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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**

RESPONSE/REPLY 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 13th day of March, 2009, to: Jan West, Goldberg & Simpson, 9301 Dayflower St. Louisville, KY 40059. The undersigned does also certify that the record on appeal was not taken from the Jefferson Circuit Court Clerk.

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INTRODUCTION

On May 12, 2003, a Jefferson County jury found in favor of Kimberly Hill and Robert Hill (collectively "the Hills") on their three liability claims against the Kentucky Lottery Corporation (hereinafter "the Lottery"), including two unanimous million dollar verdicts on defamation. Erroneously, the trial judge vacated that jury verdict by granting the Lottery a new trial on an alleged error not preserved. This Court has granted discretionary review to determine the important issues in this case which affect our judicial system.

ARGUMENT

I. Because the Hills' Wrongful Termination Claim Is Based On Separate Facts From Their Retaliation Claim, The Court Erred When It Held It Was Improper For Both Claims To Go To The Jury.

The Hills brought claims for (1) wrongful termination for being discharged for refusal to commit perjury and (2) violation of the Kentucky Civil Rights Act ("KCRA") for retaliation for protesting discrimination against a blind employee. The facts underlying the two claims differ as well as the law applicable to the two claims. The Lottery fails in its Brief to address the issue that there are differing facts for each claim. In addition, the Lottery misstates the law. The Lottery's claim that one cause of action somehow preempts the other is simply wrong; and none of the cases on which the Lottery relies so holds. Rather, preemption under *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985) turns on the theory of liability not the underlying facts of the case.

Grzyb makes clear that there are two exceptions to the at-will-employment doctrine:

> only two situations exist where "grounds for discharging an employee are so contrary to public policy as to be actionable" absent "explicit legislative statements prohibiting the discharge." First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment." *Id.* at 402 (internal citations omitted).

The Lottery and, more importantly, the trial court and Court of Appeals mistakenly applied the second *Gryzb* exception to both the wrongful termination for refusal to commit perjury and the retaliatory discharge claims. But the Hills' common-law wrongful discharge for refusal to commit perjury claim is clearly based on the first exception; and it was proper to go to the jury.

The Hills' common-law wrongful discharge for refusal to commit perjury claims were based on the proof that (1) an officer or agent of the Lottery pressured Kim Hill to testify falsely at an unemployment hearing, including threats to her and husband's job with the Lottery; (2) Kim refused to give false testimony at the hearing; and (3) the Lottery fired the Hills because Kim refused the Lottery's request to commit perjury. Giving false testimony at an unemployment hearing and committing perjury are unlawful. *See* KRS 523.010 *et seq.* Discharging an employee who refuses to commit perjury or the spouse of such an employee falls squarely within *Grzyb's* first exception to the at-will-employment doctrine. *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440, 447 (Ky. App. 2001) (holding that asking an employee "to violate a law by requesting that they perjure themselves" is actionable under *Grzyb*). Nothing in KRS Chapter 344 covers the first *Gryzb* exception under which the Hills' claim that they were fired for refusal to commit perjury. Thus, there is no KCRA preemption as the trial court and Court of Appeals erroneously held and this Court must correct.

Moreover, the Lottery's assertion that *Grzyb* requires only an analysis of facts is contrary to case law. For example, in *Farm Bureau Ins. Co. v. Jones*, 864 S.W.2d 926 (Ky. App. 1993), Farm Bureau argued that KRS 304.12-235 preempted the right to recovery for "anxiety, mental anguish, and loss of consortium under KRS 304.12-230." *Id.* at 929. In rejecting the argument, the *Jones* Court did not look to whether the claims were based on the same set of facts. Rather,

the Court decided the issue on policy and the purpose behind the two statutes:

> Farm Bureau cites *Grzyb v. Evans* . . . for the proposition that where a remedy is provided in a statute, the aggrieved party is limited to that statutory remedy. In this case, Farm Bureau contends that the Joneses should be limited to the interest and attorneys' fees provided in KRS 304.12-235. The problem with this contention is that KRS 304.12-230 and KRS 304.12-235 are different statutes which address different kinds of culpable behavior. Both of these statutes and the *Grzyb* decision were in effect when the *Reeder* decision was handed down. KRS 304.12-235 appears to be intended as a prod to prevent laxity in the adjustment of claims. KRS 304.12-230, however, speaks out against more egregious behavior. The acts listed in the statute have the character of intentionally tortious acts. The Legislature might easily believe that one damaged by such actions should receive damages as provided by KRS 446.070. We hold that the trial court did not err in its instructions to the jury. *Id.*

So *Jones* clearly contradicts the Lottery's assertion that, under *Gryzb*, the question of preemption is decided totally by examining the facts underlying the statutory claim and the claim it allegedly preempts.

More importantly, the Lottery's assertion is immaterial to this case because the facts underlying the Hills' two claims are different. The issue of refusing to commit perjury figures in only one of the two claims. Despite the Lottery's unsupported claim to the contrary, the Hills' common-law wrongful discharge for refusal to commit perjury claims required the Hills to prove a different set of facts from their KCRA retaliatory discharge claims. The jury instructions on the two claims were entirely different. (Tab 2 of the Hills' Brief contains the jury instructions.) The jury instructions on the retaliatory discharge in violation of KCRA required the Hills to prove different elements than they had to prove under the instructions on their common-law wrongful discharge for refusal to commit perjury claims, *e.g.*, that Kim believed that she was opposing a practice made unlawful under the KCRA and that the Lottery retaliated against her for that opposition. Likewise, the instructions on the Hills' common-law wrongful discharge for refusal to commit perjury claims required the Hills to prove different elements than they had to prove for

their retaliation discharge in violation of KCRA claims, *e.g.*, that the Lottery pressured Kim to commit perjury at the unemployment hearing, she refused, and the Lottery fired her for refusing to lie. The KCRA claim required that she prove she was defending a disabled person while the wrongful discharge claim for refusal to commit perjury required no proof of disability. The trial court erred as a matter of law in ruling that the KCRA preempted the Hills' common-law wrongful discharge for refusal to commit perjury claims.

II. The Trial Court Had No Jurisdiction to Enter A New Trial Order.

The May 12th Judgment in favor of the Hills is final and appealable on its face. CR 54.01. On that date there were no more pending motions; all outstanding motions had been ruled on. By granting the Hills' Rule 59 motion, as a matter of law, the Court denied the Lottery's pending and competing Rule 59 motion. Once the judgment was noted and entered on the docket sheet, the time for filing post-judgment motions and filing a notice of appeal from the judgment began to run. CR 77.04. Under Kentucky law, "a court speaks through the language of its orders and judgments." *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 648 (Ky. 2007). While *Cumberland Valley Contractors* indicates that a court may convert an otherwise final judgment or order into a non-final one by including language of non finality, the trial court did not do that here.

Therefore, the trial court could not, by separate order, convert an otherwise final and appealable judgment into a non-final one. The judgment does and must speak for itself. Under CR 52.02, the trial court could have amended the judgment within 10 days of entry in order to make it non-final. The Lottery could have so moved the trial court to amend the judgment. It would have been simple to do and would have preserved the Lottery's arguments. The Lottery did not. The trial court could not by separate order reserve jurisdiction over the judgment.

Kentucky Farm Bureau Ins. Co. v. Gearhart, 853 S.W.2d 907 (Ky. App. 1993).

In *Gearhart*, the appellant filed a CR 59.05 motion seventeen 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." *Id.* at 910. 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.*

Very similar to *Gearhart*, the trial court here attempted to reserve jurisdiction over the May 12th Judgment by separate order. As in *Gearhart*, it was incumbent on the Lottery to file a timely CR 52 or CR 59 motion in order for the trial court to maintain jurisdiction over the judgment. Having failed to do so, the trial court lost jurisdiction to *sua sponte* enter the new trial order on August 8, 2003. CR 59.04. Nothing the Lottery states in its Brief changes this.

III. The Lottery's Statements About Preservation of Error Are Unsupported By The Record; It Concedes It Was Responsible For The Combined Damage Instruction.

As clearly stated in the new-trial order, the trial court granted a new trial to the Lottery because the jury was given a damage instruction combining damages on each of the Hills' three theories of liability: (1) common-law wrongful discharge for refusal to commit perjury, (2) defamation, and (3) retaliation in violation of the KCRA. The trial court reasoned erroneously that a new trial was necessary because "there is no way to determine which damages were awarded to the Hills under the instruction for retaliatory discharges, the instruction for wrongful discharge in violation of public policy, or the instruction on defamation." TR Vol. 10 at 1462. The record makes it crystal clear that the Lottery created this very problem by insisting that the jury be given one damage instruction for all three theories of liability. As set out in the Hills'

Brief, the Court of Appeals erred on even grander scale by creating a new rule of law that was never raised, briefed or argued, when it ruled that a party may not impeach his or her pleadings on appeal even though the matter was tried by consent to a jury pursuant to CR 15.02.

The record is clear that the Lottery never objected to the combined damage instruction; indeed, the Lottery insisted upon it over the Hills' objections. The Lottery cites to immaterial objections it made to a liability instruction, not to the combined damage instruction. None of those cites are material to the issue. The simple fact is that the Lottery submitted jury instructions combining the damages for common-law wrongful discharge for refusal to commit perjury, retaliation in violation of KCRA and defamation. These instructions are attached to the Hills' Brief at Tab 3 and read, in their entirety, as follows:

> Verdict Form B
> We, the jury, find for Kimberly Hill and award her $_______________ on her claims against the Kentucky Lottery Corporation.

The trial court combined the damages for each liability claim as follows:

> Instruction No. 5: Damages (Past Earnings)
> If you find for Kim Hill under interrogatory No. 1 and/or No. 2 and/or No. 3, you will determine from the evidence an award of a sum of money equal to the gross amount of wages he would have earned from the Kentucky Lottery during the period between his discharge on August 31, 1999, until today, including fringe benefits, less any compensation she has received from other employment or could have earned through the exercise of reasonable diligence to secure other employment during that period of time, not exceeding a total award of $113,866 (the amount claimed.)
>
> Instruction No. 6: Damages (Future Earnings)
> If you find for Kim Hill under interrogatory No. 1 and/or No. 2 and/or No. 3, you will determine from the evidence an award of a sum of money, if any, equal to the gross amount of future wages she would have earned after today's date, including fringe benefits, less any compensation you believe she could earn through the exercise of reasonable diligence to secure other employment in the future, not exceeding a total of $859,080 (the amount claimed).

Instruction No. 7: Damages (Mental Anguish)

If you find for Kim Hill under Interrogatory No. 3, you will determine from the evidence an award of a sum of money, if any, for her embarrassment, humiliation and mental anguish. (Not to exceed $1,000,000).

Instruction No. 8: Punitive Damages

If you find for Kim Hill under Interrogatory No. 1 and/or No. 2 and/or 3, and awarded her a sum of money in damages under either Instruction 5, 6, or 7, and if you are satisfied from the evidence that the Kentucky Lottery acted toward Kim Hill with oppression or malice, you may in your discretion, award punitive damages against the Kentucky Lottery in addition to the damages awarded under Instruction No. 5,6, or 7. ...[The instruction provides guidance on the terms and factors to be considered.]

The Lottery's cited objections to jury instructions go to its erroneous assertion that the Hills should have elected one of two theories of liability, either common-law wrongful discharge for refusal to commit perjury or retaliation in violation of the KCRA. The Lottery was wrong about this but more importantly, the objections do not relate to the damage instruction which is at issue here. Indeed, this same error was also made by the Court of Appeals. The most salient point that the Lottery, as well as the Court of Appeals, missed, is that the Lottery combined the damage verdict form into one form, combining damages for all three claims over the objection of the Hills. The Lottery's combination of damages is an error that it invited and was the sole reason given by the trial court in improperly vacating the jury award.

The Lottery never argued to the trial court that the jury should be given separate damage instructions; at most, the Lottery argued that one count should be dismissed. In fact, the section of the argument cited by the Lottery in its footnote 11 illustrates that the Lottery argued against allowing the jury to award separate and distinct damages. In that footnote, the Lottery states that it is concerned that the jury would award "another amount" because it would assume that the "request for them to lie is a separate and distinct cause for damages." If the Lottery had not

insisted, the trial court would have had separate jury instructions for damages on each count. The Lottery invited any error created by the combination of instructions.

Before the hearing on the jury instructions, the trial court prepared what it described as a rough draft of the instructions. In this rough draft, the trial court combined the damages for unlawful retaliation under KCRA with the damages for common-law wrongful discharge for refusal to commit perjury. But the trial court separated the damages for defamation from the combined damage instruction because the defamation claim was "distinctly different." 1st Trial, Tape B8, 12/17/02 at 17:05:50-58. Nonetheless, the Lottery insisted on combining the damages for defamation with those for unlawful retaliation and wrongful discharge. In response to a discussion by the Lottery's counsel, the trial court asked, "Put all of the damages together?" *Id.* at 17:10:31-33.The Lottery's counsel replied that it believed that would make the instructions clearer. *Id.* at 17:10:35-36. This was not only an invitation for error, but a command performance for error. The Lottery insisted on the very instruction it now says warranted a second trial.

The Hills' counsel objected to a combined damage instructions on grounds that the Hills' claims were separate counts and that separate counts should have separate damages. *Id.* at 17:11:06-11. In the course of this objection, the Hills' counsel noted the potential problems of giving combined damage instructions should this case be appealed. *Id.* at 17:10:36-52. At the insistence of the Lottery, the trial court changed its initial draft and gave the jury a combined damage instruction on each type of damage (quoted above). In fact, the trial court noted the complications created by the Lottery in insisting on a combined damage instruction for the Hills' claims of defamation, retaliation, and common-law wrongful discharge. *Id.* at 10:58:53-55.

In its brief, the Lottery does not dispute that the jury was given a combined damage instruction for each of the Hills' separate and distinct liability claims. Rather, the Lottery simply

argues that the trial court had to grant a new trial because the damages were combined. In support of this, the Lottery relies on *Kroger Co. v. Buckley*, 113 S.W.3d 644 (Ky. App. 2003), when it should rely on *Craig & Bishop, Inc. v. Piles,* 247 S.W.3d 897 (Ky. 2008). In *Piles*, the jury was instructed on both common-law fraud and violation of the Kentucky Consumer Protection Act. The Court of Appeals "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 901. This Court concluded that review of this issue was not necessary because the defendant did not object to "the trial court's instructions to the jury, [which] allowed the same damages for loss of use and inconvenience 'under either Instruction Nos. 6 [KCPA violations] or 7 [fraud.]'" *Id.* at 901-02. So *Piles* stands for the proposition that where a combined damage instruction is given for separate and distinct claims, reversal of one of those claims on appeal does not require setting aside the damage award as long as one of the claims survive, at least where the complaining party fails to object to the combined damage instruction.

Similar to *Piles*, the instructions here contained a combined compensatory-damage instruction for all three of the Hills' separate and distinct claims. Not only did the Lottery fail to object to the combined damage instruction, the Lottery was responsible for the combined damage instruction being given to the jury. In stark contrast, the Hills submitted separate damage instructions for each claim, asking the jury to look at wrongful termination for refusal to commit perjury and award damages just for that claim before looking at retaliatory discharge and awarding damages on that claim, then moving to defamation. See Tab 4 of the Hills' Brief.

The trial court should have provided a separate damage instruction for separate claims. *Brewer v. Hillard*, 15 S.W.3d 1, 14 (Ky. App. 1999). Giving a combined damage instruction as

requested by the Lottery for the Hills' distinct and separate liability claims was error. *Id.* In discussing an alleged instruction error similar to the combined compensatory-damage instruction here, the *Brewer* Court explained:

> As CF points out, Hillard presented two separate and distinct claims of injury; one for intentional infliction of emotional distress against Hillard and one against CF for the sexual harassment by Brewer. **Because there were two separate and distinct claims against two tortfeasors, there should have been two damage instructions:** one for the damages resulting from the sexual harassment and one for the damages resulting from intentional infliction of emotional distress. However, no one made a specific objection to Instruction No. 3, Interrogatory No. 8. Therefore, we are stuck with what, in essence, is a total award of $75,000 for two distinct causes of action. *Id.* (emphasis added).

On this point, *Brewer* is similar to *Piles.* Because the defendants in *Brewer* and *Piles* both failed to object to the combined damage instruction, they were both "stuck" with the jury's verdict. The same argument applies with even greater force where, like here, the Hills submitted a separate damage instruction for each of their separate and distinct claims, but the Lottery objected and insisted on a combined damage instruction for the distinct claims. The Lottery's attempt to distinguish *Piles* based on superficial differences between the language of the instructions in this case and those in *Piles* is meaningless. What makes *Piles* controlling is not the language of the instructions. What makes *Piles* controlling is that the Lottery insisted on giving the combined damage instructions. The Lottery created the error. The Lottery is not allowed to gain an advantage from error it created. *See e.g., McVey v. Berman,* 836 S.W.2d 445, 450-451 (Ky. App. 1992) (holding that "appellants are estopped to take advantage of error which was present in the instructions tendered by them, and objected to by appellee"); *accord Wright v. Jackson,* 392 S.W.2d 560, 562 (Ky. 1959); *Gibson v. Thomas,* 307 S.W.2d 779 (Ky. 1957). This makes the Lottery's other argument on preservation meaningless as well.

While conceding that it was responsible for the combined damage instruction, the Lottery claims that it was not responsible for creating the error because it asked the trial court to use "in the alternative" in the instructions instead of the "and/or" used by the trial court. This argument is disingenuous. "And/Or" is tantamount to saying "In the alternative." Both simply mean that the jury could find one and the other or one or the other. Juries decide cases based on "and/or" instructions every day. Indeed, Kentucky's bare bones jury instructions allow and encourage the use of everyday words such as "and" and "or." The words are in the damage instruction which reads, "If you find for Bob Hill under interrogatory No. 1 and/or No. 2 and/or No. 3 ...". The Lottery argued in its Brief that this should have read, "If you find for Bob Hill under interrogatory No. 1 or in the alternative No. 2 or in the alternative No. 3..." Even if the Lottery's language was used, the results would be the same because the Lottery combined the damages.

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). But that is what the trial court and Court of Appeals allowed. The trial court abused its discretion by granting a new trial based on an alleged error created by the Lottery, as did the Court of Appeals. This is bad law, bad precedent and changes the civil rules.

IV. The Hills Are Entitled To Recover Their Punitive Damages Awarded By The Jury.

Because the trial court erred in ruling that the KCRA preempted the Hills' claims for

common-law wrongful discharge for refusal to commit perjury, and it erred in ruling that the Lottery had a qualified privilege (and that the Lottery had preserved the affirmative defense of qualified privilege), the Hills are entitled to recover their punitive damages from the first trial. Both the common-law wrongful discharge for refusal to commit perjury claims and defamation claims support the jury's punitive damage award. *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, 179 S.W.3d 785, 792 (Ky. 2005) (defamation); *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440, 448 (Ky. App. 2001) (wrongful discharge). So under *Piles*, the Hills are entitled to the punitive-damage award from the first trial as well.

As explained in *Piles*,

> Sonny Bishop Cars also contends that 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. However, 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. *Piles*, 247 S.W.3d at 905.

Similar to *Piles*, the combined punitive-damage instruction was given at the Lottery's insistence. So again, the Lottery should not be able to take advantage of an error it created.

V. No Earlier Court of Appeals Motion Panel Ruling Is Binding On This Case.

The Lottery argues that a ruling by a Kentucky Court of Appeals' motion panel is the law of the case on the question of the trial court's jurisdiction over the May 12th Judgment. The Lottery's argument is wrong as a matter of law and policy.

At issue here is an order by a Court of Appeals' motion panel[1] dismissing the Hills' appeal from the trial court's August 8, 2003 new trial order, in which the Hills argued that the

[1] While not apparent on the face of the order dismissing, under CR 76.34(6) motions to dismiss that are passed to the merits appear to go a Court of Appeals motion panel. *See Rainwater v. Jasper & Jasper Mobile Homes, Inc.*, 810 S.W.2d 63 (Ky. App. 1991) (noting that after "appellee moved for dismissal of the petition[, t]his Court passed that motion to the panel which would review the case on the merits").

trial court lacked jurisdiction to enter the order. The Lottery chides the Hills for not mentioning the order dismissing. But this was neither an oversight nor an attempt to deceive the Court. Rather, the Hills did not mention the order because it is not relevant. Now that the Lottery has raised the issue, it must be addressed. Moreover, the Hills believe it would be of benefit the bench and bar to have an opinion from this Court addressing the legal effect of motion-panel decision to dismiss an appeal on the merits of the underlying case. The Court should embrace the majority view that the law-of-the-case doctrine does not apply in this situation.

For example, in *United States v. Houser*, 804 F.2d 565 (9th Cir. 1986), the Ninth Circuit Court of Appeals expressly held that "the law of the case doctrine does not apply to the denial by a motions panel of this court of a motion to dismiss on jurisdictional grounds."*Id.* at 567. The Fourth Circuit, the Fifth Circuit, and the Seventh Circuit Court of Appeals are all in accord with the Ninth Circuit on this point. *See e.g.*, *CNF Constructors v. Donohoe Constr. Co.*, 57 F.3d 395, 398 (4th Cir. 1995) (holding that "the doctrine of 'law of the case' does not prevent this Court from revisiting a prior ruling of a motion panel on the Court's jurisdiction"); *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991) (holding that "[w]e are free to reexamine the motion panel's determination of [the] question [of jurisdiction] unembarrassed by the law of the case doctrine"); *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 (5th Cir. 1983) (noting that "[a]denial by a motions panel of a motion to dismiss for want of jurisdiction, however, is only provisional"). More importantly, the Kentucky Court of Appeals is in accord with this position as well. *Bellarmine College v. Hornung*, 662 S.W.2d 847 (Ky. App. 1983).

In *Hornung*, the trial court entered an order certifying Bellaramine College as the class-representative defendant in a class action suit. Bellarmine appealed. Paul Hornung, the plaintiff, "moved to dismiss the appeal on the ground that the order was interlocutory and nonappealable."

Id. at 848. A Court of Appeals' motion panel initially denied the motion to dismiss. On further review, the *Hornung* Court reversed course and dismissed the appeal for lack of jurisdiction.

In dismissing, the *Hornung* Court explained:

> Although a panel of this Court has previously considered the order to be final and appealable, this panel has now had an opportunity to peruse the record and view the situation more thoroughly. This Court has a duty to determine for itself whether it is authorized to review an order appealed from, even if the issue is not presented or no longer pursued by a party opposing an appeal. *Id.*

So just like the federal circuits that have addressed the issue, the Court of Appeals does not consider a motion panel's decision as to jurisdiction to be binding or, as the Lottery argues, the law of the case. This Court should make clear that this is the law of the Commonwealth. Moreover, a "dismissal of an appeal means that the case is to be treated as though an appeal had not been taken." 5 Am Jur. 2d *Appellate Review* § 876 (2004); *accord Newman v. Moyers*, 253 U.S. 182, 186 (1920) (holding that "[a] dismissal for want of prosecution will remit the case to the lower court in the same condition as before the appeal was taken"); *Wilson v. Aderhold*, 89 F.2d 903, 904 (5th Cir. Unit B 1937); *Stewart v. Oneal*, 237 F. 897, 919 (6th Cir. 1917).

Once the appeal was dismissed in this case, the case was restored to where it was immediately before the Hills appealed the trial court's August 8th order. In other words, the dismissal had absolutely no legal effect on the trial court's order. The motion panel's dismissal of the Hills' appeal is not "law of the case" as to whether the trial court retained jurisdiction to grant a new trial 87 days after entering judgments in the Hills' favor on May 12, 2003. This result is consistent with Kentucky's jurisprudence on the law-of-the-case doctrine.

As explained *Ranier v. Kiger Ins.*, 998 S.W.2d 515, 518 (Ky. App. 1999), "[t]he law of the case doctrine essentially holds that a final decision of an appellate court is determinative of an issue." The motion panel's order dismissing the Hills' appeal was not a "final decision" by

this Court that the trial court retained jurisdiction over the May 12th judgments beyond ten days after entry of those judgments. That order did not finally decide whether the May 12th judgments were final and appealable. Under *Hornung*, the motion panel's order did not even finally decide the question of whether this Court has jurisdiction over the Hills' appeal from the trial court's August 8th new trial order.

Of course the question of whether this Court has jurisdiction over the Hills' former appeal is moot. Nor has the question been raised in this appeal. Rather, the issue raised in this appeal is whether the trial court's August 8th order is null and void for lack of jurisdiction to enter the order. As such, the Hills' jurisdictional challenge to the trial court's order falls within a clear exception to the law-of-the-case doctrine.

As held by the D.C. Circuit Court of Appeals, "the doctrine of 'law of the case' does not apply to the fundamental question of subject matter jurisdiction." *Green v. Department of Commerce*, 618 F.2d 836, 839 (D.C. Cir. 1980). Similarly under Kentucky law, "[s]ubject matter jurisdiction may be raised at any time and cannot be consented to, agreed to, or waived by the parties." *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1997); *Commonwealth Health Corporation v. Croslin*, 920 S.W.2d 46, 47 (Ky. 1996). Implicit in this rule of Kentucky law is that jurisdiction cannot be imposed upon the parties under the law-of-the-case doctrine. Certainly, the Court of Appeals' motion panel's order of dismissal did not irrevocably put the question of jurisdiction beyond this Court's review on appeal.

Therefore, the law-of-case doctrine does not apply in this case. This Court may reach the merits of the Hills' jurisdictional arguments. *Hornung*, 662 S.W.2d at 848; *United Tobacco Warehouse, Inc. v. Southern States Frankfort Coop.*, 737 S.W.2d 708, 710 (Ky. App. 1987).

VI. No Hearing Occurred On Interest; And No Notice Or Opportunity To Present Evidence Was Given.

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, Tab 1, 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." To be entitled to a reduction in the interest, the Lottery must demonstrate that a hearing on the issue was noticed and occurred. *Decker v. Gassock Trucking*, 403 S.W.2d 275, 276 (Ky. 1966).

Not satisfied with the trial court's erroneous reduction of interest, the Lottery now requests a further reduction in the interest rate. The Lottery's argument in favor of further reduction essentially asks the Court to declare KRS 360.040 unconstitutional. (Note: that the Attorney General has not been notified of any challenge to KRS 360.040 as required by CR 24.03). Instead of bearing 12%, under the Lottery's argument, the trial court must always reduce the judgment interest to reflect the market rate of interest. There's nothing to support this argument. Moreover, the argument is directly contrary to the plain language of the statute, which expressly provides: "A judgment shall bear twelve percent (12%) interest compounded annually from its date."

The statute further provides a mechanism for reducing the interest rate: "Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment may bear less interest than twelve percent (12%) if the court rendering such judgment, **after a hearing on that question,** is satisfied that the rate of interest should be less than twelve percent (12%)." (Emphasis added.) The Lottery argues that the Court should completely ignore the plain language of the statute and impose an interest rate completely independent of the statute and the

trial court's decision reducing the interest rate. The Lottery asks the Court to declare the statute null and void because it is punitive. This is an argument that should be made to the General Assembly, not to this Court. It should be rejected.

In fact, the trial court's reduction of the judgment interest rate for the Hills' retaliatory discharge claims should be stricken, and the case remanded with instructions to reinstate the statutory rate of 12%, because the trial court failed to hold a hearing or give any reason for this reduction.

VII. The Lottery had no Privilege to Release the Defamatory Memoranda.

Similar to creating an error by insisting on a combined damage instruction for the Hills' separate and distinct claims, the Lottery waived the defense of qualified privilege by failing to raise the defense at any time. The court based its new trial order in part on failure to instruct on qualified privilege but there was never a request to do so. The Lottery, to this day, insists that it has an absolute privilege to secretly put any false document into a personnel file and release it to whomever it pleases. It tendered an instruction asking the jury to determine if an absolute privilege exists for the Lottery. (Tab G to the Hills' Brief.) In contrast, the Hills tendered an instruction that did not include privilege language. The trial court later decided that despite no argument regarding qualified privilege, it would hold a second trial to allow a jury to decide that issue. This was wrong. As set forth in the Hills' Brief, the Lottery had the burden to plead and argue qualified privilege before the jury was instructed in the first trial.

Ignoring its own ruling that litigants must be limited to their initial pleadings, the Court of Appeals erroneously concluded that the Lottery's proposed instruction on absolute privilege preserved the alleged error in failing to instruct the jury on qualified privilege as a defense to the Hills' defamation claims. The Court of Appeals reasoned that the Lottery

> did tender a jury instruction which would have permitted the jury to find liability against [the Lottery] 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 (emphasis added). The Court of Appeals' reasoning is completely wrong. If it stands, it substantively changes the law in Kentucky.

As shown below, the Lottery's tendered instruction was wrong as a matter of law and it would have been clear error for the trial court to give it to the jury. If a party has an absolute privilege, the Court does not instruct the jury to examine the privilege; it is a question of law not fact. Under CR 51, tendering an incorrect instruction does not preserve an instructional error for review.

CR 51(3) provides:

> No 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, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

"The purpose of the rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them." *Brumley v. Richardson*, 273 S.W.2d 54, 55-56 (Ky. 1954). Consequently, tendering an incorrect instruction does not preserve an instruction error because an incorrect instruction fails to "fairly and adequately" alert the court to the party's position. *Id.* Or as explained recently by this Court,

> in both civil and criminal cases, Kentucky appellate courts have explained that a tendered instruction will not fairly and adequately present the party's position as to an allegation of instructional error when: (1) the omitted language or instruction was not contained in the instruction tendered to the trial court; i.e., when the allegation of error was not presented to the trial court *at all;*

Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153, 163-64 (Ky. 2004) (emphasis in original and internal footnotes omitted).

The Hills tendered a well recognized defamation instruction based on Kentucky case law without a qualified privilege prong because the Lottery never raised qualified privilege in its answer, in its arguments or briefs or even in its motion for directed verdict. The Hills tendered instructions are attached at Tab 4 to their Brief and required the jury to determine if the Lottery exercised ordinary car to determine whether the defamatory statements were true or false.

The Lottery's "privilege" instruction failed to present *at all* the Lottery's current position that it was entitled to an instruction on qualified privilege as a defense to the Hills' defamation claims. The Lottery's tendered instruction required the jury to determine whether a privilege existed. This is contrary to law. "The determination of the existence of privilege is a matter of law." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 796 (Ky. 2004) (quoting *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 276 (Ky. App. 1981), and also citing *Baker v. Clark*, 186 Ky. 816, 218 S.W. 280, 285 (1920)). Thus, the existence of a privilege is a question of law for the court decide and not the jury.

The defamatory statements in this case are contained in two preliminary termination memoranda. The defamatory memoranda were prepared by the Lottery's vice president of human resources, Church Saufley, in anticipation of a meeting with the Hills that never happened. Trial 1, Tape B6, 12/13/02 at 14:2920-25. On advice of legal counsel, the Lottery never presented the defamatory memoranda to the Hills. *Id.* at 14:43:30-44:15. Rather, the memoranda were simply copied and secretly placed in Kim and Bob's personnel files. Neither Saufley nor the Lottery was required to make any statement concerning the Lottery's reasons for terminating the Hills. And the Lottery was certainly not required by law to include the

defamatory statements about the Hills in their employment files. Therefore, the Lottery's argument that it has absolute immunity from defamation because it was required under Kentucky law to respond WLKY's open-records request is wrong conceptually, legally, and factually. It would be the worse public policy to shield a public agency when it secretly placed a known falsehood about an employee in a file for it to be copied and released by a low level employee who claims "the Open Record Law made me do it."

The argument is conceptually wrong because immunity can only attach to documents that the Lottery was required both to create and to produce. The Lottery completely skips the first requirement and focuses solely on the question of whether it was required to produce the defamatory memoranda to WLKY under Kentucky law. But as the very cases cited by the Lottery demonstrate, the correct analysis begins a step earlier with the question of whether it was required by law to create the defamatory statements in the first place.

For example in *Matthews v. Holland*, 912 S.W.2d 459 (Ky. App. 1995), the plaintiff was employed as a school principal for a year. *Id.* at 460. After the plaintiff's contract was not renewed, she wrote to the school superintendent asking for specific reasons why her contract was not renewed. In response, the superintendent "forwarded her a brief letter and enclosed several written complaints." *Id.* The superintendent also forwarded the same information to the Professional Standards Board. The plaintiff sued the superintendent for libel based on the publication of the information to the Professional Standards Board.

As explained in the facts of *Mathews*, the superintendent was required by law both (1) to provide the plaintiff with the "true reasons" why her contract was not renewed, and (2) to provide the same information to the Professional Standards Board. *Id.* So in *Mathews*, the defendant was required by law to state the reasons for the plaintiff's termination *and* to publish

those reasons to the Professional Standards Board. But in this case, the Lottery was neither required to state the reasons why the Hills were terminated nor to disclose those reasons to WLKY under its open-record request.

The Lottery makes no claim that it was legally required to state the reasons why the Hills were terminated. Certainly it was not required to sneak the unsent memoranda containing false and defamatory reasons for the terminations in the Hills' personnel files. Moreover, as the Lottery repeatedly argued at trial, the Hills were at-will employees. As such, the Lottery could terminate their employment for any reason, except for a reason contrary to law (*e.g.*, unlawful retaliation in violation of the KCRA) or contrary to public policy (*e.g.*, unlawful discharge for refusing to commit perjury). The Lottery was not required to terminate the Hills only for cause. And the Lottery points to no such obligation in its brief. So the Lottery had no legal obligation to state any reason for terminating the Hills' employment. Also, as explained in the Hills' Brief, the Lottery's claim that it was required by law to disclose the defamatory memoranda is wrong, because the memoranda fall within disclosure exceptions in the Open Records Act. Finally, none of the Lottery personnel responsible for creating and publishing the defamatory statements in the memoranda are of such high office that absolute immunity attaches to their statements.

As stated in *Compton v. Romans*, 869 S.W.2d 24 (Ky. 1993), "It has long been settled Kentucky law that absolute immunity from defamation actions is available to *certain governmental officials* with respect to matters upon which the law requires them to act." *Id.* at 26 (emphasis added). The opinion then goes to great lengths to explain why the appellee in the case, the former chairman of the Kentucky State Racing Commission, was a governmental official of such high rank as to be entitled to absolute immunity from the appellant's defamation suit:

> [I]t is of no significance that the Racing Commission is not a cabinet-level department of state government. With respect to thoroughbred racing, its status as

> an independent agency of state government (KRS 230.220(1)) and the composition of its membership by gubernatorial appointment renders it fully comparable to a cabinet-level department for the purpose of immunity analysis. Moreover, by virtue of the statute which requires the Commission to designate one of its members as Chairman (KRS 230.220(1)), we conclude that the person so designated is of a comparable rank to the executive head of a department of state government. *Id.* at 27.

The Lottery makes no argument that Church Saufley, who prepared the termination memoranda and copied them to the Hills' employee files, or the paralegal, who actually produced the memoranda to WLKY television, rises to the level of "executive head of a department of state government." Nor does the Lottery make any similar argument regarding the persons who signed the defamatory memoranda and had no idea that they were kept by the Lottery at all once the Lottery decided not to send them to the Hills. Instead, the Lottery focuses exclusively on the legally-required-to-act component of the law regarding absolute privilege. But *Compton* clearly focuses on both whether the defendant was legally required to act *and* the defendant's official status. Therefore, under *Compton* the Lottery had no absolute immunity because neither the person who made the defamatory statements nor the person who produced them to WLKY fall within the narrow class of persons entitled to absolute immunity from defamation actions. Also, under *Compton*, the Lottery has no absolute immunity because no one at the Lottery—from the highest official to the lowliest—was legally required to make any statement at all regarding the reasons for the Hills' terminations. And this brings us to one more reason why the Lottery should not be entitled to an absolute privilege.

The Lottery urges this Court to declare that it is above and beyond the reach of the law. It wants the unfettered right to say whatever it likes about its employees, its players, etc. as long as those statements are made public through an open-records request. Perhaps, if the Hills had been merit employees who could only be fired for cause, then the Lottery's argument might have

some merit. Of course if they'd been merit employees, the Hills would have the right to a hearing and a fair opportunity to rebut and to correct the Lottery's false allegations against them. But as to the defamatory memoranda snuck into their personnel files, the Hills were never given the chance to challenge the defamatory statements before they were released to WLKY and published to the world. They were victims of the Lottery's caprice. This Court should remind the Lottery that it is not above the law and that, sometimes, words hurt much worse than that inflicted by sticks and stones.

VIII. The Lottery Has No Sovereign Immunity; It Is Not Immune to Interest.

The Lottery misapplies to itself a number of cases concerning whether judgment interest can be assessed against a governmental entity entitled to sovereign immunity. All of these cases hold that, just like liability, in order to assess judgment interest against an entity entitled to *sovereign immunity*, there has to be specific waiver of the imposition of judgment interest. As explained by this Court, "because of *sovereign immunity principles*, 'a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified.'" *Ky. Dep't of Corr. v. McCullough*, 123 S.W.3d 130, 140 (Ky. 2003) (quoting *Powell v. Board of Education of Harrodsburg*, 829 S.W.2d 940, 941 (Ky. App. 1992)). But the Lottery is not entitled to sovereign immunity. The cases it cites are not applicable.

In fact, in a recent case against the Hoosier Lottery the Seventh Circuit Court of Appeals decided a similar issue. In *Burrus v. State Lottery Commission of Indiana* 546 F. 3d 417 (7th Cir. 2008) the court held that the Hoosier Lottery was not entitled to sovereign immunity as it was not an arm of the state. Similar to the Lottery in this matter, the Hoosier Lottery claimed that it was a state agency. *Id.* at pg. 420. The court in Burrus indicated that it looks at two factors to determine whether an entity is an arm of the state: (1) the extent of the entity's financial

autonomy from the state; and (2) the general legal status of the entity. *Id.* If this Court uses the same factors, it must conclude that the Kentucky Lottery is not an arm of the state.

The Kentucky Lottery was the first lottery in the United States to be created through incorporation according to the Lottery's own history on its website, www.kylottery.com (About Us, History). The Lottery is not a part of state government. The Lottery has not received funds from the state since its inception in 1989. By statute, it is self sustaining and self funded. KRS 154A.140(2). No claim for the payment of an expense of the Lottery shall be made against any money of the Commonwealth. Id. In short, the Commonwealth is not responsible for the debts of the Lottery.

Moreover, the Lottery fails to cite to *Kentucky Lottery Corp. v. Casey*, 862 S.W.2d 888 (Ky. 1993), which holds that the Lottery is liable for interest for failing to award the correct prize amount to one of its players. *Id.* at 891. And the Lottery also fails to cite *Stone v. Kentucky Ins. Guar. Ass'n*, 908 S.W.2d 675 (Ky. App. 1995) in this section of its argument. The main issue in *Stone* was whether the Kentucky Insurance Guaranty Association ("KIGA") was liable for interest on a judgment under KRS 360.040. As noted by the *Stone* Court, KRS 360.040 makes "no exceptions . . . for any class of persons or any entities in this Commonwealth." *Id.* at 678. In a footnote, *Stone* notes "that interest cannot be assessed against state agencies without an explicit declaration from the General Assembly or a contract provision expressly permitting the assessment." *Id.*, n4 at 678. The *Stone* Court held that this exception did not apply to KIGA because it is "not a state agency and [did] not claim sovereign immunity."

Like KIGA, the Lottery has not claimed sovereign immunity. And no claim has been made that it is a state agency entitled to sovereign immunity under the state-agency set forth in

Kentucky Center for Arts Corp. v. Berns, 801 S.W.2d 327 (Ky. 1990).[2] But of course such an argument would be ridiculous in light of the Lottery's enabling statute. KRS 154A.020 expressly provides that the Lottery is an independent municipal corporation. So the Lottery has no immunity from judgment interest. Its argument to the contrary is meritless.

CONCLUSION

For the forgoing reasons, the Hills respectfully request that this Court reverse the Court of Appeals' decision, vacate the August 8, 2003, Order requiring a second trial, and reinstate the Final Judgments dated May 12, 2003 at 12% interest on the award and fees. Furthermore, justice requires that the Order on attorney fees be vacated and the case remanded to the trial court for an award of all attorney fees incurred for both trials and all appeals following the procedure set out in *Morehead v. Manning*, 265 S.W.3d 201 (Ky. 2008).

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[2] *Berns* sets for the test for "determining whether an entity is properly classified as a state agency" for sovereign immunity purposes. *Yanero v. Davis*, 65 S.W.3d 510, 520 (Ky. 2001). Under the *Berns* test, the entity must show (1) that it is an arm of the central state government, *i.e.*, under control of the Commonwealth; and (2) it supported by money from the state treasury. *Id.* The Lottery can satisfy neither prong of this test.