RENDERED: JULY 20, 2007; 2:00 P.M.

ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT:
APRIL 16, 2008
(FILE NO. 2007-SC-0562-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001301-MR

ROSIETTA TAYLOR AND LINDA
CANNON, CO-ADMINISTRATORS OF THE
ESTATE OF JAMES EDWARD TAYLOR — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 02-CI-009354

DET. MIKE O'NEIL; LOUISVILLE
DIVISION OF POLICE; CITY OF
LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT — APPELLEES

AND: NO. 2005-CA-001385-MR

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT, THE
SUCCESSOR IN INTEREST TO THE CITY
OF LOUISVILLE, ON BEHALF OF ITSELF
AND THE METRO POLICE DEPARTMENT — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
v. ACTION NO. 02-CI-009354

ROSIETTA TAYLOR AND LINDA
CANNON, CO-ADMINISTRATORS OF
THE ESTATE OF JAMES EDWARD
TAYLOR CROSS-APPELLEES

AND: NO. 2005-CA-001438-MR

DET. MIKE O'NEIL CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 02-CI-009354

ROSIETTA TAYLOR AND LINDA
CANNON, CO-ADMINISTRATORS OF
ESTATE OF JAMES EDWARD TAYLOR CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

WINE, JUDGE: On December 23, 2003, Rosietta Taylor and Linda Cannon brought a wrongful death action on behalf of the Estate of James Edward Taylor ("Estate") against the City of Louisville ("City"), the Louisville Metro Police Department ("LMPD") and Detectives Mike O'Neil ("O'Neil") and Brian Luckett ("Luckett") of the Louisville Police Department. The claim arose from the December 5, 2002, shooting of James Taylor by O'Neil. In addition to the wrongful death claim, the Estate also asserted that the City had failed to adequately train and supervise its officers in the use of deadly force.

Prior to trial, the court granted summary judgment dismissing the claims against Luckett. That order has not been appealed. The matter proceeded to a jury trial in May 2005. At the conclusion of the evidence, the trial court instructed the jury on the wrongful death claim and on the City's liability for failure to train. However, the court declined the Estate's instruction that the City could be liable for negligent failure to train independent of O'Neil's personal liability. The jury found that O'Neil's use of deadly force was justified under the circumstances. Consequently, the trial court entered a judgment in favor of the City and O'Neil. This appeal and the two cross-appeals followed.

On appeal, the Estate argues that the Appellees improperly used peremptory challenges to strike African-American jurors from the panel, that it was entitled to a jury instruction on its independent negligence claim against the City, that it was entitled to directed verdicts on its claims against the City and O'Neil, and that the trial court should

have granted a mistrial based on improper comments during opening statements. In its cross-appeal, the Louisville/Jefferson County Metro Government, the successor in interest to the City, argues that the Estate failed to present sufficient evidence on the failure-to-train claim. In his cross-appeal, O'Neil argues that the trial court erroneously instructed the jury on self-defense and damages for the destruction of Taylor's capacity to earn money. We find no error on any of the issues raised in the direct appeal or the City's cross-appeal. Consequently, the issues raised in O'Neil's cross-appeal are moot. Hence, we affirm the trial court's judgment confirming the jury's verdict.

While the details of Taylor's death are disputed, the circumstances are not. During the evening of December 5, 2002, O'Neil and Luckett went to 713 East St. Catherine Street in Louisville to investigate a crime. A resident told the officers that the woman they were seeking was located next door, at 709 East St. Catherine Street. As the officers approached the building, they heard screaming coming from one of the apartments. They followed the noise to Taylor's one-room apartment. As he was approaching the door, O'Neil heard a female voice say the word "knife."

The door was open and Luckett could see Taylor inside with his fists clenched. O'Neil saw crack pipes on the table. In addition to Taylor, there were four other individuals in the apartment: Cannise Phoenix ("Phoenix"), Derrick Spaulding ("Spaulding"), Ricky Dunn ("Dunn") and Rhonda Maddox ("Maddox"). Phoenix was screaming that she was not going to let Taylor cut her.

When Taylor saw the officers, he attempted to close the door. Depending upon the witnesses' accounts, Luckett either prevented the door from fully closing or Taylor reopened the door and allowed the officers to enter. By all accounts, Taylor was very agitated and appeared intoxicated. Upon entering the apartment, Luckett grabbed Taylor's arms, walked him across the room, and sat him down in an armchair. Luckett then handcuffed Taylor's arms behind his back.

O'Neil conducted pat down searches of Spaulding and Dunn, while Luckett kept watch over Taylor and listened to Phoenix. According to Phoenix, she and Taylor had been drinking and using drugs all day. Taylor had given Phoenix money to buy crack cocaine, and Taylor believed that Phoenix had stolen the money. Phoenix stated that Taylor had cursed her, pulled a knife and threatened to cut her.

While O'Neil was searching Spaulding and Dunn, Taylor attempted to get out of his chair several times. Luckett was able to push him back down. However, Taylor managed to move his hands around to his side and retrieve a box cutter knife from his pocket. Taylor got up and began advancing toward the officers. O'Neil pulled out his weapon and ordered Taylor to stop and drop the knife. Taylor refused to stop and attempted to slash Luckett. Several witnesses testified that Taylor cursed and challenged the officers, saying "come on," or "come and get me."

At this point, the accounts vary somewhat. O'Neil and Luckett testified that O'Neil unsuccessfully tried to kick the knife out of Taylor's hand. Other witnesses dispute this account. By this point, Luckett had backed up to the doorway and O'Neil

had backed into a corner. Taylor continued to advance on O'Neil. O'Neil fired one shot, hitting Taylor in the chest. Taylor slumped forward or turned sideways, depending on accounts, but did not stop. O'Neil then fired again, shooting Taylor ten more times.

Despite the shots, Taylor was still standing and the box cutter was in his hands. O'Neil again kicked at Taylor. Taylor fell backward and over a small table. He died at the scene.

The shooting of a 59-year old, handcuffed, African-American man by a white police officer prompted considerable controversy in the Louisville area. Due to the intense pre-trial publicity, the parties agreed to a jury questionnaire to help with *voir dire*. Included in the questionnaire was Question Number 50 which read as follows:

> Do you believe it is impossible for a man in handcuffs to pose a threat of death or serious bodily injury to a police officer?

The panel began with a venire of one hundred people, eight of whom were African-American. After strikes for cause, four African-American jurors remained among the twenty-six who were randomly selected. Independently, the City and O'Neil each used their peremptory challenges to exclude these four African-American jurors, in addition to three non-African-American jurors. The Estate objected, arguing that the City and O'Neil had used their peremptory challenges to improperly exclude African-American jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1722-24, 90 L. Ed. 2d 69 (1986). All of the African-American jurors who were stricken had answered "yes" to Question 50. But after considering defense counsels'

explanations, the trial court found that the defense had given adequate race-neutral reasons for the strikes.

In *Batson*, *supra*, the United States Supreme Court held that the use of peremptory challenges based on race is improper. Although *Batson* was a criminal case, the rule applies equally to civil litigation. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). *See also Washington v. Goodman*, 830 S.W.2d 398, 400-02 (1992). The Court in *Batson* set out a three-step process to evaluate whether a prosecutor's use of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Batson*, 476 U.S. at 96-98, 106 S. Ct. at 1722-24. First, the party opposing the strike must make a *prima facie* showing that the opposing attorney has exercised a peremptory challenge based on race. *Id.* at 96-97, 106 S. Ct. at 1723. Second, if such a *prima facie* showing has been made, the burden shifts to the party making the strike to articulate a race-neutral explanation for striking the juror in question. *Id.* at 97-98, 106 S. Ct. at 1723-24. Third, the trial court must determine whether the party opposing the strike has carried the burden of proving purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724. *See also McPherson v. Commonwealth*, 171 S.W.3d 1 (Ky. 2005).

"Numbers alone cannot form the only basis for a *prima facie* showing." *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989). In determining whether counsel has used peremptory strikes in a discriminatory manner, the test is whether the party has a good faith belief in the information and can articulate the reason to the trial

court in a race-neutral manner. *Commonwealth v. Snodgrass,* 831 S.W.2d 176, 179 (Ky. 1992). As with the state of mind of a juror, evaluation of counsel's state of mind, as well as the proffered reasons for the peremptory challenge, lies "peculiarly within a trial judge's province." *Id., citing Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). "A trial court's ruling on a *Batson* challenge will not be disturbed unless clearly erroneous." *Washington v. Commonwealth*, 34 S.W.3d 376, 380 (Ky. 2000).

The Estate argues that the defendants' proffered reasons were clearly a pretext for purposeful discrimination in light of the totality of the circumstances. *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 2324-25, 162 L. Ed. 2d 196 (2005). But in *Miller-El*, there were compelling reasons to reject the prosecution's explanation for its use of peremptory challenges. First, the prosecution had repeatedly sought a "jury shuffle" to manipulate the number of African-Americans on the venire. Second, the prosecution marked the race of the jurors on the jury forms. Third, the prosecution used disparate tactics in conducting *voir dire* of African-American jurors *vis-a-vis* white jurors. Fourth, the prosecution mischaracterized the responses of the African-American jurors to justify the strikes. Fifth, the prosecution used peremptory challenges to strike ten of the eleven African-Americans on the panel. Sixth, many of the prosecution's stated reasons for excluding African-Americans could be applied equally to whites. And finally, the defense presented evidence that the prosecutor's office had adopted a formal policy to exclude minorities from jury service. Given this compelling evidence, the

Supreme Court concluded that the trial court clearly erred in finding that the state had articulated legitimate, non-pretextual reasons for its use of peremptory strikes. *Id.* at 253-266, 125 S. Ct. at 2332-40.

In this case, the Estate focuses on three factors. First, the City's counsel circled the race of all members of the venire on the jury questionnaire forms. However, unlike the forms in *Miller-El* on which the prosecution noted the juror's race, the forms used in this action required the juror to indicate his/her race. Second, the City and O'Neil used peremptory challenges to exclude all four African-Americans left on the final venire. And third, the Estate contends that the City and O'Neil chose not to use peremptory challenges against a number of white panel members who also answered "yes" to Question 50.

The first two factors do not definitely establish pretext absent other circumstances supporting that inference. As for the third factor, *Miller-El* notes that "[i]f [counsel's] proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* at 241, 125 S.Ct. at 2325. However, defense counsel articulated reasons other than the responses to Question 50 for striking the African-American jurors. By coincidence, the City and O'Neil each used a peremptory strike for Juror #107927 because she also stated that she could accept the witnesses' testimony that their earlier statements to police were influenced by duress. Juror #115078 struck by O'Neil made similar answers, and also

stated that she had formed an opinion about the case based on pre-trial publicity. O'Neil used a peremptory strike for Juror #89092 because she believed that police officers treat African-Americans differently than they treat Caucasians. After reconsidering the jurors' answers, the Estate withdrew its objection to the City's use of a peremptory strike for Juror #122134.

As in *Miller-El*, the Estate identifies a number of white panelists who made similar responses to Question 50. But none of these prospective jurors had the same combinations of objectionable answers.[1] And unlike in *Miller-El*, there were no other circumstances which would compel a finding that the City and O'Neil used their peremptory challenges in a racially discriminatory manner. Since the trial court was in the best position to evaluate the conduct and credibility of the parties, the Estate has not shown the trial court's conclusion to be wrong to a clear and convincing degree. *Id.* at 266, 125 S. Ct. at 2340. Therefore, trial court did not clearly err in finding that the City and O'Neil used their peremptory challenges in an appropriate manner.

The central issue in this case concerns the sufficiency of the evidence on the Estate's claims against O'Neil and the City. The Estate, O'Neil and the City each

[1] The estate points to Juror #96548, a white panelist who answered "yes" to Question 50. Juror #96548 also answered that police officers "could" treat criminal suspects differently in low income neighborhoods than in middle or high income neighborhoods. And in response to the question, "If you have an opinion as to whether Officer O'Neil was justified in shooting Mr. Taylor please express that opinion," Juror #96548 answered, "I don't think it should have gone that far." Despite these answers, neither the City nor O'Neil used a peremptory challenge to exclude Juror #96548, and she was ultimately selected for the jury. While these responses are similar to those given by the stricken African-American panelists, they are much more equivocal. Therefore, we cannot say that Juror #96548 was "similarly situated" to the stricken jurors.

presented expert testimony to evaluate O'Neil's conduct and the City's training program. The Estate presented the testimony of Melvin Tucker ("Tucker"), a former FBI agent and chief of police. He has extensive experience in training police officers in the use of force. Tucker was of the opinion that the police department's program failed to adequately train officers how to respond to fear when considering the use of deadly force.

Tucker specifically criticized the City's use of Pressure Point Control Tactics (PPCT) Management System, Inc.'s *Spontaneous Knife Defense* system course. Rather, Tucker endorsed the program published by the International Association of Police Chiefs as more compliant with the standards for use of deadly force enunciated by the United States Supreme Court in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). However, he admitted that there is no uniform standard for police training.

Tucker was of the opinion that the City failed to properly train O'Neil in the use of deadly force. He believed that O'Neil should have grabbed Taylor and restrained him without the use of a firearm. In the alternative, Tucker stated that O'Neil could have retreated from the apartment. Tucker further opined that O'Neil's decision to shoot was an overreaction to the actual threat which Taylor presented.

In response to this testimony, O'Neil and the City presented the testimony of Sergeant Alex Payne ("Sgt. Payne") and Officer William Weedman, who are both instructors for Kentucky police. Sgt. Payne testified that he has received training in and has taught PCCT's *Spontaneous Knife Defense* system. He disputed Tucker's criticism

of the PCCT system, stating that the program teaches the effects and management of stressful situations. Sgt. Payne stated that the PCCT program provides that when an officer is faced with an edged-weapon assault, the officer should first give a verbal command to drop the weapon. If the person does not obey, the officer should then fire his weapon until the attack stops. He rejected Tucker's opinion that O'Neil should have grabbed Taylor, stating that an unarmed response to an edged weapon is only appropriate when an officer cannot use a firearm. Likewise, he disagreed with Tucker that O'Neil should have retreated. Rather, Sgt. Payne was of the opinion that O'Neil responded as trained and appropriately under the circumstances.

Officer Weedman agreed with Sgt. Payne's assessment. In addition, Officer Weedman testified the City's training program is approved by the Kentucky Law Enforcement Council. He further added that the Council and the Department of Criminal Justice specifically require the use of the PCCT's *Spontaneous Knife Defense* system course in police training. *See* 503 KAR 1:110 § 5(b)3b.

The Estate argues that it was entitled to a directed verdict against O'Neil and the City. The Estate contends that Tucker's testimony conclusively establishes that neither the City's training program nor O'Neil's actions complied with the "objectively reasonable" standard required by the United States Supreme Court in *Graham*, 490 U.S. at 396-98, 109 S. Ct. at 1871-73. Conversely, O'Neil and the City contend that they were entitled to directed verdicts. Based on the testimony of Sgt. Payne and Officer

Weedman, they assert that the City's training program complies with the standards adopted by Kentucky law enforcement, and O'Neil acted in accordance with his training.

In ruling on a motion for a directed verdict, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable [inference] that the evidence can justify." *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991). A directed verdict must not be entered "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). "On appeal, the appellate court considers the evidence in the same light." *Lovins*, 814 S.W.2d at 922. But "[o]nce the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). Following this standard, we cannot find that the trial court clearly erred by allowing the Estate's claims to go to the jury.

First, there were significant factual disputes concerning what actually happened in Taylor's apartment that night. There was conflicting evidence about Taylor's ability to pose a threat to the officers. As the Estate notes, Taylor was a 59-year old man, weighed 159 pounds, was in poor health, was handcuffed, and was under the influence of alcohol and crack cocaine. Earlier in the incident, Luckett was able to easily restrain Taylor. On the other hand, O'Neil and Luckett testified that Taylor voiced

threats to them as he advanced. But other witnesses did not hear this. There was conflicting testimony as to whether O'Neil attempted to kick the knife out of Taylor's hands. Finally, the parties disputed whether Taylor continued to pose a threat after O'Neil fired the first shot. These factual issues were relevant to determine whether O'Neil acted reasonably in shooting Taylor.

Moreover, none of the expert testimony compelled or precluded a finding of liability. While Tucker criticized the City's use of the PCCT system in its training program, he conceded that there is no national standard for training. He also admitted that he had not reviewed all of the City's training materials or the applicable statutes in Kentucky. Furthermore, Sgt. Payne and Officer Weedman both disputed Tucker's claim that the PCCT system does not adequately train officers to handle fear.

But conversely, we disagree with the City that Tucker's testimony was insufficient to create a jury issue on the reasonableness of its training program. The City concedes that Tucker was properly qualified as an expert witness. The disputes over his methods went to the weight and credibility of his testimony, not to its admissibility. Furthermore, the United States Supreme Court has mandated an "objective reasonableness" test in police shooting cases. *Graham*, 490 U.S. at 398-99, 109 S.Ct. at 1872-73. The Commonwealth is not entitled to a presumption of reasonableness if it adopts a training system which fails to meet this standard. *See Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 411 (Ky. 1998). ("We agree that if an industry adopts careless methods, it cannot be permitted to set its own uncontrolled standard.")

Likewise, O'Neil's adherence to his training would not insulate him from liability if the methods he employed were not objectively reasonable under the circumstances. Tucker's testimony was sufficient to place at issue the reasonableness of the City's procedures and O'Neil's actions. *See also Cassady v. Tackett*, 938 F.2d 693 (6th Cir. 1991). Therefore, the trial court properly submitted the issue of liability to the jury.

The Estate next argues that the trial court erred by failing to instruct the jury that the City could be independently liable for failure to adequately train its officers in the use of deadly force. In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978), the United States Supreme Court held that a municipality is liable under 42 U.S.C. § 1983 only when execution of its policy or custom causes a plaintiff to suffer constitutional injury. Since *Monell*, the Court has held that a municipality may be liable for a police shooting allegedly caused by inadequate training only where there is proof that the shooting "was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 824, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791 (1985). Municipal liability under § 1983 is separate and distinct from *respondeat superior* or vicarious liability. *Monell*, 436 U.S. at 694-95, 98 S. Ct. at 2037-38. *See also City of Canton, Ohio v. Harris*, 489 U.S. 378, 387, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989).

In this case, however, the Estate is not asserting a claim against the City based upon 42 U.S.C. § 1983. Rather, the Estate states that it may assert such a claim

against the City under Kentucky negligence law. Thus, the Estate asserts that the City could be liable even if the jury determined that O'Neil had acted in accordance with his training if there was proof that the City had negligently trained its officers in the use of deadly force.

There are no Kentucky cases holding that an employer may be independently liable for an injury caused by its failure to adequately train or supervise an employee. In most cases, rather, the employer's liability for the negligence or intentional acts of an employee within the scope of his employment rests upon doctrines of *respondeat superior* or vicarious liability. Unless negligence on the part of an employee is shown, a plaintiff cannot recover against the employer. *See Bowling Green-Hopkinsville Bus Co., Inc. v. Adams*, 261 S.W.2d 14, 15 (Ky. 1953).

The Estate submits several cases from other jurisdictions which have allowed state law claims against an employer which are not contingent upon the employee's liability. But in these cases, the employer's liability must be predicated on acts of the employer which are independent of the negligent or intentional acts of the employee. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580, 584 (1987); *Skalos v. Higgins*, 303 Pa. Super. 107, 449 A.2d 601, 603-04 (1982). Furthermore, "[t]o support a claim for negligent training[,] the plaintiff must show that a specific training addressing a specific problem was necessary, that the employer failed to provide such training and, most importantly, that there is a causal connection between the lack of such training and

plaintiff's injury." *Glover v. TransCor America, Inc.*, 57 F. Supp. 2d 1240, 1245 (D. Wyo. 1999).

Even if Kentucky would recognize an independent negligence claim against an employer for failure to train or supervise, the Estate could not recover against the City under this standard. On the wrongful death claim, the trial court instructed the jury that it could find for the Estate unless it was satisfied by the evidence that, at the time O'Neil shot Taylor:

> 1. Detective O'Neil had reasonable grounds to believe, and in good faith did believe, that he was in immediate danger of serious physical injury or death about to be inflicted upon him by James Taylor; and
>
> 2. Detective O'Neil did not use any more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect himself from such harm or apparent harm . . . .

Although O'Neil's potential liability was based on an intentional act and the City's on negligence, both parties' liability was based on the same objective standard. Under these instructions, the jury had to consider whether O'Neil acted reasonably in using deadly force to protect himself from Taylor. While his training was clearly a factor to be considered in determining the reasonableness of his reaction, that standard was not tied to the City's training. The trial court separately, and correctly, instructed the jury that O'Neil was required to "exercise the degree of care and skill expected of a reasonably competent police officer acting under similar circumstances with due regard to the safety and well-being of others . . . ." The jury found that O'Neil complied with

this standard. Thus, even if the jury found that the City's training program was deficient, the jury's finding for O'Neil would preclude a finding that the City's negligence caused the injury. Consequently, the trial court properly refused to instruct the jury on a separate negligence claim against the City.

Finally, the Estate argues that the trial court should have granted a mistrial due to an improper comment by O'Neil's counsel. During his opening statement, O'Neil's counsel informed the jury that Taylor had been convicted of manslaughter. The Estate objected and moved for a mistrial. O'Neil's counsel responded that this evidence was relevant to the Estate's claim for the destruction of Taylor's power to earn money. The trial court denied the motion for a mistrial, but later admonished the jury that opening statements are not evidence.

The purpose of opening statements is to allow each party to outline for the jury what they expect the proof will be during the trial. And while the parties are given reasonable latitude during opening statements, their statements should not contain references to plainly inadmissible matters or to anything that may tend to unduly prejudice the opposing party. *See Mills v. Commonwealth*, 310 Ky. 240, 243, 220 S.W. 2d 376, 378 (1949). But a trial court should grant a mistrial only for manifest necessity. *Turpin v. Commonwealth*, 780 S.W.2d 619, 621 (Ky. 1989), *abrogated on other grounds in Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993). "For the purpose of appellate review, the trial judge is always recognized as the person best situated to properly evaluate . . . when a mistrial is required." *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76

(Ky. 2001). Thus, a trial court's decision to declare or deny a mistrial should not be disturbed absent an abuse of discretion. *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993). Under the circumstances of this case, we cannot find that manifest necessity compelled a mistrial.

The Estate argues that the prejudicial effect of this statement far outweighs its probative value. KRE 404(b). The Estate notes that O'Neil was not aware of Taylor's criminal record at the time of the shooting, so it could not have been a factor in determining the reasonableness of his actions. But again, the statement was not made for this purpose. Rather, the statement was made (and the evidence was subsequently offered) to refute the Estate's claim for damages for the destruction of Taylor's power to earn money. That evidence was plainly relevant to the issues in dispute. Furthermore, there is no indication that O'Neil's counsel made the statement to inflame the jury's passions or prejudices. Under the circumstances, we cannot find that the trial court abused its discretion by denying the Estate's motion for a mistrial.

In conclusion, we find no basis for setting aside the jury's verdict and remanding for a new trial. The Estate has failed to show that the City or O'Neil improperly used their peremptory challenges. Furthermore, we find that the jury was properly instructed and the issue of liability was properly submitted to the jury. Finally, the statements by O'Neil's counsel during opening statements did not cause any unfair prejudice to the Estate. And since the jury found that O'Neil was justified in shooting

Taylor, we need not address the issues raised in O'Neil's cross-appeal concerning the burden of proof and sufficiency of the evidence of damages.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS/CROSS-APPELLEES, ROSIETTA TAYLOR AND LINDA CANNON, CO-ADMINISTRATORS OF THE ESTATE OF JAMES E. TAYLOR:

Aubrey Williams
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT, MIKE O'NEIL, DET.:

Frank F. Chuppe
Michael W. McClain
Jennifer Starr
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT, MIKE O'NEIL, DET.:

Frank F. Chuppe

BRIEFS FOR APPELLEES/CROSS-APPELLANTS, LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ON BEHALF OF ITSELF AND THE METRO POLICE DEPARTMENT:

Irv Maze
Jefferson County Attorney

B. Frank Radmacher, III
Assistant Jefferson County Attorney
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES/CROSS-APPELLANTS, LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ON BEHALF OF ITSELF AND THE METRO POLICE DEPARTMENT:

B. Frank Radmacher, III