

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002368-MR

JOHN MARTIN, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NO. 92-CI-00447

MAN O WAR RESTAURANTS, INC.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

BUCKINGHAM, JUDGE: The litigation between these parties, John Martin, Jr., and Man O War Restaurants, Inc. (MOWR), began thirteen years ago and is now before this court for the third time. Martin was successful in his first two appeals, and we conclude that he should also be successful in this one. Therefore, we reverse and remand.

Martin was hired in 1989 as a manager of MOWR's Sizzler Restaurant, located on Richmond Road in Lexington,

Kentucky. At the time he was hired, his contract with MOWR permitted him to purchase 25% of its stock for \$1,000. The contract was for a term of five years, and it required him to return the stock in exchange for the amount he paid for it if his employment was terminated during the contract term. Otherwise, Martin's ownership of the stock was unrestricted. Less than three years into the contract term, MOWR terminated Martin's employment and demanded the return of the stock. Martin refused, and MOWR filed a civil complaint against him in the Fayette Circuit Court on February 5, 1992.

The Fayette Circuit Court enforced the contract provision that required Martin to return his stock to MOWR in exchange for the sum he originally paid for it, \$1,000. This court reversed the trial court on the basis of public policy against forfeiture, and the Kentucky Supreme Court granted discretionary review. The supreme court then affirmed this court, concluding that the stock return provision of the contract operated as forfeiture and was unenforceable. Man O War Restaurants, Inc. v. Martin, 932 S.W.2d 366, 368 (Ky. 1996). The court reasoned that once the stock was transferred to Martin, it became his property independent of his status as an employee. Id. at 369. In determining that the stock return provision was unenforceable, the court stated that "strong

public policy against forfeiture protects property from being taken without appropriate compensation." Id.

After the case was remanded to the trial court, a jury trial was held to determine the value of the stock at the time Martin surrendered it to MOWR. At the conclusion of the trial, the jury rendered a verdict finding that the fair market value of Martin's stock on that date was zero. A final judgment was entered on June 5, 2000, in accordance with the jury verdict, and Martin again appealed.

In a unanimous opinion, this court reversed the trial court's judgment and remanded the case for a new trial. See Martin v. Man O War Restaurants, Inc., 2000-CA-001547-MR & 2000-CA-001695-MR (rendered November 2, 2001) (unpublished). This court held that the verdict of zero was "both inadequate and contrary to the proof in the case," in light of MOWR's statement in the record that the stock had substantial value and that the parties had stipulated the stock was worth more than \$1,000. Noting that our supreme court had stated in the first appeal that Martin's stock could not be taken without "appropriate compensation," this court remanded the case for a new trial to determine such compensation in an amount not less than \$1,000. Discretionary review was denied by the supreme court on September 18, 2002, and this court's opinion became final.

The Kentucky legislature enacted an amendment to KRS<sup>1</sup> 271B.6-270 in its 2002 session. The amendment became effective on July 15, 2002. The applicable portion of the amended statute states as follows:

- (4) A restriction on the transfer or registration of transfer of shares may without limitation:
  - (c) Obligate a shareholder to transfer the restricted shares to the corporation or other persons for an agreed price or a price based on a valuation formula, including an obligation to transfer the shares for an amount equal to the original consideration paid for the shares[.]

KRS 271B.6-270(4)(c). Based on the amendment to the statute, MOWR moved the trial court to award it summary judgment. Relying on the case of Central Kentucky Production Credit Ass'n v. Smith, 633 S.W.2d 64 (Ky. 1982), the court granted the motion. This third appeal by Martin followed.

Martin argues that the statute may not be given retroactive effect so as to apply to this case because it did not expressly state such an intent. In support of his argument, he cites KRS 446.080(3) which states that "[n]o statute shall be construed to be retroactive, unless expressly so declared." He further cites University of Louisville v. O'Bannon, 770 S.W.2d 215 (Ky. 1989), wherein the Kentucky Supreme Court held that

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<sup>1</sup> Kentucky Revised Statutes.

"[r]etroactive application of legislation absent a clear legislative intent in that respect is impermissible." Id. at 216. Further, the court stated that "[u]nless the legislative intent is clear, the presumption is for prospective application." Id., citing Everman v. Miller, 597 S.W.2d 153 (Ky.App. 1979).

On the other hand, MOWR argues that the amended statute is remedial and is not subject to the general bar against retroactive legislation. In support of its argument, MOWR relies on the Central Kentucky Production case as well as Kentucky Ins. Guaranty Ass'n v. Jeffers, 13 S.W.3d 606 (Ky. 2000). "The general rule is that a statute, even though it does not expressly state, has retroactive application provided the statute is remedial." Jeffers, 13 S.W.3d at 609. The issue, therefore, is whether the statute is remedial in nature and not barred from being made retroactive to the facts of this case.

The Kentucky Supreme Court in the Jeffers case addressed what is meant by a remedial statute. "Remedial means no more than the expansion of an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy." Id. Further, the court described the guideline for identifying a remedial statute as follows:

The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to

impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.

Id., quoting BLACK'S LAW DICTIONARY (Sixth Ed. 1990). See also Peabody Coal Co. v. Gossett, 819 S.W.2d 33, 36 (Ky. 1991).

In the Central Kentucky Production case, the case upon which the circuit court relied, a debtor signed two notes and a mortgage in favor of a lending institution and then defaulted. The two promissory notes involved in the case contained a provision whereby the debtor promised to pay the lending institution reasonable attorneys' fees and costs in connection with collecting the balance owed. After the execution of the note and mortgage but before a judgment was entered in the case, the legislature passed a statute permitting the recovery of attorneys' fees under circumstances such as those. The trial court denied an allowance for attorneys' fees, reasoning that the note and mortgage were executed and delivered prior to the effective date of the statute.

When the case came before the Kentucky Supreme Court, the court held that the statute was remedial in nature and that "the controlling date for the application of the statute is the

date of judgment and not the date of the execution of the instrument." Id. at 66. The court reasoned that "[a] remedy has been enlarged by legislative enactment[.]" Id.

In the Jeffers case patients whose malpractice insurance carrier had become insolvent sought payment from the Kentucky Insurance Guaranty Association (KIGA). The statutory coverage limit by KIGA was \$100,000 at the time the plaintiffs filed their action. During the pendency of their cases, the statute was amended to increase the cap on payments from \$100,000 to \$300,000.

The sole issue before the court was whether the increased amount was limited only to those cases in which the insolvency occurred after the effective date of the amended statute or whether the statute applied retroactively to all unresolved cases. Id. at 607. The court in Jeffers first addressed the nature of a retrospective law as "one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." Id. at 609, quoting Peabody, 819 S.W.2d at 36. The court then concluded that the amendment did not create a vested right but merely provided a remedy when there is a judgment. Id. at 611. Thus, the court determined

that the amendment was remedial and was applicable to pending cases. Id.

Neither the Central Kentucky Production case nor the Jeffers case addresses a factual situation such as that in this case. In the Central Kentucky Production case and the Jeffers case, the change in the statute came prior to the trial court ruling on the issue before it. In this case, however, the rights of the parties concerning the enforceability of the contract provision had been determined by the Kentucky Supreme Court before the statute became effective. Therefore, we will first look at the applicability of the law of the case doctrine and the doctrine of res judicata.

While Kentucky law on this issue is scarce, courts in other states have reported decisions involving facts similar to those herein. In Young v. O'Keefe, 82 N.W.2d 111 (Iowa 1957), the surviving husband of a deceased policewoman was denied benefits from a city's policeman's pension fund following his wife's death because the applicable statute provided benefits only to "the surviving widow" and made no provision for a surviving widower. After the appellate court ruled adversely to the surviving husband and before a petition for rehearing was filed, the Iowa state legislature amended the statute and created a right to pension funds in surviving widowers as well as surviving widows.

The petition for rehearing was denied, and the surviving widower commenced a new action for pension benefits. The case again made its way to the Iowa Supreme Court, and the court ruled against the surviving widower based on the doctrine of res judicata. Id. at 115. The court reasoned that its earlier decision "would not be exactly *final* if the legislature could by subsequent retroactive (nunc pro tunc) change of statute reopen the identical controversy for the benefit of a losing litigant." Id. at 114-15.

In Slater v. Blackwood, 543 P.2d 593 (Cal. 1975), the California Supreme Court acknowledged that there was some authority for the proposition that courts may, in particular circumstances, refuse to apply res judicata when to do so would constitute a manifest injustice. Id. at 595. However, the court held that that rule was inapplicable where "the only possible basis for its implementation is founded on a change in law following the original judgment." Id.

In LaBarbera v. Batsch, 227 N.E.2d 55 (Ohio 1967), the Ohio Supreme Court stated that "[o]nce a matter has been finally determined in favor of a party and is no longer subject to appeal, he has a right to rely on the stability and finality of such determination." Id. at 62. The court further held that in the absence of clear legislative intent, even a retroactive

statute does not abrogate the effect of res judicata and the validity of a final judgment. Id.

The Kansas Supreme Court addressed a legislative attempt to nullify a final judgment in Estate of Reed v. Reed, 693 P.2d 1156 (Kan. 1985). Like this case, the Reed case also involved three separate appeals. Following an adverse appellate court ruling in the first appeal, counsel for the losing party lobbied the state legislature and was successful in getting the law changed. After again receiving an adverse decision in the second appeal, counsel again successfully lobbied the legislature and was successful in getting the law changed in such a manner that the amended statute would be retroactive and clearly applicable to the case. Nevertheless, the Kansas Supreme Court again rejected the argument that the statute had retroactive application. Id. at 521. The court reasoned that the prior decisions were final and that the doctrine of res judicata prevented the newly amended statute from having any applicability. Id. at 522.

Likewise, the Arizona Supreme Court faced a legislative attempt to override one of its decisions by amending the statute. See Dowell v. Ross, 657 P.2d 410 (Ariz. 1982). The court rejected application of the new statute to the same parties in the earlier suit based on res judicata. Id. at 411. The court concluded that its earlier decision finally

adjudicated the rights of the parties prior to the statutory amendment. Id.

One Kentucky case with facts similar to those herein is Smith v. Campbell, 286 S.W.2d 532 (Ky. 1955), overruled in part by Ward v. Southern Bell Telephone and Telegraph Co., 436 S.W.2d 794 (Ky. 1968), overruled by Commonwealth, Dept. of Transp., Bureau of Highways v. Louisville Gas & Electric Co., 526 S.W.2d 820, 822 (Ky. 1975).<sup>2</sup> In the Smith case a citizen and taxpayer brought a civil action against magistrates of the Harlan Fiscal Court and against the county treasurer based on lump sum payments made to the magistrates for office rent and telephone expenses. In 1950 the Kentucky General Assembly had enacted a statute prohibiting such payments.

The appellate court first ruled that any payments made after the effective date of the statute clearly were invalid. Id. at 534. As for payments made to the magistrates before the effective date of the statute, the magistrates pled in defense that a 1935 Harlan Circuit Court judgment, upholding the validity of a previous resolution of the Harlan Fiscal Court providing for allowances to the magistrates for office rent, was res judicata and therefore absolved them of any liability for those payments. The appellate court found it unnecessary to

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<sup>2</sup> We conclude that the Ward and Louisville Gas cases have no effect on the portions of the Smith case with which we are concerned herein.

determine whether the 1950 statute retroactively invalidated the payments made before that time "because it is our opinion that the plea of res adjudicata should have been sustained as to those payments." Id. In other words, the court in the Smith case refused to give the statute retroactive effect because a prior judgment had determined the rights of the parties up until the time the statute became effective.

We recognize that Martin did not raise the affirmative defense of res judicata.<sup>3</sup> However, Martin did raise the defense of the law of the case doctrine, and "[t]his jurisdiction incorporates the doctrine of res judicata into the law of the case rule." Burkett v. Board of Education of Pulaski County, 558 S.W.2d 626, 628 (Ky.App. 1977). See also Hill v. Parks, 627 S.W.2d 36, 38 (Ky.App. 1981). The court in Burkett also noted that "the doctrine of res judicata prevents the relitigation of the same issues in a subsequent appeal[.]" Id. at 627. Further, the appellate court in Nolan v. Nolan's Adm'rs, 234 Ky. 50, 27 S.W.2d 408 (1930), held that "[u]nder the well-settled rule, the judgment on the former appeal is the law of the case." 27 S.W.2d at 409. Finally, the court in the Central Kentucky Production case stated that "the controlling date for the application of the statute is the date of the judgment[.]" Id. at 66.

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<sup>3</sup> See Kentucky Rules of Civil Procedure (CR) 8.03.

We conclude that the doctrine of res judicata prevents the retroactive application of KRS 271B.6-270(4)(c) to this case. The ruling by the Kentucky Supreme Court in Man O War Restaurants, Inc. v. Martin, 932 S.W.2d 366 (Ky. 1996), which was decided before the effective date of the statutory amendment, finally decided the issue of the enforceability of the contract provision.

The judgment of the Fayette Circuit Court is reversed, and this case is remanded for a new trial in accordance with this court's opinion resolving the second appeal.<sup>4</sup>

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gregory P. Parsons  
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<sup>4</sup> We decline to address Martin's other arguments since they are rendered moot by our resolution of the single issue decided in this opinion.