notice of appeal to include the ruling on the CR 60.02 motion. Pursuant to *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4 (Ky. 2006), which is procedurally on point, a separate appeal should have been filed from the CR 60.02 ruling. Consequently, the CR 60.02 issues are not properly before this Court.

CONCLUSION

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[15] As a general rule, the trial court loses jurisdiction to rule on motions after a notice of appeal has been filed. However, motions filed under CR 60.02 are exceptions to the general rule. *See Young v. Richardson*, 267 S.W.3d 690, 695 (Ky. App. 2008). "'The obvious reason for requiring a movant under CR 60.02 to notify the Court of Appeals is to let the court know the motion is pending so it will not take further steps until the motion is adjudicated in a lower court.'" *Id.* (quoting *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 481 S.W.2d 36, 38 (Ky.1972)).

[16] CR 60.04 provides that

> [i]f a proceeding by motion or independent action is commenced under Rule 60.02 or 60.03 while an appeal is pending from the original judgment and prior to the time an opinion is rendered by the appellate court, the party commencing such proceeding shall promptly move the appellate court to abate the appeal until a final order is entered therein. When the trial court has entered such final order, the party who moved for abatement shall promptly file with the clerk of the appellate court a certified copy thereof.

Based on the foregoing, the judgment of the Laurel Circuit Court is hereby vacated, and this matter is remanded for a new trial. Any remaining issues are deemed moot.

ALL CONCUR.

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