

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002330-MR

WAL-MART STORES, INC. APPELLANT/CROSS-APPELLEE

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 97-CI-000099

WANDA SMITHHISLER APPELLEE/CROSS-APPELLANT

AND NO. 1997-CA-002389-MR

WANDA SMITHHISLER APPELLANT/CROSS-APPELLEE

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS R. LEWIS, JUDGE  
ACTION NO. 97-CI-000099

WAL-MART STORES, INC. APPELLEE/CROSS-APPELLANT

OPINION  
VACATING IN PART AND AFFIRMING IN PART  
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BEFORE: HUDDLESTON, McANULTY, and SCHRODER, JUDGES.

McANULTY, JUDGE: This is an appeal from a jury verdict in an unlawful detention and violation of civil rights action awarding "0" in compensatory damages and \$1,000 in punitive damages. Appellant Wal-Mart Stores, Inc. ("Wal-Mart") asserts that the punitive damages award cannot stand since the jury failed to

award compensatory damages. Appellee Wanda Smithhisler ("Smithhisler") cross-appeals the failure of the jury to award compensatory damages and seeks a new trial on the issue of damages. We have examined the record in this matter and conclude that the verdict awarding punitive damages must be vacated and the motion for a new trial was properly denied.

On or about January 27, 1996, Smithhisler was shopping at a Wal-Mart store in Bowling Green, Kentucky. Upon completing her purchases, she was detained by an unidentified security guard a few feet from the checkout lane. The guard asked to see Smithhisler's receipt and searched her bags. The period of detention did not exceed five minutes.<sup>1</sup>

During this time, Smithhisler was accompanied by her son and her boyfriend's daughter. No other customers were in the immediate area. There was no evidence that the incident was communicated to any member of the community save Smithhisler's co-employees who were informed by her or those who read of the incident in the newspaper after the filing of the lawsuit.

Smithhisler did not report the incident to a Wal-Mart manager that night but waited approximately 10 days later when she encountered a problem with a merchandise return at the same store. About two weeks after the initial incident, her boyfriend, a Bowling Green City police officer, informed her that he believed her civil rights had been violated. On January 24,

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<sup>1</sup> In her deposition, Smithhisler testified that the detention lasted approximately 15 seconds. However, at trial she testified that it lasted three to five minutes.

1997, Smithhisler filed a complaint alleging unlawful detention and a violation of her civil rights.

The trial court directed a verdict against appellant on liability and instructed the jury on damages as follows:<sup>2</sup>

INSTRUCTION NO. 2

You will determine from the evidence the sum or sums of money that will fairly compensate Wanda Smithhisler for the damage that she sustained by reason of the unreasonable detention by the Defendant.

- (a) Humiliation and embarrassment,  
(not to exceed \$50,000) \$ \_\_\_\_\_
  - (b) Mental pain and suffering she has  
suffered as a result of Defendant's  
conduct toward her.  
(not to exceed \$50,000) \$ \_\_\_\_\_
- TOTAL \$ \_\_\_\_\_

INSTRUCTION NO. 3

If you find for Wanda Smithhisler and award her a sum or sums in damages under Instruction No. [2], and if you are further satisfied from the evidence that Defendant acted with oppression or malice, you may award punitive damages against Defendant in addition to damages under Instruction No. [2]. Punitive damages are permitted by law to punish a defendant for their conduct and to deter such conduct in the future.

As used in this instruction:

"Oppression" means conduct that was specifically intended by Defendant to subject Wanda Smithhisler to cruel and unjust hardship.

"Malice" means conduct that was specifically intended by Defendant to cause tangible or intangible [in]jury to Wanda Smithhisler OR conduct that was carried out by Defendant with both a flagrant indifference to Wanda Smithhisler's rights.

If you award punitive damages, you will state the amount separately from the sum or sums awarded under Instruction No. 2.

\$ \_\_\_\_\_

The jury awarded "0" compensatory damages under Instruction No. 2 but awarded Smithhisler \$1,000 in punitive damages. Wal-Mart filed post-trial motions to alter and/or amend the judgment and

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<sup>2</sup> The trial court's instructions were not included in the record on appeal, however the Trial Order and Judgment set out the court's instructions.

for judgment notwithstanding the verdict. Smithhisler filed motions for a new trial and to vacate, alter, or amend the judgment. The trial court denied the motions of both parties. This appeal and cross-appeal followed.

The first issue before this Court is whether punitive damages may be awarded if a jury has returned a verdict of "0" compensatory damages. KRS 411.184(1)(f) defines punitive damages as "damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." The plaintiff must prove oppression, fraud, or malice on the part of the defendant in order to recover these damages which extend past the actual damages sustained. Harrod v. Fraley, Ky., 289 S.W.2d 203 (1956).

Appellant asserts that the trial court erred in upholding the award of punitive damages in the absence of compensatory damages and relies on Estep v. Werner, Ky., 780 S.W.2d 604 (1989). Estep stated that "[t]he rule of law recognized in this state is that, 'if the plaintiff has suffered an injury for which compensatory damages might be awarded, ... he may in a proper case recover punitive damages.'" Lawrence v. Risen, Ky. App., 598 S.W.2d 474, 476 (1980)." However, the trial court rejected Appellant's interpretation of Estep and read the reference to Lawrence to only require "a factual allegation of actual compensatory damages" to exist. The trial court ruled that Estep did not require an actual award of compensatory damages in order to recover punitive damages. We disagree.

The Kentucky Supreme Court explicitly stated in Estep that the "[m]ovant failed to demonstrate that he suffered any injury. Thus, the award of punitive damages was improper." Estep 780 S.W.2d at 607. This decision supports the position of Appellant that a plaintiff must both plead and prove a claim for compensatory damages. In further support, the Kentucky Supreme Court agreed with this Court in Ky. Farm Bureau v. Troxell, Ky., 959 S.W.2d 82, 85 (1997), that "punitive damages cannot be supported absent an award of compensatory damages." Current case law definitively supports the proposition that an award of compensatory damages is necessary for punitive damages to be upheld.

We therefore vacate the jury verdict awarding punitive damages based on the absence of compensatory damages.

The second issue is whether the trial court erred in denying the Appellee's motion for a new trial on the amount of damages. Appellee argues that the award of damages was inadequate and the jury verdict was rendered under the influence of prejudice and passion and in disregard of evidence presented during trial. CR 59.01(d). It is the duty of the trial court to decide whether the factors under CR 59.01(d) influenced the verdict and therefore a motion for a new trial should be granted. Cooper v. Fultz, Ky., 812 S.W.2d 497, 501 (1991). It is the function of this Court to determine whether the trial court's decision to deny a new trial was clearly erroneous. Id. The Kentucky Supreme Court has warned that overturning a trial court's decision "should be exercised by this Court with great

caution and only in exceptional cases." Aker v. Smith, Ky., 290 S.W.2d 496, 498 (1956).

In this case, the trial court concluded that the award of "0" compensatory damages did not strike the court as so inadequate that it was a result of passion, prejudice, or a disregard of the evidence presented. The trial court disagreed with Appellee that a directed verdict on liability guarantees an award of damages. The court decided that the evidence presented at trial could lead a jury to properly conclude that "0" compensatory damages was appropriate. We agree with the trial court.

An award of "0" compensatory damages is not an incomplete or irregular verdict. Spalding v. Shinkle, Ky.App., 774 S.W.2d 465, 466 (1989). See also Cooper, 812 S.W.2d at 501. The jury did not leave the spaces blank, rendering the verdict incomplete, but made a conscious decision to not award compensatory damages. See Spalding, 774 S.W.2d at 466 (explaining that the "0" compensatory damage "verdict was no more incomplete if the jury had inserted \$1 for pain and suffering."). There is no automatic requirement of damages after a directed verdict on liability if the jury does not believe an injury exists. Carlson v. McElroy, Ky. App., 584 S.W.2d 754, 756 (1979). See also Smith v. McMillan, Ky., 841 S.W.2d 172, 174 (1992). The absence of compensatory damages does not constitute an irregular verdict.

There is sufficient evidence on the record to support the jury's decision not to award compensatory damages. The

period of detention did not exceed five minutes and may have only lasted 15 seconds. There were no physical threats, accusations of theft, nor raised voices. Appellee did not feel compelled to report the incident until ten days later. There was no evidence that her job was in jeopardy nor that any customers overheard the incident. Based on these facts, it was reasonable for the jury to decide that no recoverable injury resulted from the unlawful detention. The jury does not have to accept the plaintiff's testimony concerning her humiliation and embarrassment or mental pain and suffering as the truth. See Carlson, 584 S.W.2d at 754. See also Davidson v. Vogler, Ky., 507 S.W.2d 160 (1974); Thompson v. Spears, Ky., 458 S.W.2d 1 (1970). The trial court's decision to deny Appellee's motion for a new trial was not an abuse of its discretion.

We affirm the trial court's denial of Appellee's motion for a new trial on damages.

For the foregoing reasons we vacate the trial court's judgment awarding punitive damages and affirm the denial of Appellee/Cross-Appellant's motion for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
APPELLEE WAL-MART STORES,  
INC.:

David F. Broderick  
Kenneth P. O'Brien  
Bowling Green, KY

BRIEF FOR APPELLEE/CROSS-  
APPELLANT WANDA SMITHHISLER:

Matthew J. Baker  
Bowling Green, KY