SUPREME COURT OF KENTUCKY
NO. 2006-SC-0748-DG
NO. 2008-SC-0380-D

KIMBERLY G. HILL and
ROBERT W. HILL — MOVANTS
CROSS-MOVANTS

v.

KENTUCKY LOTTERY CORPORATION — RESPONDENT
CROSS-RESPONDENT

BRIEF OF MOVANTS, CROSS-MOVANTS KIMBERLY G. HILL and ROBERT W. HILL

COURT OF APPEALS NO. 2005-CA-000111 and NO. 2005-CA-000183
JEFFERSON CIRCUIT COURT NO. 2000-CI-4922

Certificate of Service

I certify that a true and correct copy of this Brief has been mailed via U.S. Mail this the 10th day of November, 2008, to: Jan West, Goldberg & Simpson, 9301 Dayflower St. Louisville, KY 40059.

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INTRODUCTION

This case, brought by wrongfully terminated employees of the Kentucky Lottery, Robert and Kimberly Hill, has been tried twice and appealed twice on numerous issues including, but not limited to, whether employees may have both a common-law wrongful discharge claim for refusal to commit perjury and a statutory wrongful discharge claim under the Kentucky Civil Rights Act, whether a combined damage instruction requires a second trial when it was not objected to at the first trial, and whether a trial court may extend its own jurisdiction for 88 days after entry of a Final Judgment. The Lottery has also filed for discretionary review but did not appeal liability for wrongful termination.

STATEMENT CONCERNING ORAL ARGUMENT

Because the issues in this case are numerous and complex, oral argument may assist the Court; the Hills would welcome the opportunity to participate in an oral argument if the Court so desires.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The question before this Court is whether the trial court erred when it set aside the jury verdict entered in 2002 awarding Bob and Kim Hill a total of $4,352,316 for wrongs committed by their employer, the Kentucky Lottery. The 2002 jury verdict was based on three counts all correctly before the jury: (1) Wrongful termination in violation of a fundamental public policy right to refuse to perjure oneself, (2) Violation of the Kentucky Civil Rights Act and (3) Defamation. After the 2002 jury reached its verdict, the trial court entered a judgment of $2,654,450 on motion of the Lottery that did not reflect the jury verdict; later, it heard post trial motions from both parties seeking to vacate, modify or amend the same judgment it tendered. Several months later, the trial court entered a judgment acting on the Hills' motion that reflected the jury verdict of $4,352,316. Then, it waited 88 days and ordered a new trial. That second trial was unnecessary and contrary to law. It was tried in 2004 on limited issues of damages and defamation. The Lottery did not appeal the wrongful termination liability verdict, thus conceding that it is liable to the Hills. The Hills, however, implore this Court to uphold the 2002 jury verdict because, *inter alia*, a trial court must not extend its own post-trial jurisdiction beyond that granted by law and must follow the dictates reached by this Court in *Craig & Bishop, Inc. v. Piles et al*, 247 S.W.3d 897 (Ky. 2008) and *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985).

Appellants, Bob and Kim Hill, began working for the Kentucky Lottery Corporation ("the Lottery") in 1989,[1] the year it first started operations. Bob and Kim met through their work for the Lottery.[2] At the time they started dating in 1994, Kim was living in Louisville. In 1995, she moved to Paducah, where Bob, a lifelong resident, lived

[1] Trial 1, Tape B2, 12/3/02 at 13:44:30-43.
[2] Trial 1, Tape B4, 12/11/02 at 13:42:58-43:20.

and worked.[3] They were married in April 1999.

Both Bob and Kim had good jobs that paid well and provided good benefits. Bob was a sales representative[4] and Kim was a machine repair technician.[5] They planned to stay with the Lottery until they retired. But everything fell apart for the Hills when Kim was subpoenaed to testify on behalf of Ed Gilmore, a discharged Lottery employee, at his unemployment hearing.[6] The Lottery pressured Kim to testify that Gilmore, who was legally blind, was not disabled and was not discharged because he was disabled.[7] Under threats to her job and to Bob's job, the Lottery required Kim to commit perjury and to state that the Lottery terminated Gilmore for misconduct and therefore should not be liable for his unemployment compensation. Despite the Lottery's threats to her job and to Bob's job,[8] Kim refused to commit perjury and testified truthfully.[9] Gilmore received his unemployment compensation.

After a campaign of harassment and intimidation, the Lottery fired both Kim and Bob. While their official termination letters were neutral, unbeknownst to the Hills, the Lottery planted a secret, undelivered preliminary memorandum listing reasons for their termination in each of their employment files.[10] As found by the jury, these preliminary termination memoranda contained false and defaming statements, including charges of fraud and forgery.[11] The Lottery disclosed the preliminary memoranda to WLKY Channel 32 in response to an open-records request, which broadcast the memoranda's

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[3] Trial 1, Tape B2, 12/3/02 at 13:47:40-47.
[4] Trial 1, Tape B4, 12/11/02 at 13:43:20-40.
[5] Trial 1, Tape B2, 12/3/02 at 13:47:40-50.
[6] *Id.* at 16:31:00-20.
[7] *Id.* at 15:31:30-32:30.
[8] *Id.* at 15:33:45-37:30.
[9] *Id.* at 16:35:20-36:20.
[10] Plaintiffs' Trial Exhibits #'s 26 and 35.
[11] TR Vol. 8 at 1111, 1124.

defaming charges on the evening news,[12] further devastating Bob and Kim's formerly happy life.

A jury of their peers found that the Lottery was guilty of unlawful retaliation in violation of KRS 344.280, common-law wrongful discharge for firing Bob and Kim for Kim's refusal to lie at Gilmore's unemployment hearing, and defamation.[13] In addition to lost past and future wages, the jury also awarded both Bob and Kim damages for mental anguish caused by the Lottery's defamation and wrongful termination, and it assessed punitive damages against the Lottery. In total, the jury awarded damages to Bob in the amount of $2,654,450.00 and to Kim in the amount of $1,697,866.00 for a total of $4,352,316. *Id.* The jury returned these verdicts on December 18, 2002.

On December 26, the Lottery filed a motion without any memorandum, supporting facts or law for relief under CR 50.02, 59.01, and CR 59.05.[14] No grounds or law were stated in the motion. With this motion, the Lottery also tendered a final judgment that awarded the Hills total damages of $2,654,450.[15] Without explanation, the trial court entered the Lottery's tendered judgment, which was inconsistent with the jury verdicts, on January 21, 2003.[16]

On January 23, the Hills filed a motion to vacate the January 21st judgment and to enter judgments in the Hills' favor consistent with the jury's verdict.[17] On January 31, the Lottery filed what it labeled an "Amended Motion for Judgment Notwithstanding the

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[12] Plaintiffs' Exhibit # 24
[13] TR Vol. 8 at 1107-33.
[14] TR Vol. 7 at 988.
[15] *Id.* at 989.
[16] *Id.*
[17] TR Vol. 8 at 1155-56.

Verdict Motion for New Trial/Motion to Alter Amend or Vacate Judgment."[18] On May 12, the trial court granted the Hills' motion to vacate the January 21st judgment.[19] On the same day, the trial court rendered separate judgments in both Bob and Kim's favor, which were consistent with the jury's verdict.[20] Copies of these Final Judgments are attached at Tab 5. The clerk of the court noted the judgments on the docket sheet along with a notation of service by mail.[21]

Then 10 days passed without any post-judgment motions being filed or served against the May 12th judgments. And another 20 days passed—for a total of 30 days since the judgments were entered—without a notice of appeal being filed. Then another 57 days passed—for a total of 87 days since the judgments were entered—without anything happening in the case. Finally, 88 days after the May 12th judgments were entered, the trial court filed an order on August 8 granting the Lottery a new trial on damages for the Hills' retaliation claims and a new trial on the Hills' defamation claims.[22] A copy is attached at Tab 8.

In granting a new trial, the trial court found that it erred in instructing on both common-law discharge for perjury and retaliation under KRS 344.280 based on its conclusion that Chapter 344 preempts a cause of action for common-law wrongful discharge for perjury. This conclusion contradicted a November 15, 2002, Order in which the trial court held that the common-law discharge for perjury was not based on the statutory violation of KRS 344.280. A copy is attached at Tab 7. The trial court then concluded that retrial on damages were necessary because the damages were combined in

[18] *Id.* at 1161.
[19] TR Vol. 10 at 1435.
[20] *Id.* at 1440-43.
[21] TR Vol. 15 at 2210.
[22] *Id.* at 1460-65.

a single instruction at the Lottery's insistence and over the objections of the Hills. This erroneous ruling not only stripped the Hills of the jury's verdict in their favor, it also wrongly precluded the Hills from seeking their jural right of punitive damages at retrial. The trial court also found in the August 8, 2003, Order at 3-4 that it erred in not instructing on qualified privilege in the defamation instruction, even though the Lottery did not seek such an instruction and never alleged it was entitled to a qualified privilege. This erroneous ruling that asserting the right to an *absolute* privilege to the defamation claim preserved the right to a *qualified* privilege defense in the instructions not only unjustly stripped the Hills of the jury's verdict in their favor on defamation, it also essentially allowed the Lottery to assert an affirmative defense for the first time post judgment, and it gave the Lottery an unfair second bite at the apple by allowing it to tailor its defense on retrial to the Hills' proof on defamation at the first trial.

I. Under *Piles*, If Any Theory of Liability Supports A Damage Award, No New Trial Is Needed If One Theory Is Later Dismissed.

In the first *Hill v. Lottery* trial, the trial court submitted three different claims to the jury: violation of the Kentucky Civil Rights Act ("KCRA"), common-law wrongful discharge for perjury, and defamation. The jury verdicts are attached at Tab 2. Over the Hills' objection and at the insistence of the Lottery, the trial court combined the damages for these three claims into a single instruction. The Lottery's tendered instructions are attached at Tab 3. The Hill's tendered instructions had specific damage instructions for each claim. The Hill's tendered instructions are attached at Tab 4. After the trial, the trial court ruled incorrectly that the KCRA preempted the common-law discharge claim (discussed in III) and ordered a second trial because the damages could not be separated. The Court of Appeals erroneously agreed, stating: "Since the damages associated with

the nonsurviving verdicts were combined with the damages connected with surviving verdict, there was no reasonable alternative to granting a retrial on damages." Tab 1, Slip op. at 23-24. This is clear error under *Craig & Bishop, Inc. v. Piles et al*, 247 S.W.3d 897 (Ky. 2008) as to both compensatory damages and punitive damages

A. The Trial Court Erred in Setting Aside the Compensatory Damages

In *Piles*, the trial court provided the jury a single damage instruction for three separate theories of liability. *Piles*, 247 S.W.3d at 901-02(see *also,* the Court of Appeals opinion in *Piles* for a more detailed discussion 2005 WL 3078860, *4-5 (Ky. App. Nov. 18, 2005)). The *Piles* Court found that if the damage award was proper under any one of the three theories, the instruction is proper and there is no need for a new trial on damages.

The Court of Appeals in *Piles* "vacated the jury's verdict on the common-law fraud claim, stating that a common-law fraud claim was not viable because the alleged misrepresentations concerned predictions of future events." *Id.* at 902. In explaining why it declined to address the issue of whether alleged misrepresentations of future events is actionable, this Court explained:

> We express no opinion on this issue, however. We note that the trial court's instructions to the jury allowed the same damages for loss of use and inconvenience "under either Instruction Nos. 6 [KCPA violations] or 7 [fraud.]" Sonny Bishop Cars did not object to the form of these instructions. Because we find, as discussed below, that the jury's verdict on KCPA violations was proper, we decline to address the common-law fraud issue as unnecessary to the resolution of this case.

Id. at 901-02.

The situation here is almost identical to that of *Piles.* The damage instruction allowed for the same damages under three different theories of

liability, *i.e.*, common-law wrongful discharge, retaliation under the KCRA, and defamation. Each of these theories individually and separately supported the compensatory damages for lost wages and embarrassment and humiliation. So under *Piles*, as long as one theory of liability survives a post-judgment or appellate challenge, the compensatory damage award survives as well. This is especially true where the single damage instruction was included at the insistence of the Lottery over the Hills' objection, as evidenced by the Lottery's tendered instructions combining all damages into one verdict form for each plaintiff. TR Vol. 8 at 1062-75 (the Lottery's tendered instructions are attached at Tab 3). *Piles* also demonstrates why the trial court erred in setting aside the punitive-damage award from the first trial.

B. The Trial Court Erred in Setting Aside the Punitive Damages

Obviously, the retaliation claim cannot support the punitive damage awards. *See Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 138 (Ky. 2003). But both the common-law wrongful discharge claims and the defamation claims would support the support the punitive damage awards. As shown below, the trial court erred in setting aside the liability verdict on both of these claims. Under *Piles*, however, as long as the Court finds that the trial court erred setting aside the jury's liability verdict on either of these claims, the Court must reinstate the punitive damage awards from the first trial.

Finally, reversal of the Court of Appeals is proper under *Piles* on grounds that the Lottery waived the right to challenge the compensatory damage awards and the punitive damage awards by combining the compensatory damages into a

single instruction for each of the three claims and combining the punitive damages into a single instruction for each of the three claims.

C. Waiver under *Piles*

In *Piles*, Sonny Bishop Cars argued that the punitive damage award against it was in error because "there is no way to tell whether the punitive damages award was based solely on the conversion (which it does not appeal herein) or was based all or in part on fraud or on KCPA violations." *Piles*, 247 S.W.3d at 905. In holding that the issue was waived, the Court explained that "Sonny Bishop Cars fails to cite to the record to show where it requested that the punitive damage instruction ask the jury to indicate on which specific verdict it was basing its punitive damages award. So this issue is not preserved for our review." *Id.* The same is true in this case: the Lottery waived the issue by insisting on combining the damages.

While *Piles* concerned preservation of an issue for appeal, the same principle applies to motions for new trials under CR 59.

Under CR 59.01(h), the trial court may grant a new trial for "[e]rrors of law occurring at trial *and* objected to by the party under the provision of these rules." (Emphasis added). In other words, the error has to be preserved by the party seeking a new trial. So in this respect, a trial court's authority to grant a new trial is coextensive with an appellate court's power to consider unpreserved errors on appeal. On appeal, an appellate court is *precluded* from considering an unpreserved instruction error on appeal. *Ellison v. R & B., Inc.*, 32 S.W.3d 66, 73 (Ky. 2000); *Struetker v. Neiser*, 290 S.W.2d 781, 782 (Ky. 1956). Likewise, the trial court was precluded from considering the unpreserved issue of combining the damages on the unlawful-retaliation claim under

KCRA and the unlawful-discharge for perjury claim as grounds for granting a new trial. The trial court abused its discretion by considering the issue. The Lottery's creation of the alleged error in combining the damages and its failure to object to the instruction prevented the trial court from entertaining its objection based on the instructions combining the compensatory damages and the instructions combining the punitive damages.

II. The Trial Court Erred in Granting the Lottery a New Trial on Defamation

The trial court found that "[a]s to the claim of defamation that it erred in ruling that the Lottery did not have a qualified privilege under the circumstances of this case."[23] This finding assumes that the trial court ruled on the issue of qualified privilege, which further assumes that the issue was before the court to rule upon. Both assumptions are wrong.

The defamation claims that went to the jury were based on the false statements contained in the preliminary termination memoranda that the Lottery planted in the Hills' personnel files and which were broadcast on television.[24] The Lottery consistently argued that it had an *absolute privilege* to publish the statements in the memos. It made this argument in its motion for directed verdict at the close of the plaintiffs' case,[25] and again in its directed verdict motion at the end of its case.[26] The Lottery didn't tender an instruction on qualified privilege.[27] The Lottery didn't object to the instructions on grounds that the instructions failed to instruct on qualified privilege. So the only issue before the trial court was whether the Lottery had an absolute privilege to publish the

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[23] TR Vol. 10 at 1462.
[24] TR Vol. 8 at 1111, 1124; Plaintiffs' Exhibit # 24.
[25] TR Vol. 7 at 970-73.
[26] 1st Trial, Tape B8 at 14:22:45-23:00.
[27] TR Vol. 8 at 1069-70.

preliminary termination memos. Because the issue of qualified privilege was never before it, the trial court could not have "erred" in ruling that the Lottery didn't have a qualified privilege.

Qualified privilege is an affirmative defense. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 275 (Ky. App. 1981). It must be plead or lost. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (holding the "[q]ualified official immunity is an affirmative defense that must be specifically pled."); *Northeast Health Mgmt., Inc. v. Cotton,* 56 S.W.3d 440, 451 (Ky. 2001) (holding that ("[t]he exclusive remedy provision of KRS 342.690 is an affirmative defense which must be pled and proven and the failure to do so constitutes a waiver of the defense"). The Lottery arguably raised the issue of qualified privilege for the first time in its post-judgment motions. This was way too late. As a matter of law, the trial court could not grant the Lottery a new trial because it failed to give the Lottery an instruction on an unasserted affirmative defense.

Contrary to the clear record in this case that the Lottery failed to preserve a claim of qualified privilege, the Court of Appeals nonetheless held that the issue was preserved:

> 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.

Slip op. at 13.

It's true that the Lottery did argue that it was privileged to release the planted termination memos. But it's also true that the Lottery only claimed an absolute privilege.

It never claimed a qualified privilege at any time before the jury rendered its verdict that it had a qualified privilege to release the memos. The Court of Appeals conclusion that the Lottery's tendered instruction preserved its affirmative defense of qualified immunity is wrong as a matter of law.

Under CR 51, "[n]o party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion." The Lottery's tendered instruction "[t]hat the Lottery was not privileged in producing the memorandum" does not fairly and adequately present a claim of qualified privilege. Not only does the instruction fail to mention qualified privilege, the instruction is an erroneous qualified privilege instruction as a matter of law.

At a minimum, a legally correct qualified privilege instruction would have required the jury to find that, when it released the memos, the Lottery was acting "in **good faith**, without actual malice, with reasonable or probable grounds for believing them to be true . . . in respect to which [the Lottery had a legal duty to disclose]." *Tucker v. Kilgore*, 388 S.W.2d 112, 115 (Ky. 1964). The instruction tendered by the Lottery in no way presented any of these elements. As a matter of law, the Lottery's tendered instruction, by itself, did not and could not have preserved a claim of qualified privilege. *Cf. Columbia Sussex Corp., Inc. v. Hay*. 627 S.W.2d 270 (Ky. App. 1981)

In finding that a defamation defendant preserved the right to a qualified privilege instruction, the *Hay* Court explained:

> In chambers during the course of supporting their motion for a directed verdict appellants spoke to both absolute and qualified privilege and asked assurances from the court that such an instruction would be given. The court was noncommittal; however, appellee's response was not an objection that such defense had not been raised by the pleadings but rather that such a defense could be defeated by a showing of over-publication or

> malice. In view of this exchange, we cannot hold that appellants lost their opportunity to raise on appeal the issue of failure to instruct on privilege. CR 15.02.

Id. at 275.

Here, the Lottery only spoke to absolute privilege. It never mentioned qualified privilege. Moreover, the Hills did raise the issue of waiver of an affirmative defense. So under *Hay*, the Lottery failed to assert the affirmative defense of qualified privilege. And it's well worth noting that *Hay* acknowledges the fundamental differences between qualified and absolute privilege.

Absolute privilege and qualified privilege are different defenses. A claim of absolute privilege does not embrace a claim of qualified privilege. Consequently, the issue of qualified privilege was never properly before the trial court. Any attempt to raise the issue in a motion for new trial was too late. *See e.g.*, *Bingham v. Davis*, 444 S.W.2d 123, 124 (Ky. 1969) (holding that raising an error as to the instruction in a "motion and grounds for a new trial . . . was too late"). Thus, the Court of Appeals erred in holding that the Lottery properly preserved its affirmative defense of qualified privilege in the Lottery's erroneous instruction. Consequently, the trial court erred in granting the Lottery a new trial on defamation. More importantly, because punitive damages are an available remedy for a defamation claim, *see e.g.*, *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 179 S.W.3d 785, 792 (Ky. 2005), the trial court erred in setting aside the jury's punitive damages award.

III. *Grzyb* Preemption Does Not Apply Because the Wrongful Termination Claim Was Based On Different Elements Than The KCRA Claim.

The trial court's conclusion that it was error to submit both claims to the jury was based on a misapplication of *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985). In its August 8 Order, the trial court held that "the Hills were limited to claims of discriminatory discharge under KRS 344.280, and their claims of wrongful discharge in violation of public policy [for refusal to commit perjury] 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 Hills' retaliatory discharge [under KCRA] claims." (at 3) This should not be the law in Kentucky and does not serve the interest of justice. The Court of Appeals affirmed for yet another invalid reason, one never raised by the Lottery or briefed by either party. The Court of Appeals held that the two counts were "predicated upon the same conduct by KLC – its insistence that Kim commit perjury at the Unemployment Compensation Hearing of Edward J. Gilmore." (at 21) Both courts, however, erred.

The *Grzyb* count was based on the Lottery insisting that Kim Hill commit perjury. The KCRA claim was based on the Lottery punishing Kim Hill because she opposed what she perceived to be the unfair treatment of Gilmore on the basis of his disability as framed by the trial court in its pretrial November 15, 2002, Order and in the instructions to the jury. The two acts are separate; the elements of the two claims are separate. One does not preempt the other; and, this Court must firmly establish this as the law for the Commonwealth of Kentucky.

A. *Grzyb* Preemption Is Limited To Statutory Claims Not Fundamental Public Policy Right Claims

Grzyb allows a common-law claim for wrongful termination in two situations (1)

an act contrary to public policy but without explicit legislative statements prohibiting the discharge and (2) an act contrary to the employee's exercise of a right conferred by well-established legislative enactment. *Grzyb*, 700 S.W.2d at 402. In the case at bar only situation (1) is implicated. TR (Nov. 15 order). Under situation (2), *Grzyb* may be preempted if the legislative statements include a specific remedy. *Grzyb* is never preempted under situation (1) because no legislative statement exists under situation (1).

The first *Grzyb* exception that applies here allows a cause of action for wrongful discharge "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." *Id.* This same exception applied in the post-*Grzyb* case of *Northeast Health Mgmt., Inc. v. Cotton,* 56 S.W.3d 440, 447 (Ky. App. 2001). In *Cotton*, two employees were constructively discharged for refusing to commit perjury in a criminal proceeding. The *Cotton* Court held that the employees' claims fell within the first of *Grzyb's* two exceptions to the employee-at-will doctrine. This case is very similar. The Hills' claim that the Lottery discharged them because Kim Hill refused the Lottery's urgings to lie at an unemployment hearing falls squarely within *Grzyb's* first exception to the employment-at-will doctrine.

Statutory preemption of common-law claims under *Gryzb* is determined by comparing the elements of the statutory claim to the common-law claim. This is very similar to the "same elements test" as adopted by this Court after the federal constitutional test for double jeopardy claims in *Blockburger v. United States,* 284 U.S. 299 (1932). *Commonwealth v. Burge,* 947 S.W.2d 805 (Ky. 1996) (holding that "we now depart from the 'same conduct' test ... and the 'single impulse test'... and declare that double jeopardy issues arising out of multiple prosecutions henceforth will be analyzed in

accordance with the principles set forth in *Blockburger* and KRS 505.020.)" *Burge*, 947 S.W.2d at 811. The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution. *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993)." In the case at bar, as illustrated below, the jury was forced to find completely different elements for the wrongful termination claim as for the KCRA claim.

B. The Trial Court Correctly Ruled the First Time that the Grzyb Claim Was Based on a Violation of Fundamental Public Policy and Instructed the Jury as Such

Before the first trial, the trial court agreed that the first *Grzyb* situation applied where a fundamental right is violated, not the second situation where a statutory right is violated. The trial court issued a November 15, 2002, Order in response to a motion filed by the Lottery to reconsider the August 6, 2002, denial of summary judgment. In that November 2002 Order, the Court held that the Hills had met their burden to get to the jury on two employment counts: (1) the common-law claim under *Gryzb* based on "a fundamental right to speak at an administrative hearing without the fear of losing their job (at 3)"; and (2) the civil rights claim under KRS 344 based on "whether this Hills were retaliated against because Kimberly Hill opposed what she perceived to be the unfair treatment of Gilmore on the basis of his disability (at 5)." As to the common-law claim, the trial court wrote, "the Court is of the opinion that if the Lottery attempted to coerce Kimberly Hill to testify as they wished at Gilmore's unemployment hearing and if such testimony would have been false then she could have been subjected to criminal prosecution." (at 4). As to the statutory Kentucky Civil Rights Act claim, the trial court

quoted KRS 344.280(1) and stated, "The first half of section one clearly makes it unlawful to retaliate in any manner against a person because he or she has opposed a practice declared unlawful by KRS 344. Among the practices declared unlawful by KRS 344 is discrimination on the basis of disability." (at 5)

With that ruling, the parties tried the *Grzyb* wrongful termination claim completely separate from the KRS 344 civil rights violation claim, as evidenced by the two jury instructions on the claims. 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.[28] None of these elements fall within 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* preemption does not apply. The trial court's application of *Grzyb* preemption to the facts of this case was wrong as a matter of law.

It was only later, after the trial of this matter, that the trial court confused the two *Grzyb* tests, erroneously stated that the Hills' common-law claim was based on a statutory right not a fundamental right (thus falling under situation (2) and not situation (1)), and held that the *Gryzb* claim was preempted by the KCRA. This is completely contrary to *Cotton* and completely unsupported by the record which required the jury to

[28] TR Vol. 8 at 1122, 1109.

find two separate sets of elements for the two employment claims. Because the second trial was made to separate the two claims, it was completely unnecessary.

C. The Court of Appeals Erred in Creating a New Rule that Parties Cannot Impeach their Pleadings

The Court of Appeals never reached the merits of the argument; instead it looked at the facts alleged in the Complaint and administered the wrong test: relying on the conduct complained of not the elements necessary for the claims. It also construed the conduct complained of erroneously. In the *Gryzb* count the behavior required for the claim was retaliation for refusal to commit perjury; in the KCRA claim it was retaliation for objecting to a civil rights violation. The Court of Appeals also erred in upholding the trial court ruling based on a *sua sponte* reading of the complaint without recognizing that the issues were tried based on a ruling by the trial court. This jurisprudence should not be the law in Kentucky. The complaint does not specify whether the first *Grzyb* situation or the second is claimed.

The Third Amended Complaint was the operative document for setting out the Hills' claims against the Lottery. The Court of Appeals quoted a recitation of facts from the Third Amended Complaint. Instead, the Court of Appeals should have looked to the legal claims set out in the Complaint which clearly identifies the "First Cause of Action" as termination "in retaliation for opposing a practice declared unlawful in violation of KRS 344.280." Complaint paragraphs 20 and 21. The "Second Cause of Action" is described as "violation of Public Policy for Kimberly Hill's refusal to offer false testimony during a legal proceeding." Id. at 23. In other words, the Court of Appeals misread the Complaint by assuming that all facts in the recitation of facts were necessary to all causes of action. (As noted below, the Court of Appeals made this analysis *sua*

sponte, therefore, without the insight that arguments and briefing may have brought to them.)

The Civil Rules do not require that a plaintiff separate the facts necessary for each cause of action, only that it give "a short and plain statement of the claim showing that the pleader is entitled to relief." That the Hills did. For the *Grzyb* count, the Hills pled the facts to show they were terminated after Kim was threatened and pressured by the Lottery to perjure herself. Id at 23. For the KCRA count, the Hills pled the facts to show they were terminated after Kim told her superiors that she believed the Lottery violated the civil rights of Ed Gilmore. Id. at 20 and 21. In *Smith v. Isaacs*, 777 S.W.2d 912 (Ky. 1989), this Court held that pleadings should not be searched for flaws but should be "liberally construed." Specifically, this Court held:

> Long ago, in 1958, we abandoned the old rules of common-law pleadings and adopted modern Rules of Civil Procedure. We no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common-law. Whereas the old common-law demur searched the pleadings for a reason to dismiss, now a Motion to Dismiss is directed at the substance of the pleading. As stated in *Morgan v. O'Neil* [652 S.W.2d 83, 85 (Ky. 1983)] now the rule of construction is "that the Rules of Civil Procedure with respect to stating a cause of action should be liberally construed and that much leniency should be shown in construing whether a complaint ... states a cause of action." *Smith v. Issaacs* at 915 (quoting *Morgan v. O'Neil* at 85)(internal citations omitted).

See also *J. N. R. v. O'Reilly*, 2008 WL 1848644, *21 (Ky. April 24, 2008) (rehearing denied October 23, 2008), stating:

> In *McCollum v. Garrett*, 880 S.W.2d 530 (Ky.1994), this Court affirmed that the sufficiency of the pleadings should be resolved by a commonsense reading so as to do substantial justice. To that end, all that is necessary is that a pleading sufficiently identify the basis of the claim. *Natural Resources and Environmental Protection Cabinet v. Williams,* 768 S.W.2d 47, 51 (Ky.1989).

Cordle v. Merck & Co. Inc. 405 F.Supp.2d 800,804 (E.D. Ky. 2005):

> Kentucky's Civil Rules, like the Federal Rules of Civil Procedure, require only that a plaintiff state a claim with sufficient specificity so that defendants receive fair notice of the claims against them. As the Kentucky Court of Appeals explained, "[u]nder the theory of 'notice' pleading adopted by the Civil Rules a complaint will not be dismissed for failure to state a claim unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim. It is immaterial whether the complaint states 'conclusions' or 'facts' as long as fair notice is given." *Pierson Trapp Co. v. Peak*, 340 S.W.2d 456, 460 (Ky.1960) (emphasis added and internal citations omitted); see also *Morris v. Cabinet for Families & Children*, 69 S.W.3d 73, 74 (Ky.2002) ("The principal objective of a pleading is to give fair notice to the opposing party.")

Kentucky is a notice pleading state and the Third Amended Complaint clearly provides notice that the Hills have three causes of action: Wrongful termination based on refusal to perjure, KCRA violation and Defamation. The Court of Appeals erred when it read the Third Amended Complaint to limit the Hills. This Court should reaffirm notice pleading in Kentucky.

D. Even If The Complaint Failed To Set Forth Three Claims, CR 15.02 Requires That the Hills Be Allowed to Recover On the Three Claims Tried To The Jury.

Even if the Complaint had specified only one claim, pursuant to CR 15.02 the claims actually litigated are proper. Indeed, once the trial court ruled in 2002 that the first *Gryzb* situation based on non-statutory fundamental right to refuse to commit a crime applied not the statutory *Gryzb* situation based on a civil rights violation, the parties proceeded to trial on the *Gryzb* claim as well as on the KCRA claim. CR 15.02 states in part "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Having litigated thus and having instructed the jury on thus; both of the

claims were appropriately given to the jury. The Supreme Court adopted the Civil Rules to specifically avoid what the Court of Appeals did in this case, create a trap with pleadings. A court should be precluded from using pleadings to limit the claims *after* a trial which, expressly or impliedly, tried to a jury certain claims.

In *Bean v. Bevins*, 287 S.W.2d 627, 628 (Ky. 1955), the Court held that even though no question of estoppel or waiver was raised by either party in the pleadings, the plaintiffs were not prejudiced because the jury heard and considered their proof on the question of waiver and estoppel before rendering a verdict. *Id.* at 628. *Bean* relied on CR 15.02, which provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Thus, under *Bean* and CR 15.02, the case as litigated controls inconsistent pleadings.

A judgment notwithstanding the verdict on the grounds that the pleadings do not support the verdict was once valid under the old Civil Code but may no longer be obtained under the Rules of Civil Procedure. *Ashland Oil & Ref. Co. v. Hudson*, 275 S.W.2d 585, 586 (Ky. 1955). Where evidence supports the award, it is not error to allow recovery for more than sought in the pleadings, particularly where the parties have treated the issues as joined. *Ford v. Gilbert*, 397 S.W.2d 41, 43 (Ky. 1965).

IV. With Different Damages, *Grzyb* Preemption Does Not Apply.

If KRS 344.280 preempts the Hills' common-law wrongful discharge claim, then this construction of *Gryzb* violates their jural right to punitive damages common-law wrongful discharge claims. In *Ky. Dept. of Corrections v. McCollough*, 123 S.W.3d 130, 140 (Ky. 2003), the Kentucky Supreme Court held that punitive damages are not

available under KRS Chapter 344. But it also held that Kentucky's punitive damages statutes apply to all cases in 'which punitive damages are already authorized by common-law . . . .' So under *McCollough*, common-law claims that allow for punitive damages as a remedy are governed by Kentucky's punitive damages statutes.

This argument is simply a legal analysis based on KRS Chapter 411. It does not implicate constitutional issues in any way. Indeed, the argument *avoids* the constitutional issue and states simply that the Hills' common-law claims are governed by KRS 411.184 and 411.186 rather than by KRS Chapter 344, because punitive damages are available for common-law wrongful discharge. This result preserves the Hills' right to seek punitive damages, thereby *precluding* reaching the constitutional question of whether the General Assembly can usurp a common-law right to punitive damages . . . by codifying a common-law case of action with statutory remedies that exclude punitive damages.

Instead of addressing the Hills' actual argument on appeal—which avoided a constitutional challenge—the Court of Appeals treated the Hills' argument as a direct constitutional challenge to the remedy provision of the KCRA. Based on this incorrect assessment of the Hills' argument, the Court of Appeals decided the issue against the Hills on the grounds that they failed to notify the Attorney General as required by KRS 418.075 and failed to cite to any authority that recognized a common-law right to bring a cause of action for wrongful discharge prior to 1891. *Slip op.* at 26-27. Neither of these issues was argued by the Lottery on appeal or at trial. Nor does either argument address the actual issue before the Court of Appeals. The Hills' argument concerning the constitutionality of KRS 344.450's restriction against punitive damages was not a challenge to the constitutionality of the statute; rather, it was a challenge to this Court's

construction of the statute under *McCollough*, *supra*, as denying the right to punitive damages. So notification of the Attorney General was not required.

Jural rights is based on a simple theory that a cause of action for damage to person, property or reputation that existed before the current Kentucky Constitution cannot be abridged. *William v. Wilson*, 972 S.W.2d 260, 262-3 (Ky. 1998). It is based on Sections 14, 54 and 241 of the Kentucky Constitution read together. *Gryzb* did not create a new cause of action, it merely recognized that common-law contained a limited cause of action for wrongful termination. This common-law claim is most easily seen in the rationale set out by the Court of Appeals in *Cotton*, which begins with the oft repeated adage that an employer may discharge an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Cotton* at 446. *Cotton* continues to explain the ruling, which upholds a jury award of punitive damages in a wrongful termination case, by turning to caselaw in Michigan, clearly the source of common-law not statutory law. *Cotton* explains as follows:

> Generally, punitive damages have been allowed in actions for wrongful discharge of an at-will employee where the action has been based upon the claim that the discharge was in violation of public policy. Courts have reasoned that such a violation sounds in tort and that all damages including punitives are available. Punitive damages are thus used as a deterrent. *Id* at 449.

Jural rights restrict the legislature from enacting a law restricting employees alleging damages for injuries to the person, property or reputation from seeking punitive damages. Jural rights would not restrict the legislature from setting whatever limits it deems proper in new statutory rights such as those created by the KCRA. These statutory rights did not exist at the time of the Kentucky Constitution's adoption. However, the Hills' common-law claim is not so restricted. Before the adoption of the Kentucky Constitution,

Kentucky law recognized the right of a party to sue for damages to person, property and reputation and that would include a wrongful termination claim such as the Hills' common-law claim against the Lottery.

V. The Trial Court Lacked Jurisdiction To Order Retrial 88 Days After the Entry of An Amended Judgment.

On December 26, 2002, eight days after the jury verdict in the Hills' favor, the Lottery filed an unsupported motion for relief under CR 50.02, 59.01, and CR 59.05. No memorandum was appended to the motion; no law and no factual grounds were stated in the motion. Despite the jury verdicts which were separate for Kim and Bob but totaled $4,352,316, the Lottery tendered one final judgment that awarded the Hills a combined total of $2,654,450. Only the Lottery knows the reason for choosing this amount which it never explained in the record and which does not reflect any portion of the jury verdicts entered for either Bob or Kim. The Lottery knowingly and intentionally had the court enter this judgment, which was $1,697,866 less than the two jury verdicts, then attacked its own judgment despite its knowing and intentional act. This Court should not allow the Lottery to attack its own intentional and wrong judgment with consecutive Rule 59 motions contrary to the Civil Rules. In effect, it gives the Lottery two bites at the apple while requiring the Hills to expend their one post-trial motion on an inexplicable judgment that had nothing to do with the jury verdicts.

The trial court entered the Lottery's wrong judgment on January 21, 2003. On January 23, the Hills filed a motion to vacate the Lottery's wrong judgment and to enter judgments in the Hills' favor consistent with the jury's verdict. On January 31, the Lottery filed an "Amended Motion for [JNOV] Motion for New Trial/Motion to Alter Amend or Vacate Judgment" attacking its own wrong $2.6 million judgment. On May 12,

the trial court granted the Hills' motion to vacate the Lottery's wrong $2.6 million judgment. On the same day, the trial court rendered separate judgments in both Bob and Kim's favor, which were consistent with the jury's verdict and which were properly noted on the docket sheet. The trial court's Order included a notation that the May 12th judgments were not final because it had not yet ruled on the Lottery's "pending motions." The Lottery, however, had no pending motion against the May 12 judgments; its motion was attacking the $2.6 million judgment that it had tendered. The Court of Appeals erred in agreeing that the May 12th Judgments were not final because the Lottery's motion attacking the $2.6 million judgment was still pending. Additionally, once the Court granted the Hills' motion vacating the Lottery's $2.6 million judgment, it, in effect, denied the Lottery's opposing motion.

A. The Lottery Cannot Attack Its Own Judgment

The Lottery tendered a judgment entered on January 21 that in no way reflected the jury verdicts in this case. The judgment combined both Bob and Kim's claims and totaled $2.6 million instead of the $4.3 million awarded. Only the Lottery knows how it came up with the $2.6 million figure. It in no way reflected the verdicts entered by the jury. The judge entered the judgment without explanation. The Hills were forced to file a Rule 59 motion against the Lottery's $2.6 million judgment. The Lottery also filed a Rule 59 motion attacking its own tendered $2.6 million judgment. Ultimately, the court granted the pending motions, vacating the $2.6 million judgment. The Lottery, however, should never have been allowed to attack its own judgment, should never have been allowed to create a situation where the Hills had to move to have it vacated, and should certainly never have been allowed "transfer" its Rule 59 motion against the $2.6 million

judgment to the later judgments for $4.3 million without doing anything. By implication, the transfer occurred with the trial court vacated the $2.6 million judgment, entered the $4.3 million judgment and stated that it would rule on the Lottery's motion as if it were filed against the $4.3 million judgments. As explained below, the time for an appeal began to run with the entry of the second judgments, and the Lottery did nothing. Allowing the Lottery to attack its own judgment is allowing the Lottery to create its own error.

B. Kentucky Law Does Not Hold A Judgment Non Final Simply Because A Motion Is Pending.

The trial court's May 12th Judgments declare that they are final. The separate May 12th Order does not say otherwise. Rather, the trial court noted its legal conclusion that the May 12th Judgments were not final and appealable based on its erroneous assertion that the Lottery's motion attaching the January judgment was still pending before the court. So under the trial court's and the Court of Appeals' interpretation of the rules, it was not the May 12th Order that prevented the May 12th Judgments from becoming final. Under Court of Appeals' interpretation of the rules, the Lottery's motion was "pending" simply because the trial court had not expressly ruled on it. This means that an amended judgment is never final until the trial court expressly rules on all prior post-trial motions. This is contrary to the Kentucky caselaw on Rule 59.05 as well as federal interpretation of the effect of an amended judgment under Fed. R. Civ. P. 59.

As made clear by this Court *in Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky.,2007), entry of an amended judgment that makes substantive changes to the original judgment resets the clock for filing post-judgment motions and a notice of appeal. *Id.* at 648. citing *FTC v. Minneapolis-*

Honeywell Regulator Co., 344 U.S. 206, 211-12, 73 S. Ct. 245, 249, 97 L. Ed. 245, 252 (1952). Here, there were clearly substantive changes from the first judgment to the second judgments.

The first judgment rendered by the trial court on January 21, 2003 was tendered by *the Lottery* and awarded the Hills total damages in the amount of $2,694,878.00.[29] The second judgments entered on May 12, 2003 were tendered by *the Hills* and awarded the Hills total damages in the amount of $4,352,316.00. A change in the amount of damages in a second judgment is a substantive change that starts the clock running on filing post-trial motions and the notice of appeal. *Kraft, Inc. v. United States*, 85 F.3d 602, 607 (6th Cir. 1996) (citing *Harrell v. Dixon Bay Transportation Co.*, 718 F.2d 123 (5th Cir. 1983). Once the clock began to run, the trial court lacked the power to *sua sponte* toll the time in order to extend its jurisdiction beyond the 10-day limit or to enlarge the time for filing a notice of appeal.

C. Ten Days After A Judgment Is Entered, A Court Loses Jurisdiction To Amend The Judgment Absent Some Additional Filing By A Party

CR 50.02, CR 52.02, and CR 59 all provide for a strict 10-day time limit *after* entry of judgment for motions directly attacking a judgment. CR 73.02(1)(a) specifically provides that "[t]he notice of appeal *shall* be filed within 30 days *after* the date of notation of service of the judgment or order under Rule 77.04(2)." (Emphasis added). Under CR 73.02(1)(e), the only event that terminates the running of time for appeal is a *timely* motion under CR 50.02, CR 52.02, or CR 59 Without question, CR 73.02(1)(a) is mandatory. As this Court held in *Fox v. House,* 912 S.W.2d 450, 451 (Ky. App. 1995), entry of a final judgment coupled with notation of service "is the date of entry for the

[29] TR Vol. 7 at 989-90.

purpose of fixing the running of time for appeal." *Fox v. House,* 912 S.W.2d 450, 451 (Ky. App. 1995). So only an enumerated motion under CR 73.02(1)(e) filed *after* entry of notation of service can terminate the running of time. And the cases interpreting the rules reach the same conclusion. For example:

- In *Security Federal Savings. & Loan Association v. Nesler*, the Kentucky Supreme Court held that under CR 59.05, "a court cannot change on motion or *sua sponte* a judgment it has entered *after* ten days." *Security Federal Sav. & Loan Association v. Nesler*, 697 S.W.2d 136, 139 (Ky. 1985) (emphasis added).

- In *City of St. Matthews v. Roberts* no direct attack (via CR 59) was made on a condemnation judgment *after entry* of the judgment and no notice of appeal was ever filed. *City of St. Matthews v. Roberts*, 490 S.W.2d 750, 754 (Ky. 1973). Therefore, the *City of St. Matthews* Court held that the judgment "remained open to challenge only by collateral attack in a separate proceeding."

- *Rodgers v. Berry* held that a timely motion under CR 59.05 filed within 10 days *after entry* of judgment "terminates the running of time for appeal." *Rodgers v. Berry*, 346 S.W.2d 43, 44 (Ky. 1961).

- In *Taylor v. Warman* the appellant filed a second motion for a new trial after the trial court denied the first motion. The *Taylor* Court held that the second new-trial motion did not "terminate the running time for appeal, because such motion was not 'timely' within the meaning of CR 73.02, it not having been filed within 10 days *after entry* of judgment as required." *Taylor v. Warman*, 331 S.W.2d 899, 900 (Ky. 1960) (emphasis added).

- In *Marrs Elec. Co. v. Rubloff Bashford, LLC*, 190 S.W.3d 363 (Ky. App. 2006), the Court of Appeals confirmed that a trial court cannot "reserve" jurisdiction over a judgment.

- And in *Kentucky Farm Bureau Ins. Co. v. Gearhart*, this Court held that "a trial court loses control of a judgment ten (10) days *after the entry* of the judgment, except to the extent an authorized, timely motion under CR 59 is made." 853 S.W.2d 907, 910 (Ky. App. 1993) (emphasis added).

- Finally, in *Stewart v. Kentucky Lottery Corp.*, this Court applied the Civil Rules as plainly written to dismiss an appeal against the Kentucky Lottery Corporation. *Stewart* held that the time for filing notice of appeal from an order denying a motion for reconsideration began to run when the order was noted on the docket sheet along with a notation of service by mail. The *Stewart* Court then dismissed the appeal against the Lottery because the appellant's notice was not timely filed despite the uncontroverted evidence that the appellant did not receive notice or

service of the order denying the motion for reconsideration before the time for filing notice of appeal had elapsed. *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918, 920 (Ky. App. 1998).

Kentucky's criminal jurisprudence borrows the 10-day rule for a court to lose jurisdiction over a judgment from Kentucky Civil Rule 59.05. See, e.g., *Com. v. Marcum*, 873 S.W.2d 207, 211 (Ky. 1994) which holds that a second judgment entered the month after a first judgment was *void ab initio* because the court lost jurisdiction ten days after the first judgment not because of any Criminal Procedure Rule, but because of Civil Rule 59.05's 10-day rule. The 10-day rule was also discussed in one Kentucky civil case, *Potter v. Eli Lilly & Company*, 926 S.W.2d 449, 454 (Ky. 1996), in which this Court ruled that in very narrow circumstances the court which generally has lost jurisdiction 10 days after entry of a judgment may open an investigation regarding the accuracy of that judgment so as to prevent fraud on the court. The basis of the court's power is a rule in equity to correct injustices. *Id.* at 453. This Court in *Potter v. Eli Lilly* talked about the "recognized time period" for altering judgments having expired and states that such authority to alter judgments after the recognized time period "must be exercised with great caution" to determine if a fraud has been committed on the court. *Id.* at 453-54. (At issue in the case was whether the parties had settled the action prior to the jury verdict without informing the Court; and, therefore, whether the judgment should reflect a settlement.)

The rule of no altered judgments after 10 days was so ingrained in Kentucky Civil jurisprudence at the time of the *Potter v. Eli Lilly* case that the Court of Appeals had to issue a writ of prohibition preventing Judge Potter from holding a hearing in order to determine if the judgment should be altered. *Id.* at 452. This Court wrote in overturning

the Court of Appeals that it understood the dilemma:

> We can fully understand the reluctance of the Court of Appeals to embark on such uncharted legal waters because there are no reported cases establishing such an authority in Kentucky. *Id.*. at 453.

This has to mean that motions attacking the prior judgment were no longer pending before the trial court. As a result, the May 12th Judgments, which were properly noted as entered on the docket sheet and which resolved all the issues between the parties, were final and appealable. CR 58.

D. Successive Rule 59 Motions Are Not Allowed, Nor Are Amended Rule 59 Motions

The Lottery filed a Rule 59 motion without support before a judgment was even entered in the case. Later it filed what it called an amended motion. Such a motion is not allowed by the rules, nor are successive Rule 59 motions. See, e.g., *Ligon Specialized Hauler v. Smith*, Ky. App., 691 S.W.2d 902 (1985) (party cannot file a motion for a new trial within 10 days of judgment and submit supporting grounds and affidavits almost three weeks later); *Rogers v. Berry*, Ky., 346 S.W.2d 43 (1961) (court is without jurisdiction to consider late motions); and *Cloverleaf Dairy v. Michels*, Ky. App., 636 S.W.2d 894 (1982)(Rules of Civil Procedure do not permit successive post-judgment motions).

In *Mollett v. Trustmark Insurance Co.*, 134 S.W.3d 621, 623 (Ky. App. 2003) modified Aug. 29, 2003, discretionary review denied June 9, 2004, an appeal filed after a second post-judgment motion was dismissed as untimely. The appellant originally filed a Rule 59 motion which was denied. *Id.* Several days after the denial, appellant filed another motion to set aside the order or, alternatively, to "make a final appealable order." *Id.* The second order denied the motion to set aside and granted them motion to make the

first order "final and appealable." *Id.* The Court of Appeals held, "The Rules of Civil Procedure do not permit successive post-judgment motions." *Id.* The first order was "by definition and by operation of law, a final judgment" as it dismissed the complaint. *Id.* See also, *State Farm Mutual Insurance Co. v.* Caudill, 136 S.W.3d 781, 783 (Ky. App. 2003)("the finality of an order is determined by whether it grants or denies the ultimate relief sought in the action."). The second post-judgment motion did not stay the time for filing a notice of appeal. *Id.* In this case, the Lottery filed two post-trial motions. The second was a nullity and both had no effect on tolling the time for filing a notice of appeal once the final judgments were noted as filed by the Clerk on May 12, 2003. No notice of appeal was filed within 30 days; therefore, the final judgments are unappealable.

In *Kentucky Farm Bureau Ins. Co. v. Gearhart* this Court flatly rejected an argument that a trial court can "reserve" an issue so as to extend its jurisdiction over a judgment beyond 10 days after entry. Gearhart filed a CR 59.05 motion 17 days after judgment seeking prejudgment interest. On appeal, Gearhart argued that the 10-day limit for filing his motion did not apply because "the trial court 'reserved' its decision on the issue prior to trial." *Kentucky Farm Bureau Ins. Co. v. Gearhart*, 853 S.W.2d 907, 910 (Ky. App. 1993).

In rejecting the argument, the *Gearhart* Court held that

> it was incumbent upon Gearhart to timely move under CR 59.05 to alter or amend the judgment when it was issued and prejudgment interest was not awarded. . . . Having failed to do so, Gearhart's motion is time barred, even if the trial court did "reserve" the question. *Id.*

This was recently upheld in *Marrs Elec. Co. v. Rubloff Bashford, LLC*, 190 S.W.3d 363 (Ky. App. 2006). So in this case, even if the trial court "reserve" ruling on the Lottery's

motion to alter, amend, or vacate the January 21st judgment, it was still incumbent upon the Lottery to make a timely motion after the entry of the May 12th judgments in order to extend the trial court's jurisdiction beyond its 10-day limit and this Court's 30-day jurisdictional limit.

E. Requiring All Pending Motions To Be Explicitly Decided Vitiates The Law Of Collateral Estoppel

Under the rulings in this case, no Kentucky lawsuit is final even in the face of final judgments if any motion remains without a specific ruling. Not only does this increase the burden on judges and litigants to carefully review records to determine if anything remains even if the issues are mooted by a final judgment. This contradicts the law on collateral estoppel which looks not to explicit rulings but holds that all litigated issues, whether explicitly incorporated into a final judgment, are implicitly incorporated and afforded preclusive effect when material to the litigation. "The general rule of issue preclusion is "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459, 465 (Ky.1998)(citing *Restatement (Second) of Judgments § 27.*

The Lottery at its own peril relied on the trial court's erroneous conclusion that there were motions still pending for the trial court to rule on, *i.e.*, the Lottery did not file *any* motions after entry of the May 12th Judgments. No motions were pending. Thus, the trial court lost jurisdiction over the May 12th Judgments 10 days after entry and the Lottery lost the right to appeal the May 12th Judgments 30 days after entry. The trial court had no jurisdiction to grant the Lottery's motion for a new trial 88 days after entry of the

May 12th Judgments.

IV. The Trial Court's Reduction of Attorneys' Fees must be set aside

At retrial, the Hills won their civil-rights claims but lost on defamation. The trial court reduced the Hills' attorneys' fees because they didn't succeed on both claims. But the Hills did succeed on all of their claims at the first trial. Because the trial court lacked jurisdiction to grant a new trial and the new-trial order itself must be reversed, the first-trial judgments must be reinstated. This utterly eliminates the trial court's basis for reducing attorneys' fees. Therefore, the trial court's reduction of attorneys' fees must be set aside.

If and only if this Court both concludes that the trial court had jurisdiction to grant a new trial and affirms the trial court's order granting the Lottery a new trial, the Hills offer the following argument strictly in the alternative. This issue is preserved by the Hills' reply to the Lottery's objection to the Hills' application for attorneys' fees.[30]

At the conclusion of the second trial, the trial court reduced the award of attorneys' fees to the Hills based on lack of success at the retrial on the defamation claim, even though Plaintiffs' counsel was completely successful on the Hills' KCRA claim. Retrial did not affect this result. December 28, 2004, Order at 3-4 (Tab 9). The Lottery conceded that unlawfully retaliated against the Hills and violated their civil rights by judicially admitting on appeal that the results at the retrial were correct. *Center v. Stamper*, 318 S.W.2d 853, 955 (Ky. 1958) (holding that a judicial admission is conclusive).

Because the defamation claims and the KRS 344.280 retaliation claim were

[30] TR Vol. 15 at 2155-61.

inextricably intertwined, reduction of attorneys' fees was error. *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (holding that attorneys' fees should not be reduced when the "claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced"). The trial court also reduced attorneys' fees because the jury awarded the Hills less at retrial than at the original trial. December 28, 2004 Order at 4 (Tab 9). But the award was less only because the trial court erroneously denied the Hills the right to pursue their jural right to punitive damages at retrial by precluding their common-law wrongful discharge claim. Because the trial court's findings of fact were not supported by substantial evidence, the reduction of attorneys' fees based on those findings must be set aside. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (holding that a trial court's findings of fact are clearly erroneous if they are not supported by substantial evidence). Also, the reduction must be set aside based on the trial court's failure to take into account changes in the law occurring between the time the Hills filed their complaint and the beginning of the re-trial.

The trial court's attorney fee decision is made in its Opinion and Order of December 28, 2004, in which it acknowledges that the Hills were successful on three claims at the first trial: *Grzyb* wrongful termination, KCRA violation and defamation. Tab 9. The court then notes that it erred in allowing the wrongful termination and KCRA violation to both go to the jury and erred in not ruling on a qualified privilege for the defamation claim, even though no such privilege was pled. Id. After the second trial, where the Hills again prevailed on obtaining damages for their KCRA violation but lost

on their defamation claim, the court decided to reduce the attorney fees by 50% even while recognizing that the "claims of defamation were somewhat interrelated with their KCRA retaliatory discharge claims." Id at 3-4. Basically, the Court ignored the first trial, allowed only two claims at the second trial and split the attorney fees because one of the two claims was unsuccessful. This method is an abuse of discretion.

While acknowledging that the Hills' defamation claims and retaliation claims were interrelated, the trial court found that the claims were based on differing facts. This finding is not supported by the evidence. Proof that the reasons for terminating the Hills contained in the preliminary termination memoranda were false was important to Bob and Kim Hills' defamation claims because the evidence (1) was necessary the rebut the Lottery's defense of truth; and (2) showed that the statements were maliciously made, which the trial court required the Hills to demonstrate at retrial. But the same proof was just as important to their retaliation claims.

In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), the U.S. Supreme Court held that proof that an employer's reasons for adverse-employment actions are "false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." And this Court held in *McCullough* that "[p]roof that the defendant's non-retaliatory reasons are 'unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Ky. Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003). So proof that the Lottery's reasons for firing the Hills were false was persuasive evidence that the Lottery's true reason was to retaliate against Bob and Kim for Kim's refusal to lie at Ed Gilmore's unemployment hearing.

Therefore, the trial court's finding that the Hills' retaliation and defamation claims were based on sufficient differing facts to justify a 50% reduction in attorneys' fees is not based on substantial evidence. Rather, the evidence clearly demonstrates the opposite: that the claims were so intertwined that any reduction in attorneys' fees was not appropriate. *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (holding that attorneys' fees should not be reduced by a "simple ratio of successful claims to claims raised [when the] claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced.").

In addition to reducing the attorneys' fees award on limited-success grounds, the trial court implied that its decision was also based on the size of the Hills' award relative to the damages sought. But this reasoning failed to take into account a major change in the law. When the Hills filed their complaint, ample authority supported their position that punitive damages were available under the Kentucky Civil Rights Act. After the trial court granted the Lottery a new trial, the Kentucky Supreme Court held otherwise. This and the trial court's conclusion that the Hills could not retry their common-law wrongful discharge claims significantly affected the breadth of damages that were recoverable at retrial. Given the size of the punitive damage award at the first trial, it is very likely that the Hills would have been similarly successful at retrial, if they'd been allowed to put the issue before the jury. The trial court abused its discretion by failing to take this change of law into account.

Finally, in addition to erroneously reducing the attorneys' fee award by half, the

trial court also reduced the attorneys' fees award for time spent appealing the trial court's August 8th new-trial order. Because the trial court acted beyond its jurisdiction in granting the new trial, the Hills' appeal not only had merit, but if they had succeeded, the retrial would not have been necessary. *See, e.g., Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001). Therefore, the trial court abused its discretion in reducing the attorneys' fees award for time spent on this appeal.

The Hills provided detailed billing records. From these, the Court could have easily awarded all amounts up to the second trial for there is absolutely no question that the Hills were not responsible for any of the alleged errors that made the second trial necessary, if indeed it was necessary. The fees incurred for the second trial could then be split to carve out the defamation claims but the split must take into account the intertwined nature of the claims. Such a method would not be arbitrary unlike the method used by the trial court. Of course, any split in fees should be reversed if this Court finds that no second trial was necessary.

VII. KRS 360.040 Requires A Hearing Before Post judgment Interest Is Reduced

KRS 360.040 mandates that "[a] judgment shall bear twelve percent (12%) interest compounded annually from its date." But the statute also provides "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.*" (Emphasis added). Here, the trial court reduced the post-judgment interest rate on the damage award to the Hills from 12% to 6%, but the court did not hold a hearing as required by KRS 360.040.

While the Court of Appeals' opinion states that the trial court held a hearing on the Lottery's motion to reduce post-judgment interest, *slip op.* at 38, the record does not support this finding. On appeal, the Lottery does not argue that a hearing was held or cite to the record to show a hearing was held. Rather, the Lottery merely argued the trial court "could take judicial notice of the prevailing interest rate as determined by the Federal Reserve." This Court should expressly hold that a hearing under KRS 360.040, and that any reduction of the post-judgment interest rate without a hearing is void.

VIII. By Deciding The Case On Issues Not Raised On Appeal, The Court Of Appeals Denied The Hills Due Process.

The Court of Appeals' opinion devotes over two pages to a discussion of the *complaint's* allegation concerning the Hills' common-law retaliatory discharge claims and their statutory retaliation claims. This discussion includes quoting ten paragraphs from the third amended complaint. *Slip op.* at 19-21 (Tab 1). After quoting from the Hills' brief, including a portion of the trial court's jury instructions, the Court of Appeals, *slip op.* at 22-23 (Tab 1), held:

> 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. . . . The Hills now . . . impeach their own pleading . . . . 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.

The Lottery did not argue on appeal that the Hills' complaint limited the Hills' argument on appeal. Nor was this ever addressed or raised by the trial court. The first time that the Hills and their counsel were made aware of this argument was when they received copies of the Court of Appeals' opinion. Thus, the Hills were unable to test the merits of the Court of Appeals *sua sponte* declaration that the Hills could not impeach

their complaint by arguing the case as litigated by the parties, which declaration is plainly contrary to law. As stated above, the Court of Appeals opinion is internally inconsistent in that it hold that the Lottery is not bound by the record in which it insisted the only privilege it had was absolute not qualified but the Hills were bound by their complaint. The record is clear that the parties tried three claims, not two. See, e.g., the jury verdicts attached at Tab 2.

While it is true that the Court of Appeals may decide a case based on issues not raised by the parties so as long as it confines itself to the record, it is also true that appellate courts should be "reluctant to engage in such practice." *Priestly v. Priestly*, 949 S.W.2d 594, 598 (Ky. 1997). As explained by this Court:

> Ordinarily, this Court confines itself rather closely to deciding only those issues which the parties present. We take the view that counsel and the courts below have sufficiently identified the issues; that we need not redefine the question in the last stage of the litigation. However, we are constrained by no rule of court or constitutional provision to observe this procedure, and *on rare occasions*, the facts mandate a departure from the normal practice. When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of the law.

Mitchell v. Hadl, 816 S.W.2d 183, 185 (Ky. 1991) (emphasis added).

Neither *Mitchell* nor *Priestly* address the question of whether the parties were given the right to respond to the unraised issues relied on by the appellate court. But granting discretionary review allowed the parties in *Priestly* to respond the Court of Appeals' *sua sponte* grounds. In *Mitchell*, it may well be that the un-raised issues were addressed at oral argument. Indeed, *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005) strongly implies that parties must be given an opportunity to respond to *sua sponte* grounds relied on by an appellate court: "[W]e would note that this

separation of powers issue was not raised in the lower courts, but rather it was raised *sua sponte* by members of this Court during oral argument. The parties addressed the issue and we have confined ourselves to the record." *Id.* at 424. Here, the Hills were given no right to respond to the grounds raised by the Court of Appeals *sua sponte*. This lack of notice and opportunity to be heard completely circumvented the Civil Rules and denied the Hills the basic protections of due process of law.

For example, CR 76.03(8) confines a party "on appeal to issues in the prehearing statement" unless the party can show "good cause" for arguing other issues. Under CR 76.12(4)(c)(v), a party must begin its argument "with reference to the record showing whether issue is preserved for review and . . . in what manner." Indeed, an appellate court normally will not consider error not properly preserved for review as grounds for reaching a decision. *See e.g.*, *Hall v. Commonwealth*, 862 S.W.2d 321, 324 (Ky. 1993) (holding that "because appellant concedes that this issue is not preserved for review, the Court declines to consider it"). Finally, CR 76.12(4)(e) provides that "[r]eply briefs shall be confined to points raised in the briefs to which they are addressed." But the Court of Appeals' decision both circumvented these rules and denied the Hills both substantive and procedural due process.

As to substantive due process, the Court of Appeals' decision completely bypassed the adversarial process. In *Powell v. Graham*, 185 S.W.3d 624, 632 (Ky. 2006), this Court addressed the fundamental importance of adversarial testing to the quest for truth at trial:

> Though we often speak of fundamental fairness in trial procedures as a principle to protect a defendant's rights, the principle is no less applicable to the prosecution. Even if it is only an attempt at parity between the prosecution and the defense, fundamental fairness demands that a defendant's

> decision to place an issue in controversy subjects that claim to the rigors of the adversarial process. To hold otherwise would give criminal defendants a distinct and undeserved advantage . . . .

Mitchell reflects the Confrontation Clause's

> ultimate goal [which] is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *It commands*, not that evidence be reliable, but *that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.* The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

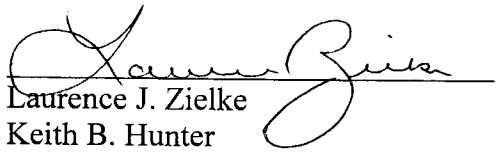
Crawford v. Washington, 541 U.S. 36, 61 (U.S. 2004) (emphasis added). While this civil case does not implicate the Sixth Amendment, *Crawford* is instructive in that the constitution protects adversarial testing as a *procedural* device to ensure the reliability of evidence.

The right to procedural due process applies with same force on appeal as it does at trial. *Cf. Perdue v. Commonwealth*, 82 S.W.3d 909, 912-13 (Ky. 2002) (holding that an "appeal forms an 'integral' and inextricable part of the procedures for determining whether a defendant should be deprived of his life, liberty, or property"). By not giving the Hills the right to respond to its *sua sponte* grounds for affirming the trial court, the Court of Appeals gave the Lottery "a distinct and undeserved advantage" that deprived the Hills of the right to due process of law. Moreover and more importantly, as shown below, the Court of Appeals *sua sponte* grounds for affirming the trial court are clearly erroneous.

CONCLUSION

For the forgoing reasons, the Hills respectfully request that this Court vacate the August 8, 2003, Order (Tab 8) requiring a second trial and reinstate the Final Judgments dated May 12, 2003 (Tab 5). Furthermore, justice requires that the Order on attorney fees (Tab 9) must be vacated and the Hills awarded all fees incurred for both trials and all appeals.

Respectfully Submitted,



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