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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1997-CA-002949-MR

SIMMS 208, INC. — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE WILLIAM HALL, JUDGE
ACTION NO. 96-CI-00080

DANNY R. TUNGATE; JOSEPH E. COX,
INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF KAREN COX, DECEASED,
AND FRIEDA COX, HIS WIFE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Simms 208, Inc. (Simms 208), brings this appeal from a September 12, 1997, judgment of the Taylor Circuit Court entered upon a jury verdict. We affirm.

On December 16, 1995, Karen M. Cox (Karen), age 16, a passenger in her own vehicle, died as a result of injuries sustained in an accident in Campbellsville, Taylor County, Kentucky. The vehicle was operated by her boyfriend, Danny R. Tungate (Danny), age 19, and was also occupied by Shane Cox, age

15. It was determined that Danny was intoxicated at the time of the accident.

Co-appellees Joseph E. Cox, individually and as administrator of the estate of Karen Cox, and Frieda Cox (the Coxes) filed an action against Danny in the Taylor Circuit Court on March 11, 1996, to recover damages incident to their daughter's death. On April 16, 1996, Danny filed a third-party complaint against appellant Simms 208, a retail beverage business located in Marion County. The Coxes amended their complaint on July 16, 1996, to assert dram shop liability against Simms 208.

Upon trial of the case, the jury apportioned awards for funeral expenses; loss of society, companionship and services; and destruction of Karen's power to earn money. Additionally, the jury awarded punitive damages against Simms 208. Simms 208 appeals from the judgment entered upon this verdict.

The ultimate issue at trial centered upon whether the teens had purchased alcoholic beverages from Simms 208 before the ill-fated accident. The query was answered in the affirmative. Although Simms 208 makes no serious attempt to contradict this finding, it assigns numerous errors, which, it claims, compel reversal. We shall address each in what we believe is logical order.

Simms 208 contends that because the alcoholic beverages were purportedly sold in Marion County, the venue of this action was improperly laid in Taylor County. Simms 208 directs our attention to Ky. Rev. Stat. (KRS) 452.450 and Copass v. Monroe County Medical Foundation, Inc., Ky., 900 S.W.2d 617 (1995). We are not convinced as to the applicability of Copass, wherein

there were divers defendants and independent torts. In the case at hand, we are faced with a wrong that was committed in Marion County resulting in an actionable tort in Taylor County. The wrong at issue came to fruition only upon Karen's death in Taylor County. KRS 452.450 permits suits against corporations to be brought either where the "tort is committed" or where the corporate business is situated or the agent resides. Thus, we believe the subject tort was "committed" in Taylor County within the purview of KRS 452.450.

In any event, we are not faced with evaluating or distinguishing Copass. Venue is waived unless the issue is raised by a Ky. R. Civ. Proc. (CR) 12 motion or in a responsive pleading. CR 12.08(1). Finding no such assertion in this case, we believe any question as to improper venue was waived.

Long after the case was filed, Simms 208 attempted to change venue under KRS 452.010(2). The motion was not verified as required by KRS 452.030. This alone was sufficient basis for denying the motion. Nevertheless, we observe that the object was to change venue based upon adverse publicity in Taylor County. The record, however, is devoid of significant publicity involving Simms 208. As we understand the matter, publicity was primarily directed toward the tragedy of Karen's death and not toward the fault or blame of Simms 208.

Change of venue is a matter solely within the trial court's discretion and the trial court's decision will not be disturbed on appeal except upon a clear showing of abuse. Miller v. Watts, Ky., 436 S.W.2d 515 (1969). Here, we find no abuse. The circuit court correctly denied Simms 208's motion for change.

We turn now to Simms 208's allegation that the court erred in admitting certain irrelevant and prejudicial evidence. Before discussing the specific claims, we note that the central issue herein was whether Danny purchased from Simms 208 the alcohol of which he became intoxicated. Danny and Shane both testified that on the day of the accident, they had entered Simms 208 and Danny had purchased a case of beer from an unidentified clerk. They testified that later that evening, Danny purchased at Simms 208's drive-in window a half gallon of whiskey from one Jimmy Sprowles. It appears Danny consumed a considerable amount of the alcohol before the accident. Simms 208 denied the sales.

Simms 208 contends the trial court erroneously admitted the following evidence: (1) testimony that Sprowles had been convicted of five DUIs; (2) testimony that Simms 208 had a reputation for selling to minors; (3) testimony that the Taylor County Sheriff had previously issued warnings to Simms 208 for selling to minors; and (4) that Simms 208 had received prior citations from the Alcoholic Beverage Control (ABC) Board for selling to minors. Simms 208 claims it is entitled to reversal.

At the outset, we observe that the trial judge admitted much of the evidence complained of because he felt it appropriate upon the claim for punitive damages. Accordingly, citing Ky. R. Evid. (KRE) 105,[1] he instructed the jury to consider certain evidence only as it pertained to those damages. In this regard, we feel constrained to note that admissibility or rejection of evidence is not governed by the prayer for damages. In a tort

[1]The limited admissibility rule.

action predicated upon negligence, all relevant, probative and otherwise competent evidence is admissible regardless of whether there is a claim for punitive as well as compensatory damages. The theory of punitive damages is that when an award is made for compensatory damages, the jury, in its discretion, may award an additional sum as punitive damages upon the same evidence as a deterrent to the type of conduct. See Ashland Dry Goods Company v. Wages, 302 Ky. 577, 195 S.W.2d 312 (1946). Punitive damages are not predicated upon the actor's unsavory character but rather upon the gravity of his act. If the actor is negligent and his conduct is so egregious as to be elevated from ordinary negligence to the level of gross negligence in the eyes of the jury, the jury may award punitive damages. The rules pertaining to admissibility of evidence are the same. Perforce, we are of the opinion that the trial court's admission of certain evidence with limitation of its consideration to punitive damages under KRE 105 was fallacious thinking. We now examine the evidence complained of to determine whether same was properly admitted. Indeed, the evidence was properly admitted only if it would have been admitted without regard to the prayer for punitive damages.

First, Simms 208 complains of the receipt of evidence that Sprowles had five DUI convictions. Upon examination of the record, we find that this information was offered by Sprowles in an unresponsive answer. The Coxes' counsel had asked Sprowles how many times he had visited an alcohol rehabilitation center. Sprowles responded that he had five DUI convictions. Apparently, the implication was that if he had received five DUI convictions, he would have had several occasions to visit a rehabilitation

center. Under the circumstances, we do not think said injection of Sprowles's DUI experiences constituted reversible error.

Next, Simms 208 maintains that evidence of its reputation for selling alcohol to minors was improperly admitted. Having reviewed the record, we believe it is more specifically complaining about the introduction of evidence of prior bad acts -- selling alcohol to Danny and other minors. Simms 208 denied ever selling alcohol to Danny. It is, therefore, our opinion that such evidence was admissible under KRE 404(b) to prove *identity* of the vendor of the alcohol that Danny consumed on the night in question.

Simms 208 next complains of the receipt of evidence that the Taylor County Sheriff had previously issued warnings for its sale of alcohol to minors. Our examination of the record reveals that Simms 208's *motion in limine* concerning such evidence was never ruled upon. Nor was there a contemporaneous objection made when the evidence was offered at trial. Perforce, we perceive no error. Cf. Tucker v. Commonwealth, Ky., 916 S.W.2d 181 (1996).

Simms 208 complains of evidence concerning ABC citations. We find no such evidence in the record. Simms 208 points us only to evidence of a "citation" from the Taylor County sheriff. Such evidence, however, is not the basis of its complaint; Simms 208 specifically refers to ABC citations.

Upon the whole, we find no reversible error in the admissibility of evidence.

Simms 208 alleges that the trial court erred in instructing the jury on the common law standard for punitive damages rather than the statutory standard set forth in KRS 411.184. We are unable to assign merit to this contention as the common law standard of gross negligence prevails. See Williams v. Wilson, Ky., 972 S.W.2d 260 (1998).

Simms 208 challenges the jury verdict in that the jury first returned a "0" verdict for destruction of Karen's power to earn money. The Coxes' counsel requested the jury be returned to the jury room for reconsideration of this matter. The trial court complied. Upon reexamination, the jury awarded the Coxes $1,100,000.00. We are familiar with the wide range of cases adressing this and similar matters since Stucker v. Bibble, Ky., 442 S.W.2d 578 (1969). Having reviewed same, we think the trial court complied with the holding in Shortridge v. Rice, Ky. App., 929 S.W.2d 194 (1996). It is appropriate to return the jury to reconsider a "0" verdict in cases such as this. When a reconsidered verdict is returned, the remedy of the aggrieved party is to complain that the verdict is inadequate or excessive, as the case may be.

Simms 208 also argues that the trial court erred in failing to instruct the jury on two available "affirmative defenses." It first maintains that the jury instructions should have included certain protections found in KRS 413.241. Specifically, it refers to the following provision:

> (1)The general assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing or sale of such beverages, is the proximate cause of any injury, including

> death and property damage, inflicted by an intoxicated person upon himself or another person.

In construing same, however, it is important to refer to subsection (2) of said statute which reads in relevant part:

> Any other law to the contrary notwithstanding, no person holding a permit under KRS 243.010, 243.030, 243.040, 243.050, nor any agent, servant, or employe of such a person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises . . . . (Emphasis added.)

We believe a plain reading of this statute establishes that while it may indeed protect a tavern owner when it lawfully sells or serves alcohol, it offers no such protection when the sale is unlawful; that is, to an underage purchaser as in the instant case. Accordingly, we find no error in the omission of same from the jury instructions.

Simms 208 next asserts that pursuant to KRS 244.080(1), it was entitled to an instruction on whether it was "reasonable to believe that Danny R. Tungate was of the age of twenty-one (21)." KRS 244.080(1) reads in relevant part:

> . . . except that in any prosecution for selling alcoholic beverages to a minor it is an affirmative defense that the sale was induced by the use of false, fraudulent, or altered identification papers or other documents and that the appearance and character of the purchaser were such that his age could not have been ascertained by any other means and that the purchaser's appearance and character indicated strongly that he was of legal age to purchase alcoholic beverages . . . . (Emphases added.)

It is our opinion that the record is devoid of any evidence that would indicate Danny presented false identification to obtain the alcohol in question. Simms 208's defense was that it did not sell alcohol to Danny on the day in question. As such, we do not believe the trial court erred by refusing to instruct the jury on this affirmative defense. Moreover, we question the applicability of this affirmative defense to a civil action.

Last, Simms 208 makes a rather perfunctory argument that the trial court should have instructed the jury on an adult standard for Karen Cox. Simms 208 does not direct us to the challenged instruction, the preservation of error, or supporting authority. We nevertheless conclude that under the totality of the circumstances in this case, any error in this regard was harmless. CR 61.01.

For the foregoing reasons, the judgment of the Taylor Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I respectfully dissent. I believe the decision of the trial court denying the appellee's motion for a new trial should be reversed and the case should be remanded to the trial court accordingly. The trial court ignored the law of this Commonwealth with respect to inadequate verdicts, which is stated succinctly in Cooper v. Fultz, Ky., 812 S.W.2d 497, 499 (1991):

> It is indeed a "booby trap" to send back a jury which flatly decided that the claimant's pain and suffering is worth nothing to replace the "-0-" with a dollar amount. If "-0-" is inadequate, this forces the lawyer seeking to represent a litigant who has just been abused by an inadequate jury verdict to further jeopardize his client's interest by asking that this hostile jury reconsider. Erasing the zero and replacing it with a few dollars will not correct the inadequacy. The first verdict as completed should be received and should be subject to a motion for a new trial which should be granted unless there is countervailing evidence such that the jury's verdict, taken as a whole, withstands the test of inadequacy.

The majority's reliance on Shortridge v. Rice, Ky. App., 929 S.W.2d 194 (1996), in this case is misplaced. In Shortridge, the jury returned a verdict in favor of the plaintiff for $5,000 in medical expenses and zero for pain and suffering. After repeated requests for reconsideration of the zero award for pain and suffering by the plaintiff, the trial court ordered the jury to reconsider the issue. Thereafter, the jury awarded the plaintiff $1,000 for pain and suffering. The plaintiff then moved the trial court for a new trial claiming that the verdict was inadequate. The trial court denied the plaintiff's motion. On appeal, we stated that:

> While we agree wholeheartedly with *Cooper*, we cannot overlook [the plaintiff's] insistence that the trial court order reconsideration. We will not fault the court for complying with that insistent request.

Id. at 196 (emphasis added).

The special circumstances presented in Shortridge are not present in the case sub judice. In this case, the appellees moved for reconsideration after the jury returned a verdict in

favor of the appellees but awarding "-0-" for destruction of the deceased's power to labor and earn money. The appellant opposed reconsideration of the verdict and moved for a new trial. The trial court ordered reconsideration contrary to current authority. After the jury awarded $1,100,000 upon reconsideration, the appellant again moved for a new trial and the trial court again denied such motion.

In Shortridge, we refused to order the new trial because the very party who insisted on reconsideration sought a new trial due to what it perceived as an inadequate verdict upon reconsideration. However, we specifically endorsed the decision in Cooper with regard to inadequate verdicts. In the present case, the appellee moved for reconsideration, which the appellant opposed by moving for a new trial. Since the jury verdict was complete, the trial court should have denied appellee's motion for reconsideration and instead ordered a new trial. On this issue, the trial court clearly erred. For this reason alone, I would reverse and remand.

On all the other issues raised on appeal and addressed by this Court, I would concur.

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