

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002044-MR

DENNIS McCOY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 98-CI-007187

DILLARDS, INC.  
AND LARRY SINGLETON

APPELLEES

OPINION  
REVERSING AND REMANDING  
\*\* \*\* \* \* \* \* \*

BEFORE: BARBER, DYCHE, AND MILLER, JUDGES.

BARBER, JUDGE: We are asked to decide whether failure to object to the jury's verdict constitutes waiver. For the reasons outlined below, we reverse and remand for reinstatement of the original judgment in favor of the Appellant, Dennis McCoy ("McCoy"), plaintiff below. The Appellees are Dillard's, Inc. and Larry Singleton ("Appellees").

McCoy's complaint arose out of an incident at a Dillard's store involving Singleton, who was working as a security guard. The facts are not at issue on appeal. McCoy explains that the jury returned a verdict in his favor under

Instruction No. 1 (False Arrest), and awarded "\$0" in compensatory damages; the jury awarded \$1,000.00 in punitive damages under Instruction No. 7. There was no objection to the verdict by either party prior to discharge of the jury.

Following the trial, both parties tendered judgments to the court. On June 7, 2000, the trial court entered McCoy's tendered judgment. On June 16, 2000, the Appellees filed a motion to vacate the judgment on the ground that it was a nullity, contending that punitive damages cannot be recovered, in the absence of at least nominal compensatory damages, citing Estep v. Werner, Ky., 780 S.W.2d 604 (1989) and Lawrence v. Risen, Ky. App., 598 S.W.2d 474 (1980). The trial court granted the motion. On July 28, 2000, the trial court entered judgment dismissing the action against the Appellees with prejudice at McCoy's cost, the jury not having found any compensatory damages.

McCoy appeals and argues that the trial court erred in granting Appellees' motion to alter, amend, or vacate the June 7, 2000 judgment. McCoy contends that where a jury verdict is incomplete or ambiguous, the proper procedure is for the affected party to ask the court to send the jury back or correct the verdict. McCoy maintains that the affected party must do this prior to the discharge of the jury, or the error is waived, and relies upon Smith v. Crenshaw, Ky., 344 S.W.2d 393 (1961), and Breathitt Funeral Home v. Neace, Ky., 437 S.W.2d 490 (1969).

In Smith, the court recognized that "Our prior decisions on the question of whether a defect in a verdict is waived by failure to move that the jury be returned to the jury

room to complete or correct the verdict are not consistent." Id. at 395. In Smith, the verdict was patently incomplete in that it made no finding on the claim of the administrator or on the counterclaim of Crenshaw. One could not tell from the verdict whether the jury intentionally did not allow anything on the counterclaim, or whether they simply overlooked the matter of awarding damages on the counterclaim, which was for a small amount. In Breathitt, the verdict was irregular because the jury rendered an award against the two masters but did not find against their two servants, who were operating the motor vehicles and had been made parties defendant.

Appellees attempt to distinguish these cases and cite cases from foreign jurisdictions in an attempt to persuade us to affirm the trial court's judgment. We need not resort to the law of other jurisdictions, where Kentucky law is dispositive of the issue before us.

In Hazelwood v. Beauchamp, Ky. App., 766 S.W.2d 439, 440 (1989), the jury awarded medicals but put "0" in the two blanks for pain and suffering and for lost earnings. The jury was sent back to deliberate the issue of damages for pain and suffering. The court explained

that it is futile to require a jury that has consciously inserted "0" or its equivalent to reconsider its decision. This is not the same situation as that created when a jury has left a verdict slot blank. Such a verdict is patently irregular or incomplete . . . . [W]here the jury has deliberately awarded nothing, despite the evidence and instructions to the contrary . . . . [the] verdict is no more incomplete or irregular than had the jury inserted one dollar. It may be defective as contrary to the evidence

and the law that relates to the adequacy of an award, but such a defect is one appropriate to be addressed by the trial court upon a motion for a new trial.

In Spalding v. Shinkle, Ky. App., 774 S.W.2d 465, 466 (1989), the jury awarded future medicals but failed to award future pain and suffering. The court explained:

We begin by pointing out that a distinction exists between a jury leaving a verdict slot blank and where the jury inserts "0" or its equivalent. Leaving a verdict slot blank would indicate one or more of the following on the jury's part: (1) an oversight, (2) confusion, or (3) refusal to make an award. A blank verdict slot is patently an irregular or incomplete verdict. A blank slot circumstance is controlled by the rule in Breathitt Funeral Home v. Neace, Ky., 437 S.W.2d 490 (1969) . . . .

. . . .

Under the facts of the present case, the jury consciously inserted "0." This finding is not an irregular or incomplete verdict. Therefore, it was not a waiver of error situation.

In Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991), the Supreme Court reaffirmed the reasoning in Hazelwood and Spalding. In Cooper, the Supreme Court:

accepted discretionary review to consider under what circumstances the waiver principle, which requires a party to move the court to correct a patent inconsistency in the verdict before the jury is discharged or forfeit the right to complain of it thereafter, should apply to the present situation. For reasons that will be stated, we have decided that the waiver principle should not apply where the jury's award specifies "-0-", as contrasted with failing to complete the verdict by leaving it blank.

Id. at 499.

Here, the jury inserted "-0-" for compensatory damages; thus, waiver does not apply. That said, we agree with McCoy that the trial court erred in granting the motion to vacate the June 7, 2000 judgment – but on other grounds – and reverse under CR 61.02, which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The trial judge vacated the judgment for McCoy because the jury did not award compensatory damages; however, Commonwealth of Kentucky, Department of Agriculture v. Vinson, Ky., 30 S.W.3d 162 (2000), explains that punitive damages may be available, absent an award of compensatory damages. The decision, which dealt with a claim under the Whistleblower Act, provides a detailed discussion of the common law of Kentucky on punitive damages:

The Department of Agriculture argues that Vinson and Anderson were not entitled to punitive damages in the absence of actual compensatory damages. They contend that the punitive damages provision of the [Whistleblower] Act should be interpreted in harmony with the Kentucky common law of punitive damages. They assert that the legislature did not intend to change the common law because the statute contains no language expressly declaring such a change.

The undisputed evidence demonstrates that Vinson and Anderson did not suffer a loss of wages or fringe benefits. The Department of Agriculture maintains that the trial judge erred in instructing the jury on punitive damages in the absence of compensatory damages. We disagree. In support of its argument, they cite 24 cases from other jurisdictions as well as Estep v. Werner, Ky., 780 SW2d 604(1989); Karst Robbins Coal Co., Inc. v. Arch of Kentucky, Inc., Ky. App., 964 SW2d 419 (1997); and Lawerence v. Risen, Ky. App., 598 SW2d 474 (1980). Estep, supra, and Karst Robbins, supra, relied on the earlier case of Risen, supra, which in turn cited Louisville & N.R. Co. v. Ritchel, 148 Ky., 701, 147 SW2d 411 (1912).

Ritchell,<sup>1</sup> supra, states in part that a verdict for punitive damages only will not be set aside because the jury failed to return a verdict for compensatory damages. Where the plaintiff has suffered an injury for which compensatory damages, though nominal in amount may be awarded, the jury may in a proper case, award punitive damages as well. The Ritchell court stated as follows:

It is true that there are respectable authorities which appear to hold that punitive damages cannot be awarded when the actual injury is merely nominal. In our opinion, however, this view is not correct, and does not agree with a great weight of authority. The correct rule, we think, is that if a right of action exists; that is, if the plaintiff has suffered an injury for which compensatory damages might be awarded although nominal in

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<sup>1</sup> Ritchell, supra, affirmed a judgment entered upon a jury verdict for punitive damages only.

amount, he may in a proper case recover punitive damages . . . . The fact that the jury returned a verdict for punitive damages only, furnishes no just reason why the verdict should not be allowed to stand, since, under the rule in force in this State, punitive damages, when allowed, are given as compensation to the plaintiff and not solely as punishment of the defendant.

Ritchell. (Internal citations omitted.) It is clear that Kentucky follows the rule that it is the invasion of a right which entitles a person to legal compensation.

We are also persuaded by the reasoning of Nappe v. Anschelwitz, 97 N.J. 37, 477 A.2d 1224 (N.J. 1984) that compensatory damages are not an essential element of an intentional tort committed willfully and without justification. The mere fact that no compensatory damages were awarded to Vinson or Anderson does not mean that they did not have compensable injuries. The fact that there is not a quantifiable monetary damage awarded for lost pay does not mean that injury did not occur.

The trend throughout this nation is to allow recovery for punitive damages in an equitable action. [Citation omitted.] The absence of a showing of actual damages need not bar an award of punitive damages. [Citations omitted.] We agree.

. . . .

Here there is a factual basis for a possible award of actual compensatory damages although not given in this case. The common law of Kentucky does not provide a basis for defeating the judgment in question . . . .

Id. at 165-66.

False imprisonment is an intentional tort. It protects the personal interest from physical restraint and may be maintained without proof of actual damages. Banks v. Fritsch, Ky. App., 39 S.W.3d 474 (2001). The jury found in McCoy's favor on false arrest and awarded \$1,000.00 in punitive damages. We are persuaded that a manifest injustice has resulted from the trial court dismissing McCoy's action with prejudice because the jury did not find any compensatory damages. We reverse and remand for reinstatement of the June 7, 2000 judgment in McCoy's favor.

ALL CONCUR.

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