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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001600-MR

JAMI L. SUMMERS APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 14-CI-00815

BEECH BEND PARK, INC. APPELLEE

AND NO. 2016-CA-001654-MR

BEECH BEND PARK, INC.;
BEECH BEND RACEWAY PARK, INC.;
AND DALLAS C. JONES CROSS-APPELLANTS

CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 14-CI-00815

JAMI L. SUMMERS CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Jami L. Summers appeals from four orders entered by the Warren Circuit Court: a protective order; a trial order and judgment; an order denying a judgment notwithstanding the verdict ("JNOV") or alternatively, a new trial; and, an order denying a renewed motion to show cause. Each order was entered in a lawsuit filed by Summers in 2014 alleging Beech Bend Park, Inc. ("BBP") was a hostile work environment and violated the Kentucky Civil Rights Act (KCRA).[1] Named as defendants were BBP, Beech Bend Raceway Park, Inc. ("Raceway"), and, Dallas Jones, owner and president of both entities. Summers claimed Jones sexually harassed, abused and molested her weekly beginning in 2001, creating conditions so intolerable she was compelled to resign in 2009. After a four-day trial—by a vote of nine to three—jurors found in favor of BBP,

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[1] Kentucky Revised Statutes (KRS) 344.010 *et seq.*

> Under the Kentucky Civil Rights Act, it is unlawful for an employer, on the basis of sex, to "discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . [or] to limit, segregate, or classify employees in any way which would . . . tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee." The Kentucky Act is similar to Title VII of the 1964 federal Civil Rights Act and should be interpreted consistently with federal law.

Ammerman v. Board of Educ., of Nicholas County, 30 S.W.3d 793, 797-98 (Ky. 2000) (footnotes omitted).

the only defendant not dismissed[2] before deliberations began. On review of the record, the briefs and the law, we affirm.

According to Summers, she and a friend saw a job posting for BBP on television in 2001. Summers was thirteen and had just graduated eighth grade. Both girls applied and were hired. Summers was immediately trained to operate amusement park rides. During her time as a park employee, she was also a life guard, and an attendant at the ticket booth, main gate, concessions and racetrack.

The seasonal job paid well. Summers' family had little money and she was responsible for providing her own school essentials. She liked the job. While employed at BBP she had frequent contact with Jones.

Summers says she worked at BBP from 2001[3] through 2004. In May 2005, she gave birth to her first child and did not work at the park again until the Christmas holiday season of 2008. She also worked part of the next year before quitting[4] in July 2009 when she claims Jones put his hands down her pants.

Summers filed her verified complaint in July 2014, alleging from 2001 forward on a weekly basis Jones fondled her breasts and genitalia, made unwelcome comments about her breasts, and boasted he would bed her if he was younger. When Summers told Jones to stop touching her, as she contends she

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[2] Jones was dismissed from the case before trial commenced. Summers voluntarily dismissed Raceway at the close of all proof.

[3] BBP maintains Summers did not begin working at the park until 2002.

[4] BBP contends Summers was terminated after missing or being tardy for several work shifts.

frequently did, he would say, "Do you like your job?" Once, when Summers objected to Jones licking her breasts during a power outage, she claims Jones coerced her silence by giving her $4,000 to buy a vehicle.

Because much of the alleged activity occurred while Summers and Jones were alone—often in Jones' truck, scooter or golf cart traveling around the park—Summers had no corroborating proof. She had no witnesses, no diaries, no photographs and no recordings. She could specify no date on which Jones touched her inappropriately. Thinking she would not be believed, she told no one of Jones' unwanted advances—not family, friends, co-workers or supervisors. After leaving BBP in 2009, Summers sought legal advice, but no one returned her call.

Summers raises three claims on appeal. Likewise, BBP, Raceway and Jones—the three original defendants—raise three issues on cross-appeal.

APPEAL

Summers' first claim is the trial court erred in excluding testimony from two other women[5]—former BBP employees, one of whom had filed suit against BBP, Raceway and Jones—alleging Jones had sexually harassed them. Summers argues their testimony was critical to proving Jones' harassment of her created a "sufficiently severe or pervasive" atmosphere, altered her job conditions

[5] In the argument portion of her brief, Summers does not specify whose testimony was wrongly excluded. In preparation for trial, she deposed multiple women who had worked at BBP. Based on the section of her brief titled "Relevant Procedural History," we assume she is referencing Connie Wilson and her daughter, Aliyah Dixon. A third former BBP employee, Cheryl French, is mentioned by BBP in its brief on this issue. French's suit was unresolved when Summers' case was tried. French testified in her deposition she did not leave BBP because of anything Jones had done. French did not testify at trial.

and produced "an abusive working environment." *Ammerman*, 30 S.W.3d at 798 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986)). In contrast, BBP argues the trial court properly excluded the testimony because admitting it would have run afoul of KRE[6] 401, 403 and 404(b). We review the trial court's ruling for an abuse of discretion. *Trover v. Estate of Burton*, 423 S.W.3d 165, 173 (Ky. 2014).

> In 1986, the United States Supreme Court decided the watershed case of *Meritor Saving Bank v. Vinson*, [477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)], which held that a sexual harassment claim can be brought based upon a hostile or abusive work environment. For sexual harassment to be actionable under the *Meritor* standard, it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. [*Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405, 91 L.Ed.2d at 60; *Harris v. Forklift Systems*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775, 784-86, 118 S.Ct. 2275, 2282-83, 141 L.Ed.2d 662, 675 (1998); *Meyers* [*v. Chapman Printing Co. Inc*., 840 S.W.2d 814, 821 (Ky. 1992)]]. In other words, hostile environment discrimination exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [*Williams v. General Motors Corp*., 187 F.3d 553, 560 (6th Cir. 1999) (citing *Harris*, 510 U.S. at 21, 114 S.Ct. 367 (citations and quotation marks omitted))]. Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." [*Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989)]. As stated by the United States Supreme Court in *Harris v. Forklift Systems*, the harassment must also be both objectively

[6] Kentucky Rules of Evidence.

> and subjectively offensive as determined by "looking at all the circumstances." [510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295, 302; *Faragher*, 524 U.S. at 786-87, 118 S.Ct. at 2283, 141 L.Ed.2d at 676; *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-82, 118 S.Ct. 998, 1002-03, 140 L.Ed.2d 201, 208 (1998) (quoting *Harris*)]. These circumstances may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [*Harris*, 510 U.S. at 23, 114 S.Ct. at 371.]

Ammerman, 30 S.W.3d at 798.

In the context of an alleged hostile work environment claim—filed by a single plaintiff—instances of alleged sexual harassment directed at *employees other than* the plaintiff cannot be the foundation of a successful case. *Id.* Reading *Ammerman* too broadly, Summers claims testimony from other female park employees was critical to establishing the hostile work environment necessary to prevail at trial. This is a misstatement of the law. The "severe and pervasive" climate required by *Ammerman* must be unique to Summers—she had to experience it; she had to subjectively and objectively view the treatment as sexual harassment; and the alleged treatment had to impede her job performance. *Id.* (citing *Harris*, 510 U.S. at 23, 114 S.Ct. at 371). As the trial court found, introducing proof of how another female employee believes she was treated or how she responded to such treatment could not prove Summers' case and would have been highly prejudicial to the defense.

The questions jurors were impaneled to answer in Summers' case were whether:

1. [Summers], because of her female sex, was subjected to unwelcome sexual advances, unwelcome sexual touching, or other unwelcome verbal or physical conduct of a sexual nature;

   AND

2. That such conduct was so severe or pervasive that it had the purpose or effect of unreasonably interfering with a reasonable female employee's work performance or creating an intimidating, hostile or offensive work environment for a reasonable female employee;

   AND

3. That such conduct caused injury to [Summers'] emotional and/or mental well-being.

Under the foregoing instruction, which is not challenged as erroneous, jurors were not required to make any finding about the experience of any BBP employee other than Summers. Admitting such testimony would have been extraneous.

Having no witnesses to shed light on her own experience with Jones, Summers came to trial armed with only her own testimony and anticipated testimony from other female employees who claimed Jones had harassed them. But suggesting Jones may have touched other women in a sexual way could not prove Jones touched Summers that way and did so with such severity and pervasiveness she felt it necessary to quit a job she testified she liked. Separating the wheat from the chaff, as the sole plaintiff, Summers had to prove Jones

harassed *her*—not others—with such severity and pervasiveness she quit her job. *Id.* The alleged experiences of women who worked at BBP *after* Summers quit (or was terminated) was irrelevant to proving Jones treated Summers so badly Summers considered BBP to be a hostile work environment. A majority of jurors recognized Summers had not sustained her burden and returned a verdict in favor of BBP.

Summers argues the proposed testimony was admissible to show Jones' "common scheme or plan"—an exception to KRE 404(b) and the basis of the trial court's exclusion of other acts evidence. Summers argues the sexual assaults on Wilson and Dixon were "close in time," occurred "in the exact same manner" as Jones' harassment of her, and were "eerily similar." We disagree.

KRE 404 reads in relevant part:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

The purpose of the rule

> is to guard against the substantive use of so-called character or propensity evidence. This type of evidence

> is generally evidence that on other occasions a person has acted in a particular way, and it is offered as proof that the person, being the sort of person who does that sort of thing or acts that way, is likely to have done the same sort of thing or acted that same way on the occasion at issue in the case. Our courts have long been concerned that triers of fact are apt to give such evidence more weight than it deserves, and that such evidence poses a substantial risk of distracting the trier of fact from the main question of what actually happened on a particular occasion. *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007).

Trover, 423 S.W.3d at 172. KRE 404(b) does not completely prohibit use of other acts evidence at trial—it may be offered for another purpose—but only "if (1) it is relevant for a legitimate purpose; (2) it is probative, *i.e.*, only if there is sufficient evidence that the other crime, wrong, or act actually occurred; and (3) its probative value is not substantially outweighed by any prejudicial effect." *Id.* (citing *Bell v. Commonwealth*, 875 S.W.2d 882, 889-91 (Ky. 1994)).

In the case at bar, Wilson's lawsuit was settled and the record was sealed. Wilson's claims against Jones were unsubstantiated. Dixon never filed suit against Jones. The allegations of both women—being bare and untested—were not probative under *Bell*.

The similarity of Jones' treatment of Wilson and her daughter, Dixon, was not "identical" to Summers' experience. Both Wilson and Dixon testified briefly at trial. Both stated they considered Jones to be dishonest.

No deposition of Wilson appears in the appellate record. Thus, we do not know how she would have testified about her interaction with Jones. Dixon

was deposed in 2016 at the age of twenty-one. She stated she worked two summers in the park—2009-2011—beginning when she was fifteen. She stated on one occasion Jones "made a comment about the size of my breasts and how they were similar to my mom's. And then I went -- for prom I went to show them my dress so they could see me and he told me I had a healthy body." When asked whether she had seen Jones touch her mother's breasts, Dixon responded, "I would see him brush up against her but not just literally grab, like that." Dixon further stated Jones never touched her personally.

Summers theorized Jones engaged in a pattern of conduct in which he preyed on financially vulnerable, well-endowed women working at the park. Her strategy was to show a common plan or scheme, but the evidence she could muster did not support her theory. First, neither Wilson nor Dixon worked at BBP with Summers or even at the same time as Summers. Neither woman could establish a hostile work environment existed at the park between 2001 and 2009. Second, there was no proof Wilson or Dixon were in financial straits. Third, consistent with her deposition, Dixon would have testified Jones "brushed up" against Wilson but did not "grab" her breast. Fourth, Dixon stated Jones never touched her. Fifth, there was no mention of Jones putting his hands down Wilson's or Dixon's pants. Sixth, there was no mention of Jones buying Wilson's or Dixon's silence. Seventh, neither woman testified about the frequency of Jones' actions. Objective review of the evidence casts doubt on whether testimony from Wilson and Dixon about their personal experience with Jones would have secured a jury verdict for

Summers. Wilson's and Dixon's experiences were not similar enough to constitute a common plan or scheme.

Allowing Wilson and Dixon to reveal their personal experiences with Jones would have distracted jurors from the case Summers filed and would have improperly bolstered Summers' allegation—precisely what KRE 404 forbids. Because their testimony did not tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[,]" the other acts testimony was irrelevant under KRE 401. Moreover, it was properly excluded because its "probative value [was] substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. The trial court properly exercised its discretion in excluding allegations of other acts. *Trover*, 423 S.W.3d at 173.

Summers' second claim[7] is she was improperly prohibited from impeaching Jones and Charlotte Gonzalez—Jones' daughter and BBP's general manager—about whether any BBP employee or officer had ever been disciplined for sexual harassment, to which Gonzalez responded, "[n]ever had a claim or an allegation." Summers argues this was a "lie" because Wilson and French had filed suit against BBP. As soon as Gonzalez responded, defense counsel asked to

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[7] Summers bases her claim in part on an unpublished case rendered by the Supreme Court of Kentucky in 2011. Said case was not included in the appendix to her brief as required by Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

approach the bench where counsel sought to impeach Gonzalez with claims made by Wilson and French. Defense counsel stated Gonzalez was responding in terms of an insurance policy.

The trial court disallowed the impeachment, stating, "you asked the question, live with the answer." The trial court then reiterated—as it had stated multiple times during the run-up to trial and throughout trial—claims by BBP employees other than Summers are not being tried, "we're gonna try *this* case."

We resolve this issue on the strength of *Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010), from which we quote at length.

> This case forces us to apply the somewhat confusing rule against collateral impeachment. In fact, there is no particular rule in the Kentucky Rules of Evidence (KRE) clearly addressing impeachment on collateral facts, matters, or issues. Yet, our case law continues to hold that impeachment on collateral matters by extrinsic evidence is not allowed. Despite the clear prohibition from case authority against impeachment on collateral matters by extrinsic evidence, we still review the trial court's decision to admit evidence over objections of collateral impeachment under an abuse of discretion standard of review as we explain below.
>
> Professor Lawson notes that rules concerning collateral impeachment "are easy to describe but very difficult to apply, because of the complexity involved in determining 'collateralness.'" And because determinations of the collateralness are so fact-specific and generally not clear-cut, Kentucky precedent provides that a trial court's decision to admit impeachment evidence on a purportedly collateral matter is subject to an abuse of discretion standard: "decisions on collateralness fall within the discretion of the judge and are reviewed for abuse of that discretion[; and this is] no surprise since they depend so heavily on the specific facts of the case

> and require a careful exercise of sound judgment in the heat of courtroom battle."

324 S.W.3d at 397-98 (footnotes omitted). In *Prater*, impeachment on a collateral matter was allowed because Prater raised the issue on direct examination and it would have been unfair to allow the question to go unexplored. Just like Prater, Summers raised the issue when questioning Gonzalez on direct examination as follows:

> Q: So the last 23 years you have seen probably thousands of employees come and go?
>
> A: I have.
>
> Q: In all that time, no employee or officer of Beech Bend has ever been disciplined for sexual harassment have they?
>
> A: Never had a claim or an allegation.

As the trial court stated during the bench conference, "[y]ou invited that answer."

> *Prater* queried:
>
> "[m]ay a party who first opens the door to a collateral issue take advantage of the prohibition against collateral facts impeachment?" On the one hand, "[t]he damaging effects of issue proliferation do not depend upon who takes the initiative to introduce a collateral issue into the case." On the other, "one must harbor at least some doubt as to whether a party should be permitted to raise a collateral matter and then use the law as a shield against full contradiction of that matter."
> And Professor Lawson notes a split among Kentucky cases before adoption of the Kentucky Rules of Evidence. He cites *Dixon v. Commonwealth*, [487 S.W.2d 928 (Ky. 1972),] as indicating that impeachment on collateral matters may be permitted when a party "opens the door" to a collateral issue through that party's

> testimony on direct examination. He also cites *Keene v. Commonwealth*[, 307 Ky. 308, 210 S.W.2d 926 (1948), *overruled on other grounds by Colbert v. Commonwealth*, 306 S.W.2d 825, 828 (Ky. 1957), *overruled by Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991] as an opposing example where impeachment on a collateral matter was considered improper without any discussion of the fact that the collateral issue was first raised by the defendant upon direct examination. Professor Lawson concludes that this split "may suggest that outcomes should depend upon specific facts and circumstances of a case and the exercise of sound discretion by the trial judge." [Robert G. Lawson, *The Kentucky Evidence Law Handbook* (4th ed. 2003) §4.05[4].]
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> In light of the concerns raised in Professor Lawson's discussion—desire to avoid issue proliferation versus potential use of collateral impeachment rules as a "license to lie"—including an apparent split in authority, we conclude that the trial court has discretion to determine whether or not to permit impeachment on collateral issues when a party has opened the door to such issues by raising them in direct testimony. And we believe that our conclusion is supported by Kentucky precedent. To the extent that some Kentucky cases might appear to hold that a trial court invariably lacks discretion to permit impeachment on a collateral issue raised by a party on direct examination, such cases are hereby overruled.
>
> We believe the trial court is in the best position to decide whether the facts and circumstances of that case present a scenario in which the evil of allowing a party to offer voluntarily what may be knowingly false testimony with impunity outweighs the evil of having to devote trial time to impeachment on collateral matters. And we now clearly hold that the trial court has discretion to permit or deny impeachment by extrinsic evidence on a collateral issue raised by a party on direct examination.

324 S.W.3d at 399-400 (footnotes omitted).

Just as *Prater* involved a unique set of facts, so too does this case. Summers had no direct proof of her own claim. Her trial strategy was to introduce unsubstantiated allegations of sexual harassment made by other women against Jones to convince jurors she had been treated similarly. Had Summers been allowed to introduce the desired proof, trial would have shifted from the case Summers had pled in her complaint to allegations made by others on unrelated, unsubstantiated matters. As a result, BBP would have had to defend those claims, resulting in a trial within a trial—something the trial court rightly strove to avoid.

As a corollary to *Prater*, we hold a party cannot introduce proof on a collateral matter as a vehicle for introducing proof the trial court has previously determined is inadmissible. That is precisely what happened here. Defense counsel knew he could not impeach Gonzalez with unrelated allegations made by other women and admitted as much at the bench. When counsel saw an opening based on Gonzalez' response, he pounced and tried to open the door. The trial court rightly prohibited the attempt.

The trial court consistently ruled jurors would try only Summers' complaint. As it was, it took five days. Had collateral proof been admitted, it would not have provided probative support for Summers' case, it would have been highly prejudicial to the defense, and it would have unnecessarily prolonged trial with extraneous matters. Based on a review of the record before us, we simply cannot say the trial court erred in its evidentiary rulings. There was no abuse of discretion. *Id.*

In another aspect of this claim, Summers alleges she was wrongly precluded from impeaching Jones with inconsistent prior testimony on multiple topics—whether Jones was circumcised; had filed a false insurance application; had been held in contempt in a property dispute; had admitted kissing Wilson and touching her breast; and had commented on Dixon's breasts and compared them to her mother's. "Generally, the law disfavors impeachment of a witness on a collateral matter through the introduction of extrinsic evidence." *Brown v. Commonwealth*, 416 S.W.3d 302, 311 (Ky. 2013) (citing *Prater*, 324 S.W.3d at 399). As an example, whether Jones was circumcised was irrelevant in Summers' case as she never claimed to have seen Jones' genitalia. In contrast, whether Jones was circumcised was apparently an issue in *Wilson v. Beech Bend Park, Inc.*, Warren Circuit Case No. 12-CI-01128, because of the precise accusations made in that case. The same is true of whether Jones kissed Wilson, touched Wilson's breast, and commented on Dixon's body. Those events were unique to Wilson and her daughter and they were not contemporaneous with any action alleged by Summers.

There was a dearth of proof in Summers' case. As a result, she tried to introduce anything negative about Jones to besmirch his reputation, even though it was wholly unrelated to her case and did not tend to prove her case. As stated previously, the trial court properly recognized the proof offered was low in probative value, high in prejudicial value, and irrelevant to the claims jurors were

deciding. The trial court properly exercised its discretion in excluding testimony on collateral matters. We have no reason to disturb the result.

Summers' final claim is the trial court committed reversible error in denying her full access[8] to the *Wilson* record. She specifically argues the trial court sealed the *Wilson* record without holding a hearing and without finding good cause as required by *Fiorella v. Paxton Media Grp., LLC*, 424 S.W.3d 433 (Ky. App. 2014). BBP—a party to both *Wilson* and this case—maintains a hearing was held in *Wilson*, good cause for sealing the record was shown, and Summers' access to the record was appropriately limited by the trial court. During a hearing in the Summers case, the trial court—which presided during both *Wilson* and *Summers*—also indicated the request to seal the *Wilson* record had been heard and good cause shown and found before the order sealing the record was entered.

We devote little time to this claim because Summers failed to pursue it properly. In the *Wilson* case, Summers moved to intervene in and unseal the record. In the *Wilson* case, the trial court entered an order denying the motion to intervene and unseal the *Wilson* record. It is from that order—in the *Wilson* case—Summers should have sought appellate review. She did not. Hence, her claim is not properly before this panel. Furthermore, the judge ultimately gave Summers' legal team access to the entire *Wilson* record except the confidential settlement agreement but forbade discussion of any content of the *Wilson* record without prior

[8] During a hearing on April 27, 2015, counsel for Summers stated, "I'm okay with for your eyes only."

court approval. Summers having failed to properly seek appellate review in the *Wilson* case, we discern no abuse of discretion and no error in this appeal.

CROSS-APPEAL

All three original defendants filed a timely cross-appeal alleging three errors made by the trial court: the complaint should have been dismissed as time-barred; summary judgment should have been granted in favor of the defendants because Summers could prove neither existence of a hostile work environment nor violation of the KCRA; and BBP should have received attorney's fees. We view the cross-appeal as an effort by the defense to protect itself in the event of reversal on appeal. Having affirmed the trial court, we discuss the cross-appeal in cursory fashion.

First, suit was filed within the applicable five-year statute of limitations. KRS 413.120(2). Summers alleged Jones improperly touched her on a weekly basis during seasonal employment between 2001 and 2009, however, the only incident for which she could specify a date occurred in July 2009, the day she says Jones put his hands down her pants and she quit. The trial court properly found this incident occurred within the allowable window; a finding the defense does not challenge. Their dispute centers on the court's additional finding of activity allegedly occurring between 2001 and 2004 being "part of the same unlawful unemployment practice[,]" and its further finding this activity occurred while Summers was an infant which tolled the statute of limitations until August 2005 when she turned eighteen. KRS 413.170(1). Applying the "continuing

violation doctrine," the court "consider[ed] conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107, 122 S.Ct. 2061, 2069, 153 L.Ed.2d 106 (2002) (citations omitted). Subject matter, frequency, and permanence are three of many criteria to be considered when determining whether to apply the doctrine. *Ammerman*, 30 S.W.3d at 798-99. We discern no reason to disturb the trial court's decision.

Second, summary judgment, CR 56, is a means of disposing of civil cases where the nonmoving party cannot prevail, thereby avoiding unnecessary trials. *Transportation Cabinet, Bureau of Highways, Commonwealth of Ky. v. Leneave*, 751 S.W.2d 36, 38 (Ky. App. 1988). BBP sought summary judgment on two intertwined grounds—the single 2009 act could not possibly create the "severe and pervasive" atmosphere needed to prove a hostile work environment and Summers could not prove BBP violated the KCRA.

While the 2009 touching was the only alleged act to have occurred within the window for filing a timely claim, that act did not have to be considered in isolation. Summers alleged Jones touched her weekly between 2001 and 2004 and again in 2009. Depending on the proof Summers could muster, she may have convinced jurors Jones created a hostile workplace environment at BBP lasting many years. Awarding the defense summary judgment would have been improper.

BBP also sought summary judgment claiming Summers could not sustain her burden of proving BBP violated the KCRA.

> A plaintiff may establish a violation of Title VII by proving that the discrimination based on sex created a hostile or abusive work environment. To establish a prima facie case of a hostile work environment based on sex, a plaintiff must show that:
>
> > (1) she is a member of a protected class,
> >
> > (2) she was subjected to unwelcome sexual harassment,
> >
> > (3) the harassment was based on her sex,
> >
> > (4) the harassment created a hostile work environment, and that
> >
> > (5) the employer is vicariously liable.

Gray v. Kenton County, 467 S.W.3d 801, 805 (Ky. App. 2014) (quoting *Clark v. United Parcel Service, Inc.*, 400 F.3d 341, 347 (6th Cir. 2005)).

Viewing the evidence in the light most favorable to Summers, it appeared possible Summers could establish all five factors required for a successful claim. She was part of a protected class; she did not want Jones' sexual advances; she claimed Jones repeatedly fondled her breasts and genitalia indicating he groped her because she was female; she endured sexual harassment for years until she finally quit a good paying job she liked; and as owner and president of BBP and Raceway, Jones was vicariously liable for his actions toward Summers—a park employee. In light of Summers' allegations, we cannot say the defense was entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). We affirm denial of summary judgment.

Finally, KRS 344.450 reads:

> [a]ny person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the *plaintiff's attorney of record* and any other remedies contained in this chapter.

(Emphasis added.) BBP claims KRS 344.450 violates Kentucky's equal protection provision, presumably referring to Section 3 of the Kentucky Constitution. The gist of BBP's argument is attorney's fees should not be limited to plaintiff's counsel, but should be available to any prevailing counsel.

We need not—and do not—address this claim because BBP failed to notify the Office of the Attorney General ("OAG") it was challenging the constitutionality of a statute as required by KRS 418.075(1). Noncompliance with that statute is fatal. *Benet v. Commonwealth*, 253 S.W.3d 528, 532-33 (Ky. 2008).

BBP argued its request for attorney's fees at a hearing on September 12, 2016. At that time, the trial court told defense counsel he would need to notify the OAG of the challenge and defense counsel agreed. However, we are not cited to any point at which the OAG was given notice of the constitutional challenge. Furthermore, in her reply brief, Summers stated BBP had *not* notified the OAG. BBP did not correct Summers—presumably because there was no correction to be made—and did not comment on the statement in its reply brief. In light of BBP's failure to preserve the issue by giving notice to the OAG, we say nothing more.

For the foregoing reasons, we affirm the orders of the Warren Circuit Court *in toto*.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

Matthew M. McGill
T. Brian Lowder
Bowling Green, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANTS:

David F. Broderick
Brandon T. Murley
Bowling Green, Kentucky