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**SUPREME COURT GRANTED DISCRETIONARY REVIEW:
MAY 14, 2008
(FILE NO. 2006-SC-0748-DG)**

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000111-MR
AND
NO. 2005-CA-000183-MR

KIMBERLY G. HILL; ROBERT W. HILL — APPELLANTS/CROSS-APPELLEES

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 00-CI-000492

KENTUCKY LOTTERY CORPORATION — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BARBER, JUDGE; BUCKINGHAM AND HUDDLESTON, SENIOR JUDGES.[1]

BARBER, JUDGE: Kimberly G. Hill and Robert W. Hill appeal from a judgment of the Jefferson Circuit Court entered upon a jury verdict awarding them damages for retaliatory discharge under

[1] Senior Judges David C. Buckingham and Joseph R. Huddleston sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the Kentucky Civil Rights Act and finding against them upon their claim for defamation. The Hills contend that the trial court erred when, following the first trial in this matter, it dismissed a judgment in their favor on their claim of common law wrongful discharge; granted a new trial on their claim of defamation; and granted a new trial on the issue of damages. The Hills also allege that the trial court erred in reducing their claim for attorney fees. Kentucky Lottery Corporation (KLC) has filed a protective cross-appeal claiming that it was entitled to an absolute privilege with respect to the Hills' defamation claim. KLC also cross-appeals claiming that it is a state agency not subject to the interest statute and, alternatively, challenging the interest rate applied by the trial court under the interest statute. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Hills' Version of Events

The facts from the standpoint of the Hills and KLC are in considerable disagreement. We begin with the Hills' version of events.

Bob and Kim both began working for the Lottery Corporation in 1989. They met through their work at the lottery. At the time they began dating in 1994, Kim was living in Louisville and Bob was living in Paducah, where he was a

lifelong resident. In 1995 Kim moved to Paducah to be near Bob. They were married in April 1999.

Bob was a sales representative for KLC and Kim was a machine repair technician. They were dedicated to their jobs and planed on remaining with the Lottery Corporation until their retirements.

In 1999, Kim was called to testify on behalf of discharged Lottery employee Ed Gilmore, who is legally blind, in a hearing concerning his entitlement to unemployment benefits. KLC sought to have Kim testify, untruthfully, that Gilmore was not legally blind, and threatened her and Bob's employment if she did not. Kim, however, testified truthfully at the unemployment hearing.

Because Kim failed to follow its admonition to testify falsely at Gilmore's unemployment hearing, KLC undertook a campaign of harassment and intimidation against her and Bob, and eventually they were both terminated based upon fabricated allegations of misconduct. Further, prior to the termination, KLC planted a secret, undelivered preliminary memorandum listing falsified reasons for their termination in each of their employment files. The preliminary termination memos contained false and defaming statements, including charges of fraud and forgery. KLC disclosed the preliminary memos to Louisville television station WLKY, Channel 32, in response to an open-

records request, which broadcast the memos' defaming charges on the evening news.

The Lottery Corporation's Version of Events

According to KLC's version of events, after marrying and settling in Paducah in April 1999, the Hills did not keep their job duties separate. Four months after they were married, KLC discovered that Bob had been performing Kim's job duties while Kim stayed home and collected a paycheck. Kim admitted to an employee of the KLC security department that she had stayed at home on at least four separate days during July, 1999, while Bob performed her service calls. Kim falsely had reported to KLC on her time sheets and daily log sheets that she was working on those dates. After speaking with some of the retailers Kim had purportedly visited to make repairs to lottery machines in August, 1999, KLC concluded that Bob had actually performed those service calls.

A meeting was arranged by KLC for the Hills, their senior managers at KLC, and Church Saufley, KLC's Vice-President of Human Resources, to be held at KLC's office in Madisonville, Kentucky, on August 31, 1999. KLC prepared a memorandum for Kim and a memorandum for Bob, each signed by their senior managers, documenting the reasons for the termination of their employment.

The memorandum to Kim stated that Bob had been handling some of her services calls; that Kim had falsified work

reports indicating that she was completing the service calls; and that she allowed Bob to use her gas card to sign her name. The memorandum to Bob stated that Bob had been handling Kim's service calls; using her gas card and forging her name; and knowingly covering for Kim while she was reporting that she was doing the work and getting paid for the work. The memoranda were prepared by KLC in advance of the meeting, and if no additional explanation was presented by the Hills to change KLC's decision, KLC intended to terminate the Hills' employment at the meeting. KLC took the memoranda to present to the Hills at the scheduled meeting; however, the Hills failed to show up for the meeting.

Prior to the scheduled meeting date, in fact, the Hills had already obtained an attorney, who did not notify KLC that the Hills were not coming to the meeting until after the KLC employees had already arrived in Madisonville. Since the Hills did not show up for the scheduled meeting, KLC did not have an opportunity to present the memoranda to them. The memoranda were not preliminary, were not "secret," and did not contain false allegations. Church Saufley placed the memoranda in the Hills' personnel files either the evening of the scheduled meeting or the following day in accordance with his normal procedure. On September 1, 1999, KLC mailed letters to

the Hills informing them that their employment had been terminated.

Shortly after the Hills' termination, their attorney submitted a written request to KLC asking to inspect the Hills' personnel files pursuant to the Kentucky Open Records Act. KLC provided the personnel files as required by Kentucky Revised Statutes (KRS) 61.872. Shortly thereafter, WLKY made a virtually identical, but more detailed, request for the Hills' personnel files, including the Hills' letters of dismissal. As they had with the Hills' attorney, KLC provided the Hills' personnel files to WLKY as required by KRS 61.872.

In October, 1999, the Hills traveled to Louisville to attend a protest of the termination of former KLC employee, Ed Gilmore, in front of the KLC headquarters in Louisville. The Hills' attorney, who also represented Gilmore, attended the protest. WLKY television station appeared at the protest with cameras.

Kim and the Hills' attorney were interviewed by WLKY during the course of the protest. Kim discussed at length the termination of her employment. WLKY aired the protest and interview with Kim during its evening newscast. In the course of the interview WLKY showed a copy of Kim Hill's termination memorandum on the air. Bob Hill's termination memorandum was not shown on the WLKY broadcast, nor was the memorandum seen by

anyone other than the WLKY news reporter who requested his personnel file.

Several months later, the Hills were interviewed by WLKY at the Hills' attorney's office, and both talked extensively during the broadcast about their termination. In KLC's view, the Hills went to great lengths to publicize the termination of their employment in preparation for filing a lawsuit against KLC.

Procedural History

Following their termination, the Hills filed a lawsuit against KLC in Jefferson Circuit Court alleging (1) unlawful retaliation in violation of KRS 344.280, (2) common law wrongful discharge for Kim's refusal to testify falsely at Gilmore's unemployment hearing, and (3) defamation.

The first of the two trials in this case was held in December 2002. At the conclusion of the first trial the jury held for the Hills on all causes of action. The jury awarded damages to Bob in the amount of $154,450.00 for lost past wages; $500,000.00 for lost future wages; $1,000,000.00 for mental anguish caused by the defamation; and $1,000,000.00 in punitive damages for a total award of $2,654,450.00. The jury awarded damages to Kim in the amount of $113,866.00 for lost past wages; $84,000.00 for lost future wages; $500,000.00 for mental anguish caused by the defamation; and $1,000,000.00 in punitive damages

for a total award between the two of $1,697,866.00. In summary, the combined total award was approximately $4.3 million. The jury returned these verdicts on December 18, 2002.

On December 26, 2002, although judgment on the verdict had not been entered, KLC filed a combined motion for judgment notwithstanding the verdict pursuant to Kentucky Rules of Civil Procedure (CR) 50.02, motion for a new trial pursuant to CR 59.01, and motion to alter, amend, or vacate pursuant to CR 59.05. The motion was a bare motion and did not set forth the bases for the relief requested. For some reason, along with the motion, KLC tendered a judgment which awarded the Hills considerably less in damages than provided for by the jury verdicts. Although the judgment clearly did not comport with the jury verdicts, on January 21, 2003, the trial court entered the erroneous judgment.

On January 23, 2003, the Hills filed a motion to vacate the January 21, 2003, judgment and to enter judgments in the Hills' favor consistent with the jury verdicts. On January 31, 2003, KLC filed a motion captioned "Amended Motion for Judgment Notwithstanding the Verdict; Motion for New Trial and/or Motion to Alter, Amend or Vacate." Unlike its initial motion, this motion set forth the grounds for the relief requested.

On May 12, 2003, the trial court entered an order granting the Hills' motion to alter, amend or vacate, and simultaneously entered judgments in accordance with the jury verdicts. The order to which the judgments were attached included the statement "[i]t should be noted that these judgments are not final and appealable and are subject to further rulings on the motions currently pending to alter, amend or vacate." On August 8, 2003, the trial court entered an order ruling on KLC's post-judgment motions. The order granted the Lottery judgment notwithstanding the verdict on the common law wrongful discharge verdicts (because the Hills had a statutory remedy under the Civil Rights Act); granted a retrial as to the amount of damages for the retaliatory discharge under the Civil Rights Act (because lost wages damages in the first trial had been combined with the dismissed common law wrongful discharge verdict and the vacated defamation verdict); ordered a retrial on the defamation count (because the trial court had erroneously failed to instruct the jury upon qualified privilege); and ordered a retrial on punitive damages (because the punitive damage award in the first trial had been combined for the three counts).

The Hills subsequently appealed the trial court's August 8, 2003, order to this Court. (See Case Nos. 2003-CA-001661-MR; 2003-CA-002001-MR; 2003-CA-001789-MR; and 2003-CA-

001902-MR). On November 18, 2003, this Court entered an order dismissing the appeals as interlocutory. On January 22, 2004, this Court entered an order denying the Hills' motion to reconsider.

In August 2004 the second trial in the action was held pursuant to the trial court's August 8, 2003, order. At the conclusion of the second trial the jury returned a total damage award relating to the Civil Rights Act count of $132,500.00 for Bob and $120,000.00 for Kim, for a total award of $252,500.00, about 5% of the original award. The second jury found for KLC on the defamation count.

The Hills subsequently tendered final judgments in accordance with the jury verdict, along with a request for attorney fees of $451,529.74. KLC objected to the requested attorney fees, and the award for fees was reduced by the trial court to $212,959.87. A final judgment consistent with the jury verdict and the attorney fee award was entered on January 13, 2005. The Hills appeal that judgment, and KLC cross-appeals.

THE HILLS' DIRECT APPEAL – CASE NO. 2005-CA-000111-MR

Validity of August 8, 2003, Order

First, the Hills contend that the trial court's August 8, 2003, order setting aside their common law wrongful discharge verdict and requiring a new trial on defamation and damages was

null and void because the trial court lost jurisdiction ten days following the entry of the May 12, 2003, judgments entered in connection with its order granting their motion to alter, amend, or vacate the erroneous judgment entered on January 21, 2003.

The Hills' argument may be summarized as follows. Upon entry of service of the May 12, 2003, judgments, time began to run on the trial court's ten-day jurisdictional period to sua sponte alter, amend or vacate the judgment; on KLC's ten-day period to file a post-judgment motion to challenge the judgments so as to toll the thirty-day limitations period to appeal to this Court; and on KLC's thirty-day period limitation to file an appeal to this Court. Because the trial court did not unilaterally alter, amend or vacate the judgment during its ten-day jurisdictional period; KLC did not file a motion so as to toll the running of the limitations period to appeal (for example, pursuant to CR 59); and because KLC did not file an appeal to this Court within the 30-day limitations period as provided by CR 73.02, the trial court had lost jurisdiction over the case at the time it entered its August 8, 2003, order.

As a general principle, a judgment becomes final ten days after its entry by the trial court, see CR 52.02, 59.04, 59.05, and it is axiomatic that a court loses jurisdiction once its judgment is final. Mullins v. Hess, 131 S.W.3d 769, 774 (Ky.App. 2004). However, the judgments entered on May 12, 2003,

were not final because they were attached to an order which specifically stated that "these Judgments are not final and appealable and are subject to further rulings on the motions currently pending to alter, amend or vacate." The order specifically reserved for future adjudication the trial court's ruling on KLC's January 31, 2003, "Amended Motion for JNOV; Motion for New Trial and/or Motion to Alter, Amend or Vacate."

CR 54.01 defines a final judgment as follows:

> A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order". (Emphasis added).

"[I]f an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." Hubbard v. Hubbard, 303 Ky. 411, 197 S.W.2d 923, 924 (Ky. 1946). As the trial court's May 12, 2003, order left something further to be done (i.e., to rule on KLC's pending motions), the attached judgments were not final judgments. Simply put, at the time the judgments were entered, all the rights of all the parties had not been adjudicated. Accordingly, the principle that a trial court loses its

jurisdiction ten days following the entry of the final judgment is not applicable. The judgments were not final. Similarly, the 30-day period for filing an appeal to this Court pursuant to CR 73.02 did not begin to run. It follows that the trial court retained jurisdiction to enter the August 8, 2003, order and that the order was not "null and void" as asserted by the Hills.

RETRIAL ON DEFAMATION

The Hills contend that the trial court erred by granting KLC a retrial on their defamation count. We first consider whether the issue is preserved. The Hills allege that KLC did not properly preserve this at the first trial because it sought an "absolute" privilege rather than a "qualified" privilege. However, KLC has argued throughout the proceedings that it was privileged to publish the information contained in the memoranda both as intra-company communications and pursuant to the Open Records Act. Moreover, notwithstanding the Hills' assertion to the contrary, KLC did tender a jury instruction which would have permitted the jury to find liability against KLC on the defamation counts only if it determined "[t]hat the Lottery was not privileged in producing the memorandum." This amounts to the tendering of a qualified privilege instruction. Accordingly, we conclude that the issue was preserved at the first trial.

The Hills' defamation count was based upon statements included in the August 31, 1999, undelivered memoranda to Bob and Kim from their respective supervisors. As noted above, the memoranda contained allegations that, among other things, Bob was making Kim's service calls while Kim stayed home; that Kim falsified her time sheets and service call logs; and that Bob used Kim's gas card and forged her name.

In its August 8, 2003, order the trial court granted a new trial to KLC on the Hills' defamation count on the basis that it had erred in the first trial by failing to include a privilege instruction which would have excused KLC's communication of the information contained in the memoranda. In granting a new trial on the issue the trial court stated as follows:

> As to the claim of defamation, however, the Court finds that it erred in ruling that the Lottery did not have a qualified privilege under the circumstances of this case. As stated in Columbia Sussex Corporation, Inc. v. Hay, Ky.App., 627 S.W.2d 270 (1981), the existence of a privilege is a question of law. The Hills' August 31, 1999 termination memoranda were privileged as necessary intra-company communications. See Wyant v. SCM Corporation, Ky., 692 S.W.2d 814 (1985). These termination memoranda were given to WLKY Channel 32 television station in response to a request under Kentucky's Open Records Act. KRS 61.870 to KRS 61.884. The Lottery was under a statutory duty to turn the memoranda over [to] WLKY, unless the documents were exempt from disclosure. See

KRS 61.880(1).[2] As such, the Court finds that the Lottery had a privilege in disclosing the termination memoranda under the Open Records Act.

Both of these privileges, however, were not absolute but qualified. As stated [in] Tucker v. Kilgore, Ky., 388 S.W.2d 112 (1964):

> 'A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts which he in good faith proceeds to do.' 33 Am.Jur. 124 (Libel and Slander, § 126). 'Qualified privilege * * * comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.' 53 C.J.S. Libel and Slander § 89, pp. 143-144.

[2] KRS 61.880 provides, in relevant part, as follows: "Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action."

> A qualified privilege can be defeated by showing that the privilege was abused (i.e., made in bad faith, with malice). Whether or not such an abuse occurred is generally a factual issue for a jury. Where there is a privilege to defamation, as there was in this case, failure to instruct the jury on said privilege is prejudicial error. See Holdaway Drugs, Inc. v. Braden, Ky., 582 S.W.2d 646 (1979). Thus, the Hills' claim of defamation as to both liability and damages must be retried along with the claim of punitive damages, since the Court is unable to tell if the jury decided to award punitive damages based solely on the defamation claim or any other claim or a combination thereof.

A trial court has broad discretion in ruling on a motion for a new trial and we will not disturb the ruling absent an abuse of that discretion. Lewis v. Grange Mut. Cas. Co., 11 S.W.3d 591 (Ky.App. 2000). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" Farmland Mut. Ins. Co., 36 S.W.3d at 368, 378 (Ky. 2000) (quoting Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000)). "The discretion of the trial judge, who participates in the conduct of the trial, in refusing or granting a new trial will be interfered with only in exceptional cases." Wilkins v. Hopkins, 278 Ky. 280, 128 S.W.2d 772, 774 (Ky.App. 1939).

The trial court did not err in determining that KLC was entitled to a new trial on the basis that error had occurred

in the original trial because of the omission of a privilege instruction. KLC's theory was that the memoranda were intra-company memoranda because they were prepared by Bob and Kim's respective supervisors and were intended for distribution to the appellants while they were still employees of KLC and that the Open Records Act imposed upon it the duty to disclose the memoranda. There was a factual dispute concerning KLC's motives in preparing the memoranda, it being the Hill's position that they were prepared with malice and "secretly planted" in their personnel files, while it is the Lottery's position that the memoranda were truthful and prepared in good faith. Under these circumstances, a jury question was presented, KLC was entitled to a qualified privilege instruction, and the trial court did not abuse its discretion by granting KLC a new trial on the issue.

In connection with this argument, the Hills argue in the alternative that if retrial on its defamation claim was required, then only the issue of privilege should have been submitted to the second jury and its favorable verdict on the remaining elements of defamation should have carried forward to the second trial. Again, however, this is a matter within the discretion of the trial court, Lewis v. Grange Mut. Cas. Co., supra. Whether a privilege defense is available will, in the

normal case, affect the presentation of the entire defense and produce interplay with other elements of the defamation claim. As such, the trial court did not abuse its discretion by requiring a new trial on all elements of the claim.

COMMON LAW WRONGFUL DISCHARGE

The Hills contend that the trial court erred in granting the KLC judgment notwithstanding the verdict on their claim of common law wrongful discharge. In its August 8, 2003, order granting judgment notwithstanding the verdict on the issue the trial court stated as follows:

> In this action, the Court erred by instructing the jury to consider both a claim for retaliatory discharge under KRS 344.280 and for wrongful discharge in violation of public policy. As stated in Grzyb v. Evans, Ky., 700 S.W.2d 399 (1985), where a statute declares an act to be unlawful and specifies the civil remedy available, the aggrieved party is limited to the statutory remedy. This holding was further analyzed in Day v. Alcan Aluminum Corporation, 675 F.Supp. 1508 (W.D.Ky. 1987), as follows:
>
> > In both Firestone [v. Meadows, Ky., 666 S.W.2d 730 (1984)] and Pari-Mutuel [v. Kentucky Jockey Club, Ky., 551 S.W.2d 801 (1977)], the court found that an important public policy had been violated and that the statute embodying that policy provided no specific means of redress. Grzyb on the other hand, involved allegations of a violation of public policy specifically enunciated by statute which further provided the civil remedy. In that situation, the

> claim could not constitute the basis for a wrongful discharge suit since the Legislature, after creating the statutory prohibition against discriminatory discharge, set forth the means by which violations are to be redressed.
>
> Consequently, based on the reasoning of Grzyb, the Hills were limited to claims of discriminatory discharge under KRS 344.280, and their claims of wrongful discharge in violation of public policy should have been submitted to the jury only as alternative claims to be considered if the jury found in favor of the Lottery on the Hill's retaliatory discharge claims.

In their Third Amended Complaint filed on November 16, 2002, the Hills set forth their claim under KRS 344.280 of the Civil Rights Act in paragraphs 13 – 21 of the Complaint as follows:

> 13. The Plaintiffs incorporate and reiterate the allegation in numerical paragraphs 1 through 12 as if fully restated herein.
>
> 14. On or about March 8, 1999, the Kentucky Lottery requested Kim Hill to report to the main office in Louisville to discuss her testimony and knowledge of facts as a subpoenaed witness for a pending Unemployment Compensation Hearing for Edward J. Gilmore, a recently discharged Kentucky Lottery employee.
>
> 15. On or about March 8, 1999, Kim Hill met with Robert Beisker, Vice President for Human Resources and counsel for the Kentucky Lottery.
>
> 16. During the course of the interview representatives of the Kentucky Lottery made

various suggestions and offered factual information to the Plaintiff directing the Plaintiff to offer false testimony at the aforementioned Unemployment Compensation Hearing.

17. The Kentucky Lottery treated Kim Hill with hostility and oppression during and after the March 8, 1999, interview in an attempt to coerce her to change her testimony and or leave the employment of the Lottery.

18. On or about June 29, 1999, an unemployment compensation hearing was held for former Lottery employee Edward J. Gilmore. Kim Hill was subpoenaed as a witness for Mr. Gilmore at which time she answered all the questions, testified truthfully and refused to answer questions in the manner directed by the Kentucky Lottery.

19. Kim Hill's testimony was favorable to Edward J. Gilmore and his claim for unemployment compensation.

20. On or about August 31, 1999, the Kentucky Lottery terminated Kim Hill in retaliation for refusing to offer perjurious testimony and for testifying truthfully at the Unemployment Compensation Hearing on June 29, 1999. The Kentucky Lottery's termination of Kimberly Hill was in retaliation for opposing a practice declared unlawful in violation of KRS 344.280.

21. On or about August 31, 1999, the Kentucky Lottery terminated Bob Hill in retaliation for Kim Hill's refusal to commit perjury and truthful testimony at the Unemployment Compensation Hearing of Edward J. Gilmore on June 29, 1999. The Kentucky Lottery's termination of Bob Hill in retaliation for opposing a practice declared in violation of KRS 344.280.

The Hill's cause of action for wrongful discharge in violation of public policy was stated in paragraphs 22 and 23 as follows:

> 22. The Plaintiffs incorporate and reiterate the allegations in numerical paragraphs 1 through 21 above as if fully restated herein.
>
> 23. The Kentucky Lottery's termination of Kimberly and Robert Hill was in violation of Public Policy for Kimberly Hill's refusal to offer false testimony during a legal proceeding.

An examination and comparison of the two counts discloses that both counts were predicated upon the same conduct by KLC – its insistence that Kim commit perjury at the Unemployment Compensation Hearing of Edward J. Gilmore.

As noted by the trial court, where a statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute. Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985). Hence, if the Civil Rights Act declares it unlawful for an employer to discharge an employee based upon the employee's refusal to commit perjury in a legal proceeding, and if the Act specifies the remedy, then the Hills would be limited to bringing an action under the Act, and would not be entitled to also bring a common law cause of action based

upon wrongful discharge in violation of public policy. In their brief, the Hills state as follows:

> The Instructions on wrongful discharge allowed the jury to find for the Hills if it found that "Kim Hill refused to give false testimony at the urging of the Kentucky Lottery at an unemployment hearing and that this was a substantial and motivating factor in the Kentucky Lottery's decision to discharge" the Hills. None of these elements fall within the KRS 344.280, which declares it unlawful
>
> > [t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter;
>
> KRS Chapter 344 does not make urging a person to give false testimony at an unemployment hearing (or any hearing) an unlawful practice. Therefore, Grzyb does not apply. The trial court's application of Grzyb to the facts of this case was wrong as a matter of law.

The position the Hills now take – that KRS Chapter 344 does not provide a cause of action against an employer for the employer's discharge of an employee for refusing to commit perjury – is in direct contravention of the position taken in their Complaint as set forth above. An examination of paragraphs 13 – 21 of the Hill's Third Amended Complaint discloses that the Hills brought a Civil Rights Complaint under

this precise theory. The Hills now, in effect, impeach their own pleading under the Civil Rights Act.[3] "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). The Hills, having pled that KRS Chapter 344 provides a remedy for discharge for refusing to commit perjury may not now argue that it does not.

We need not decide whether Chapter 344 actually provides a cause of action for discharge for refusal to commit perjury in an unemployment compensation hearing, because, based upon the pleadings of the Hills in the court below, for purposes of our review, we will presume that it does. From that, it follows that there is a statutory remedy for discharge for refusing to commit perjury, and that a common law wrongful discharge cause of action predicated upon the same facts is barred. Grzyb, supra. Based upon this, the trial court did not err in setting aside the jury verdict for common law wrongful discharge returned in the first trial.

RETRIAL ON DAMAGES

[3] We note that the jury instruction for this count was presented to the jury as follows: "You will find for Bob Hill[/Kim Hill] if you are satisfied from the evidence that Kim Hill opposed what she believed to be the Kentucky Lottery's violation of Ed Gilmore's civil rights and that this was a substantial factor in the Kentucky Lottery's decision to discharge Bob Hill but for which he[/she] would not have been discharged.

Interrogatory No. 2: Did the Kentucky Lottery discharge Bob Hill in retaliation for Kim Hill's opposition to what she believed to be the Kentucky Lottery's violation of Ed Gilmore's civil rights?

We next consider the Hills' contention that the trial court erred by granting KLC a new trial upon damages.

The damages instructions in the first trial may be summarized as follows. As to both plaintiffs, the jury was permitted to award damages for lost past earnings upon the favorable common law wrongful discharge verdict, the favorable civil rights retaliatory discharge verdict, and the favorable defamation verdict. The lost past earnings damage award was entered as a single sum on Verdict Form B. The same structure was set forth for lost future wages, and a single sum was entered on Verdict Form B representing lost future wages upon the three favorable verdicts. The same structure was used for punitive damages, and a single sum was entered on Verdict Form D applicable to the three favorable verdicts. Finally, on Verdict Form C, the jury was permitted to award "embarrassment, humiliation and mental anguish" damages in connection with the defamation verdict.

In summary, the damage awards for lost past earnings, lost future earnings, and punitive damages for the three favorable verdicts were each combined into a single sum. As previously discussed, the trial court appropriately granted judgment notwithstanding the verdict upon the common law wrongful discharge verdict and did not abuse its discretion in granting a new trial upon the defamation verdict.

After the foregoing is considered, only the Civil Rights Act retaliatory discharge claim survived, and the other two favorable verdicts did not survive. Since the damages associated with the nonsurviving verdicts were combined with the damages connected with the surviving verdict, there was no reasonable alternative to granting a retrial on damages. As such, the trial court did not abuse its discretion by so ordering. See Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 786 - 787 (Ky. 2004).

The Hills contend that because KLC tendered a combined jury instruction consistent with the instruction given by the trial court, this issue is not properly preserved because KLC "invited the error." We disagree.

The giving of a combined damages instruction was not itself "error." See Stringer, supra. The genesis of the "error," rather, lies within the underlying instructions giving rise to the favorable verdicts. By this measure, the Hills, not KLC, "invited the error" by seeking a common law wrongful discharge instruction and opposing a privilege instruction in connection with the defamation claim. As such, we assign no merit to the Hills' claim that they are entitled to windfall damage awards based upon nonsurviving verdicts because KLC "invited the error."

JURAL RIGHTS

The Hills contend that "[e]ven if this Court concludes that KRS 344.280 preempts the Hills' common-law wrongful discharge claim, that preemption is unconstitutional because it deprived the Hills of their jural right to seek punitive damages." We disagree.

We first note that the Hills have not cited us to their preservation of their challenge to the constitutionality of the Civil Rights Act by their compliance with KRS 418.075's procedural mandate that the Attorney General be notified of a constitutional challenge to the validity of a statute "before judgment is entered." KRS 418.075(1). See Adventist Health Systems v. Trude, 880 S.W.2d 539, 542 (Ky. 1994) (overruled on other grounds by Sisters of Charity Health Systems, Inc. v. Raikes, 984 S.W.2d 464 Ky. 1998); Mane v. Mary Chiles Hospital, 785 S.W.2d 480, 482 (Ky. 1990) ("It is our view that KRS 418.075 is mandatory and that strict enforcement of the statute will eliminate the procedural uncertainty.").

In any event, the Hills do not cite us to any precedent demonstrating that the common law prior to Kentucky's current Constitution permitted recovery of punitive damages in a public policy wrongful discharge case. Further, as public policy wrongful discharge is a recent innovation to the at-will doctrine, see Gryzb v. Evans, 700 S.W.2d 399, 402 (Ky. 1985), we

discern no application of the jural rights doctrine to the circumstances of this case.

ATTORNEY FEES

Following the second trial the Hills filed a motion for attorney fees pursuant to KRS 344.450 in the amount of $451,529.74. By order entered December 28, 2004, the trial court awarded the Hills attorney fees of $212,959.87. The Hills contend the trial court erred by reducing its requested fees. In its December 28, 2004, order the trial court addressed the issue of attorney fees as follows:

> As stated in Kentucky State Bank v. AG Services, Inc., Ky.App., 663 S.W.2d 754 (1984), the general rule is that attorney fees are not allowable as costs in absence of a statute or contract expressly providing for said fees. In this case, the Hills were successful on their retaliatory discharge claims under the KCRA. KRS 344.450 of the KCRA provides for the award of a reasonable fee for a successful plaintiff's attorney of record.
>
> While the Lottery does not object to the Hills being awarded attorney fees under KRS 344.450, it objects to the reasonableness of the claimed $451,529.74 amount and to certain specific charges being included in said amount. The Hills agree that their request needs to be offset by $1,507.50 pursuant to the Court's November 14, 2002 order, but disagree with the Lottery's other arguments.
>
> The acceptable method of calculating a reasonable attorney fee under KRS 344.450 was discussed in Meyers v. Chapman Printing Company, Inc., Ky., 840 S.W.2d 814 (1992).

"[T]he court should not undertake to adopt some arbitrary proportionate relationship between the amount of attorney fees awarded and the amount of damages awarded." Id. at 824-26. Instead, an attorney fee should be calculated by multiplying counsel's reasonable hours with a reasonable hourly rate to produce a "lodestar" figure, which may then be adjusted due to special factors in a particular case, such as the results obtained by counsel. Id. at 826.

As pointed out by the Lottery, the Hills were seeking over 6.7 million in damages and were awarded only $252,500 (less than five percent of the total sought). The jury found against the Hills on their claims of defamation, for which they were seeking punitive damages. Even though the Hills' claims of defamation were somewhat interrelated with their KCRA retaliatory discharge claims, the defamation claims had differing facts and were based on a separate legal theory. Consequently, due to the Hills' limited success at trial, the Court finds that it would be reasonable to reduce the amount for attorney fees ($451,529.74 - $1,507.50 = $450,022.24) by fifty percent, leaving a remaining amount of $225,011.12.

The Lottery is also seeking to have the fee award reduced by $25,877.50 to exclude the attorney fees associated with preparing for the August 8, 2002 trial date, which was continued at the Hills' request. The Hills argue that this reduction should be rejected because the time spent preparing for the August trial was necessary for the eventual trial in this matter. The Court agrees.

The Lottery is further seeking to have the fee award reduced by $10,745 to exclude fees charged by Laurence Zielke before he entered an appearance as counsel of record on December 2, 2002, since KRS 344.450 specifically reads "a reasonable fee for the plaintiff's attorney of record." The Hills

> contend that it would have been unethical for Mr. Zielke to walk into Court without examining the case and discussing it with his clients. The Court finds that the language in KRS 344.450 does not prevent the plaintiff's attorney of record from recovering fees spent on the case prior to appearing as counsel of record.
>
> The Lottery is also seeking to have the fee award reduced by $12,051.25 to exclude the attorney fees associated with the Hills' futile appeal of a non-final order. The Court agrees with the Lottery that said reduction in the attorney fee award is proper under such circumstances. Thus, the Court finds that a reasonable attorney fee in this case is $212,959.87 ($225,011.12 - $12,051.25 = 212,959.87).

When a statute authorizes the payment of attorney's fees, our standard of review is to determine whether the court abused its discretion. King v. Grecco, 111 S.W.3d 877, 883 (Ky.App. 2002). The only requirement for a court is that the award be "reasonable." Id. An attorney fee cannot be fixed with arithmetical accuracy. The factors to be considered are well summarized in Axton v. Vance, 207 Ky. 580, 269 S.W. 534, 536-537 (1925). Briefly stated, they are: (a) Amount and character of services rendered; (b) Labor, time, and trouble involved; (c) Nature and importance of the litigation or business in which the services were rendered; (d) Responsibility imposed; (e) The amount of money or the value of property affected by the controversy, or involved in the employment;

(f) Skill and experience called for in the performance of the services; (g) The professional character and standing of the attorneys; and (h) The results secured. See also Boden v. Boden, 268 S.W.2d 632, 633 (Ky. 1954).

The trial court was in the best position to observe the Hills' attorneys, to assess their competency, and to determine the value of their services to the Hills. The trial court's analysis as set forth above demonstrates that it carefully reviewed the relevant factors in establishing a reasonable attorney fee, and the deductions made from the initial "lodestar" calculation were within the trial court's discretion. Considering the pertinent factors, we find no abuse of discretion in the award of $212,959.87 for attorney fees.

KENTUCKY LOTTERY CORPORATION'S CROSS-APPEAL –

CASE NO. 2005-CA-000183-MR

Absolute Privilege

KLC contends that it was entitled to dismissal of the Hills' defamation claim because the statements contained in the August 1999 memoranda were subject to an absolute privilege. Because of our disposition of this issue in the Hill's direct appeal, this issue is moot, and we will not discuss this argument on the merits.

Post-Judgment Interest

KLC contends that it is not subject to post-judgment interest because it is a state agency for purposes of KRS 154A.020(1) and that, alternatively, if it is subject to interest, the trial court erred by imposing interest at a rate of 6 percent instead of 3.25 percent. The trial court addressed this issue as follows:

> Lastly, the Lottery argues that it is a state agency and is exempt from paying interest on judgments. The Hills disagree and argue that the Lottery is a municipal corporation and not a state agency performing the services of central government.
>
> In Kentucky Department of Corrections v. McCullough, Ky., 123 S.W.3d 130 (2004), the Supreme Court of Kentucky held that interest could not be awarded against the Commonwealth or its agencies in connection with a judgment obtained under the [Kentucky Civil Rights Act.] Thus, the issue is whether or not the Lottery is considered a state agency.
>
> KRS 154A.020 reads, in relevant part, as follows:
>
> > There is hereby created and established a state lottery which shall be administered by an independent, de jure municipal corporation and political subdivision of the Commonwealth of Kentucky which shall be a public body corporate and politic to be known as the Kentucky Lottery Corporation.
>
> The Lottery is administered by an eight-member board of directors, who are appointed by the Governor but act autonomously and can only be removed for cause. See KRS 154A.030. As such, the Lottery is not under

> the control of the central state government. Furthermore, pursuant to KRS 154A.140, the Lottery is to be self-sustaining and self-funded.
>
> Under the standard set forth in Kentucky Center for the Arts Corporation v. Berns, Ky., 801 S.W.2d 327 (1990), the court finds that the Lottery is not exempt from paying post-judgment interest under KRS 360.040, as it is a municipal corporation rather than a state governmental agency.
>
> Based upon the evidence presented by the Lottery at a hearing before the Court on October 11, 2004, post-judgment interest will be awarded at the rate of six percent rather than twelve percent.

KRS 360.040 provides as follows:

> A judgment shall bear twelve percent (12%) interest compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

However, it is well established in Kentucky that "the interest statute, KRS 360.040, has no application to judgments against state government or any of its subdivisions." Kenton County Fiscal Court v. Elfers, 981 S.W.2d 553, 560 (Ky.App.

1998). See also Commonwealth, Department of Transportation, Bureau of Highways v. Lamb, 549 S.W.2d 504 (Ky. 1976); Powell v. Board of Education of Harrodsburg, 829 S.W.2d 940 (Ky.App. 1991). This principles applies to judgments obtained against a subdivision of the state under the Kentucky Civil Rights Act, as here. As stated in Kentucky Dept. of Corrections v. McCullough, 123 S.W.3d 130, 140 (Ky. 2003):

> State agencies are not liable for interest "unless there is statutory authority or a contractual provision authorizing the payment of interest." Powell v. Board of Education of Harrodsburg, Ky.App., 829 S.W.2d 940, 941 (1992). Moreover, because of sovereign immunity principles, "a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified." Id. While the KCRA specifically provides that a plaintiff may recover costs, it makes no provision for interest. Therefore, we hold that interest may not be awarded against the Commonwealth or its agencies in connection with a judgment obtained under the KCRA.

Id. at 140.

Hence, we need only decide whether KLC is a subdivision of state government. If so, then the KLC is exempt from the interest provisions of KRS 360.040; if not, then it is not so exempt. The principle statute creating KLC, KRS 154A.020 provides, in relevant part, as follows:

> (1) There is hereby created and established a state lottery which shall be administered by an independent, de jure municipal

> corporation and political subdivision of the Commonwealth of Kentucky which shall be a public body corporate and politic to be known as the Kentucky Lottery Corporation. The corporation shall be deemed a public agency within the meaning of KRS 61.805 and 61.870.[4] This corporation shall be managed in such a manner that enables the people of the Commonwealth to benefit from its profits and to enjoy the best possible lottery games. The General Assembly hereby recognizes that the operations of a lottery are unique activities for state government and that a corporate structure will best enable the lottery to be managed in an entrepreneurial and business-like manner. It is the intent of the General Assembly that government programs and services shall not be mentioned in advertising or promoting a lottery. It is also the intent of the General Assembly that the Kentucky Lottery Corporation shall be accountable to the Governor, the General Assembly and the people of the Commonwealth through a system of audits, reports and thorough financial disclosure as required by this chapter.
>
> (2) The existence of the corporation shall begin only upon confirmation of the members of the board by the Senate as provided in KRS 154A.030. Until the time of such confirmation, no business shall be conducted on behalf of the lottery.

The fundamental rule in the interpretation and construction of a statute is that the court should "ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute

[4] KRS 61.800 – KRS 61.850 provides for open meetings of public agencies; KRS 61.870 – KRS 61.884 provides for open records of public agencies. Under these provisions, KLC is deemed to be a public agency for both of these purposes.

itself if possible." Moore v. Alsmiller, 289 Ky. 682, 160 S.W.2d 10, 12 (1942). Generally a statute is open to construction only if the language that is used is ambiguous and requires interpretation. If the language is clear and unambiguous and if applying the plain meaning of the words would not lead to an absurd result, further interpretation is unwarranted. Overnite Transportation v. Gaddis, 793 S.W.2d 129, 131 (Ky.App. 1990). However, when a statute is ambiguous and its meaning uncertain, the legislative intent should be ascertained by considering the whole statute and the purpose intended to be accomplished. Department of Motor Transportation. v. City Bus Co., 252 S.W.2d 46, 47 (Ky. 1952). In construing the statute, the court must consider the policy and the purpose of the statute, the reason and the spirit of the statute, and the mischief intended to be remedied. Barker v. Commonwealth, 32 S.W.3d 515, 516-17 (KY.App. 2000). The court's interpretation of the statute should produce a practical and reasonable result. Walker v. Kentucky Department of Education, 981 S.W.2d 128, 130 (Ky.App. 1998). Statutes should not be interpreted so as to bring about absurd or unreasonable results." Estes v. Commonwealth, 952 S.W.2d 701, 703 (Ky. 1997).

KRS 154A.020 specifically provides that KLC is to be considered a public agency for purposes of open meetings and open records legislation. Consistent with this, in Kentucky

Lottery Corp. v. Stewart, 41 S.W.3d 860 (Ky.App. 2001), an open records case, this Court repeatedly referred to KLC as a state agency.

However, KRS 154A.020 also refers to the KLC as being a "municipal corporation." In Kentucky Center for the Arts Corporation v. Berns, 801 S.W.2d 327 (Ky. 1990), the Supreme Court stated as follows with respect to municipal corporations and their entitlement to sovereign immunity protections, the underpinning for excluding state agencies from the interest statute:

> Municipal corporations are local entities created by act of the General Assembly and not agencies performing the services of central state government. As such they do not qualify for sovereign immunity. The term "municipal corporation" is not limited to a city, and it is not only a city that "is no longer immune from suit for tort liability" although there is language in Louisville Metro. Sewer District v. Simpson, [730 S.W.2d 939, 940 (Ky. 1987)] that might be construed to suggest otherwise. On the contrary, as stated in Rash v. Louisville & Jefferson County Metro. S. Dist., 309 Ky. 442, 217 S.W.2d 232, 236 (1949), a "municipal corporation" means nothing more than a local government entity created by the state to carry out "designated" functions. In Stephenson v. Louisville & Jefferson County Bd. of Health, Ky., 389 S.W.2d 637, 638 (1965), we held that "the Board of Health is a municipal corporation," and then stated: "Since it is such a governmental unit, it falls squarely under the decision in Haney v. City of Lexington, Ky., 386 S.W.2d 738 (decided May 22, 1964),

> and consequently cannot claim governmental immunity." Id.
>
> The line between what is a state agency and what is a municipal corporation is not divided by whether the entity created by state statute is or is not a city, but whether, when viewed as a whole, the entity is carrying out a function integral to state government. We use by analogy the language in Kentucky Region Eight v. Commonwealth, Ky., 507 S.W.2d 489, 491 (1974), holding that sovereign immunity should extend only to "departments, boards or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure."

While KLC presents persuasive arguments in favor of excluding it from the interest statute, and we note that KLC performs a function integral to state government (raising budgetary revenues) for two primary reasons we construe it as not being so excluded. First, KRS 154A.020 specifically designated KLC as being established as a "municipal corporation," and we must presume that the legislature was aware of the pre-1988 holdings excluding municipal corporations from sovereign immunity. See e.g., Haney v. City of Lexington, supra. Hence by classifying KLC as a municipal corporation, and not elsewhere providing it with the protections of sovereign immunity, we must also presume that the legislature did not intend to cloak KLC with sovereign immunity.

The second reason we are persuaded that KLC is subject to the interest statute is that the legislature chose to

specifically provide that KLC is to be deemed a state agency for purposes of open records and open meeting legislation, but did not provide for it being considered a state agency in the context at hand. We must presume that had the legislature intended to include KLC as a state agency for purposes of the interest statute, it would have done so by including legislative language similar to that employed in classifying it as a state agency for open records and open meeting purposes. A general rule of statutory construction is that enumeration of particular things excludes other items which are not specifically mentioned. See, e.g., Louisville Water Co. v. Wells, 664 S.W.2d 525, 527 (Ky.App. 1984). Inasmuch as the legislature did not so include sovereign immunity protections in the KLC legislative scheme, we believe it to be subject to the interest statute.

KLC argues in the alternative that if it is subject to the interest statute, interest should have been imposed at an interest rate of 3.25 percent rather than the 6 percent rate imposed by the trial court.

KRS 360.040 provides a mechanism for reducing the statutory rate of 12 percent if the trial court is satisfied that the equities require a reduction. Here, following a hearing, the trial court reduced the rate to 6 percent. Owensboro Mercy Health System v. Payne, 24 S.W.3d 675 (Ky.App. 2000) makes clear that the decision is entrusted to the trial

judge's discretion. We are not persuaded that the trial court abused its discretion by setting post-judgment interest at 6 percent rather than the 3.25 percent rate sought by KLC.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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