

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002434-MR

COMMONWEALTH OF KENTUCKY,  
DEPARTMENT OF AGRICULTURE

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 93-CI-00886

DONALD R. VINSON AND  
CHARLES ANDERSON

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: McANULTY and DYCHE, Judges; and JOHN POTTER, Special Judge.<sup>1</sup>

McANULTY, JUDGE: Donald R. Vinson and Charles Anderson (hereinafter Appellees) filed this action against the Commonwealth of Kentucky, Department of Agriculture (the Department) pursuant to KRS<sup>2</sup> 61.101 et. seq., Kentucky's "Whistleblower Act." This is the second appeal in the case. The first trial, held in March, 1997, resulted in an award of one

---

<sup>1</sup>Senior Status Judge John Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

<sup>2</sup>Kentucky Revised Statutes

million dollars in punitive damages and an injunction preventing the Department from eliminating Appellees' supervisor positions. This court affirmed the judgment and on discretionary review the Supreme Court reversed on the single issue that the Department was entitled to a new trial under the original version of the Whistleblower Act as to the events that occurred prior to the amendment of the Act in September, 1993, but that events occurring after the amendments could be considered under the new version. Commonwealth Dept. of Agriculture v. Vinson, Ky., 30 S.W.3d 162 (2000).

In the second trial, the jury again found in favor of Appellees and judgment was entered awarding Vinson and Anderson two million and two dollars in punitive damages and reinstatement to their positions with a retroactive grade increase. The Department appeals. We affirm.

The appellees worked as Pesticide Inspector Supervisors for the Division of Pesticides (the Division) with the Department of Agriculture. They were responsible for reviewing violations by pesticide companies in the Commonwealth. In a 1993 reorganization of the Division, their positions were eliminated and they were demoted to inspectors without any salary reduction or loss of fringe benefits. As a result, the appellees filed this action in Franklin Circuit Court on June 18, 1993. The complaint alleged that the elimination of their positions occurred in direct retaliation for their disclosures related to mismanagement within the Division and thus violated Kentucky's Whistleblower Act.

One of the claims in their original complaint was that the reorganization of the Division, which resulted in their reclassification, violated KRS 12.028(2), in that it had not been approved by the Legislative Research Commission. The Department filed a motion to dismiss this count of the complaint, arguing that Appellees failed to exhaust their administrative remedies. The trial court remanded this count only to the Personnel Board in an order entered February 8, 1994. At the hearing before the Personnel Board, the parties stipulated that this single, narrow issue was the only issue to be decided. The Board, in an order entered September 12, 1994, adopted the findings of a Hearing Officer that the reorganization did not violate the provisions of KRS 12.028(2). On appeal, the Franklin Circuit Court granted the Department's motion to dismiss for failure of Vinson and Anderson to name the Commissioner of the Department as a party to the appeal.

In this appeal, the Department raises five claims of error: 1) that the doctrines of election of remedies and *res judicata* are a bar to the action; 2) the trial court's rulings on two evidentiary issues were erroneous; 3) misconduct of counsel requires a new trial; 4) the trial court erred in denying a motion for a directed verdict and request for jury instruction concerning the statute of limitations; and 5) that the punitive damages award was excessive.

The Department's first argument is that the action is barred under both the doctrine of election of remedies and *res judicata* because of the Personnel Board action. The basis of the

argument is that Appellees chose, or could have chosen, to file a claim with the Kentucky Personnel Board and that therefore, they were precluded from bringing the whistleblower action. They also argue that the decision by the Personnel Board is *res judicata* as to whether there was wrongful conduct on the part of the Department. They claim that this issue is properly preserved for appeal by their answer to the amended complaint and their motion for a directed verdict at the end of the second trial. However, we find that, under the law of the case rule, the Department is precluded from now raising these issues.

"[T]he opinion on the first appeal becomes the law of the case not only as to the errors there relied upon for reversal but also as to errors appearing in the first record that might have been but were not there relied upon for a reversal." Aetna Oil Co. v. Metcalf, 300 Ky. 817, 190 S.W.2d 562, 563-64 (1945).

In an answer to the amended complaint, filed February 25, 1997, the Department argued that count eight, which referred to the violation of KRS 12.028(2), should be dismissed under the "law of the case" rule and the doctrine of *res judicata*. The Department specifically referenced the Personnel Board action, stating that "this issue has already been adjudicated." The first time the Department raised the issue of election of remedies was during their motion for directed verdict at the end of the second trial.

The Department now argues that because the Personnel Board case file was not made a part of the evidence during the first trial, the issues of election of remedies and *res judicata*

were not before the court during the first trial and therefore, could not have been raised in the first appeal. However, the record shows that the Personnel Board order was entered on August 24, 1994, and order of the Franklin Circuit Court was entered on December 20, 1994. The Department attached both orders to its motion to dismiss, filed on February 25, 1997, thus raising the issue of *res judicata* before the trial court before the first trial. It is clear that issue could have been raised on the first appeal. The issue of election of remedies was not raised at the first trial or on appeal but clearly could have been. The Department's failure to raise the issues during the first trial and appeal, precludes them from raising them now.

Even if it were not so, the Department's arguments would still fail. The doctrine of election of remedies is an act of choosing between different, inconsistent remedies. Riley v. Cumberland & Manchester Railway Co., 234 Ky. 707, 29 S.W.2d 3 (1930). It can hardly be said that Appellees chose this avenue for the adjudication of their claim. Their choice was to have the circuit court determine the entire cause of action but, based on the Department's motion to dismiss, the trial court ordered that the Personnel Board should determine the narrow, strictly legal issue of whether the reorganization was procedurally legal pursuant to KRS 12.028(2). Appellees were left with no choice but to have this issue heard by the Personnel Board. As such, the doctrine of election of remedies is inapplicable.

The doctrine of *res judicata* provides that a final judgment rendered upon the merits is conclusive and bars

subsequent legal action involving the same parties based upon the same conduct. BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191 (1984). However, the rule does not act as a bar if there are different issues or questions of law presented. City of Louisville v. Louisville Professional Firefighters Ass'n., Ky., 813 S.W.2d 804, 806 (1991). As explained above, the Personnel Board was specifically asked to address the issue of whether the reorganization was procedurally legal pursuant to KRS 12.028. The civil action was brought pursuant to KRS 61.101 et seq., to determine whether actions taken by the Department were in retaliation for Appellees' reporting wrongdoing or illegality on the part of their supervisors. Clearly, the action before the Personnel Board presented different issues and questions of law. Therefore, *res judicata* does not act as a bar to this action.

The Department next argues that the trial court erroneously allowed Appellees to testify that they and other inspectors prepared inspection reports showing violations by pest control companies that were never acted upon by the Division of Pesticides. They argue that the best evidence rule required Appellees to produce all of these reports, in order to show that they were made and that the Department never acted upon them. The trial court ruled that because the content of the documents was not in issue in the case, the best evidence rule was inapplicable. The court also ruled that Vinson and Anderson could only testify as to the contents of the documents that were actually produced.

The best evidence rule requires the production of a writing when the contents of a written instrument is in issue or if the very existence of the document itself is in controversy. Hall v. Commonwealth, Ky., 817 S.W.2d 228 (1991). However, ". . . the subject of documents which are not the foundation of the action may be proved by parol." Bower v. Commonwealth, Ky., 357 S.W.2d 333, 335 (1962). While it is true that the Department disputes whether Appellees ever reported violations that were not properly prosecuted, the contents or existence of the documents was not the foundation of this action and were not directly in issue in the case.

KRS 61.103 requires that employees demonstrate that they acted in good faith and that they reported a suspected violation of state or local statute or administrative regulation to an appropriate body or authority. The statute does not require Appellees to show that there were actual violations of the law or that they wrote specific violations. Nor were they required to show that they had reported suspected violations to the Department. What they were required to show was that they, in good faith, reported suspected wrongdoing to various government officials and that they were retaliated against as a result. At issue was whether reprisal was taken as a result of their reporting to government officials that they suspected the Department was violating the law, not whether the Department had the reports of violations by pest control companies or whether it failed to follow up on them.

Our review of the testimony of Vinson and Anderson establishes that the testimony was not related to the content of inspection reports showing violations by pest control companies. Rather, it related to their attempt to report their concerns that the Department was not enforcing the law against the companies. They testified as to discussions they had at staff meetings, with supervisors, with the Commissioner and others regarding their concerns. Their references to violations they had written were in that context and not an attempt to prove the actual violations.

Because the content, or even existence, of these documents was not a foundational issue in this case, the trial court correctly ruled that the best evidence rule was inapplicable.

The Department next argue that the trial court erred in allowing evidence of widespread fraud by Terminex in that it was irrelevant and highly prejudicial and should have been excluded under KRE<sup>3</sup> 403, which permits the exclusion of relevant evidence, "if its probative value is 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." It is within the discretion of the trial court to determine whether the probative value of proffered evidence is substantially outweighed by undue prejudice. Ford Motor Co. v. Fulkerson, Ky., 812 S.W.2d 119 (1991). Therefore, our review is to determine whether the trial

---

<sup>3</sup>Kentucky Rules of Evidence

court abused its discretion in admitting the evidence. Barnett v. Commonwealth, Ky., 979 S.W.2d 98 (1998).

In support of its argument, the Department states that the only facts of consequence were whether Vinson and Anderson made reports and were subject to reprisal, and the evidence therefore, was irrelevant and unduly prejudicial. The Department fails to recognize that Vinson and Anderson were also required to show good faith reporting. KRS 61.102(1). Mike Schwendeman (Schwendeman), the Assistant Attorney General in Consumer Protection at the time of an investigation into reported statewide fraud by Terminex, testified that Appellees provided him with information that helped him identify the scope of the problem, that they provided addresses and locations of violations, and that they expressed concerns about the failure of the Division to enforce the law against the pesticide companies. He testified that when he spoke to the Division Director he was told that the inspectors (including Vinson) were not objective, that they had an axe to grind with the industry, and that the problem was not as bad as he had been led to believe. As a result of this conversation, Schwendeman stated that he put the investigation on the back burner but later discovered that this was the biggest case of consumer fraud he had an opportunity to investigate up to that time. This evidence was probative, not just to show that Appellees acted in good faith but that there was an attempt by the Department to silence and discredit them. An evidentiary fact is relevant when it has a tendency to make a fact of consequence to the determination of an action more or

less probable. KRE 401. Clearly this evidence did so and we find no abuse of discretion.

The Department next argues that misconduct of trial counsel requires reversal. While questioning Charles Anderson on re-direct, counsel for Appellees placed a stack of documents on the jury rail. The Department did not object at that time but reviewed the documents after court recessed for the day. The next day the Department moved for a mistrial, claiming that counsel was attempting to give the jury the impression that the stack of documents was a stack of inspection reports showing cases where the Division of Pesticides had failed to take appropriate enforcement action. The court did not review the individual documents but agreed that this "dramatic flourish" was uncalled for and may have created the wrong impression. The court denied the motion for a mistrial but determined that a sufficiently specific admonition would correct any prejudice. The court admonished the jury, recalling exactly what had occurred the day before and expressed its concern that perhaps this had created an impression that these were violations where action was not taken by the Department. The court admonished that "the stack of documents should not be considered by you as any kind of evidence, in any way, of violations that were reported and no action taken."

An admonition to the jury to disregard an improper argument cures the error unless it appears the argument was so prejudicial, under the circumstances of the case, that an admonition could not cure it. Knuckles v. Commonwealth, Ky., 261

S.W.2d 667, 671 (1953). The trial court was very specific in its admonition and clearly stated to the jury that these documents were not evidence of violations. Counsel for appellees made no statement as to what was in the documents. Under the circumstances we believe that the court's specific admonition cured any prejudice.

The Department next argues that the trial court erred in failing to grant its motion for a directed verdict or to submit jury instructions regarding the statute of limitations. KRS 61.102(2) provides that an employee may bring an action within 90 days after the alleged violation. The Department argues that a directed verdict was warranted as to all events that occurred outside the 90-day statute of limitations. They argue in the alternative that the trial court should have submitted instructions to the jury stating that any actions taken outside the 90-day window could not be considered as a basis for the action. We find that this argument must fail under the law of the case doctrine as articulated earlier in this opinion. The record shows that the Department asserted the statute of limitations as an affirmative defense in the first trial and also filed a motion to dismiss, arguing that the statute of limitations barred the action. The trial court summarily overruled the motion to dismiss on February 8, 1994. While they have presented the issue in this appeal based on their motion for directed verdict and request for jury instructions, we believe it is the same argument -- that all of the actions taken by the Department against Appellees which occurred outside of the 90-day

statute of limitations, i.e. any actions taken more than 90-days before Appellees filed suit, cannot be a basis for relief under the whistleblower act. However, because the Department failed to raise this issue on the first appeal, it is precluded from raising it at this time.

Even if we were to accept that this argument is not precluded under the law of the case doctrine, the argument would still fail. KRS 61.103(2) requires that a civil action must be brought within 90 days after the occurrence of the alleged violation. The basis of Appellees' claim was the reorganization in May 1993. In a supplemental response to interrogatories, Appellees were asked to state with particularity the events and time frame which they believe constituted violations of the whistleblower statute. Because some conduct was to be considered under the old version of the statute and some conduct considered under the new, the court required Appellees to identify dates of various events and actions taken by the Department. In response, Appellees stated a number of events and actions that led up to the reorganization of the Department in May 1993, and a number of events and actions that occurred after the reorganization and the filing of their claim. They acknowledged that some events occurred more than 90 days prior to the filing of the suit and stated that they would not specifically seek damages for these actions but that they believed they constituted contributing factors or were precedent and predicate to the reorganization. The Department then filed a motion *in limine* to preclude the admission of any evidence of events occurring prior to March 18,

1993, 90 days before the filing of the suit. The trial court denied this motion and ruled that the evidence was relevant to explain the reorganization. At the conclusion of Appellees' proof, and again at the conclusion of all proof, the Department asked for a directed verdict on all acts which occurred outside the statute of limitations. Appellees argued to the trial court that this was a course of conduct, which culminated in the reorganization and their demotion and we agree.

The Department cites Ammerman v. Board of Education of Nicholas County, Ky., 30 S.W.3d 793 (2000) and Leonard v. Corrections Cabinet, Ky. App., 828 S.W.2d 668, 670-72 (1992) for the proposition that acts which occurred outside the statute of limitations are time-barred and the plaintiff is precluded from pursuing a claim and seeking damages as to such time-barred acts. However, we believe that Ammerman actually supports Appellees' position. In Ammerman, the Kentucky Supreme Court adopted the analysis of the U.S. Court of Appeals for the Seventh Circuit as to when conduct occurring outside the statute of limitations could be used as a basis for a suit. The rule set forth was that such conduct may be the basis for a suit if it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case when the conduct could constitute, or be recognized, as actionable only in the light of events that occurred later, within the period of the statute of limitations." Ammerman at 800, citing Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996). Here, the actionable conduct and basis for the claim was the

reorganization, which was clearly within the statutory period. However, the reorganization and demotion of Appellees is only viewed as retaliation when viewed in the light of the events that occurred prior to and after that event. Therefore, the Department was not entitled to a directed verdict or to jury instructions as to those specific acts.

Finally, the Department argues that the amount of punitive damages was excessive under Kentucky law and that the award was unconstitutional under the Due Process Clause of the Fourteenth Amendment and the prohibition against excessive fines and cruel and unusual punishment of the Eighth Amendment.

Kentucky law provides that a new trial should be granted if the damages awarded are excessive and appear to be given under the influence of passion or prejudice, if the amount of recovery is too large or too small, or if the verdict is not sustained by sufficient evidence, or is contrary to law. CR<sup>4</sup> 59.01(d)(e)(f). The trial court is to determine, whether at "first blush" the damages are excessive based on the above criteria. Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 413-414 (1998). For purposes of appellate review, a finding of fact of a trial judge, if supported by substantial evidence, will be upheld, otherwise, it will be set aside as "clearly erroneous." Daniel v. Kerby, Ky., 420 S.W.2d 393 (1967). A trial court's denial of a motion for a new trial based upon excessive punitive damages is clearly erroneous if it is shown to the appellate court that the amount of damages

---

<sup>4</sup>Kentucky Rules of Civil Procedure

awarded was the product of undue passion or prejudice on the part of the jury. United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464, 470 (1999). The Department argues that the improper evidence and counsel's misconduct created undue passion and prejudice in the jury, resulting in this substantial award. Having found that the evidence was proper and the misconduct was cured by the admonition to the jury, this argument must fail.

The record shows that the jury found that appellees proved, by clear and convincing evidence, that the Department acted toward them with oppression, fraud or malice, as required by KRS 411.184. Only after making that determination, was the jury instructed to assess the amount of punitive damages. The jury was instructed, that in order to determine the amount of punitive damages they should consider the following:

- (a) The likelihood at the time of such misconduct by the Department of Agriculture that serious harm would arise from such misconduct;
  - (b) The degree of the awareness of the Department of Agriculture of that likelihood;
  - (c) The profitability of the misconduct of the Department of Agriculture;
  - (d) The duration of the misconduct of the Department of Agriculture;
  - (e) The actions by the Department of Agriculture to remedy the misconduct once it became known to them.
- KRS. 411.186.

There is nothing to indicate that the jury did not weigh these factors. The trial court thereafter had an opportunity to review the damage award for the "first blush" determination. The trial court first reviewed the damages award in the trial order and judgment entered October 10, 2001. The court specifically found that the verdict was in compliance with

the instructions and, based upon the record as a whole, accepted the verdict. The trial court then reviewed the damages in response to the Department's motion for a new trial, wherein, the Department made the same arguments it now makes on appeal. The trial court denied the motion for a new trial, after having considered the arguments made by the Department and Appellees.

Reviewing the evidence in this case -- the egregious conduct of the Department in their attempts to silence appellees, the duration of the misconduct, and the fact that the actions continued even after appellees filed this suit, we believe there was substantial evidence to support the findings of the jury and the trial court and to support the significant damage award. We have reviewed punitive damages awards in Kentucky and in other jurisdictions for guidance as to what is considered excessive. Generally, punitive damage awards are viewed in light of the disparity between compensatory damages and punitive damages. However, on the first appeal of this case, the Supreme Court of Kentucky held that punitive damages are not barred, even in the absence of a showing of actual damages. Vinson, at 166. Using the general rule, in light of no compensatory damages, any amount of punitive damages would be disparate. The concept of nominal punitive damages is a *non sequitur*. The purpose of punitive damages is to punish and to discourage similar conduct in the future. KRS 411.184(1)(f); Hensley v. Paul Miller Ford, Inc., Ky., 508 S.W.2d 759, 762-63 (1974); Ashland Dry Goods Co. v. Wages, 302 Ky. 577, 195 S.W.2d 312, 315 (1946). In light of the Supreme Court decision in Vinson and the purpose behind awarding

punitive damages, we cannot say that the trial court's denial of the motion for a new trial, based on excessive damages, was in error.

We do not believe that the award of punitive damages in this case implicates federal constitutional issues. The question is whether an agency of the state is protected from state action under the federal constitution. The Fourteenth Amendment prohibits the State from depriving any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV §1 (*our emphasis*). The Supreme Court of the United States has expressly held that the word "person" in the context of the Due Process Clause does not encompass the States. South Carolina v. Katzenbach, 383 U.S. 301, 323; 86 S.Ct. 803, 816; 15 L.Ed.2d 769, 789 (1966). The Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Furman v. Georgia, Ky., 408 U.S. 238; 92 S.Ct. 2726; 33 L.Ed. 2d 346. Since the punitive damage award was not against a "person" as contemplated by the Eighth or Fourteenth Amendments, an analysis of the award under federal constitutional principles is unwarranted.

For the foregoing reason we affirm the judgment of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard M. Guarnieri  
Johnson, Judy, True &  
Guarnieri, LLP  
Frankfort, Kentucky

Mark Farrow  
Kentucky Department of  
Agriculture  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Bennett E. Bayer  
Landrum & Shouse LLP  
Lexington, Kentucky