

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002785-MR

GEORGE R. RAWLINGS d/b/a
RAWLINGS & ASSOCIATES;
RAWLINGS & ASSOCIATES PLLC; and
MARK D. FISCHER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD, JUDGE
ACTION NO. 00-CI-008083

MARC L. BREIT
and
KRISTIE B. WALKER

APPELLEES

AND NO. 2004-CA-000017-MR

MARC L. BREIT

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD, JUDGE
ACTION NO. 00-CI-008083

GEORGE R. RAWLINGS d/b/a
RAWLINGS & ASSOCIATES;
RAWLINGS & ASSOCIATES PLLC; and
MARK D. FISCHER

CROSS-APPELLEES

AND

NO. 2004-CA-000030-MR

KRISTIE B. WALKER

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD, JUDGE
ACTION NO. 00-CI-008083

GEORGE R. RAWLINGS d/b/a
RAWLINGS & ASSOCIATES; and
RAWLINGS & ASSOCIATES PLLC

CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
VACATING IN PART,
AND
REMANDING

** ** * * * **

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: This is a case where two attorneys brought civil claims in the Jefferson Circuit Court against the law firm that had previously employed them. The claims resulted from the refusal of the firm to pay them bonuses to which they claim to be entitled. Verdicts rendered by the jury following a trial resulted in the entry of a judgment in favor of the two attorneys for several hundred thousand dollars in compensatory and punitive damages. All parties appealed the judgment to this court, and various trial errors have been alleged. We agree

that there were some errors in the proceedings; therefore, we affirm in part, reverse in part, vacate in part, and remand.

The appellant law firm is Rawlings & Associates PLLC. The firm is solely owned by George R. Rawlings, a licensed and practicing attorney. Mark D. Fischer is the chairman of the firm. Rawlings, his firm, and Fischer were all named as defendants in the circuit court action by the two attorneys, and all are appellants and cross-appellees herein.

The two attorneys who were the plaintiffs in the circuit court action and who are appellees herein are Kristie B. Walker and Marc L. Breit. Walker was employed as an attorney by the firm from March 1997 to May 2000. Breit was employed as an attorney by the firm from March 1992 to July 1999. In addition to being appellees herein, Breit and Walker have each filed cross-appeals.

Fischer conducted a firm meeting in the fall of 1997 to discuss a change in the focus of the firm's practice. The change was to be a "new direction" for the firm, and the practice was thereafter to concentrate on class action, mass tort cases. These class action cases included actions brought on behalf of health insurance companies to recover medical payments made by the companies on behalf of their insureds to treat injuries caused by the wrongful acts of third parties.

At the 1997 meeting Fischer set out a bonus plan for attorneys employed by the firm when fees were received in those type of cases. Bonuses were to be awarded in the following manner: (1) 10% of net attorney's fees to the attorney originating the idea for a class action; (2) 5% of net attorney's fees to an attorney originating a health insurance company representation in a class action; and (3) 10% of attorney's fees for class actions to a bonus pool to be distributed pro rata among attorneys working on the case. The firm contends that it retained discretion over the ultimate amount of the bonuses to be paid to the employees and that the plan was thus unenforceable as an "illusory contract." On the other hand, Walker and Breit contend that the bonus plan was an enforceable contract.

Breit resigned from the firm, alleging that it had failed to honor its previous commitment regarding compensation in mass tort cases. Thereafter, Walker's employment with the firm was terminated. She also claimed that she was entitled to compensation in such cases.

Alleging that the firm had wrongfully refused to pay them compensation to which they were entitled under the bonus plan, Walker and Breit filed civil complaints in the Jefferson Circuit Court against Rawlings, the firm, and Fischer. A jury trial was held in October 2002. The jury returned verdicts in

favor of Walker and Breit, and the court entered a final judgment on May 19, 2003.

The judgment directed that Breit recover \$488,211.38 in compensatory damages from Rawlings and the firm for breach of contract. Breit was also awarded punitive damages against Fischer in the amount of \$336,383.29 for tortious interference with contractual relationship. In addition, the judgment directed that Breit recover 5% of certain future attorney's fees collected by the firm. Walker was awarded \$88,151.90 in compensatory damages from the firm for breach of contract. Further, she was awarded \$299,000 in punitive damages from the firm and \$250,000 in punitive damages from Rawlings for tortious interference with contractual relationship. In addition, Walker was also awarded 5% of certain future attorney's fees. After postjudgment motions were filed by the parties and denied by the court, an appeal and cross-appeals were filed with this court.

APPEAL
NO. 2003-CA-002785-MR

The appellants' (Rawlings, the firm, and Fischer) first argument is that the court erred in permitting the breach of contract claims of Walker and Breit to go to the jury and in not granting their directed verdict motion in this regard. They contend that "[t]he discretionary nature of the bonus plan

resulted in an illusory contract that was not enforceable." They assert that no reasonable jury could have concluded anything other than that the firm retained complete discretion over bonus payments. The appellants also argue that there was no meeting of the minds to create an enforceable contract.

There were witnesses (other attorneys in the firm) who testified as to the discretionary nature of the bonuses. However, Walker and Breit testified to the contrary. Characterizing the appellees' testimony as "self-interested testimony," the appellants argue that there was no meeting of the minds and, thus, no enforceable contract. In light of the conflicting testimony, we conclude that there was clearly a fact issue to be submitted to the jury concerning whether there was a contract or merely an "illusory promise."¹

The appellants' second argument is that the court should have granted their directed verdict motions on the tortious interference claims because the firm's officers could not legally interfere with its own contracts. Regarding the tortious interference claim of Breit against Fischer, the jury awarded Breit \$336,383.29 in compensatory damages and the same

¹ The appellants also argue that the contracts were not enforceable because continued employment with the firm was a condition to receiving a bonus payment and that the percentages of fees to be given as a bonus were "a ceiling, not a guaranteed floor." There was no testimony to support the appellants' assertion that continued employment with the firm was a condition to receiving a bonus payment. Also, there was conflicting testimony regarding the percentages of fees issue. Thus, the appellants were not entitled to any ruling as a matter of law on these issues.

amount in punitive damages. Thus, the total amount awarded to Breit in his tortious interference claim against Fischer was \$672,766.58.² Concerning Walker's tortious interference claim against Rawlings, the jury determined that Rawlings had liability and awarded Walker \$250,000 in punitive damages. However, the jury instructions made no mention of the possibility of an award of compensatory damages.

Rawlings and Fischer argue that the law contemplates that the tort of tortious interference with contractual relationship must be committed by an outside third party in order to be valid and that such a claim is invalid as to members or agents of a corporation such as themselves. They reason that since "a corporation can act only through its agents," they have no liability since their alleged actions were deemed to be the acts of the corporation. See McCarthy v. KFC Corp., 607 F.Supp. 343, 345 (W.D.Ky. 1985). On the other hand, Walker and Breit cite several other cases, including Cappiello v. Ragen Precision Indus., Inc., 471 A.2d 432 (N.J. Super. Ct. App. Div. 1984), for the proposition that the agent of a principal may be liable for interfering with the principal's contract, if the agent does so for his own personnel benefit. Id. at 436. See also Stack v.

² As we will discuss later in this opinion, the court rejected the compensatory damages award against Fischer for tortious interference on the ground of double recovery since Breit had already been awarded that amount in compensatory damages against Rawlings and the firm.

Marcum, 382 N.W.2d 743, 760 (Mich. Ct. App. 1986), and Stafford v. Puro, 63 F.3d 1436, 1442 (7th Cir. 1995).

We agree that the tortious interference claim against Rawlings was invalid. Rawlings was the sole owner of the firm. Therefore, Rawlings could not interfere with his own contract. See Rao v. Rao, 718 F.2d 219, 225 (7th Cir. 1983). Thus, the portion of the judgment granting Walker \$250,000 against Rawlings for punitive damages for tortious interference of employment relationship is reversed.

Breit's tortious interference claim, however, was against Fischer, not Rawlings. Fischer was an employee of the firm and was not the owner. The bonus plan was between the firm and its employees. A tortious interference claim against Fischer was valid if he was acting in his own interest. See Capiello, Stack, and Stafford. There was evidence that Fischer was attempting to divert bonuses relating to Fen-Phen litigation away from Breit and to himself. As Breit states on page 33 of his brief, "[t]he question of whether Fischer was acting as an agent for the benefit of Rawlings Law Firm or for his own personal benefit was a question of fact for the jury." Instruction No. 6 failed to submit this fact question to the jury. Therefore, it was erroneous. Thus, we vacate the judgment in favor of Breit on his tortious interference claim against Fischer and remand for a new trial on that issue.

The appellants next argue that the court erred in allowing punitive damages instructions to be given to the jury because punitive damages cannot be awarded for a breach of contract and because the tort of bad faith is not applicable. We agree that punitive damages may not be awarded for a breach of contract. KRS³ 411.184(4). We also agree that the tort of bad faith is not applicable to this case. See Davidson v. American Freightways, Inc., 25 S.W.3d 94, 95 (Ky. 2000), where the Kentucky Supreme Court held that the tort of bad faith is applicable only to persons or entities engaged in the insurance business.

As those principles are applicable to this case, we begin by noting that there were three punitive damages instructions given. The first was Instruction No. 8 wherein Breit was awarded \$336,383.29 in punitive damages against Fischer for tortious interference. This claim was not for breach of contract or bad faith. However, as we have vacated the judgment on that claim, the portion of the judgment awarding punitive damages is likewise vacated for further proceedings.

Under Instruction No. 13, Walker was awarded punitive damages of \$299,000 against the firm. Those instructions were pursuant to findings by the jury under Instruction Nos. 2 and 12. As those instructions related to breach of contract, we

³ Kentucky Revised Statutes.

agree that punitive damages were not allowable. See KRS 411.184(4). Thus, we reverse the punitive damages award of \$299,000 under Instruction No. 13.

Instruction No. 15 was a punitive damages award of \$250,000 against Rawlings for tortious interference. As we have noted earlier, this award must be reversed because the tortious interference claim against Rawlings was invalid because he was the sole owner of the firm. See Rao, supra.

The appellants' next argument is that all of the punitive damages awards must be vacated because the jury instructions improperly removed the jury's discretion and failed to state the appropriate standard under which such damages may be awarded. As we have noted, there were three punitive damages instructions, Instruction Nos. 8, 13, and 15. We have previously herein reversed the award under Instruction No. 13 because it was based on a breach of contract claim and have previously herein reversed the award under Instruction No. 15 because it was based on an invalid claim.

That leaves us to address the appellants' argument as it relates solely to Instruction No. 8 (punitive damages for Breit against Fischer for tortious interference with contractual relationship). While we have herein vacated that award, the issue may arise again on retrial of Breit's claim. Instruction No. 8 reads as follows:

If you find for Marc Breit and award him damages under Instruction No. 6 & 7, you may in your discretion, also award punitive damages against Mark Fischer in addition to the damages awarded under Instruction No. 6 & 7 if you are satisfied by clear and convincing evidence, that Mark Fischer's conduct was accompanied by intentional wrongdoing in a spirit of malice and/or a wanton disregard for the rights of Marc Breit.

If you award punitive damages, you will state the amount separately from the sum or sums awarded to compensate Marc Breit, as follows:

We, the jury, award punitive damages against Mark Fischer in the sum of (not to exceed \$336,383.29): \$_____

That instruction did give the jury the discretion as to whether to award punitive damages in favor of Breit and against Fischer. See Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) ("the jury's decision as to whether to award punitive damages remains discretionary because the nature of punitive damages is such that the decision is always a matter within the jury's discretion."). Further, the instruction stated the "clear and convincing evidence" standard. See KRS 411.186(2). Otherwise, the instruction directs the jury to award punitive damages if it is satisfied that "Fischer's conduct was accompanied by intentional wrongdoing in a spirit of malice and/or a wanton disregard for the rights of Marc Breit."

In Hanson v. American Nat. Bank & Trust Co., 865 S.W.2d 302, 310 (Ky. 1993), overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 495 (Ky. 2002), the Kentucky Supreme Court approved instructing the jury in accordance with the provisions of KRS 411.184 and 411.186 so as to give guidance in determining the appropriateness and amount of a punitive damages award. See also Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153, 166-67 (Ky. 2004). Instruction No. 8 failed to adequately do so. Therefore, the punitive damage award against Fischer is vacated for this additional reason.

The appellants also argue that the punitive damages awards were excessive and violated their due process rights. As we have reversed two of the three punitive damages awards and vacated the other, this issue is moot.

Next, the appellants contend that the jury instructions improperly prevented the jury from considering their theory of the case. Instruction No. 2 reads as follows:

Do you believe from the evidence that the law firm of Rawlings and Associates (PLLC), or its agent, Mark Fischer, offered a bonus plan in mass-tort cases to attorneys in the firm, including Marc Breit and Kristie Walker, wherein: (1) ten percent (10%) of the attorney fees collected by the firm would be paid to the attorney originating a case; (2) five percent (5%) of the attorney fees collected by the firm from each client would be awarded to the attorney

contracting, or "signing up," each client; and (3) a pool of ten percent (10%) of the total attorney fees collected by the firm would be distributed to those attorneys working on the mass-tort case?

Yes

No

The appellants argue that this instruction never allowed the jury to consider whether the awarding of bonuses was discretionary with the firm and whether an attorney was required to be a member of the firm when the fees were collected in order to receive a bonus under the bonus plan.

The general rule for jury instructions is that they should provide only "the bare bones" with the specifics to "be fleshed out by counsel in their closing arguments if they so desire." Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974). A review of the record indicates that the appellants argued their theory throughout the trial. The "bare bones" instruction given was sufficient to address the theory that the awarding of bonuses was discretionary with the firm. We find no error in this regard. Further, the appellants have not pointed to any evidence that continued employment with the firm was a condition to receiving a bonus that had been earned. A party is only entitled to an instruction that is supported by evidence of record. See Risen v. Pierce, 807 S.W.2d 945, 947 (Ky. 1991).

The appellants next argue that the court erred in admitting evidence regarding their financial condition and purported motives. During the trial, the court allowed evidence concerning financial records of Rawlings and the firm. "It has been the law of the Commonwealth for almost one hundred years that in an action for punitive damages, the parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation." Hardaway Management Co. v. Southerland, 977 S.W.2d 910, 916 (Ky. 1998).

Walker and Breit argue in response that the evidence was admissible to show motive concerning the claims of tortious interference. As we have reversed the judgment as it relates to the tortious interference claim against Rawlings and as we have reversed the punitive damages awards against Rawlings and the firm, evidence of the financial condition of Rawlings and the firm will be irrelevant on remand since the only issue will be punitive damages against Fischer.

We do note that evidence of the firm's financial condition was relevant to rebut the assertion by Rawlings that Walker was fired because the firm was losing money. Also, evidence of the amounts of fees collected from companies was relevant to the computation of bonuses due Walker and Breit. To the extent evidence of the financial condition of Rawlings and the firm may have been used improperly during the trial, we

find, as we did in the Hardaway case, that it was harmless error. See CR⁴ 61.01.

The next argument by the appellants is that the court improperly excluded evidence regarding Breit's departure from the firm. Appellants sought to introduce evidence that Breit resigned from the firm for the purpose of opening his own firm and competing with the firm for its clients. It also sought to present testimony of Geoff Taylor that Breit planned to resign from the firm and raid the firm's files and clients. We agree with Breit that such evidence was inadmissible. However, the court permitted Breit to testify that he was "forced" to resign from the firm. In light of that testimony, the appellants argue that they should have been allowed to introduce their evidence concerning what they believed his real reason for resigning from the firm was. We conclude that any error in this regard was harmless.

Therefore, the judgment in favor of Breit against Rawlings and the firm in the amount of \$488,211.38 plus a percentage of certain future fees is affirmed. Likewise, the judgment in favor of Walker against the firm in the amount of \$88,151.90 and a percentage of certain future fees is affirmed. The judgment in favor of Breit and against Fischer for tortious interference and for punitive damages in the amount of

⁴ Kentucky Rules of Civil Procedure.

\$336,383.29 is vacated and remanded. The judgment in favor of Walker for punitive damages in the sum of \$299,000 against the firm and \$250,000 against Rawlings is reversed.

CROSS-APPEAL
NO. 2004-CA-000017-MR
and
NO. 2004-CA-000030-MR

Walker and Breit argue in their cross-appeal that they should have been awarded liquidated damages and attorney's fees pursuant to KRS 337.385 which relates to an employer's liability for unpaid wages. The statute provides in relevant part as follows:

Any employer who pays an employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. Provided, that if, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section.

Such an award would result in an additional judgment to Walker in the amount of \$88,151.90 plus attorney's fees. Such an award in favor of Breit would result in an additional judgment against Rawlings and the firm for \$488,211.38 plus attorney's fees.

Rawlings and the firm argue that KRS 337.385 is not applicable because Walker and Breit are not covered "employees" under the statute. KRS 337.010(2)(a)2 states that the term "employee" as used in the statutes in that chapter shall not include individuals employed in an executive, administrative, supervisory, or professional capacity. Despite the language in the statute, Walker and Breit claim that they are entitled to liquidated damages and attorney's fees under the statute even though they were employed as attorneys. They rely on Healthcare of Louisville v. Kiesel, 715 S.W.2d 246 (Ky.App. 1986). In that case, despite the words of the statute, the court accepted the trial court's reasoning that "[i]t is just as unlawful to fail to pay or to withhold a part of the salary of any executive, administrative, supervisory or professional employee as it would be to do so in the case of any other type of employee." Id. at 248.

The circuit court in this case rejected the KRS 337 claims for two reasons. The court first reasoned that "even though Plaintiffs may fit under the general definition of employee and their earned bonuses constitute wages, they are

still professionals, thus the type of employees the General Assembly expressly exempted from recovering under KRS 337.385." As we believe Kiesel is distinguishable, we agree.

Walker and Breit next argue that they were entitled to prejudgment interest on their compensatory damages award. Those awards were for amounts owed to Walker and Breit under the bonus plan. The appellants argue that the court properly denied prejudgment interest because the damages were unliquidated and because prejudgment interest is within the sound discretion of the trial court. We agree with Walker and Breit that the court erred in not awarding prejudgment interest on these portions of the judgment.

"When damages are 'liquidated,' prejudgment interest follows as a matter of course. Precisely when the amount involved qualifies as 'liquidated' is not always clear, but in general 'liquidated' means '[m]ade certain or fixed by agreement of parties or by operation of law.' BLACK'S LAW DICTIONARY 930 (6th ed. 1990)." Nucor Corp. v. General Elec. Co., 812 S.W.2d 136, 141 (Ky. 1991). "If the amount of the claim is a sum certain, the debt is still liquidated even if the refusal to pay is based upon a good faith denial of liability." Hale v. Life Ins. Co. of North America, 795 F.2d 22, 24, (6th Cir. 1986), citing Shanklin v. Townsend, 434 S.W.2d 655 (Ky.App. 1968).

The jury here determined that the compensatory damages were owed by the appellants pursuant to an agreement (the bonus plan). The amounts owed became a sum certain and thus a liquidated debt upon the payment of the fees to the firm. Therefore, prejudgment interest from that point forward should have been awarded. We reverse and remand for the award of prejudgment interest on the compensatory damages of Walker and Breit.

Next, Breit argues in his cross-appeal that the judgment erroneously omitted the jury's compensatory damages award in his favor against Fischer. The compensatory damages award was in the amount of \$336,383.29, and the same amount was awarded in favor of Breit against Fischer for punitive damages. The court omitted the compensatory damages award, but it gave no reason for doing so. Further, it denied Breit's motion to alter, amend, or vacate in this regard.

We conclude that the court properly denied two separate awards for the above stated amount. Breit had already received a judgment for the same compensatory damages for breach of contract by the firm. The evidence did not support additional compensatory damages against Fischer. Such an award would have amounted to a double recovery of that amount. See Hardaway, 977 S.W.2d at 918, wherein the court stated that

"[t]here is a strong public policy in this Commonwealth against double recovery for the same elements of loss."⁵

Therefore, concerning the cross-appeal, we affirm the circuit court's denial of the appellees' KRS Chapter 337 claims and Breit's claim that the court erred in striking his award for compensatory damages against Fischer. However, we reverse the court's denial to Walker and Breit of prejudgment interest on their compensatory damage awards and remand for further proceedings in this regard.

ALL CONCUR.

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⁵ We have vacated that award for another reason as noted above. On remand, the jury will first have to determine the validity of Breit's tortious interference claim. If it finds for Breit, it will award compensatory damages to the extent they do not constitute a double recovery, if any, and may award punitive damages.