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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001967-MR

CHILDERS OIL COMPANY, INC. APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
CIVIL ACTION NO. 04-CI-00663

BERTHA L. ADKINS and
LAWRENCE R. WEBSTER APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: VANMETER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.[1]

HUDDLESTON, SENIOR JUDGE: Bertha L. Adkins was employed in January 2003 to work at a convenience market, the Double Kwik, in Shelbiana, Pike County, Kentucky. Adkins was interviewed and hired for the job by Mona Delong, regional supervisor for Childers Oil Company, Inc. Upon being employed, Adkins was given the Childers Oil Company Employee Handbook of Personnel Policies which identified Childers Oil as the employer of the

[1] Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580

handbook recipient. It was her understanding, Adkins later testified, that she was employed by Childers Oil. However, the weekly checks compensating her for her work were drawn on the account of Hometown Convenience, LLC.

Adkins initially worked as a cashier at the Shelbiana store and continued doing so for seven or eight months. After a restaurant, known as the Homecooker, was opened at the store, Adkins was moved to the kitchen of the restaurant. On January 31, 2004, Adkins was discharged, ostensibly in connection with the closing of the restaurant section of the store. When informed that the restaurant portion of the Shelbiana store was to be closed, Adkins requested that she be retained as a cashier, the position for which she had originally been employed, but her request was denied.

Not long after her discharge, Adkins returned to the Shelbiana store and observed that a new employee, Sabrina, who was in her 20s, was working as a cashier She also saw a sign posted at the entrance proclaiming that the store was “Now Hiring All Positions.” Sabrina had been employed on January 19, 2004, 11 days prior to Adkins’ discharge. Before she was discharged, Adkins overheard comments to the effect that management sought to put “young, pretty, and skinny” girls at the cash registers to draw in truck drivers. Adkins, who was

then 47 years of age,[2] believed that this policy was the primary motivating factor in her discharge and her replacement by a younger person.

On May 17, 2004, Adkins filed suit against Childers Oil Company, Inc. in Pike Circuit Court alleging age and sex discrimination.[3] Childers Oil filed an answer, and discovery proceeded without incident - and with the apparent assent of Childers Oil that it was the proper defendant in the case.[4]

On March 4, 2005, Childers Oil moved for summary judgment pursuant to Kentucky Rules of Civil Procedure (CR) 56.02, but the motion was denied. On April 20, 2005, one week prior to the date on which the trial was scheduled to commence, Childers Oil filed a motion to dismiss, alleging for the first time that Adkins had not been an employee of Childers Oil, but rather was an employee of Hometown Convenience, LLC, a separate legal entity. The motion was denied on May 9, 2005, following the trial.

On April 27, 2005, a jury trial was held. A verdict was returned awarding Adkins damages on her age discrimination claim of $11,922.00 for lost wages, $50,000.00 for "injury caused by the wrongful discharge, including compensation for

[2] Atkins was born on May 31, 1956.

[3] The sex discrimination claim was not pursued.

[4] Childers Oil did not make a specific negative averment in its answer raising an issue as to its capacity to be sued. *See* Ky. R. Civ. Proc. (CR) 9.01.

emotional distress;" and $50,000.00 for punitive damages. On July 20, 2005, the circuit court awarded Adkins' attorney a fee of $6,900.00 to be paid by Childers Oil, and on July 28, 2005, a final judgment incorporating the verdict and the court's attorney fee award was entered. After Childers Oil's post-judgment motions were denied, the corporation appealed to this Court.

Denial of Motion to Dismiss

Childers Oil contends that the circuit court erred when it failed to grant its motion to dismiss on the basis that Adkins was not employed by Childers Oil Company, Inc., but instead by a separate legal entity, Hometown Convenience, LLC.

In support of its April 20, 2005, pre-trial motion to dismiss Adkins' complaint on the ground that her suit had been brought against the wrong party, Childers Oil submitted a memorandum that included as exhibits Adkins' W-2 forms reflecting that her salary had been paid by Hometown Convenience, LLC. Because matters outside the pleadings were submitted for the circuit court's consideration, Childers Oil's motion to dismiss must be treated as a motion for summary

judgment[5] which we examine in accordance with the summary judgment standard of review.[6]

Summary judgment may only be granted if there are no material issues of fact to be decided by a jury and if the moving party is entitled to judgment as a matter of law. Summary judgment is to be granted when it would be impossible for the non-moving party, in this case, Adkins, to produce any evidence at trial warranting a judgment in her favor.[7] In ruling on Childers Oil's motion for summary judgment, the circuit court was required to construe the record in a light most favorable to Atkins, the party opposing the motion.[8]

Applying these standards, it is apparent that at the time the motion to dismiss was made, there was a genuine issue of material fact as to whether Childers Oil was Adkins' employer when the alleged age discrimination took place. Adkins testified that she was interviewed, hired and discharged by Mona Daylong. In its responses to the Adkins' discovery requests, Childers Oil identified Daylong as a Childers Oil employee who is its area supervisor. Childers Oil's discovery responses also

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[5] *CR 12.03; Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958).

[6] *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 533 (Ky. App. 2005).

[7] CR 56.03; *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

[8] *Steelvest, id.*

reflect that Adkins was hired and discharged by Daylong. In Childers Oil's response to Adkins' first set of interrogatories, the following answers were submitted:

> Interrogatory No. 4(B): Please state the nature of **the Plaintiff's work for the Defendant**.
>
> Answer: Employed at the Shelby (sic) [D]oublekwik as a cashier and, later as a deli cook/attendant.
>
> Interrogatory No. 4(C): Please list the Plaintiff's job duties for all her positions **while employed by the Defendant**.
>
> Answer: Worked as cashier, prepared food, took customer food orders, cleaned in the kitchen, ordered stock and counted inventory.
>
> Interrogatory No. 4(D): Please identify all stores that the Plaintiff worked at **during her employment with the Defendant**.
>
> Answer: Shelby (sic) [D]oublekwik.[9]

Further, upon beginning work, Adkins was given an Employee Handbook of Personnel Policies which welcomed Adkins as an employee of Childers Oil. The handbook describes Childers Oil Company as consisting of, among other things, a chain of convenience stores.[10] Given this evidence, it would not have been impossible at trial for Adkins to prove that the Shelbiana store was one of a chain of stores operated by Childers Oil.

[9] Emphasis supplied.

[10] Childers Oil Company, Inc., we are told, operates some 54 convenience stores and has over 500 employees.

Viewing the evidence of record in the light most favorable to Adkins, there was a genuine issue of material fact as to whether Adkins was an employee of Childers Oil, so the circuit court did not err by denying the corporation's motion to dismiss and submitting the issue to the jury for a finding.[11]

Because of the manner in which Childers Oil has raised this issue, further explanation is necessary. In its appeal, Childers Oil addresses the employment issue only within the context of the circuit court's denial of its pretrial motion to dismiss. It does not, for example, raise the issue by arguing that the circuit court erred when it denied its motion for a directed verdict or its post-judgment motions. Hence, we will not address the issue beyond consideration of the denial of Childers Oil's pretrial motion to dismiss. Lastly, we note, as indicated by the discussion above, that there were issues of material fact as to which legal entity employed Adkins, and the jury specifically found that "Bertha Adkins was employed with the Defendant [Childers Oil] prior to January 30, 2004." Given that there was evidence to support the jury's finding, we will treat Childers Oil as Adkins' employer as we consider the remaining issues that the corporation raises.

[11] *See Palmer v. International Ass'n of Machinists*, 882 S.W.2d 117 (Ky. 1994), which addresses the factors to be considered in determining whether a named defendant or a related entity was the employer in an employment discrimination case: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control.

DENIAL OF DIRECTED VERDICT

Childers Oil next contends that the circuit court erred when it declined to grant its motion for a directed verdict on the basis that Adkins failed to establish that her age was the motivating factor for her discharge.

There are two paths for a plaintiff seeking to establish an age discrimination case. One path consists of direct evidence of discriminatory animus. Absent direct evidence of discrimination, the plaintiff must satisfy the burden-shifting test of *McDonnell Douglas Corp. v. Green*.[12] The rationale for the *McDonnell Douglas* burden-shifting approach is to allow a victim of discrimination to establish a case through inferential and circumstantial proof. As Justice O'Connor has noted, "the entire purpose of the *McDonnell Douglas prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."[13] If a plaintiff attempts to prove her case using the *McDonnell Douglas*

[12] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (When the former employee in an age discrimination case establishes a *prima facie* case of discrimination, the burden shifts to the employer to show some non-discriminatory reason for the adverse employee action).

[13] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S. Ct. 1775, 1802, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring). *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 622, 83 L. Ed. 2d 523 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has her] day in court despite the unavailability of direct evidence'").

framework, then she is not required to introduce direct evidence of discrimination.[14]

Under the *McDonnell Douglas* framework a plaintiff can establish a *prima facie* case of age discrimination by proving that she: (1) was a member of a protected class; (2) was discharged; (3) was qualified for the position from which she was discharged; and (4) was replaced by a person outside the protected class.[15] In age discrimination cases the fourth element is modified to require replacement not by a person outside the protected class, but by a significantly younger person.[16]

Childers Oil essentially concedes that Adkins proved the first three elements of her case. However, the corporation asserts that Adkins did not establish that she was replaced by a significantly younger person, thus failing to satisfy the fourth requirement.

Adkins' age discrimination claim was presented to the jury upon the following instruction:

> Do you believe from the evidence ALL of the following:

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[14] *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 349 (6th Cir. 1997); *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005).

[15] *Kline*, *id*. at 349.

[16] *O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996).

> A. Bertha Adkins was employed with the Defendant prior to January 30, 2004.
>
> B. Bertha Adkins was forty-one (41) years of age or older on January 30, 2004.
>
> C. Bertha Adkins was qualified for her job and performed her job satisfactorily prior to January 30, 2004.
>
> D. On January 30, 2004, an agent of the Defendant laid off or terminated Bertha Adkins from her job;
>
> E. A younger person replaced Bertha Adkins at her job;
>
> AND
>
> F. Bertha Adkins' age OR the Defendant's pursuant [sic] of a policy of favoring or preferring younger workers was a substantial and motivating factor but for which she would not have been laid off or terminated from her job by the Defendant's agent?

The jury unanimously found for Adkins.

We review the denial of a motion for directed verdict according to the standard set forth in *Lewis v. Bledsoe Surface Mining Company.*[17] Our role is limited to determining whether the circuit court erred in failing to grant the motion.[18] All evidence that favors the prevailing party must be taken as true; and we are not at liberty to assess the credibility of witnesses or to determine what weight is to be given the evidence, these

[17] 798 S.W.2d 459 (Ky. 1990).

[18] *Id.* at 461.

being functions reserved to the jury.[19] The prevailing party, in this case, Adkins, is entitled to all reasonable inferences that may be drawn from the evidence.[20] We are limited to determining whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"[21]

Drawing all reasonable inferences from the evidence and viewing that evidence in the light most favorable to Adkins, we conclude, as did the circuit court, that the verdict in her favor was neither palpably nor flagrantly against the evidence nor the result of passion or prejudice.

There was testimony that store management had made a deliberate decision to seek to place young females at the cash registers, and the jury was informed of specific comments to that effect. There was testimony that store manager Pauline Combs told employee Eva Brooks that "the company wanted pretty, young girls up front to draw in truck drivers and that the 'younger ones' went 'up there.'" In addition, a young female employee, Sabrina, was hired on January 19, 2004, only eleven

[19] *Id.*

[20] *Id.*

[21] *Id.*

days prior to Adkins' discharge.[22] Although Adkins had originally been hired as a cashier and had held that position for several months, Childers Oil retained the younger, less-experienced Sabrina and discharged the older, more experienced Adkins.[23]

The jury could have reasonably concluded that Childers Oil's stated reason for Adkins' discharge – that the restaurant at the store had been shut down – was a pretext. According to Childers Oil, the restaurant closed on January 30, Adkins was laid off on that date, but the restaurant reopened on January 31. Hence there is room for skepticism regarding whether Adkins' discharge was in connection with a legitimate closing of the restaurant.

From the foregoing, a jury could infer that Childers Oil calculatedly chose to retain the younger employee because of her age and thereby discriminated against Adkins because of her age. It was not unreasonable for the jury to conclude that Adkins was replaced by a person from outside the protected class and that its ostensible reason for discharging Adkins was merely a pretext. As the Supreme Court has said, "a trial court cannot enter a directed verdict unless there is a complete absence of

[22] At least five younger persons, ages 18, 18, 20, 23 and 33, were employed to work in the store not long after Adkins was discharged.

[23] The Childers Oil employee handbook said that seniority would be the deciding factor in lay-offs.

proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ."[24]

PUNITIVE DAMAGES

Childers Oil contends that the circuit court erred when it gave an instruction on punitive damages. The corporation asserts that Adkins failed to demonstrate by clear and convincing evidence that it acted toward her with oppression, fraud or malice as required by Kentucky Revised Statutes (KRS) 411.184(2).

We are aware that the Supreme Court has held that punitive damages are not available under the Kentucky Civil Rights Act, the underpinning for Adkins' age discrimination action.[25] However, this issue is unpreserved because Childers Oil did not object to the giving of a punitive damages instruction on this ground nor did it otherwise raise the issue below either before, during or after the trial.[26] Thus, it may not obtain relief on this appeal on the ground that punitive damages are not authorized under KRS Chapter 344.

Kentucky Rules of Civil Procedure (CR) 51.01(3) provides that "[n]o party may assign as error the giving [of] an

[24] *Bierman v. Klapheke*, 967 S.w.2d, 16, 18 (Ky. 1998), quoted with approval in *Hilsmeier v. Chapman*, 192 S.W.3d 340, 345 (Ky. 2006).

[25] *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 138 (Ky. 2003). *See also* KRS 344.450.

[26] Counsel for both parties acknowledged at oral argument that neither was aware of the 2003 *McCulloch* decision until well after the 2005 trial had concluded.

instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection." In *Duo-Therm Division, Motor Wheel Corp. v. Sheergrain, Inc.*,[27] Kentucky's highest court said that although a defendant may very well have had valid objections to instructions as to damages, where it failed to assert them in the trial court, the instructions are controlling on appeal in determining whether the damage award was excessive. In *Pipelines, Inc. v. Muhlenberg County Water District*[28] the same Court pointed out that a complaint as to instructions will not be considered on appeal when the trial court's attention was not called to the point. To the same effect is *Business Realty, Inc. v. Noah's Dove Lodge No. 20*[29] where the Court refused to consider the appellants' contentions with respect to instructions because of they failed to present those questions to the trial court. Likewise, in *Burgess v. Taylor*[30] this Court declined to consider a complaint as to the jury instructions that was not called to the trial court's attention. In this

[27] 504 S.W.2d 689 (Ky. 1973).

[28] 465 S.W.2d 927 (Ky. 1971).

[29] 375 S.W.2d 389 (Ky. 1963).

[30] 44 S.W.3d 806 (Ky. App. 2001).

case, Childers Oil submitted brief proposed instructions that omitted any reference to punitive damages, but it cannot be said that its proposed instructions clearly presented the position it now takes, that punitive damages are impermissible in an age discrimination case.[31]

Moreover, Childers Oil may not rely upon the substantial error rule contained in CR 61.02 to invoke *McCullough,* nor does it seek to do so. "In applying [CR 61.02], palpable error must result from action taken by the Court rather than from an act or omission by the attorneys or litigants."[32] Here, the error in giving an instruction on punitive damages resulted from Childers Oil's omission – the failure to object on the ground that punitive damages are not recoverable under the Civil Rights Act. It follows that the error was not as a result of action taken by the circuit court. If it were otherwise, then any error in the instructions could be considered a "substantial error."

Childers Oil did, however, preserve its objection to the verdict on the basis that the conduct complained of did not rise to a level that would warrant an instruction on punitive damages.

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[31] *See Myers v. Chapman Printing Co., Inc*, 840 S.W.2d 814 (Ky. 1992), and *Fields v. Rutledge*, 284 S.W.2d 659, 58 A.L.R.2d 210 (Ky. 1955).

[32] *Carrs Fork Corp. v. Kodak Mining Corp.*, 809 S.W.2d 699, 701 (Ky. 1991); *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997).

KRS 411.184(2) provides that "[a] plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice."

Fraud is not applicable under the facts of this case. Further, the Childers Oil's conduct does not amount to oppression, which means conduct that is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.[33]

"Malice," on the other hand, means "conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff . . . ."[34]

Based on the evidence in this case, a reasonable jury could have found that when Childers discharged a more experienced employee in favor of a younger employee simply because of the older employee's age, it intentionally subjected Adkins to tangible or intangible injury.[35] Consequently, the award of punitive damages was proper.

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[33] KRS 411.184(1)(a).

[34] KRS 411.184(1)(c). As the Supreme Court said in *Bowling Green Municipal Utilities v. Atmos Energy Corp*., 989 S.W.2d 577, 580 (Ky. 1999), "[m]alice . . . may be characterized as intentionally cruel and unjust or intentionally injurious behavior."

[35] *See Northeast Health Management, Inc. v. Cotton,* 56 S.W.3d 440, 448 (Ky. App 2001), quoting *Simpson County Steeplechase Ass'n v. Roberts*, 898 S.W.2d 523, 525 (Ky. App. 1995), to the effect that "the key element in deciding

DAMAGES FOR EMOTIONAL DISTRESS

Following the trial, Childers Oil filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial. The corporation contends that the circuit court erred when it failed to vacate that portion of the judgment that awarded Adkins $50,000.00 for "damages for injury caused by the wrongful discharge, including compensation for emotional distress." Childers Oil insists that the only proof of Adkins' emotional distress was her own self-serving testimony that she was embarrassed because she was discharged from her job, and that the award should be set aside because it is clearly excessive and bears no reasonable relationship to the evidence of loss suffered. Adkins testified that she suffered nervousness, crying spells and embarrassment as the result of being discharged and replaced by a younger person.

This issue is governed by the Supreme Court's decisions in *Cooper v. Fultz,*[36] and *Davis v. Graviss*.[37] As explained in *Hazelwood v. Beauchamp,*[38] the *Davis* standard for determining whether the circuit court abused its discretion by

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whether [punitive damages] are appropriate is malice or conscious wrongdoing. Malice may be implied from outrageous conduct and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing." To the same effect, see *Bowling Green Municipal Utilities v. Atmos, id*. at 580.

[36] 812 S.W.2d 497 (Ky. 1991).

[37] 672 S.W.2d 928 (Ky. 1984).

[38] 766 S.W.2d 439 (Ky. App. 1989).

not granting a new trial on the ground that the award of damages was excessive is as follows:

> The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages.[39]

While admittedly the evidence on this issue is not extensive, we know of no objective test to determine the extent of one's humiliation and embarrassment that results from a civil wrong. We agree with the Supreme Court that this matter is best left to a jury of twelve ordinary citizens to evaluate. Because the award bears a reasonable relationship to the evidence of the loss suffered, we conclude that the circuit court did not err in declining to set the verdict aside and grant a new trial.

ATTORNEY FEES

Adkins' was awarded a fee for her attorney of record, Lawrence R. Webster, in the sum of $6,900.00. An award of such fees to the prevailing party is permissible under the Kentucky Civil Rights Act.[40]

Childers Oil does not suggest that the fee awarded was unreasonable. Instead, the corporation objects only upon the

[39] *Id*. at 440.

[40] KRS 344.675.

ground that the award was impermissible because it was not Adkins' employer, and, therefore, Adkins was not entitled to prevail upon her age discrimination claim. That issue has been addressed, so there is no need to revisit Childers Oil's argument. The award of an attorney's fee was appropriate

The judgment is affirmed.

PAISLEY, SENIOR JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I concur with much of the majority opinion, I respectfully dissent from so much of the majority opinion as upholds the portion of the judgment awarding punitive damages. As recognized by the majority opinion, the Kentucky Supreme Court has held that punitive damages are not recoverable in actions brought under KRS Chapter 344. *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 138 (Ky. 2003). My view is that Childers Oil's tender of jury instructions which omitted any award for punitive damages was sufficient under CR 51(3) to preserve the issue for review. *See Surber v. Wallace*, 831 S.W.2d 918, 920 (Ky. App. 1992) (court noting that "inasmuch as [the appellants] tendered proposed instructions, under CR 51(3) no specific objections were necessary to preserve their right to appeal").

Furthermore, assuming the issue was not sufficiently preserved, then the error is a palpable one under CR 61.02 for which Childers Oil may have relief. *See Carrs Fork Corp. v. Kodak Mining Corp*., 809 S.W.2d 699, 701 (Ky. 1991); *Cobb v. Hoskins*, 554 S.W.2d 886, 888 (Ky. App. 1977). While "the palpable error must result from action taken by the court rather than an act or omission by the attorneys or litigants[,]" 809 S.W.2d at 701, Childers Oil's attorney's failure to object to the instructions does not constitute an omission which renders the matter ineligible for consideration under the palpable error rule. In all cases, a proper objection results in a preserved error, which is not considered under the palpable error rule. But under the majority's reasoning, a failure to object, *i.e.*, an unpreserved error, is also eliminated from consideration under the palpable error rule as an omission by an attorney. As a result, the palpable error rule is rendered meaningless as inapplicable to any situation.

In this case, which was tried in 2005, the trial court and, as admitted at oral argument, the attorneys for the parties failed to recognize that punitive damages were not recoverable under *McCullough,* a 2003 decision. As a consequence, the trial court gave an erroneous instruction which affected the substantial rights of Childers Oil and resulted in manifest injustice.

I would affirm the judgment of the Pike Circuit Court in all respects except to the award of punitive damages, which should be vacated.

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