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# Commonwealth of Kentucky

# Court of Appeals

NO. 2005-CA-002377-MR
&
NO. 2005-CA-002415-MR

CINTAS CORPORATION — APPELLANT/ CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL
FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 03-CI-00708

SITEX CORPORATION — APPELLEE/ CROSS-APPELLANT

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

DIXON, JUDGE: Cintas Corporation ("Cintas") appeals from a jury verdict and judgment of the Henderson Circuit Court and also from an order of that court denying

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[1] Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Cintas's post-judgment motion. Sitex Corporation ("Sitex") cross-appeals from an order of Henderson Circuit Court granting judgment notwithstanding the verdict (JNOV) in favor of Cintas on the issue of punitive damages. As there was no infirmity in the jury verdict, the trial court erred by granting JNOV. Accordingly, we affirm in part, reverse in part, and remand.

Cintas and Sitex are competing linen and uniform rental companies. Sitex is located in Henderson, Kentucky, while Cintas is headquartered in Cincinnati, Ohio, with an office in Evansville, Indiana. In April 2000, Sitex entered into a sixty month service agreement with David Hill, the owner of D & L Crawlspace ("D & L"), a business in Henderson. Pursuant to the service agreement, Sitex provided clean uniforms to Hill and his employees on a weekly basis. In May 2003, a representative from Cintas telephoned Hill to discuss the uniform service offered by Cintas. On June 3, 2003, John Sieg, a Cintas sales representative, met with Hill at the D & L office. At the conclusion of the one and one-half hour meeting, Hill signed a service agreement with Cintas. Approximately two weeks later, after Hill received uniforms from Cintas, he canceled D & L's service agreement with Sitex.

Sitex filed suit against D & L in September 2003 for breach of contract. Thereafter, in May 2004 Sitex filed an amended complaint alleging Cintas intentionally interfered with Sitex's contract with D & L. After a period of discovery, Sitex settled its claim against D & L, and D & L was dismissed as a party to the lawsuit in November

2004. In March 2005, Cintas moved for summary judgment. The court denied Cintas's motion,[2] and a jury trial commenced on April 1, 2005.

At trial, Sitex introduced testimony from witnesses Rick Shockley, a Sitex vice president; David Montgomery, general manager of Cintas's Evansville office; David Hill; and John Sieg, who no longer worked for Cintas and testified by video deposition. For its case in chief, Cintas recalled Montgomery to testify. Nine jurors found Cintas had intentionally interfered with the Sitex contract and awarded $6,612.96 in compensatory damages and $6,500.00 in punitive damages.

On April 21, 2005, Cintas filed a motion for JNOV or alternatively, a new trial. Following a hearing, the court granted JNOV on the issue of punitive damages and denied the remainder of Cintas's post-judgment claims. This appeal and cross-appeal followed.

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Cintas contends the trial court erred by failing to grant its motion for directed verdict. Cintas also argues the court erred by denying its motion for JNOV or new trial because the verdict was not supported by substantial evidence, and the jury was unduly prejudiced by the conduct of Sitex's counsel.

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[2] In its appellate brief, Cintas argues the trial court erroneously denied summary judgment. However, that issue is not before this Court: "The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact." *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, 751 S.W.2d 36, 37 (Ky.App. 1988) citing *Bell v. Harmon*, 284 S.W.2d 812 (Ky. 1955).

We first address the trial court's denial of Cintas's motion for directed verdict. Cintas takes issue with the sufficiency of the evidence presented by Sitex and contends Sitex failed to sustain its burden of proof on an intentional interference with contract claim. We disagree.

When ruling on a motion for directed verdict, the trial court is obligated to consider all of the evidence in the light most favorable to the party opposing the motion. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). The court may not grant a motion for directed verdict "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." *Id*.

On appellate review of the denial of a directed verdict, this Court will uphold the lower court's decision unless the jury's verdict was so "palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *National Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988) (internal quotation marks omitted). We are also mindful that this Court "is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

The Restatement (Second) of Torts § 766 (1979) states:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for

> the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

*See also Harrodsburg Industrial Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 533 (Ky.App. 2005); *Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Assoc., Inc.*, 561 S.W.2d 99, 102 (Ky.App. 1977) (quoting Restatement (First) of Torts § 766 (1939)).

In *National Collegiate Athletic Ass'n v. Hornung*, *supra*, our Supreme Court addressed the Restatement (Second) of Torts § 766B (intentional interference with a prospective contract). *Hornung*, 754 S.W.2d at 858. The Court stated:

> From these authorities, it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct. In *Prosser and Keeton on Torts* § 130 (W.P. Keeton ed. 5th ed. 1984), this is stated as follows:
>
> > [T]he [interference] cases have turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it....
> >
> > [S]ome element of ill will is seldom absent from intentional interference; and if the defendant has a legitimate interest to protect, the addition of a spite motive usually is not regarded as sufficient to result in liability.
>
> It should be noted, however, that just as malice may be inferred from a lack of probable cause in a malicious prosecution action, (*Massey v. McKinley*, 690 S.W.2d 131 (Ky.App. 1985) and *Sweeney v. Howard*, 447 S.W.2d 865 (Ky. 1969)), malice may be inferred in an interference action by proof of lack of justification. *Smith Development Corporation v. Bilow Enterprises, Inc.*, 112 R.I. 203, 308 A.2d 477 (1973); Restatement (Second) of Torts, § 766 Comment S (1979) ("... [T]he context and the course of the

> decisions make it clear that what is meant is not malice in the sense of ill will but merely 'intentional interference without justification.' ").

*Id*. at 859.

Cintas argues it was entitled to a directed verdict because no issues of material fact existed, and the jury's verdict was not supported by the evidence. We disagree. A thorough review of the trial proceedings reveals that several issues of fact existed at the close of all evidence.

Evidence was introduced regarding the standard practices of uniform supply companies like Cintas and Sitex. Sitex, like many of its competitors, required customers to sign a service agreement for a term of years in order for the company to recoup its investment in the uniforms. Sitex's service agreement allowed a customer to cancel the contract upon sixty days' written notice if Sitex's services were "reasonably unacceptable." Hill acknowledged he had been disappointed in the services provided by Sitex before he was ever contacted by Cintas. Hill also testified that, although he clearly told Sieg that D & L was under contract with Sitex, Hill felt Sieg "pretty much" convinced him to sign a contract with Cintas. Additionally, Hill stated that Sieg explained how most service agreements allowed a customer to cancel upon written notice. Furthermore, although Sieg denied knowing about the Sitex contract, Sieg testified that he gave Hill the Cintas sales pitch and advised that Cintas would provide better service than Sitex.

Montgomery, Cintas's general manager, testified that it was company policy for sales representatives not to ask a potential customer if they were already under contract with a competitor. Montgomery pointed out that when a new customer signed the Cintas sales agreement, it included a clause certifying that the customer was not party to a preexisting contract. Montgomery went on to state his belief that, in a competitive marketplace, Cintas had the right to call upon its competitors' customers.

We find the trial court properly denied Cintas's motion for a directed verdict, as there were clearly material issues of fact presented by the conflicting testimony of the witnesses. "Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses." *Bierman*, 967 S.W.2d at 18. After thoroughly considering the record before us, we find the jury's verdict in favor of Sitex was supported by the evidence and not the result of passion of prejudice.

We now turn to Cintas's claims regarding its post-judgment motion. First, as to JNOV, Cintas complains that, because the court erroneously denied its motion for directed verdict, JNOV was warranted because Sitex failed to present evidence of "malice or wrongful conduct." *Hornung*, 754 S.W.2d at 859. We disagree.

We review the court's denial of JNOV under the same standard set forth for reviewing a lower court's denial of a directed verdict. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). Based on the testimony, it was reasonable for the jury to infer malice by finding Cintas interfered with the contract without justification.

*Hornung*, 754 S.W.2d at 859. The jury heard testimony that Cintas was merely exercising its right to compete in the marketplace, but the jury could have also inferred that Sieg approached Hill intending to take a customer from Sitex. The evidence showed that Sieg, like all Cintas sales representatives, received a sales commission for each new account he obtained. Although Sieg claimed he did not "persuade" Hill to breach the contract, he admittedly "sold" the Cintas program and offered reasons why Cintas was superior to Sitex. Likewise, Hill testified that Sieg made Cintas sound more appealing than Sitex.

Although conflicting testimony was presented, it was wholly within the province of the jury to assess the credibility of the witnesses. *Bierman*, 967 S.W.2d at 18. Because the verdict was supported by the evidence, we find the court properly denied Sitex's motion for JNOV on the intentional interference claim.

Cintas alternatively moved for a new trial pursuant to CR 59.01, alleging misconduct by Sitex's counsel which unduly prejudiced the jury. We review the denial of a motion for a new trial under the abuse of discretion standard; consequently, we will not disturb the trial court's decision unless it was clearly erroneous. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky.App. 1992).

Cintas contends Sitex's counsel made inflammatory statements throughout the trial which improperly cast Cintas as a corporation driving small companies out of business. We have reviewed the specific instances of which Cintas complains, and we do

not find the statements so inflammatory as to prejudice the jury. Accordingly, the court did not abuse its discretion by denying Cintas's motion for a new trial.

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In its cross-appeal, Sitex appeals the trial court's grant of JNOV in favor of Cintas on the issue of punitive damages. The trial court, in granting JNOV in favor of Sitex, found:

> There was certainly no proof that Cintas was aware that its conduct in contracting with D&L would result in death or serious bodily harm. Also, while Cintas may have acted selfishly or without justification in interfering with Sitex's contract with D&L, there was no proof that Cintas formed the contract with the specific intention or objective of causing Sitex injury.

Upon review, we will only disturb the trial court's order granting JNOV if it was clearly erroneous. *Moore v. Environmental Construction Corp.*, 147 S.W.3d 13, 16 (Ky. 2004) Accordingly, we will "uphold the trial court's decision if 'after all the evidence is construed most favorably to the verdict winner, a finding in his favor would not be made by a reasonable [person].'" *Id*. quoting *First and Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137, 143 (Ky. App. 1988).

The jury instruction on punitive damages stated in part:

> If you found for the plaintiff [Sitex] under Instruction No. 2 and awarded it a sum of money in damages under Instruction No. 3, and if you are further satisfied from the evidence that Cintas acted toward the plaintiff [Sitex] with fraud, oppression or malice, then you may in your discretion award punitive damages against Cintas in addition to damages awarded under Instruction No. 3.

* * *

> "Malice" means (a) conduct that was specifically intended by the defendant to cause tangible or intangible injury to the plaintiff; or (b) conduct that was carried out by the defendant with both a flagrant indifference to the plaintiff's rights and a subject awareness that such conduct would result in death of [sic] bodily harm.[3]

Sitex did not introduce evidence that Cintas acted with fraud or oppression. Our inquiry, then, is whether the evidence showed Cintas specifically intended to cause tangible or intangible injury to Sitex.

Cintas vehemently contends Sitex failed to prove malice. However, "[m]alice may be implied from outrageous conduct, and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing." *Fowler v. Mantooth*, 683 S.W.2d 250, 252 (Ky. 1984).

Sufficient evidence was presented for the jury to infer that Cintas intentionally sought to increase its customer base to the detriment of Sitex by undermining Sitex's contract with D & L. While we acknowledge Cintas's argument that it "was acting in furtherance of its own business objectives," the jury was faced with conflicting evidence; consequently, it was within the discretion of the jury to weigh the evidence and award punitive damages.

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[3] KRS 411.186(1)(c), the statutory definition of malice, was held unconstitutional in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998), as violative of the jural rights doctrine. However, *Williams* addressed the "gross negligence" standard contained in the latter half of the statutory definition. *Id*. In the case at bar, we are concerned with the "tangible or intangible injury" portion of the definition relating to intentional torts. *See Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985).

We have thoroughly reviewed all of the evidence in this case. As such, we find the trial court clearly erred by granting JNOV as to punitive damages. When considering all of the evidence in the light most favorable to Sitex, it was reasonable for the jury to award punitive damages. We reverse the order granting JNOV and remand to the trial court with instructions to reinstate the jury's award of punitive damages.

For the reasons stated herein, the trial judgment of the Henderson Circuit Court is affirmed, and the court's post-judgment order is affirmed in part, reversed in part, and remanded.

KELLER, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SENIOR JUDGE GRAVES, DISSENTING: Respectfully, I dissent because this was not a fair and impartial trial.

A fair and impartial trial is a judicial proceeding conducted in such a manner to conform to fundamental concepts of justice and equality. It is a proceeding conducted without prejudice. The essential concept of a fair trial is that no outside influence has been brought upon the jury and the only arguments presented are those reasonably inferred from the evidence presented and admitted during trial.

The Appellee, Sitex, crossed the line of fair play when it made a blatant appeal to prejudice concerning the size, location, and effect on Sitex and the local residents in the community where the trial was held. It has often been said that Kentucky

advocates may hit fair and hard blows but they may not hit low and foul blows. I believe Appellees' closing argument was a foul blow.

It is the unquestionable privilege of counsel to indulge in all fair argument in favor of the contentions of his client. Yet, he goes outside of his duty and his right when he attempts to excite prejudice in the minds of the jury against his adversary, thereby drawing the minds of the jury away from the matter in dispute and subjecting them to influences entirely foreign to the case. Prejudice has no more sanction at the bar than on the bench.

*Blair v. Eblen*, 461 S.W.2d 370 (Ky. 1970) condemned appeals to local prejudice due to one party's residence as reversible error. *Blair* was right then and it is still good law worthy of emulation at this time.

On appellate review we can not wink at shenanigans that appeal solely to prejudice. This permits an indifferent culture to flourish. When we fail to uphold stated principles of a fair trial, one may conclude that such principles are nothing more then empty words. The concept of a fair trial must be taken seriously.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT

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