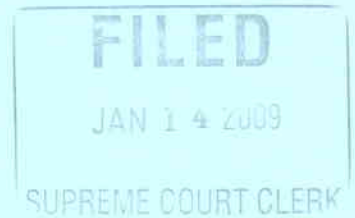


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2006-SC-000748-DG (Appeal)
NO. 2008-SC-000380-DG (Cross-Appeal)



KIMBERLY G. HILL and ROBERT W. HILL APPELLANTS/CROSS-APPELLEES

APPEAL FROM COURT OF APPEALS
NOS. 2005-CA-00011 and 2005-CA-000183

and

JEFFERSON CIRCUIT COURT
THE HONORABLE STEPHEN P. RYAN
NO. 00-CI-04922

KENTUCKY LOTTERY CORPORATION APPELLEE/CROSS-APPELLANT

BRIEF OF APPELLEE/CROSS-APPELLANT
KENTUCKY LOTTERY CORPORATION

Jan M. West
GOLDBERG & SIMPSON, LLC
9301 Dayflower Street
Louisville, KY 40059
(502) 589-4440
COUNSEL FOR APPELLEE/
CROSS-APPELLANT
KENTUCKY LOTTERY CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of Appellee/Cross-Appellant has been served, via first class U.S. Mail, postage prepaid, this 12th day of January 2009, to: Laurence J. Zielke, Keith B. Hunter, and Janice Theriot, Pedley, Zielke & Gordinier, 2000 Meidinger Tower, Louisville, KY 40202; the Honorable Stephen P. Ryan, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and the Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9230. I further certify that the record on appeal has not been removed from the office of the Jefferson Circuit Court Clerk


COUNSEL FOR APPELLEE/
CROSS-APPELLANT

INTRODUCTION

This is an employment case in which the Appellants/Cross-Appellees, Kimberly (“Kim”) and Robert (“Bob”) Hill (collectively the “Hills”), seek review of the Court of Appeals’ September 8, 2006 Opinion Affirming (“Opinion”) the trial court’s decision to grant Appellee/Cross-Appellant, Kentucky Lottery Corporation (“KLC”), a new trial based on serious, prejudicial errors in the jury instructions at the first trial. KLC also seeks review of the trial court’s decision to allow interest on the jury’s award against KLC, as well as the trial court’s determination on absolute privilege.

STATEMENT CONCERNING ORAL ARGUMENT

KLC would welcome oral argument if the Court believes it would be of assistance in deciding this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

This matter, previously reviewed by two separate Court of Appeals panels, essentially revolves around the Hills' argument that the trial court abused its discretion in granting a new trial based upon serious, prejudicial errors in the jury instructions. This Court has long deferred to trial court discretion in such matters.

At the first trial, the trial court erroneously permitted the jury to consider and grant damages for both a retaliatory discharge claim brought under the Kentucky Civil Rights Act ("KCRA"), KRS 344.280, and a common law wrongful discharge in violation of public policy claim, both based upon the same set of facts. Realizing the error, and in its discretion, the trial court set aside the jury's verdict on the common law claim, entered judgment on the KRS 344.280 claim, and granted a new trial on the issue of damages under KRS 344.280. The trial court also realized it erred in not instructing the jury on KLC's "privilege" to the Hills' defamation claim, granting a new trial on that claim as to both liability and damages.

At the second trial, after carefully considering the evidence, the jury awarded the Hills combined damages of \$252,500 on the KRS 344.280 claim and found for KLC on the defamation claim.

With the exception of granting interest against KLC, the judgment following the second trial was legally correct. KLC thus requests that this Court affirm the Court of Appeals Opinion affirming the trial court's judgment following the second trial, except that portion permitting interest to be awarded against KLC.

I. Factual Background

The Court of Appeals Opinion noted the widely divergent facts underlying each side's case, which KLC will not attempt to comprehensively revisit here. *See* Opinion, pp. 2-7, attached to the Hills' Brief at Tab 1.

In summary, KLC terminated the Hills' employment on September 1, 1999, based upon its belief that the Hills had engaged in misconduct. KLC prepared termination memoranda outlining the reasons for the Hills' terminations. (TAPE No. B3; 8/20/04; 14:01:25; Plaintiffs' Trial Exhibits 2 and 6, 12/2002 Trial). The Hills' attorney, Keith Hunter ("Hunter"), subsequently made an Open Records Act request for the Hill's personnel files. (Plaintiffs' Trial Exhibit 3A, 12/2002 Trial). Eight days later, WLKY, a television station in Louisville, also requested the Hills' personnel files. (Plaintiffs' Trial Exhibit 7, 12/2002 Trial). KLC produced the files, including the termination memoranda, to both Hunter and WLKY, believing that it was legally compelled to do so under KRS 61.872. *See, e.g., Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860 (Ky. App. 2001) (holding that KLC must disclose information required under the Open Records Act regardless of whether sought by actual or potential litigant or their attorney – in that case, also Hunter).

In October 1999, the Hills attended a protest outside KLC headquarters concerning KLC's discharge of another employee, Ed Gilmore ("Gilmore"). (TAPE No. B2; 8/19/04; 11:50:16). A reporter and camera crew from WLKY arrived at the protest and interviewed the Hills and Hunter (who also represented Gilmore). (TAPE No. B2; 8/19/04; 11:50:44; Plaintiffs' Trial Exhibit 4, 12/2002 Trial). In the course of WLKY's broadcast of the protest and interview, WLKY displayed Kim's termination memorandum on the air. (Plaintiffs' Trial Exhibit 4, 12/2002 Trial). Several months

later, WLKY again interviewed the Hills, this time at Hunter's office. The Hills talked extensively about their alleged wrongful termination. (Plaintiffs' Trial Exhibit 4).

Shortly thereafter, the Hills filed suit against KLC alleging that they were terminated, in violation of KRS 344.280, in retaliation for Kim's testimony at Gilmore's unemployment hearing concerning her belief that KLC had terminated Gilmore due to disability discrimination.¹ (Record, pp. 1-8). The Hills alleged no other facts constituting opposition to KLC's alleged discrimination against Gilmore. Based upon the same facts supporting their KCRA claim, the Hills further alleged wrongful termination in violation of public policy. (Record, pp. 1-8; 897-903).

The Hills also asserted a defamation claim, alleging that the information contained in their termination memoranda was false and defamatory and that KLC published the memoranda to WLKY, which resulted in damage to the Hills when Kim's termination memorandum was shown on WLKY. (Record, pp. 1-8; 897-903).

II. Procedural History

A. The First Trial.

1. In Pre-Trial Motions and Jury Instructions, KLC Preserved its Preemption and Defamation Privilege Arguments.

The first trial of this case was held in December 2002. KLC argued in a Motion for Summary Judgment filed prior to trial that KLC could not be liable for wrongful termination in violation of both the KCRA and public policy, pursuant to *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985) (where a statute declares an act to be unlawful and specifies the civil remedy available, the aggrieved party is limited to the statutory remedy).

¹ KLC terminated Ed Gilmore for poor performance but he claimed that KLC terminated his employment because of a disability, in violation of the KCRA. Ed Gilmore's Jefferson Circuit Court claim was dismissed on summary judgment in favor of KLC, which dismissal was affirmed on appeal. (Record, pp. 943-952).

(Record, pp. 178-203). In addition, KLC asserted an absolute privilege from liability for defamation as a matter of law because it was required to produce the Hills' personnel files to WLKY pursuant to the Kentucky Open Records Act. (Record, pp. 178-203).

2. The Jury Awarded Damages Against KLC.

The trial court denied KLC's Motion for Summary Judgment and allowed the Hills to proceed with separate claims for wrongful termination in violation of public policy and in violation of the KCRA. When the trial court failed to dismiss the defamation claim on the basis of absolute privilege, KLC tendered a jury instruction that would have submitted the privilege question to the jury. (Record, pp. 1069-1070). Despite KLC's request, the trial court failed to instruct the jury on the issue of KLC's privilege defense to the Hills' defamation claim. (TAPE No. B8; 12/17/02; 16:56:32). In addition, the instructions submitted to the jury combined the lost wages and punitive damages for the three causes of action. However, the instruction for mental anguish was only submitted on the defamation claims. (Record, pp. 1111, 1114, 1118 [Bob]; 1124, 1127, 1130 [Kim]). At the conclusion of the jury trial, the jury found in favor of the Hills on all causes of action and awarded compensatory and punitive damages in the amount of \$4.3 million. (Record, pp. 1108-1120 [Bob]; pp. 1121-1133 [Kim]).

3. The Parties Timely Filed Post-Trial Motions.

On December 26, 2002, KLC tendered a Motion for JNOV, Motion for New Trial and/or Motion to Alter, Amend or Vacate Judgments (Record, p. 988). KLC filed this motion within ten days of the jury verdict out of an abundance of caution. The time for filing post judgment motions had not actually begun, as the trial court had not yet entered the Final Judgments. The trial court entered the Final Judgments on January 21, 2003. (Record, pp. 989-990).

The Final Judgments entered by the trial court did not award the same amount of damages to the Hills as that awarded by the jury verdicts. The Hills subsequently filed a Motion to Vacate the Judgments and enter judgments in the amount of the jury verdicts. On January 31, 2003, ten days after the trial court entered the Final Judgments, KLC filed an Amended Motion for JNOV, Motion for New Trial and/or Motion to Alter, Amend or Vacate the Judgments and Memorandum in Support of the Motion. (Record, pp. 1161-1201).

4. **The Trial Judge Entered an Order Partially Deciding the Post-Trial Motions, But Leaving Work to be Done.**

On May 12, 2003, the trial court entered an Order which partially addressed the issues pending in the parties' post-trial motions. The trial court granted the Hills' Motion to Vacate the Final Judgments on the basis that the amount of damages awarded in the original judgments did not conform to the jury's verdicts and entered amended Judgments in accordance with the verdicts, but expressly stated "**these judgments are not final and appealable and are subject to further rulings on the motions currently pending to alter, amend or vacate**" (emphasis added) (May 12, 2003 Order and attached Judgments, attached at Tab A; Record, pp. 1435, 1440-1443). The trial court thus specifically withheld finality of the amended Judgments and reserved a ruling on any substantive post-judgment issues, including the issues raised in KLC's Amended Motion for JNOV, Motion for New Trial and/or Motion to Alter, Amend or Vacate.

5. **The Trial Judge Decided the Remaining Post-Trial Motion Issues, Granting a New Trial.**

On August 8, 2003, the trial court ruled on KLC's post-judgment motions, issuing an Opinion and Order ("August 8, 2003 Opinion") granting KLC's Motion for a New Trial. (August 8, 2003 Opinion, attached to the Hills' Brief at Tab 8; Record pp. 1460-

1465). The trial court acknowledged numerous errors in the jury instructions, and after a well-reasoned discussion of each of these errors, together with citations to Kentucky law, exercised its broad discretion to grant a new trial pursuant to CR 59.01.

First, in the August 8, 2003 Opinion the trial court found that it erred in instructing the jury to consider both a claim for wrongful discharge in violation of the KCRA and wrongful discharge in violation of public policy pursuant to *Grzyb v. Evans, supra*. (Record, p. 1461). The trial court dismissed the claim of wrongful discharge in violation of public policy and upheld the liability verdict against KLC for wrongful discharge in violation of the KCRA.

Second, the trial court concluded that it erred in combining the lost wage and punitive damages for all three claims in the jury instructions. In this regard, the court stated (Record, p. 1462):

The instructions provided for the jury to determine an amount for past wages and lost future wages if they found for the Hills under the instruction for retaliatory discharge and/or the instruction for wrongful discharge in violation of public policy and/or the instruction for defamation. The instruction for punitive damages was also combined. Consequently, there is no way to determine which damages were awarded to the Hills under the instruction for retaliatory discharge, the instruction for wrongful discharge in violation of public policy, or the instruction for defamation.

For the reasons stated above, the trial court ordered a new trial on the issue of damages for wrongful discharge under the KCRA and defamation. (Record, pp. 1462-1465).

Finally, the trial court found that it erred in failing to instruct the jury on KLC's privilege from liability for defamation. (Record, p. 1462). Although the court did not

find an absolute privilege,² it found that KLC had a qualified privilege from liability based on KLC's statutory duty to disclose the Hills' termination memoranda pursuant to the Open Records Act and as necessary intra-company communications pursuant to *Wyant v. SCM Corp.*, 692 S.W.2d 814 (Ky. 1985). The trial court held that its failure to instruct the jury on the qualified privilege – in order to resolve the “factual issue” of whether the privilege was abused – was prejudicial error. (Record, p. 1463). As a result, the court ordered a new trial to determine KLC's liability for defamation.

B. The Hills' First Appeal.

On August 11, 2003, the Hills filed an appeal of the trial court's August 8, 2003 Opinion (Record, pp. 1466-1468) (see Kentucky Court of Appeals Case No. 2003-CA-001661). KLC moved to dismiss the appeal on the basis that Kentucky law prohibits the appeal of an order granting a new trial until the conclusion of the second trial. The Court of Appeals agreed with KLC's position and dismissed the appeal in an order entered November 18, 2003. (November 18, 2003 Order Dismissing Appeals, attached at Tab B). The Court of Appeals also rejected the Hills' argument that the trial court lost jurisdiction to grant a new trial ten days after entry of the May 12, 2003 Order and amended Judgments, finding that KLC's January 31, 2003 post-trial motion “tolled appeal time from the decision entered May 12, 2003.” (*Id.*, Tab B, p. 4).

The Hills moved the Court of Appeals panel to reconsider its dismissal of the appeal, again claiming that the trial court lost jurisdiction to order a new trial after it entered the amended Judgments on May 12, 2003. The Hills argued that the amended

² Such a finding would have resulted in dismissal of the defamation claim as a matter of law by the trial court. *See, e.g., Rogers v. Luttrell*, 144 S.W.3d 841, 844 (Ky. App. 2004) (“the question of privilege is a matter of law for the court's determination [and] the circuit court, not a jury, had the sole responsibility to determine as a matter of law whether” an absolute privilege applied).

Judgments were final and appealable, **even though the trial court specifically stated in the May 12, 2003 Order that the Judgments were not final and appealable.** The Hills argued that the trial court had no authority to consider KLC's previously filed post-trial motion and grant a new trial in August 2003, **even though the trial court expressly stated in its Order that the finality of the amended Judgments was subject to further ruling on KLC's post-trial motion.** The Court of Appeals panel explicitly rejected the Hills' arguments by dismissing the appeal and denying the Hills' Motion to Reconsider. (January 22, 2004 Order denying the Motion to Reconsider, attached at Tab C). The Hills did not seek discretionary review of either the Court of Appeals' dismissal of their appeal or its Order denying their Motion to Reconsider, nor did they seek CR 76.36 relief from this alleged jurisdictional defect.

C. The Second Trial.

1. The Jury Rejected the Hills' Defamation Claims, but Awarded the Hills Over \$250,000 on Their KCRA Claims.

The Hills' trial for damages for their KCRA wrongful discharge claims, as well as the Hills' claims for defamation and damages, began on August 19, 2004 and concluded on August 26, 2004. The Hills presented 22 witnesses at the second trial. However, the jury in the second trial awarded the Hills only about five percent of the damages awarded by the first jury. Kim was awarded \$120,000 and Bob was awarded \$132,500 in damages for lost wages³ and mental distress for their KCRA claims. (Record, pp. 1979-1987

³ The jury limited the Hills' lost wages in the second trial. Kim had not obtained full-time employment and, in fact, did not work at all for most of the time between the date of her termination in August, 1999 and August, 2004. KLC produced evidence that with her education and skill level, should she have engaged in a serious job seeking effort, Kim would have found employment. (TAPE No. B7; 8/25/04; 11:03:11). Similarly, Bob had a college degree and extensive sales experience, yet he worked at a series of part-time, non-sales jobs between 1999 and 2004. (TAPE No. B2; 8/19/04; 15:49:21). KLC produced evidence that there were numerous job openings available in the Paducah area for which Bob would have

[Kim]; pp. 2011-2020 [Bob]). The jury in the second trial found that the Hills failed to prove their defamation claim and returned a verdict in favor of KLC. (*Id.*)

2. **The Trial Judge Addressed the Hills' Attorneys' Fee Request, as Well as Post-Judgment Interest.**

The Hills tendered final judgments following the second trial (Record, pp. 2021-2022). Incredibly, the judgments included attorneys' fees in the amount of \$451,529.74 -- nearly \$200,000 more than the amount of the jury's award -- **but the Hills did not serve copies of their tendered judgments to KLC.** Thus, KLC had no opportunity to object to the claimed fees and, receiving no objection from KLC, the trial court entered the judgments. Upon receipt of the judgments entered by the trial court, KLC immediately filed a motion to vacate. The trial court granted KLC's motion and vacated the judgments on October 13, 2004, allowing both parties to brief the Hills' claim for attorneys' fees. (Record, pp. 2075-2076).

On December 28, 2004, the trial court found, in its discretion, that the Hills were not entitled to recover the entire amount of their attorneys' fees claimed from the first and second trials (December 28, 2004 Opinion and Order ("December 28, 2004 Opinion"), attached to the Hills' Brief at Tab 9; Record, pp. 2164-2169). Although the KCRA allows the prevailing party to recover reasonable attorneys' fees, the Hills also pursued claims for defamation in both trials. In fact, the second trial was primarily focused on the Hills' defamation claims, as liability had already been determined on their KCRA claims. Kentucky law does not allow plaintiffs to recover attorneys' fees for defamation claims, nor were the Hills successful on their defamation claims in the second trial.

been qualified, and that Bob's job search efforts were generally inadequate. (TAPE No. B7: 8/25/04; 11:29:34).

Consequently, the trial court reduced the fees to reflect that at least one-half of those fees were incurred by the Hills in their unsuccessful pursuit of their defamation claims. The trial court also excluded the attorneys' fees claimed by the Hills in pursuit of their untimely and unsuccessful appeal of the trial court's order granting a new trial. The final judgments entered by the trial court on December 28, 2004 awarded the Hills attorneys' fees of \$212,959.87.

Also in that December 28, 2004 Opinion, the trial court denied KLC's motion to eliminate post-judgment interest, but granted KLC's motion to reduce the interest on the judgment, lowering the rate to six percent per annum. The trial court specifically noted that this determination was "[b]ased upon the evidence presented by the Lottery at a hearing before the Court on October 11, 2004" (December 28, 2004 Opinion, p. 5, attached to the Hills' Brief at Tab 9; Record, p. 2168).

D. The Court Of Appeals Affirmed The Trial Court In A Comprehensive Opinion.

The Hills filed an appeal of the final judgments on January 13, 2005. KLC filed a cross-appeal on January 24, 2005. The Hills appealed the August 8, 2003 Opinion of the trial court granting a new trial and sought to have the first jury verdict reinstated. The Hills also appealed the amount of attorneys' fees awarded. KLC cross-appealed the trial court's award of post-judgment interest, as well as its finding that KLC was not entitled to an absolute privilege for its Open Records Act production. On September 8, 2006, the Court of Appeals issued a comprehensive 39 page Opinion addressing the numerous issues raised by the Hills, as well as KLC's cross-appeal of the post-judgment interest award and absolute privilege determination. The Court of Appeals rejected every argument made by the Hills, affirming the trial court's decision to grant a new trial based

on prejudicial errors in the jury instructions given the jury in the first trial. (Opinion, attached to the Hills' Brief at Tab 1).

ARGUMENT

I. Issues Arising Out Of The Hills' Appeal⁴

In comprehensively addressing, and ultimately rejecting, the Hills' arguments on appeal, the Court of Appeals did what appellate courts regularly do: defer to the trial court's discretion in granting a new trial based upon trial errors. Our courts have long recognized this deferential standard, holding that "the discretion of the trial judge, who participates in the conduct of the trial, in refusing or granting a new trial will be interfered with only in exceptional cases." *Wilkins v. Hopkins*, 278 Ky. 280, 128 S.W.2d 772, 774 (Ky. 1939). This is not an exceptional case.

A. The Trial Court Properly Granted The Lottery A New Trial.

1. The Trial Court Possessed Jurisdiction to Grant a New Trial, a Conclusion Reached Three Times by the Court of Appeals.

The Hills argue that the trial court was without jurisdiction to issue the August 8, 2003 Opinion granting a new trial. (Hills' Brief, pp. 23-32). In doing so, the Hills merely repeat jurisdictional arguments the Court of Appeals considered, and rejected, no less than three times. *See* November 18, 2003 Order Dismissing Appeals; January 22, 2004 Order denying the Hills' Motion to Reconsider; and Opinion, pp. 11-13 (attached at Tabs B and C, and the Hills' Brief at Tab 1, respectively).

⁴ Notably, the Hills failed to provide record cites at the beginning of any of their arguments "showing whether the issue was properly preserved for the record and, if so, in what manner" as required by CR 76.12(4)(c)(v). After two trials and two appeals, the record in this case is voluminous and the Court should not be required to scour the record to determine if the alleged errors were properly preserved. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). As such, the Court could, in its discretion, decline to consider any of the issues raised by the Hills herein. *Id.*

On May 12, 2003, the trial court granted the Hills' Motion to Vacate the trial court's judgments entered on January 21, 2003 and entered judgments conforming to the amounts awarded by the jury in the first trial. Contrary to the Hills' assertions, the trial court did not declare that these judgments were "final," nor did the trial court express a "legal conclusion" as to their effect. (Hills' Brief, p. 25).

Instead, the trial court entered the Order with the "Final Judgments" **attached and subject to** the terms of that Order. The Final Judgments cannot, as the Hills would have it, be read in a vacuum. They exist subject to the terms of the trial court's Order to which they were attached:

IT IS FURTHER ORDERED that the Judgments in favor of Kimberly G. Hill and Robert W. Hill attached hereto are in accordance with the jury verdict rendered on December 15, 2002 and are this day ENTERED. It should be noted that **these Judgments are not final and appealable and are subject to further rulings on the motions currently pending to alter, amend or vacate.**

(Tab A) (emphasis added).

It is axiomatic that a court's orders issued in the manner as here must be construed together to determine their effect. The Hills ask this Court to ignore the plain language of this Order.

- a. **The Court of Appeals Opinion correctly addressed the issue, concluding that the May 12, 2003 order was not final and appealable.**

The Court of Appeals found that the May 12, 2003 judgments were not final and appealable because the trial court specifically stated that they were not final judgments and were subject to further ruling on KLC's pending motion. (Opinion, pp. 11-13, attached to the Hills' Brief at Tab 1). Since CR 54.01 defines a final and appealable judgment as a "final order adjudicating all the rights of all the parties" and the trial court

specifically stated that it had not adjudicated all the rights of all the parties, the May 12, 2003 judgments were not final. (*Id.* at p. 12).

A trial court speaks through its orders and the trial court here clearly expressed its intent that it was not then issuing a final and appealable order. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 648 (Ky. 2007). For a court's orders to be truly final and appealable, nothing must remain to be done. *Jacoby v. Carrollton Federal Savings & Loan Ass'n*, 246 S.W.2d 1000, 1001 (Ky. 1952) (citing *American Jurisprudence*, Court noted that order which "reserves further questions or directions for future determination" is interlocutory, and not final). As this Court held in *Cumberland Valley Contractors, Inc.*, 238 S.W.3d at 648, as long as issues remain to be decided, a case is not final and the trial court retains jurisdiction and the right to revoke the finality of any prior order or judgment.

Here, the trial court unquestionably had jurisdiction over the case at the time it entered the May 12, 2003 Order and Judgments. It, therefore, had the right to revoke the prior Judgments and enter a new one, as well as withhold the finality of the amended Judgments pending its decision on the post-trial issues which remained to be decided. *Id.* The May 12, 2003 Order expressly stated that this was exactly the trial court's intent. As such, the Court of Appeals correctly determined that the amended Judgments attached to the May 12, 2003 Order were not final and the trial court retained jurisdiction to enter the August 8, 2003 Opinion granting a new trial.

b. The Court of Appeals twice considered, and rejected, the Hills' jurisdictional argument in the first appeal, which stands as the law of the case.

In its November 18, 2003 Order dismissing the first appeal, the Court of Appeals panel noted the chronology of proceedings which the Hills continue to claim deprived the

trial court of jurisdiction to issue the August 8, 2003 Opinion granting KLC's post-trial request for relief. Curiously, aside from a passing reference to a second appeal in their Introduction (Hills' Brief, p. i), the Hills make no mention of the first Court of Appeals panel's decisions on the issue. Yet, those decisions concluded the jurisdictional arguments the Hills again press here.

The Court of Appeals thoroughly examined the very alleged defects which the Hills raise here, rejecting each of their arguments. Specifically, the court determined that KLC's December 26, 2002 CR 59 post-trial motion -- filed *before* the trial court's January 21, 2003 Judgment -- does not create a jurisdictional defect. (November 18, 2003 Order Dismissing Appeals, p. , attached at Tab B). That one-page motion is, in effect, a nullity. The court further held that KLC's "second post-judgment motion [filed January 31, 2003] was timely and stated grounds with particularity." (*Id.*) The court added that such motion did not compromise the trial court's jurisdiction. (*Id.* at 3-4). Finally, the court determined that KLC's January 31, 2003 "motion tolled appeal time from the decision entered May 12, 2003" (*Id.* at 4), specifically noting the trial court's statement that the May 12, 2003 judgments "are not final and appealable and are subject to further rulings on the motions currently pending to alter, amend or vacate." (*Id.* at 2-3).

The Court of Appeals thus considered, and rejected, the Hills' argument that KLC should have appealed within 30 days of May 12, 2003. (*Id.* at 2). *See also Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923, 924 (Ky. 1946) ("if an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final"). Accordingly, the

trial court retained jurisdiction to do what its order specifically noted was left to do – to decide KLC’s post-trial motion.

Not satisfied with that disposition, however, the Hills filed a Motion to Reconsider, making arguments which mirror those now before this Court. The Court of Appeals rejected that Motion in a January 22, 2004 Order (attached at Tab C). The Hills did not, however, seek discretionary review from the Court of Appeals’ 2003 and 2004 Orders, nor did the Hills seek CR 76.36 relief from this alleged jurisdictional defect, despite their belief that “had they succeeded” on the initial appeal it would have ended the litigation at that time. (Hills’ Brief to the Court of Appeals, p. 24, attached at Tab D).

Accordingly, the Court of Appeals’ Orders are the law of the case, controlling here as to the Hills’ jurisdictional argument. *See, e.g., Union Light, Heat & Power Co. v. Blackwell’s Adm’r*, 291 S.W.2d 539, 542 (Ky. 1956) (“It is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been. Perhaps no court has been as consistent as this court in strictly adhering to the doctrine.”); *Ellison v. Commonwealth*, 994 S.W.2d 939, 940 (Ky. 1999) (holding that denial of petition for rehearing also becomes law-of-the-case as to issues raised in rejected petition).

The Hills’ argument that the trial court lacked jurisdiction to enter the August 8, 2003 Opinion granting a new trial is thus without merit. The Court of Appeals has already thrice considered and rejected these arguments. As set forth above, those Court of Appeals’ decisions were correct. Moreover, the decisions are now the law of this case and cannot be changed by this Court.

2. **The Trial Court's Grant of New Trial was not an Abuse of Discretion.**

Our appellate courts have long held that “[t]he granting of a new trial is a matter of judicial discretion, and unless there has been an abuse of that discretion, we will not reverse.” *Whelan v. Memory-Swift Homes, Inc.*, 315 S.W.2d 593, 594 (Ky. 1958). Here, after substantial briefing and oral argument, the trial court issued a thoughtful Opinion on August 8, 2003 in which it exercised its discretion to vacate the judgment on the jury verdicts.

Specifically, the trial court dismissed the Hills’ claim for wrongful discharge in violation of public policy based upon long-standing preemption principles announced in *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985). The trial court also accepted KLC’s contention that its disclosure of the Hills’ termination memoranda was privileged, and that the jury should have been instructed on this privilege. Finally, given the need to vacate the liability verdicts for two of the three asserted claims, the trial court held that it should not have issued a single damages instruction, and thus vacated all damages awarded in the first trial. Thus, the trial court confirmed the jury’s liability verdict against KLC for retaliatory discharge in violation of KRS 344.280, ordering a retrial on damages for this count, while acknowledging that punitive damages are not available pursuant to *Kentucky Dep’t of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003). The trial court also ordered retrial of the Hills’ defamation claim, pursuant to which they could seek compensatory and punitive damages. There is no basis for finding that the trial court abused its discretion in ordering a new trial.

a. **The KRS 344.280 and common law public policy claims were based upon the same facts, mandating preemption of the common law claim.**

Before the trial court, KLC repeatedly argued that the court should, pursuant to *Grzyb*, dismiss the common law wrongful discharge claim and instruct only on the statutory (KRS 344.280) retaliatory discharge claim. The trial court rejected KLC's summary judgment, directed verdict and jury instruction arguments, instructing the first jury on both the statutory and common law claims, even though both claims arose out of the same set of facts.⁵ (Record, pp. 178-203; 965-981; 985-987; 1006-1033; TAPE No. B9; 12/18/02; 10:56:53, 10:59:23 and 11:00:07). KLC reiterated its *Grzyb* argument in its January 31, 2003 post-trial motion. (Record, pp. 1161-1201).

Relying on *Grzyb* and its progeny, the trial court acknowledged this error in its August 8, 2003 Opinion, concluding that "based on the reasoning of *Grzyb* the Hills were limited to claims of discriminatory discharge under KRS 344.280 . . .". (August 8, 2003 Opinion, p. 3, attached to the Hills' Brief at Tab 8; Record, p. 1462). By now, there can be no dispute that under Kentucky law, a statutory retaliatory discharge claim under KRS 344.280 preempts a common law wrongful discharge claim arising out of the same set of facts. *See, e.g., McBrearty v. Kentucky Community & Tech. College System*, 262 S.W.3d 205, 212 (Ky. App. 2008) ("Claims of retaliation are solely creatures of statute and in Kentucky, they are under KRS 344.280"); *Grzyb* (KCRA preempts wrongful discharge in violation of public policy claim); *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001) (KCRA preempts tort of outrage claim); *Kroger v. Buckley*, 113

⁵ The Hills alleged that KLC's actions constituted "retaliation for opposing a practice declared unlawful in violation of KRS 344.280." (Third Amended Complaint, ¶¶ 20-21, attached at Tab E; Record, pp. 897-903). The same facts allegedly supporting the KCRA retaliatory discharge claim (*Id.*, ¶¶ 13-21) also form the basis for the Hills' wrongful discharge in violation of public policy claim. (*Id.*, ¶ 23).

S.W.3d 644 (Ky. App. 2003) (KCRA preempts tort of outrage claim). This error alone so tainted the jury's verdict as to compel a retrial, including a retrial on all damages.

The Hills heavily rely on the Court of Appeals opinion in *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440 (Ky. App. 2001), for the proposition that a common law cause of action for wrongful discharge always lies where employees are terminated for allegedly refusing to commit perjury in a court proceeding. (Hills' Brief, pp. 14, 16). The Hills extrapolate that *Cotton* sets forth an independent wrongful discharge cause of action, not subject to preemption under *Grzyb* and its progeny.

But *Cotton* does not stand for such a broad proposition, as it merely recognized a common law wrongful discharge claim for employees' refusal to commit perjury at a criminal trial in which the employees' manager was accused of shoplifting. *Cotton*, 56 S.W.3d at 443. Significantly, the testimony in *Cotton* did not constitute protected opposition to a violation of the KCRA or other civil rights laws. As such, unlike the Hills' claims here, the common law wrongful discharge claim in *Cotton* was not subject to preemption under *Grzyb*.

There is no serious dispute that testifying in an unemployment hearing regarding conduct which violates federal anti-discrimination laws constitutes protected activity under the relevant statute. *See, e.g., Baird v. Outlook Pointe*, 2008 WL 4287382, *9 (M.D. Pa. 2008) (noting that the defendant conceded that testimony at an unemployment hearing is protected activity under Title VII); *Sisay v. Greyhound Lines, Inc.*, 34 F. Supp. 2d 59, 65 (D.D.C. 1998) (assuming that "testifying in an unemployment compensation hearing falls within the scope of a protected activity under Title VII"); *Fedio v. Circuit City Stores, Inc.*, 1998 WL 966000 (E.D. Pa. 1998) (assuming that testifying regarding

alleged sexual harassment in the workplace during an unemployment hearing is protected activity for purposes of Title VII retaliation). This is also true in the context of an employee complaining in an unemployment hearing about discriminatory treatment of a former fellow employee under the KCRA. *See Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 817 (Ky. 1992) (noting that the KCRA is virtually identical to Title VII and “should be interpreted consonant with federal interpretation.”).

Regardless of the Hills’ misguided attempts to characterize their public policy and KCRA claims as causes of action based on different acts, both claims alleged that KLC terminated the Hills’ employment in retaliation for Kim’s testimony at Gilmore’s unemployment hearing, in which she testified to her belief that Gilmore had been terminated based on his disability. As the trial court and the Court of Appeals correctly determined, both claims were “predicated upon the same conduct by KLC – its insistence that Kim commit perjury at the Unemployment Compensation Hearing of Edward J. Gilmore.” (Opinion, p. 21, attached to the Hills’ Brief at Tab 1). The KCRA declares the unlawful act of retaliatory discharge at KRS 344.280 and provides a remedy in KRS 344.450. Thus, pursuant to *Grzyb*, the statutory claim preempts the field of its application and provides the Hills’ only cause of action for wrongful discharge.

b. KLC repeatedly argued that its disclosures were privileged, even tendering an instruction containing this element.

Throughout the trial court proceedings, KLC argued that its disclosure of the Hills’ termination memoranda was privileged. KLC presented the issue in its motions for summary judgment and directed verdict, and in its tendered jury instructions which would have permitted the jury to find in favor of the Hills only if it determined that KLC’s disclosure was not privileged. (Record, pp. 178-203; 965-981; 985-987; 1006-

1033; 1062-1075). KLC objected when the trial court's instructions did not require that the jury find that KLC's actions were subject to a privilege, but the trial court overruled KLC's objection. (TAPE No. B8; 12/17/02; 16:56:32). All of this supplied more than enough notice to the Hills and to the trial court to preserve the issue. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 275 (Ky. App. 1981) (noting that the privilege issue was preserved where "the record reveals that both the court and appellees were aware that appellants were establishing privilege as a line of defense"; court held that failure to instruct jury on privilege was reversible error).

KLC reiterated all of these arguments to the trial court in its January 31, 2003 post-trial motion. (Record, pp. 1161-1201). Based upon these arguments, the trial court found "that the Lottery had a privilege in disclosing the termination memoranda under the Open Records Act." (August 8, 2003 Opinion, p. 4, attached to the Hills' Brief at Tab 8; Record, p. 1463). That is exactly what KLC had been arguing throughout the first trial. The trial court added that "[w]here there is a privilege to defamation, as there was in this case, failing to instruct the jury on said privilege is prejudicial error." *Id.*, citing *Holdaway Drugs, Inc. v. Braden*, 582 S.W.2d 646 (Ky. 1979).

It is apparent that the trial court finally accepted KLC's argument that its disclosure was privileged, albeit a "qualified" one, thus requiring submission of the issue to the jury. *See Tucker v. Kilgore*, 388 S.W.2d 112 (Ky. 1964) (concluding that fact issues existed for a jury to decide concerning such privilege). KLC's jury instructions specifically requested that the privilege issue be presented to the jury. (Record, pp. 1069-1070). The tendered jury instructions necessarily involved the question of qualified privilege, as opposed to an absolute privilege, as "the circuit court, not a jury, ha[s] the

sole responsibility to determine as a matter of law whether” an absolute privilege applies. *Rogers v. Luttrell*, 144 S.W.3d 841, 844 (Ky. App. 2004). Similarly, the determination of the existence of a qualified privilege is determined as a matter of law. *Columbia Sussex Corp.*, 627 S.W.2d at 276. “However, whether or not such has been waived is factual. A jury should be instructed accordingly.” *Id.*

Here, the trial court determined KLC’s disclosure of the Hills’ termination memoranda was privileged as a matter of law. (August 8, 2003 Opinion, p. 4, attached to the Hills’ Brief at Tab 8; Record, p. 1463). Once it made that determination, the trial court could either dismiss the Hills’ defamation claim entirely, or remand the case for a new trial with instructions giving the jury an opportunity to determine whether the privilege had been waived. *Columbia Sussex Corp.*, 627 S.W.2d at 276. The trial court decided the issue should have gone to the jury and, therefore, properly ordered a new trial on the Hills’ defamation claims.⁶

B. Given The Erroneous Instruction On Two Of The Three Liability Counts, The Trial Court Had No Choice But To Vacate The Entire Damages Verdict.

The Hills claim that the trial court erred in setting aside the compensatory and punitive damages award as a result of the combined damages instruction presented to the jury. (Hills’ Brief, pp. 5-9). The Hills claim KLC waived the trial court’s error in combining the damage instructions by tendering instructions containing a single damages

⁶ An appellate court may affirm a lower court’s ruling on any basis, even one which the lower court did not rely upon. *See, e.g., Board of Trustees of Judicial Form Retirement System v. Attorney General*, 132 S.W.3d 770, 787 (Ky. 2003) (“the decision of the Court of Appeals is affirmed, though on different grounds than expressed in its opinion”). As reflected in KLC’s cross-appeal, and as an alternative basis for affirming the trial court’s new trial order, the defamation issue should never have been presented to the jury, as KLC was entitled to an absolute privilege to disclose the termination records at issue here. Because this issue was raised as part of KLC’s cross-appeal, it will be further addressed in Argument section II, A, *infra*, at pp. 38-42.

award. However, in light of the dismissal of the public policy wrongful discharge claims and the erroneous instructions given on the Hills' defamation claims, the damage verdict had to be vacated by the trial court.

The trial court ruled in its August 8, 2003 Opinion that the jury instructions were improper, because "there is no way to determine which damages were awarded to the Hills under the instruction for retaliatory discharge [under KRS 344.280], the instruction for wrongful discharge in violation of public policy, or the instruction on defamation." (August 8, 2003 Opinion, attached to the Hills' Brief at Tab 8; Record, p. 1462).⁷ In *Kroger v. Buckley*, 113 S.W.3d 644 (Ky. App. 2003), the Court of Appeals addressed the issue of a jury's combined damage award in a case where, as here, the jury was erroneously allowed to consider claims for both retaliatory discharge under KRS 344.280 and wrongful discharge in violation of public policy, holding:

As the parties are well aware, the jury was instructed to return one damage award representing the combined damages of both the statutory and common law claims. As it is impossible to now sever the statutory claim damages and common law claim damages, we must vacate the judgment on appeal and remand the matter for a new trial.

Id. at 647.

This Court also recently addressed the effect of a combined damages instruction under circumstances analogous to the instant case in *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 801 (Ky. 2004), stating:

⁷ Given the trial court's acknowledgement that the liability verdicts for wrongful discharge in violation of public policy and for defamation were in error, and must be vacated, the punitive damages verdict was inherently defective, as the sole remaining claim -- under the KCRA -- does not permit punitive damages. See *McCullough, supra*. See also *Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008) (holding that the trial court committed "palpable error" in giving punitive damage jury instruction for a KCRA claim even though the defendant failed to specifically object on the basis of this Court's holding in *McCullough*, because "[p]unitive damages are not an available remedy under KRS 344.450").

[O]ur conclusion that Appellees [Defendants below] were entitled to directed verdicts as to two of the three claims upon which the jury awarded damages to Appellants requires us to address the jury's damage award. We observe that Appellants sought common elements of damages under each claim and that the jury's compensatory and punitive damages verdicts did not segregate the damages awarded for each claim. As such, we find it impossible to determine what portion, if any, of the jury's compensatory and punitive damages verdicts was attributable to actions on the part of Appellees for which they had no liability to Appellants. Accordingly, we vacate the previous damage awards and remand the case for the trial court to conduct a retrial solely to determine appropriate awards of damages as to Appellants' defamation claims.

Similarly, here, it was impossible for the trial court to determine what damages were awarded to the Hills for statutory retaliatory discharge, wrongful discharge in violation of public policy, or defamation. As such, the trial court properly vacated the award and ordered a new trial on damages.

1. **The Jury Instructions Given In This Case Are Distinguishable From the Jury Instructions Given in *Piles*.**

This Court's recent decision in *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897 (Ky. 2008), on which the Hills heavily rely, does not support the Hills' assertion that the trial court abused its discretion in granting a new trial on damages. In *Piles*, contrary to the jury instructions given by the trial court in the first trial of this case, the jury instructions made clear that the jury was to award compensatory damages to Piles if it found Craig & Bishop liable for *either* fraud *or* conversion *or* a violation of the Kentucky Consumer Protection Act ("KCPA"). *Piles*, 247 S.W.3d at 901-902 and 902 n. 2. Further, the jury was instructed that it could award punitive damages to Piles if it found Craig & Bishop liable for *either* fraud *or* conversion *or* a violation of the KCPA. (*Id.* at 905-906). Therefore, the instruction made clear that the jury was not to award duplicative compensatory or punitive damages for the fraud, conversion **and** the KCPA

violation. No matter whether the jury found for Piles under one theory or under all three theories, they were to award only one set of damages.

In *Stringer*, certainly the defamation claim left standing by this Court could have arguably supported the compensatory and punitive damages awarded to the plaintiff. 151 S.W.3d at 801. Nevertheless, this Court vacated and remanded the case for a new trial on damages because it was “impossible to determine what portion, if any, of the jury’s compensatory and punitive damage verdicts were attributable to actions on the part of Appellees for which they had no liability to Appellants.” *Id.*

This case differs from *Piles* -- and is similar to *Stringer* -- because the instructions given to the jury allowed them to award compensatory and punitive damages to the Hills if they found KLC liable for wrongful termination **and/or** retaliation **and/or** defamation. (Record, pp. 1112-1113, 1115 [Bob]; 1125-1126, 1128 [Kim]). The jury in the first trial found for the Hills on all three claims. But the trial court then dismissed the common law wrongful termination claims and ordered a new trial on the defamation claims. Because the jury did not indicate the amount of damages it separately awarded for each cause of action, there was no way of knowing the amount it awarded the Hills on the sole undisturbed KCRA claim. Thus, a new trial on damages was required.

Further, with respect to the punitive damage award, unlike *Piles* – in which *any* of the claims for fraud, conversion or violation of the KCPA could support “the same damages,” 247 S.W.3d at 901-902, 905-906 – it is without question that punitive damages were **not** available on the Hills’ sole remaining verdict for liability under the KCRA.⁸ *See, McCullough*, 123 S.W.3d at 138 (punitive damages are not available in

⁸ It was palpable error, as this Court recently held in *Childers Oil*, 256 S.W.3d at 27, to award punitive damages under the KCRA even where the issue was unpreserved. It should likewise be palpable error to

KCRA cases); *Childers Oil Co.*, 256 S.W.3d at 27. The jury instructions in the first trial allowed the jury to award punitive damages if it found in favor of the Hills on their KCRA claim. As such, the trial court had no reasonable alternative but to grant a new trial on the issue of damages and the Court of Appeals correctly affirmed the trial court's decision.

2. **KLC Properly Preserved Its Objections to the Jury Instructions and Did Not "Invite the Error."**

The Hills also rely on *Piles* for the assertion that KLC waived the issue of combining damage awards because KLC never objected to damages being combined. The Hills' assertion is simply not true. As stated above, unlike *Piles*, in which any or all of the claims asserted against the defendant could support the punitive damage award, in this case the Hills' KCRA claim could not alone support the punitive damage award. Furthermore, unlike the defendant in *Piles*, which apparently "fail[ed] to cite to the record to show where" it preserved the error, 247 S.W.3d at 905, the Court of Appeals correctly determined that KLC did not "invite the error" of the combined damage instructions, but repeatedly objected to instructing the jury on both violation of the

award punitive damages against a public agency whose mission is to supply revenue to the General Fund. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (due to the "novelty of the legal issue at stake" Supreme Court engaged in "unconstricted review" of jury's punitive damages award against city, despite defense counsel's failure to object to jury instruction). See KRS 154A.020(1) (KLC "shall be managed in such a manner that enables the people of the Commonwealth to benefit from its profits"); KRS 154A.060(1) (KLC "shall conduct and administer lottery games which will result in maximization of revenues to the Commonwealth"). KLC's status is analogous to the Louisville Housing Authority, which is not subject to punitive damages. *Louisville Metro Housing Auth. v. Burns*, 198 S.W.3d 147 (Ky. App. 2005). Compare KRS 80.010(3) (housing authorities included within definition of "public body") with KRS 154A.020(1) (KLC is a "political subdivision of the Commonwealth," a "public body," and a "public agency"). The public policy honored in *Burns* -- protecting taxpayers from the "burden for payment" of a punitive damages award (198 S.W.3d at 151) -- is equally applicable to KLC, particularly given that any judgment for punitive damages would reduce KLC's ability to provide revenue to the General Fund, at a time when KLC has been asked to contribute even more.

KCRA and wrongful discharge in violation of public policy. (Opinion, p. 25, attached to the Hills' Brief at Tab 1).

KLC properly argued at the close of all evidence that the KRS 344.280 retaliatory discharge claim preempted the public policy wrongful discharge claim and should not be presented to the jury.⁹ After being faced with the trial court's decision that both theories would be presented to the jury, KLC argued that the claims should be presented to the jury as alternate theories so that the jury would not be confused and mistakenly award damages for both retaliatory discharge under the KCRA and public policy wrongful discharge.¹⁰ Despite KLC's objections and arguments, the trial court issued a combined damages instruction.¹¹

As reflected in KLC's objections to instructing the jury on both the KCRA claims and the wrongful discharge claims, KLC was clearly concerned that the jury would not understand that the damages for both claims were the same and that they should only

⁹ [For Lottery] Ms. West: Okay. All right. All right. On -- on -- remember when we talked about this in our directed-verdict motion that they have the public policy and the 344? There are not -- these are alternative claims. If they had the 344, then they don't have the public policy under the *Grzyb v. Evans* case. . . . (TAPE No. B9; 12/18/02; 10:56:53).

¹⁰ [For Lottery] Mr. Scharfenberger: Then it should say "in the alternative." (TAPE No. B9; 12/18/02; 10:59:23).

¹¹ Judge Ryan: Well, they have to -- they have to -- they still have to go to the evidence to determine the damages. So even if they found them under both, the evidence would be what the damages are. You know what I mean? So the aver -- so even if they award on both, then they're damaged under -- they were wrongfully discharged either for discrimination or public policy or both. And, you know, I -- I just don't -- I think -- I've thought about this, worked it out, and I think this is the best way to do it. And then, we can clear it up in the judgment if necessary. But their damages are still the same, whether they were terminated for public-policy reasons or whether they were terminated for 344 reason; the evidence of -- the damages are still the same.

Mr. Scharfenberger: I agree with that. I'm just -- I'm concerned that they might come back and say, "Well, we think that this request for them to lie is a separate and distinct cause for damages. We going to award her another amount."

Judge Ryan: The damages are still the same. No, the damages are damages.

Mr. Scharfenberger: Well, I mean, I agree with what you're saying. I'm just concerned that the 12 people sitting over there will not understand that. (TAPE No. B9; 12/18/02; 11:00:07).

award one set of damages, even if they found in favor of the Hills under both claims. Therefore, as the Court of Appeals correctly determined, “the genesis of the ‘error,’ rather, lies within the underlying instructions giving rise to the favorable verdicts. By this measure the Hills, not KLC, ‘invited the error’ by seeking a common law wrongful discharge instruction and opposing a privilege instruction in connection with the defamation claim.” (Opinion, p. 25, attached to the Hills’ Brief at Tab 1).

It is clear from KLC’s arguments to the trial court that it preserved its objections to the jury instructions. As this Court noted in *Ellison v. R.B. Contracting, Inc.*, 32 S.W.3d 66, 73 (Ky. 2000), the proper method for preserving an error as to the jury instructions is to object “to the form of those prepared and given by the trial court.” *Id.* It being evident that the record is replete with objections by the Lottery to the proposed instructions, the Court of Appeals correctly affirmed the trial court’s grant of a new trial. As the trial court properly ruled, the improper instructions left the court with no way to determine which damages were awarded for which claim and the only fair way to proceed was to conduct a new trial regarding damages. *Buckley*, 113 S.W.3d at 647; *Stringer*, 151 S.W.3d at 801.

C. The Court Of Appeals Did Not Violate The Civil Rules Or Deny The Hills Due Process In Affirming The Trial Court’s New Trial Order.

The Hills argue that the Court of Appeals’ Opinion was based upon grounds not argued on appeal or raised at trial which, the Hills contend, circumvents the civil rules and denies due process. (Hills’ Brief, pp. 13-19).¹² The Hills’ arguments fail, however, as they either misstate the record or fail to acknowledge controlling law.

¹² In this regard, the Hills complain that they were not afforded the opportunity to further address the Court of Appeals’ concerns, citing authority in which parties were able to address issues at oral argument. (Hills’

First, the Hills argue that the Court of Appeals applied the wrong test in determining that *Grzyb* preempted their common law wrongful discharge claims. (Hills' Brief, p. 17). The Hills argue that because their wrongful discharge claim arises from a "fundamental right" which has different "elements" than a claim pursuant to KRS 344.480, *Grzyb* preemption should not apply. (Hills' Brief, pp. 14-15). However, *Grzyb* preemption does not require the court to conduct a "same elements test" to determine whether the elements of the statutory claim and the elements of the wrongful discharge claim are the same. *Grzyb* requires preemption whenever the statute provides the "necessary underpinnings" for the wrongful discharge suit and provides a remedy. 700 S.W.2d at 401. In *Buckley*, the Court of Appeals held that the KCRA preempted the employee's intentional infliction of emotional distress claim ("IIED") because "the facts upon which Buckley relied in support of her disability discrimination claim were the same facts relied upon in support of the common law [IIED] claim." 113 S.W.3d at 647. It is clear that the purpose of *Grzyb* is to maintain the general employment "at-will" doctrine, while also protecting employees who may have been discharged for a reason that is a violation of public policy, where such employees may not otherwise be able to obtain a statutory remedy.

In an effort to distinguish between the factual allegations supporting their public policy wrongful discharge and KCRA claims, the Hills assert that their public policy wrongful discharge claims were based on KLC's termination of them for Kim's refusal to "commit perjury." (Hills' Brief, p. 13; Third Amended Complaint, ¶¶ 22-23, discussed in Opinion, pp. 19-21, attached to the Hills' Brief at Tab 1). They then assert that their

Brief, pp. 38-39). **It bears noting that the Hills specifically declined the opportunity to request oral argument before the Court of Appeals.**

KCRA claims were based on their allegations that KLC terminated them because Kim “opposed what she perceived to be KLC’s unfair treatment of Gilmore on the basis of his disability.” (Hills’ Brief, p. 13 and Third Amended Complaint, ¶¶ 13-21, discussed in Opinion, pp. 19-21, attached to the Hills’ Brief at Tab 1). However, Kim “opposed” KLC’s perceived unfair treatment of Gilmore in violation of KRS 344.280 by refusing to “commit perjury” at Gilmore’s unemployment hearing. Therefore, despite the Hills’ desperate attempts to characterize this as different conduct, it clearly is not.

The Hills alleged, and were allowed to present to the jury, a claim pursuant to KRS 344.280 that they were retaliated against because Kim opposed the discriminatory treatment of Gilmore by refusing to give false testimony at his unemployment hearing.¹³ As the Court of Appeals correctly determined, because these are the very facts upon which the Hills relied for their public policy wrongful discharge claim, the public policy claim is preempted by *Grzyb*. As such, the Court of Appeals properly affirmed the trial court’s grant of a new trial on that basis, which should not be disturbed by this Court.

Next, the Hills argue that the Court of Appeals *sua sponte* reviewed the record in citing the inconsistency between the Hills’ pleadings and their argument before the Court of Appeals, thereby creating a new rule that parties cannot impeach their own pleadings. (Hills’ Brief, pp. 17-18).¹⁴ Contrary to the Hills’ assertion, the Court of Appeals did not create a new rule that parties cannot impeach their own pleadings. Rather, the Court of

¹³ The Hills allege in paragraphs 20 and 21 of their Third Amended Complaint that “the Kentucky Lottery terminated [Kim Hill and Bob Hill] in retaliation for Kim Hill’s refusal to commit perjury and truthful testimony at the Unemployment Hearing ...”. The Hills claim in paragraph 23 that “the Kentucky Lottery’s termination of Kimberly and Robert Hill was in violation of Public Policy for Kimberly Hill’s refusal to offer false testimony during a legal proceeding.” (Hills’ Third Amended Complaint, attached at Tab E). Clearly, the same alleged facts form the basis for both causes of action.

¹⁴ KLC pointed out this inconsistency to the Court of Appeals. (Brief of Appellee/Cross-Appellant to Court of Appeals, p. 17 n. 3).

Appeals merely assumed that the facts as alleged by the Hills in their pleadings and presented to the jury at trial -- that they were retaliated against because Kim opposed the discriminatory treatment of Gilmore by refusing to give false testimony at his unemployment hearing -- were true. Based on these assumptions, the Court of Appeals concluded that the Hills' Third Amended Complaint asserted a statutory violation and a common law claim predicated upon the same conduct by KLC and, therefore, *Grzyb* preemption applied. (Opinion, pp. 19-23, attached to the Hills' Brief at Tab 1). This was the same analysis employed by the Court of Appeals in *Buckley*, 113 S.W.3d at 647, in determining that the employee's IIED claim was preempted by her KCRA claim.

For the Hills now to argue that they are not bound by their own complaint is ludicrous, particularly since they cite to no evidence in the record that the Hills actually presented proof at trial that was different than the facts alleged in the Third Amended Complaint.¹⁵ As noted by the Court of Appeals, the Hills "should not be permitted to feed one can of worms to the trial judge and another to the appellate court." (Opinion, p. 23, attached to the Hills' Brief at Tab 1, *citing, Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976)).

D. The Trial Court Committed No Reversible Errors At The Second Trial And The Jural Rights Doctrine Was Simply Not Implicated.

The Hills assert that, despite the preemption of their common law wrongful discharge claim by their KRS 344.280 claim, they should have been permitted to seek

¹⁵ The Hills contend that CR 15.02 required that they be allowed to recover on all three claims tried to the jury at the first trial. (Hills' Brief, p. 19). CR 15.02 provides that "[w]hen 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." As demonstrated above, KLC argued throughout the case that the public policy discharge claims were preempted and should not be submitted to the jury. Therefore, the claim was not tried with either KLC's express or implied consent. Moreover, because the Hills presented no proof at trial that was different from the facts alleged in their pleadings, CR 15.02 has no application.

punitive damages on the preempted claim. (Hills' Brief, pp. 20-23). Specifically, the Hills argue that denying their right to such punitive damages at the second trial deprived them of a "jural right" to seek such damages. Thus, the Hills claim that since punitive damages are allowed for a claim of wrongful termination in violation of public policy,¹⁶ they should be entitled to punitive damages despite this Court's repeated holdings that such damages are not available under the KCRA and despite the fact that their wrongful termination claim was dismissed. The jural rights doctrine has no application here.

The Hills raise this issue merely to avoid the effect of this Court's decisions in *McCullough*, 123 S.W.3d at 140 and *Adkins*, 256 S.W.3d at 27, holding that punitive damages are not available under the KCRA. Simply put, preemption analysis under *Grzyb* and its progeny does not involve or require any discussion of jural rights – despite the fact that all of the preempted common law claims arguably permitted punitive damages. *See, e.g., Grzyb; Wilson; Kroger; all supra.* That is because the jural rights doctrine only precludes legislation that impairs a right of action in negligence that was recognized at common law prior to the adoption of our 1891 Constitution. *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71, 73 (Ky. 2002). *See also Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997) (the purpose and effect of the jural rights doctrine is to

¹⁶ Even this proposition is debatable, as courts have previously recognized that KRS 446.070 provides the "[u]nderpinning for any cause of action for wrongful discharge." *Shrout v. The TFE Group*, 161 S.W.3d 351, 354 (Ky. App. 2005). KRS 446.070 merely permits a "person injured by the violation of any statute [to] recover ... such damages as he **sustained**..." (emphasis added). Punitive damages have always been intended to deter and punish, and thus are not "sustained" by a plaintiff in any sense. *See, e.g., Bisset v. Goss*, 481 S.W.2d 71, 73-74 (Ky. 1972) (punitive damages are "the penalty for the violation of the rights of another"; they are "allowed not because of any special merit in the injured party's case, but are awarded by way of punishment to the offender, and as a deterrent, warning, or example to defendant and others."). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages "are not compensation for injury" but are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"). This is not a novel construction of the statutory language at issue. Indeed, 120 years ago, our highest Court held that a jury instruction permitting a jury to "find for the plaintiff such damages as he sustained" to be "entirely distinct from the idea of exemplary or punitive damages, that might have been given to or found for, but could not in any sense have been sustained by, him." *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 8 S.W. 691, 693 (1888).

protect “some rights . . . so fundamental that they predate and exist independently of the Constitution. . . .”). *Accord Johnson v. Gans Furniture Industries*, 114 S.W.3d 850 (Ky. 2003) (the jural rights doctrine does not bar the General Assembly from altering and limiting the remedies available under statutory causes of action); *Bishop v. Manpower, Inc. of Cent. Kentucky*, 211 S.W.3d 71, 77-78 (Ky. App. 2006) (the jural rights doctrine “only applies to common law rights of action” and “does not ban the General Assembly from altering and limiting the remedies available under statutory claims”). The Hills argue that the jural rights doctrine protects “the rights of a party to sue for damages to person, property and reputation” and that a public policy wrongful discharge claim is the type of fundamental right that falls within its protection. (Hills’ Brief, p. 23). Yet, the Hills fail to cite a single case or other authority which recognizes the existence of a public policy wrongful discharge claim prior to the 1891 Constitution. Presumably, if any such authority existed, the Hills would have cited it to this Court.

The Hills’ statutory and common law wrongful discharge claims were simply not cognizable prior to our current Constitution, and thus any jural right to punitive damages on those claims is simply non-existent. Only the Hills’ defamation claim was recognized at law prior to 1891, and as such was the only claim arguably subject to the jural rights doctrine. The trial judge properly issued a punitive damages instruction on this claim at the second trial.

The Hills claim that the Court of Appeals’ reasoning in *Cotton* supports their argument that the Court of Appeals’ decision here violates the jural rights doctrine. (Hills’ Brief, p. 22). The Court’s decision in *Cotton* recognized the availability of punitive damages in a public policy wrongful discharge claim on the basis “that such a

violation sounds in tort and that all damages, including punitive damages are available” for tort claims under KRS 411.184. 56 S.W.3d at 449. However, even assuming that KRS 411.184 allows for the recovery of punitive damages in public policy wrongful discharge claims where the KCRA is not implicated,¹⁷ does not mean that that the legislature did not have the right to eliminate their availability in cases, such as this, where a public policy and KRS 344.280 claim are based on the same facts and, therefore, such public policy claim falls under and is preempted by the KCRA. Indeed, the Hills do not challenge the constitutionality of KRS 344.450 or the elimination of punitive damages under the KCRA, nor could they, as they have not preserved the issue for consideration as required by KRS 418.075. (Opinion, p. 26, attached to the Hills’ Brief at Tab 1).

In effect, the Hills attempt to graft a punitive damages remedy into a statute which does not permit it. Clearly, the legislature may limit the remedies available under the KCRA, or any other statutory cause of action. *See Com'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (the KCRA “is a creature of statute and not a common-law tort”). *Accord, Martin v. Board of Council of City of Danville*, 275 Ky. 142, 120 S.W.2d 761, 762 (Ky. 1938) (the “established rule that where a right is a new one, unknown to the common law, and created by statute the remedy created by statute for the enforcement or protection of such right is exclusive and must be followed”). This Court should reject the Hills’ jural rights argument, and affirm the judgment following the second trial which awarded no punitive damages.

¹⁷ Again, this proposition is debatable, *supra* herein at p. 31 n. 16.

E. The Trial Court Properly Exercised Its Discretion In Reducing The Hills' Attorney's Fees.

The Hills' counsel argue that the trial court erroneously reduced the attorneys' fees awarded from the \$451,529.74 (an amount nearly \$200,000 more than their clients were awarded by the jury at the second trial) to \$252,500. (Hills' Brief, pp. 32-36.) Invoices submitted by the Hills' counsel in support of their request for fees showed that they were seeking all their fees incurred since the inception of the litigation in July 2000, through both jury trials, including fees incurred in unsuccessfully pursuing their defamation claim and the appeal of the trial court's order granting a new trial. Thus, the Hills' sought every penny of their attorneys' fees incurred since the inception of this litigation in July 2000, despite the fact that the Hills were only successful on one of the three claims asserted.

In Kentucky, a trial court's award of attorneys' fee authorized by statute may only be overturned on appeal upon a finding that the trial court abused its discretion. *King v. Grecco*, 111 S.W.3d 877, 883 (Ky. App. 2002). The U.S. Supreme Court has determined that the reasonableness of an award in a civil rights act case should be determined on a case-by-case basis, but of prime importance is the level of success achieved by the plaintiff, i.e., the amount involved and the results obtained. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Moreover, "a reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 439.

Likewise, in *Chapman Printing Co.*, 840 S.W.2d at 825-26, this Court held that the trial court has wide discretion to reduce a fee award for time spent on unsuccessful claims. Other factors to be considered include:

- (a) Amount and character of services rendered; (b) Labor, time, and trouble involved; (c) Nature and importance of

the litigation or business in which the services were rendered; (d) Responsibility imposed; (e) The amount of money or the value of property affected by the controversy, or involved in the employment; (f) Skill and experience called for in the performance of the services; (g) The professional character and standing of the attorneys; and (h) The results secured.

(Opinion, pp. 29-30, attached to the Hills' Brief at Tab 1, citing *Axton v. Vance*, 207 Ky. 580, 269 S.W. 534, 536-537 (Ky. 1925) and *Boden v. Boden*, 268 S.W.2d 632, 633 (Ky. 1954)).

The trial court heard evidence presented in two separate jury trials and properly found that the "defamation claims had differing facts and were based on a separate legal theory" than the KCRA claims. (December 28, 2004 Opinion, p. 4, attached to the Hills' Brief at Tab 9). The KCRA claim involved facts surrounding and leading up to the Hills' termination. In contrast, the defamation claim involved facts arising from the KLC's alleged improper publication of the Hills' termination memoranda pursuant to an Open Records Request more than a month *after* their termination and the alleged damage to the Hills' reputation suffered as a result of that allegedly defamatory publication.

In reaching its decision to reduce the amount of fees awarded to the Hills, the trial court noted that the jury found against the Hills on their defamation claim. While the Hills' argued that their defamation and KCRA retaliatory discharge claims were so "inextricably intertwined" that the fee award should not be reduced for their lack of success on the defamation claims (Hills' Brief, pp. 32-33), the trial court rejected the argument, concluding that "the defamation claims had differing facts and were based on a separate legal theory," thereby rejecting the argument. (December 28, 2004 Opinion, p. 4, attached to the Hills' Brief at Tab 9). Therefore, the Hills should not have been entitled to recover the entire amount of their fees incurred in pursuing the KCRA claim,

the dismissed common law wrongful termination claim and the unsuccessful defamation claim.¹⁸ The trial court also considered the Hills' limited success, noting that "the Hills were seeking over [\$]6.7 million in damages and were awarded only \$252,500 (less than five percent of the total sought)" on their KCRA claims. (December 28, 2004 Opinion, p. 3, attached to the Hills' Brief at Tab 9).

In affirming the trial court's reduction of fees awarded, the Court of Appeals found that the trial court "was in the best position to observe the Hills' attorneys, to assess their competency and to determine the value of their services to the Hills" and that the trial court had "carefully reviewed the relevant facts" for determining the reasonableness of the fees sought and the reductions made. (Opinion, p. 30, attached to the Hills' Brief at Tab 1). As such, the Court of Appeals accordingly found "no abuse of discretion" in the trial court's reduction of the Hills' fee award. *Id.*

Here, the Hills make the same arguments with respect to the trial court's reduction of attorneys' fees (i.e., that the fee award should not have been reduced because "the defamation and the KRS 344.280 retaliation claims were inextricably intertwined," Hills' Brief, pp. 32-33) that were rejected by both the trial court and Court of Appeals. The Hills also attempt to argue that they were more successful on their claims than what the trial court gave them credit for because they won on their defamation claim at the first trial, and because of the trial court's failure to take into account changes in the law on the availability of punitive damages for KCRA claims occurring between the time the Hills

¹⁸ Even had the Hills prevailed on their defamation claim, they could not recover attorneys' fees on such claim. *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754 (Ky. App. 1984) (attorneys' fees are not allowable as costs in the absence of a statute or contract expressly providing for said fees); *Dulworth & Burrell Tobacco Whse. Co. v. Burrell*, 369 S.W.2d 129 (Ky. 1963) (under Kentucky law, attorneys' fees are not allowable as costs to a prevailing party, or recoverable as an item of damages, unless a statute or contract expressly provides for an award of attorneys' fees).

filed their complaint and the beginning of the second trial. None of these arguments, however, demonstrate an abuse of discretion by the trial court.

Here, the Hills public policy wrongful discharge claim was dismissed. They sought \$6 million on the retrial of their defamation claim and on the retrial of their KCRA retaliatory discharge damages claim. The jury found in favor of KLC of the Hills' defamation claim and awarded them total of \$252,500, less than 5% of the amount claimed, for their KCRA claim. Consistent with the above authorities, and the factors courts consider in awarding fees, the trial judge's fee award is entitled to deference and should not be disturbed by this Court.

F. The Trial Court Properly Exercised Its Discretion In Reducing The Interest On The Hills' Judgments.

The Hills argue that the trial court improperly reduced the post-judgment interest rate from the statutory rate of twelve percent to six percent, claiming that the trial court failed to hold the "hearing on the question" set forth at KRS 360.040. (Hills' Brief, pp. 36-37).¹⁹ In fact, the trial court's December 28, 2004 Opinion stated that: [b]ased upon the evidence presented by the Lottery **at a hearing before the Court on October 11, 2004**, post-judgment interest will be awarded at the rate of six percent rather than twelve percent." (Emphasis added) (December 28, 2004 Opinion, p. 5, attached to the Hills' Brief at Tab 9). The trial court considered, and relied upon, the Federal Reserve Statistical release for September 13, 2004, reflecting the then current market rate of 2.10%. (Statistical Release, attached as an Exhibit to KLC's Supplemental

¹⁹ KRS 360.040 clearly does not mandate application of a 12% rate, but instead allows a court to establish any rate that it deems appropriate. See, e.g., *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675 (Ky. App. 1999) (holding no abuse of discretion by the trial court in setting a post-judgment interest rate of 9%); *Church and Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 322, 325 (Ky. 1992) (Supreme Court reinstated trial court's award of post-judgment interest at 10%, reversing the Court of Appeals' determination that interest should have been 12%).

Memorandum; Record, pp. 2035-2052). That release not only was “evidence,” it was also subject to judicial notice, given its availability on the Federal Reserve Board’s website at www.federalreserve.gov/releases/h15. See *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004) (noting that “[a] court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet” so long as the party “identif[ies] the uniform resource locator (url) of the website on which they were published.”).

The trial court’s Order, which is part of the record, explicitly reflects that a hearing was held on the interest rate issue, and the trial court’s docket sheet shows that the October 11, 2004 hearing was scheduled at the trial court’s motion hour held on September 22, 2004. (Record, pp. 2075-2076). Consequently, this argument, based upon an abject mischaracterization of the record, is without merit.

II. Issues Arising Out Of The Lottery’s Cross-Appeal

A. The Hills’ Defamation Claim Should Have Been Dismissed As A Matter Of Law, As KLC Had An Absolute Privilege To Disclose The Allegedly Defamatory Documents.

This issue was preserved throughout the proceedings before the trial court, in KLC’s summary judgment, directed verdict and post-trial motion. (Record, pp. 178-203; 965-981; 985-987; 1006-1033; 1161-1201).

As a “political subdivision of the Commonwealth,” KLC is a public agency subject to the requirements of the Open Records Act. See KRS 154A.010 (“all records of [KLC] shall be deemed open records and subject to public inspection.”). KLC received a request from WLKY television station under the Kentucky Open Records Act for the Hills’ personnel files, including complaints, reprimands and the letters of dismissal which form the basis of the Hills’ defamation claims. (See Defendants’ Trial Exhibit 24;

Plaintiffs' Trial Exhibit 7).²⁰ KLC is required by its own enabling statutes, as well as the Open Records Act, to provide documents in response to Open Records Act requests within three days of receipt of a request. KRS 61.872. The stated purpose of the Kentucky Open Records Act is to provide free and open examination of public records "even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871. If KLC fails to fully respond to an Open Records Act request, it is subject to suit in Jefferson Circuit Court and may be fined for each day that documents are withheld, a fact which the Hills' counsel is well aware, having successfully litigated an open records claim against KLC involving Gilmore. *See Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860 (Ky. App. 2001).²¹

The trial court's August 8, 2003 Opinion found that KLC "was under a statutory duty to turn the memoranda over to WLKY" pursuant to the Open Records Act. (August 8, 2003 Opinion, p. 4, attached to the Hills' Brief at Tab 8). The court then found that KLC had a qualified privilege in disclosing the termination memoranda as required by the statute. The court cited *Tucker v. Kilgore*, 388 S.W.2d 112 (Ky. 1964), which held that a publication is subject to qualified privilege where circumstances exist "which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty." A qualified privilege may be defeated by a showing that the privilege was abused by being made in bad faith or with malice. *Id.*

²⁰ KLC Vice-President Church Saufley prepared memoranda to the Hills outlining the reasons for their termination and placed these memoranda in the Hills' personnel files. (TAPE No. B3; 8/20/04; 14:01:41).

²¹ The WLKY open records request mirrored, and closely followed, the request made by the Hills' counsel.

KLC had an **absolute** privilege, rather than a qualified privilege, from liability for defamation as a result of its tender of the termination memoranda to WLKY in response to the Open Records Act request. Kentucky cases following *Tucker v. Kilgore* have held that when an entity is required by law to disclose or publish information, it is entitled to an **absolute** privilege from liability for defamation, even if the information disclosed is found to be false. *Matthews v. Holland*, 912 S.W.2d 459 (Ky. App. 1995); *Compton v. Romans*, 869 S.W.2d 24 (Ky. 1993). Any privilege conferred by statute applies to defamation claims. *Gray v. Central Bank & Trust Co.*, 562 S.W.2d 656 (Ky. App. 1978). In this regard, the Court in *Compton* held that:

It has long been settled in Kentucky law that absolute immunity from defamation actions is available to certain government officials with respect to matters upon which the law requires them to act.

Id. at 26 (emphasis added). The Court in *Compton* determined that the chairman of the Kentucky Racing Commission, an independent agency of state government, had absolute immunity regarding actions taken by the chairman which were necessary for the fulfillment of his statutory duties. It was undisputed that statements made by the chairman in a press release were false; however, the Court found that since the chairman had broad authority to regulate horse racing, he was subject to absolute immunity from defamation for such false statements. *Id.* at 27.

In a later Kentucky case, even more factually similar to the case at bar, the Court of Appeals held that a school superintendent had absolute immunity from liability for defamation with regard to documents he forwarded to the Kentucky Education Professional Standards Board pursuant to a legal duty to provide such information. *Matthews*, 912 S.W.2d 459. The documents provided by the superintendent to the Board

included the reasons that a principal's contract was not renewed, including several complaints made by other teachers. The principal alleged that the complaints contained in the documents forwarded to the Board were false and defamatory. This Court dismissed the principal's defamation complaint for the following reasons:

Holland did nothing more than he was required to do by KRS 161.120(2)(b) when he forwarded copies of all the relevant documents and records [relating to the non-renewal of Matthews' contract] in his possession to the Professional Standards Board. **As a public official acting under express authority of law, he is entitled to absolute immunity from a defamation action.** This is so even if the information forwarded to the Professionals Standards Board was false.

Id. at 461 (emphasis added).

The Court of Appeals has held that complaints against an employee of a public agency contained in the employee's personnel file must be disclosed in response to an Open Records Act request. In *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001), the information at issue consisted of a complaint filed against a police officer relating to sexual misconduct with another officer. The police department initiated an investigation as a result of the complaint and the police officer subsequently resigned. The court held that the complaint against the police officer was of a personal nature since it related to sexual misconduct; however, the public's right to have access to such information outweighed the police officer's privacy interest.

In its ruling, the court primarily based its decision on the fact that although the information in the complaint was embarrassing to the public employees involved in the improper activity, it must be disclosed because it did not contain information of a personal nature that would affect the privacy interests of innocent third parties. *Id.* at 598-599. The Court distinguished the case from *Kentucky Board of Examiners of*

Psychologists v. Courier-Journal, 826 S.W.2d 324 (Ky. 1992), wherein disclosure of information contained in the personnel file of a psychologist would have invaded the privacy of third parties -- the psychologist's patients -- and would have intruded upon the patient/psychologist privilege, as the information in the personnel file referenced personal information between the psychologist and his patients.

It is clear that, under Kentucky law, personnel records of public agency employees must be disclosed under the Kentucky Open Records Act. This interpretation of the law has been confirmed in an opinion of the Kentucky Attorney General. The Attorney General's opinions, while not binding on the court, do provide well reasoned analysis of open records requests from the public body that regularly reviews such requests and is charged with rendering opinions in this regard.²² See KRS 61.880. In *In re: Renie Schruble/7 Counties Services, Inc.*, 97-ORD-140 (Sept. 11, 1997) the Attorney General specifically found that personnel records, including records of disciplinary action stemming from job-related misconduct, did not come within the privacy exception to the Kentucky Open Records Act and, therefore, must be disclosed. Accordingly, established Kentucky law required that the Hills' personnel records be disclosed in response to the Open Records Request and KLC had no basis for refusing to disclose this information.

The absolute privilege, described in *Compton v. Romans* and *Matthews v. Holland*, protects public officials from liability for defamation if acting under "express authority of law." See also *Burgess v. Paducah Area Transit Authority*, 2006 WL 2228956 at *9 (W.D. Ky. 2006) (holding that an employer who released personnel documents which contained allegedly defamatory statement in response to an Open

²² See, e.g., *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991) ("An attorney general's opinion is highly persuasive" and its reasoning is given "great weight" from the courts).

Records Request was entitled to an **absolute** privilege to the employee's defamation claims, citing *Restatement (Second) of Torts*, § 592A (1977) ("One who is required by law to publish defamatory matter is absolutely privileged to publish it.")). KLC clearly acted under express authority of law in responding to WLKY's Open Records Act request. Indeed, not only was KLC privileged in disclosing the Hills' personnel files to WLKY, it was legally mandated to do so. Had KLC not produced the information to WLKY, it would have been subject to a separate Open Records Act lawsuit by WLKY pursuant to KRS 61.882. Based on the foregoing, the Hills' defamation claims should have been dismissed as a matter of law, as KLC was protected by an absolute privilege in disclosing the termination memoranda to WLKY.

B. No Post-Judgment Interest Should Have Been Awarded Against KLC, And The Interest That Was Awarded Was Too High.

KLC cross-appeals here from that aspect of the Court of Appeals Opinion affirming the trial court's December 28, 2004 Opinion denying KLC's argument that, as a state agency, it is not subject to interest or, alternatively, that interest should be no more than 3.25% to reflect prevailing market rates. (Opinion, pp. 31-39, attached to the Hills' Brief at Tab 1). This issue was preserved through KLC's post-trial motion on the issue. (Defendant's Supplemental Memorandum in Support of its Motion to Alter, Amend or Vacate the 9/10/04 Final Judgments, filed September 20, 2004, with attached Federal Reserve Statistical Release of prevailing interest rates, Record, pp. 2035-2052).

1. Interest Cannot be Awarded Against KLC, a State Agency.

KLC was established by law as a "political subdivision of the Commonwealth of Kentucky" and a "public agency." KRS 154A.020(1). Under Kentucky law, KRS 360.040 -- the statute addressing post-judgment interest -- "has no application to

judgments against state government or any of its subdivisions.” *Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 560 (Ky. App. 1998). See also *Commonwealth Dep’t of Transp., Bureau of Highways v. Lamb*, 549 S.W.2d 504, 507 (Ky. 1976) (rejecting application of KRS 360.040 to state agency under the “well-settled principle that neither a state **nor any subdivision thereof** may be held to the payment of interest on their public debts” and holding that “the award of interest is not justified”) (emphasis added); *Powell v. Board of Educ. of Harrodsburg*, 829 S.W.2d 940, 941 (Ky. App. 1991) (“It is a well-settled principle that neither a state **nor public agency** is liable for interest on public debts unless there is statutory authority or a contractual provision authorizing the payment of interest.”) (emphasis added).

This Court recently reiterated this principle, holding that post-judgment interest cannot be awarded against a state agency for a judgment under the KCRA:

State agencies are not liable for interest “unless there is statutory authority or a contractual provision authorizing the payment of interest....” While the [Kentucky Civil Rights Act (“KCRA”)] specifically provides that a plaintiff may recover costs, it makes no provision for interest. Therefore, we hold that **interest may not be awarded against the Commonwealth or its agencies** in connection with a judgment under the KCRA.

McCullough, 123 S.W.3d at 140 (emphasis added).

In this case, the Hills were awarded damages against KLC solely for their KCRA retaliation claims. KLC’s enabling statute, KRS 154A.020(1), deems it both a “political subdivision of the Commonwealth” and a “public agency,” which entities are not subject to post-judgment interest under the above authority. Accordingly, the Hills are not entitled to post-judgment interest on these awards, and the trial court should not have awarded such interest.

2. **Alternatively, the Interest Rate Should Have Reflected Prevailing Market Conditions; Anything Higher is an Impermissible Windfall.**

The trial court awarded the Hills interest at a rate of 6%. KRS 360.040 clearly does not mandate application of a 12% rate, but instead grants a trial court discretion to establish a lower rate.

KRS 360.040 was amended in 1942, 1976 and in 1982, in order to reflect current economic conditions. In 1982, the United States faced severe inflationary pressure, which led to interest rates far above today's levels. It was during this period that the Kentucky legislature amended the statute to provide for a 12% interest rate, *if such rate was appropriate*. Given today's low interest rate environment, the 12% rate is not only inappropriate, it is impermissibly punitive. *See, e.g., Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 n. 5 (6th Cir. 1998) (affirming the district court's refusal to apply Michigan's 12% statutory interest rate and applied instead a rate based on the average 52-week U.S. Treasury bill for the relevant period; the Sixth Circuit found that the 12% rate was punitive in nature and thus violated ERISA's prohibition against punitive damages awards).

The purpose of KRS 360.040 is to encourage a judgment debtor to promptly comply with the terms of the judgment and to compensate the judgment creditor for the judgment debtor's use of his money. *Stone v. Kentucky Ins. Guar. Ass'n*, 908 S.W.2d 675 (Ky. App. 1995). As the Sixth Circuit held in *Ford*, an interest rate of 12% was impermissibly punitive in light of the 9% interest rates prevailing at the time of judgment in that case. *Ford*, 154 F.3d at 619. Such a finding is even more pertinent in today's lower interest rate environment, among the lowest in history. And the appropriate measure of post-judgment interest is best reflected in the benchmark which federal courts

now rely upon, set at “the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System.” 28 U.S.C. § 1961(a) (rate was utilized because the United States Treasury discontinued 52-week Treasury bill auctions in February 2001). That rate currently stands at a remarkably low 0.40%. (Federal Reserve Statistical release for January 5, 2009, attached at Tab F).²³

The current market rate is thus far below the 3.25% annual interest rate that KLC proposed, a rate sufficient to protect the Hills’ interests on appeal. In today’s economy, with interest rates at historically low levels, to allow the Hills to recover even 6% interest results in a windfall for them and a penalty for KLC. Moreover, KLC is public agency whose revenues support a myriad of essential government programs. Although imposing 6% interest on any litigant in today’s low interest rate environment would be impermissibly punitive, to do so against a public agency is unconscionable. Clearly, this was not the intent behind KRS 360.040.

Accordingly, and in the alternative, KLC requests that this Court reverse the portion of the trial court’s judgment awarding interest of 6%, and award interest at a rate of 3.25%.

²³ At the time KLC presented this issue to the trial court, the rate stood at 2.10%. See Federal Reserve Statistical release for September 13, 2004 (attached as an Exhibit to KLC’s Supplemental Memorandum; Record, pp. 2035-2052). This statistical information, available at www.federalreserve.gov/releases/h15, is entitled to judicial notice from this Court. See, e.g., *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004) (noting that “[a] court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet” so long as the party “identif[ies] the uniform resource locator (url) of the website on which they were published.”).

C. Even If This Court Finds Fault In The Trial Court's Decision To Vacate The Entire Damages Award, As KLC Argued Below, The Jury's Award Was Excessive And A New Trial Was Required On That Basis Alone.

The trial court's August 8, 2003 Opinion noted that KLC had argued that the damages awarded were excessive. (August 8, 2003 Opinion, pp. 4-5, attached to the Hills' Brief at Tab 8; Record, pp. 1463-1464; see also post-trial motion, Record, pp. 1161-1201). KLC has repeatedly raised this as an alternative argument before the Court of Appeals and this Court. (Brief of Appellee/Cross-Appellant to the Court of Appeals, p. 22; Cross-Motion for Discretionary Review, pp. 7-8). Although a trial court possesses great discretion to grant a new trial on this basis, the trial court found no need to resolve this issue given its conclusion that other errors of law mandated a retrial on damages. However, the trial court noted that the first jury's \$4.3 million damages award "may well have been excessive" (*id.*, p. 5), requiring remand to the trial court to resolve this issue in the event that this Court finds fault with the trial court's other bases for vacating the jury's damages award.

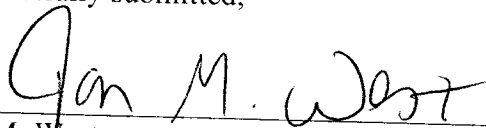
D. Alternatively, The Jury's Damages Award Solely Pertaining To The Hills' Defamation Claims Cannot Be Reinstated.

The trial court's order vacating the damages award, including the jury's award of \$1 million to Bob and \$500,000 to Kim for embarrassment, humiliation and mental anguish, was also correct for the additional reason that the "mental anguish awards are based solely on the Hills' defamation claims" (Hills' Brief to the Court of Appeals, p. 24, n. 110, attached at Tab D), which were properly vacated below. KLC has repeatedly raised this as an alternative argument before the Court of Appeals and this Court. (Brief of Appellee/Cross-Appellant to the Court of Appeals, pp. 18-19; Cross-Motion for Discretionary Review, p. 8).

CONCLUSION

For the foregoing reasons and authorities, the Kentucky Lottery Corporation requests that this Court affirm the Opinion of the Court of Appeals, which affirmed the judgment entered by the trial court following the second trial, with the sole exception that interest may not be awarded against KLC.

Respectfully submitted,



Jan M. West
GOLDBERG & SIMPSON, LLC
9301 Dayflower Street
Louisville, KY 40059
(502) 589-4440

COUNSEL FOR APPELLEE/
CROSS-APPELLANT
KENTUCKY LOTTERY CORPORATION

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