

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001000-MR

WANDA HAGAN, BETTY W. SMITH  
and SHARON BALLARD

APPELLANTS

v. APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
ACTION NO. 00-CI-00118

TERRY CORPORATION, INC.  
d/b/a CONVENIENT STOP IV  
and TERRY BURKE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI and TACKETT, JUDGES.

BUCKINGHAM, JUDGE: The appellants (Wanda Hagan, Betty W. Smith, and Sharon Ballard) appeal from a judgment of the Monroe Circuit Court dismissing their complaint against the appellees (Terry Corporation, Inc., d/b/a Convenient Stop IV, and Terry Burke) following a jury verdict in favor of the appellees. The appellants' complaint essentially alleged sexual harassment by

an employee of the appellees, Rodney Cassidy, who was the store manager at Convenient Shop IV. We affirm.

Terry Corporation owned Convenient Stop IV, a small convenience store located in Tompkinsville, Kentucky. Terry Burke was the sole shareholder and president of the corporation. The appellants were employees at the convenience store.

Each appellant was fired by Cassidy in late June or early July 2000. On September 25, 2000, the appellants joined together and filed a civil complaint against the appellees. Cassidy was not named as a defendant.

The case was tried by a jury over three days in February 2002, and the jury rendered a verdict in favor of the appellees. The jury essentially found that Cassidy did not sexually harass the appellants, that Cassidy did not create a hostile or offensive work environment for a reasonable female employee, and that the appellants did not give notice of Cassidy's alleged conduct to Burke so that he could take action to prevent further harassment. The court entered a final judgment on March 14, 2002, and the appellants' motion for a new trial or to alter, amend, or vacate the judgment was denied by the court. This appeal followed.

The appellants have raised six issues for our consideration. Their first contention is that the trial court abused its discretion in ruling on the appellees' motions *in*

*limine*. The appellees filed motions *in limine* relating to four areas of possible testimony. The motions were filed on the morning of the first day of the trial, and the appellants' attorney was not aware of them until that time. The court denied one of the motions before the trial began, and it deferred the other motions until the issues arose during the course of the trial. Two of the three remaining issues were resolved in favor of the appellees during the trial, and the other issue was resolved in favor of the appellants.

KRE<sup>1</sup> 103(d) provides in relevant part that "[a] party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial." See also Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 117 (1990). Thus, the court did not err by ruling on one of the motions in advance of trial and deferring a ruling on the other motions until the evidence was offered.

The appellants argue that the motions *in limine* were brought for the court's consideration just prior to the start of the trial and that their attorney was thus unable to adequately respond to said motions. We again note that only one of the motions was ruled on by the court when the motions were

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<sup>1</sup> Kentucky Rules of Evidence.

initially presented. That motion was resolved in the appellants' favor, and the remaining motions were deferred for ruling until the trial. We fail to see how the appellants could possibly have been prejudiced by the motions having been brought on short notice since the only motion resolved prior to the trial was resolved in their favor. Thus, we find no error in this regard.

The appellants' second argument is that the court abused its discretion by excluding the testimony of Dr. Frank Slesnick. Dr. Slesnick was a professor of economics at Bellarmine University in Louisville, Kentucky. He was prepared to testify as to the economic loss suffered by each of the appellants due to their employment having been terminated.

By the afternoon of the second day of the trial, all witnesses for the appellants other than Dr. Slesnick had testified. Dr. Slesnick was not available to testify at that time, and the trial judge suggested to the appellees that they begin presenting proof in support of their case out of order so that the appellants would have the opportunity to call Dr. Slesnick to testify the following morning.

The trial was scheduled to continue the following morning at 9:00 a.m. Shortly after that time, the trial began and the appellants called two witnesses to testify on their behalf. At approximately 9:30 a.m., the appellants had called

all witnesses with the exception of Dr. Slesnick. At approximately 9:40 a.m., Dr. Slesnick still had not appeared at the courthouse to testify. At that point, the trial judge ruled that he was excluding Dr. Slesnick's testimony on the ground that he had not been produced as a witness in a timely fashion so as to avoid a delay in the proceedings and on the ground that there was no reliable foundation for his testimony.<sup>2</sup>

The appellants argue that the court abused its discretion in excluding Dr. Slesnick's testimony. We conclude that any error in this regard was harmless. See CR<sup>3</sup> 61.01. The jury returned a verdict that resulted in no liability for the appellees. Thus, the issue of damages and any evidence in that regard was moot. See Lewis v. Charolais Corp., Ky. App., 19 S.W.3d 671, 677 (1999).

The appellants' third argument is that the trial court erred in failing to instruct the jury on causes of action relating to assault, negligent retention, and retaliation. The appellants assert that each of these causes of action was valid and supported by sufficient evidence to warrant submission to the jury. Thus, they contend that the jury should have been given instructions in that regard.

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<sup>2</sup> Dr. Slesnick was prepared to testify as to the lost wages of the appellants based on five years of lost wages for Hagan and seven years of lost wages for both Smith and Ballard.

<sup>3</sup> Kentucky Rules of Civil Procedure.

The assault claim to which the appellants refer was based on their allegation that Cassidy, acting intentionally, had harmfully and offensively touched each of them on numerous occasions. The first part of the first instruction to the jury made reference to "physical conduct of a sexual nature." Thus, it is evident that the cause of action for offensive touching was subject to the jury instructions and was not omitted as alleged by the appellants.

As for the cause of action for negligent retention, the appellants alleged that the appellees negligently retained Cassidy as an employee because Burke knew that Cassidy had sexually harassed Hagan in front of a customer. To the extent the failure to give the instruction was error, the error was harmless because the jury determined under the first instruction that sexual harassment by Cassidy never occurred.

As for the appellants' argument that the court should have given a jury instruction for the cause of action for retaliation, the appellants claimed in their complaint that they were terminated by the appellees because of complaints of sexual harassment. However, the appellants acknowledged during their testimony at trial that none of them had complained to Burke of Cassidy's actions. The appellants now maintain that they did not have to complain to Burke and that complaints of sexual harassment to Cassidy himself were sufficient. In this regard,

they state in their brief that they were fired when Hagan threatened Cassidy that she would report him to Burke for sexually harassing the appellants.

Again, the jury determined that sexual harassment by Cassidy did not occur. Further, the jury determined that none of the appellants had given notice of Cassidy's alleged conduct to Burke. Therefore, we cannot see how the failure to give an instruction on retaliation could have been error since the appellants' complaints of sexual harassment were determined by the jury to lack merit.

The appellants' fourth argument is that the trial court erred in granting a directed verdict for Terry Burke, individually. As we have noted, Burke was the sole shareholder of Terry Corporation, Inc. The trial court granted a directed verdict in favor of Burke, individually, but it allowed the case to go to the jury against the corporation. The appellants argue that "Terry Burke was the alter ego of his corporation; therefore, he should be held responsible for [Cassidy's] acts while working as a manager."

"[A] corporation is usually recognized as an entity which is distinct from its shareholders, officers, and directors." White v. Winchester Land Dev. Corp., Ky. App., 584 S.W.2d 56, 61 (1979). However, one theory that has been utilized to hold shareholders of a corporation responsible for

corporate liabilities is the "alter ego" theory. Id. Although Burke was the sole shareholder of the corporation, the appellants have not demonstrated that the corporation was fraudulently organized, was a sham, or was otherwise Burke's alter ego. Thus, we fail to see how Burke could have any individual liability for any corporate acts. Furthermore, the issue is moot since the jury determined that Cassidy did not commit acts of sexual harassment. As such, neither the corporation nor Burke had any liability.

The appellants' fifth argument is that the trial court erred when it refused to instruct the jury that they could award punitive damages. Any error in this regard was harmless because the jury found no liability. Levi v. Gonzenbach, 236 Ky. 586, 590, 33 S.W.2d 657, 659 (1930).

The appellants' sixth argument is that the trial court should have granted a new trial based upon affidavits which indicated that two jurors had not voted for the appellees but had actually voted in favor of the appellants. One of the affidavits was signed by one of the appellants, and the other affidavit was signed by one of the appellants' daughter.

The jury's verdict indicated a unanimous verdict in favor of the appellees. Furthermore, the jurors were individually polled by the court following the return of their

verdict, and each juror indicated his or her agreement with the verdict.

Generally, "a verdict cannot be impeached by the testimony of a juror." Doyle v. Marymount Hosp., Inc., Ky. App., 762 S.W.2d 813, 815 (1988). However, "the affidavits of jurors are admissible to show a mistake in a verdict which had the effect of misrepresenting the jury's intention and finding." City Taxi Serv., Inc. v. Gipson, Ky., 289 S.W.2d 723, 725 (1956). In the case *sub judice*, there were no affidavits from jurors. Rather, the affidavits were from individuals affiliated with the appellants' case.

There is broad discretion in the trial court in granting a new trial on such grounds. Id. Considering the fact that the jurors were individually polled after the return of their verdict and the fact that the affidavits were not from the jurors themselves, we conclude that the court did not abuse its discretion in refusing to grant a new trial on this ground.

The judgment of the Monroe Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR  
APPELLANTS:

Nancy Oliver Roberts  
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEES:

Patrick A. Ross  
Horse Cave, Kentucky