

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2008-SC-000415-DG

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THE KROGER CO. d/b/a COUNTRY
OVEN BAKERY

APPELLANT

v.

APPEAL FROM COURT OF APPEALS
CASE NO. 2006-CA-002244-MR

JOANNE BUCKLEY

APPELLEE

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of this Appellant's Reply Brief were served by first class U.S. mail, postage prepaid, this 2nd day of September, 2009, upon the following: Lee Huddleston, 1032 College Street, Bowling Green, Kentucky 42102; Clerk of Warren Circuit Court, Justice Center, 1001 Center Street, Bowling Green, Kentucky 42101; the Honorable Steve Alan Wilson, Warren Circuit Court, Division 1, 404 Justice Center, 1001 Center Street, Bowling Green, Kentucky 42101; and Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. The undersigned further certifies that the Appellant has not withdrawn the record on appeal.



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INTRODUCTION

Appellant, The Kroger Co. d/b/a Country Oven Bakery (“Kroger”) submits this Reply to the Brief for Appellee, Joanne Buckley (“Appellee’s Brief”). In her Brief, Buckley barely addresses the two issues presented in Kroger’s Motion for Discretionary Review and comprehensively discussed in its Appellant’s Brief: (1) whether the Court of Appeals acted outside its authority in violation of the law-of-the-case by resurrecting a claim dismissed by a prior Court of Appeals panel in 2003; and (2) whether the Court of Appeals erred in basing its Opinion on arguments neither party made, which directly conflict with controlling precedent concerning the distinction between subject matter jurisdiction and a jurisdictional element of a cause of action. Instead, Appellee’s Brief is a transparent attempt to reargue issues regarding her IIED claim conclusively decided against her in 2003, while also attempting to reinstate her KCRA disability discrimination claim conclusively dismissed in 2007. Both efforts are barred by the law-of-this-case, resulting from Buckley’s failure to timely seek discretionary review of either decision.

ARGUMENT

I. BUCKLEY CANNOT ESCAPE THE BINDING LAW OF THIS CASE.

In response to Kroger’s argument concerning the application of the law-of-the-case, Buckley merely repeats the same argument considered, rejected and conclusively decided by the Court of Appeals in 2003 – that is, that her KCRA “disability discrimination claim relates solely to Kroger’s failure in 1998 to reasonably accommodate her disability and allow her to return to work, whereas the [IIED] claim addresses the 1996 actions of Kroger supervisors which resulted in her diagnosis of post traumatic stress disorder.” *Kroger v. Buckley*, 113 S.W.3d 644, 647 (Ky. App. 2003)(“*Kroger I*”). While acknowledging Buckley’s 1998 disability discrimination

claim, the Court of Appeals noted that Buckley plead a disability discrimination claim and IIED claim in her 1997 Complaint (*See*, Complaint ¶¶ 10, 11, 12, 15), and therefore, held that:

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 claim. As such, the issue at bar falls within the scope of *Wilson*.

Id., citing *Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229 (Ky. App. 2001).

Buckley insists that the Court of Appeals in 2003 “did not get” that she asserted two different disability discrimination claims. (Appellee’s Brief, pp. 6-8). However, the language of *Kroger I* plainly belies this assertion. The Court clearly understood her argument and rejected it. *Kroger I*, 113 S.W.3d at 647. When Buckley failed to seek discretionary review of that decision, it became the immutable law-of-this-case. *Williamson v. Commonwealth*, 767 S.W.2d 323, 325-26 (Ky. 1989). Indeed, Buckley readily admits that she *intentionally chose* not to seek discretionary review of the 2003 Opinion and the Order denying her Petition for Rehearing and Motion for Leave to Amend her Complaint, stating that “to try to get the case retried before Joan died of old age, counsel chose to return to the trial court and immediately move to amend the Complaint to clarify the language that had misled the panel of the Court of Appeals.” (*See*, Appellee’s Brief, pp. 8-9, 16).

Given the requirements of CR 11, Kroger must presume that the disability discrimination claim set forth in Buckley’s 1997 Complaint was “well grounded in fact and [was] warranted by existing law ...” CR 11. The fact that Buckley made a strategic trial decision to press the disability discrimination claim which she alleges accrued in 1998 does not render the discrimination claim plead in her 1997 Complaint a “virtual

nullity.” (Appellee’s Brief, p. 18). While Buckley may have found it more advantageous to emphasize the 1998 disability discrimination facts at trial, it is the disability discrimination claim plead in her 1997 Complaint which preempted her IIED claim. *Kroger I*, 113 S.W.3d at 647. Try now as she might to erase it from her Complaint, as the master of her pleadings, Buckley must live with the consequences of her decision to use the “shotgun approach” and assert a claim which she now argues¹ was factually unsupported at the time she filed it.² (Appellee’s Brief, pp. 6-7).

A. The Law-Of-The-Case Doctrine Prevents Buckley From Relitigating Issues Decided In The 2003 Opinion.

Upon her election not to seek discretionary review, the Court of Appeals’ dismissal of Buckley’s IIED claim in *Kroger I* became the binding law-of-this-case. *Williamson*, 767 S.W.2d at 325-26. Yet, the Court of Appeals premised its 2007 Opinion reinstating Buckley’s IIED claim on her oft-repeated argument that the KCRA discrimination and IIED claims were based on separate sets of facts. (2007 Opinion, Tab A at 2, 5).³ In doing so, the Court of Appeals violated the law-of-the-case principles

¹ Buckley’s counsel notes that he initially “included a claim for employment discrimination for the purpose of redundancy and for the considerable attorney’s fees that would be accumulated.” (Appellee’s Brief, p. 16). Thus, “using the ‘shotgun approach,’ [he] filled [sic] the Compliant [sic] with numerous alleged causes of action including employment discrimination,” but now argues that “[t]here is no question that the facts supported [the Court of Appeals’ 2007] conclusion” that such claim was “certainly not ripe at that time because [Buckley] . . . was not a qualified individual with a disability seeking a reasonable accommodation.” (*Id.* at 6, 17). Rather, it was apparently only the serendipitous occurrence of events a year later which “finally [gave] rise in 1998 to a *genuine* cause of action for employment discrimination on account of disability,” as opposed to the “factually-unsupported claim of employment discrimination in 1996.” (*Id.*, pp. 6-7) (bold and italics added; underline in original).

² “[T]he plaintiff is the master of [her] complaint.” *See, e.g., Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 663 (6th Cir. 2004), quoting *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). The benefits of the ability to control such pleadings, however, often include certain “pitfalls.” *Id.* In Buckley’s case it did. Having chosen to file a disability discrimination claim in 1997, she is saddled with the consequences of that decision.

³ The 2007 Opinion and Buckley’s 1997 Complaint referred to herein are found, respectively, at Tabs A & B to Kroger’s Appellant’s Brief.

ardently adhered to by this Court. *See, e.g., Hogan v. Long*, 922 S.W.2d 368, 370 (Ky. 1995) (reversing a 1994 Court of Appeals decision which improperly revisited, in violation of the law-of-the-case doctrine, “the same issue litigated and finally settled by the 1988 Court of Appeals’ Opinion.”). Accordingly, this Court should reverse the 2007 Opinion reinstating the IIED claim to protect the sanctity of the finality principles underlying the law-of-the-case rule.

B. Buckley Cannot Reargue An Issue The Court Of Appeals Rejected In Denying Her 2003 Petition For Rehearing.

Buckley argues that CR 15.02 effectively cured her pleading “error” (Appellee’s Brief, pp. 7-8, 18-20), while failing to note that she presented the very argument to the Court of Appeals in her Petition for Rehearing of the 2003 Opinion. (*See*, Buckley’s June 19, 2003 Petition for Rehearing, pp. 5-8). Once the petition was rejected by the Court of Appeals, and Buckley failed to seek discretionary review, that also became the final and binding law of the case. *Ellison v. Commonwealth*, 994 S.W.2d 939, 940 (Ky. 1999) (denial of rehearing also law-of-the-case as to issues raised in rejected petition).

C. This Court Consistently Applies The Law-Of-The-Case Doctrine, With Only Rare Exception.

Buckley references the exception to the law of the case recognized in *Union Light, Heat & Power Co. v. Blackwell’s Adm’r*, 291 S.W.2d 539, 542 (Ky. 1956). (Appellee’s Brief, pp. 13-15).⁴ But this reference is disingenuous, given that the Court of Appeals’ 2007 Opinion made no reference to the law-of-the-case rule, although Kroger

⁴ As explained in *Blackwell’s Adm’r*, the exception is intended for use only in extraordinary cases where: “[1] lack of harmony with other decisions and where no injustice or hardship would flow from a change, or [2] where by inadvertence principles of law have been incorrectly declared the first time, or [3] mistake of fact has been made, or [4] injustice to the rights of parties would be done by adhering to the first opinion, then the exceptions to the rule have play, and it is our duty to re-examine and correct our own errors on the second appeal in the same case.” 291 S.W.2d at 542 (citation omitted).

had briefed and argued the point, nor did it attempt to invoke the exception. And for good reason – few Kentucky appellate courts have applied the *Blackwell's Adm'r* exception. Indeed, of the nine cases other than *Blackwell's Adm'r* Buckley cites for the proposition, only three invoked the exception, and even then only upon express finding that one of the four conditions necessary to invoke the exception existed.⁵ Moreover, whatever the continuing viability of the exception, the Court of Appeals recently noted the “want of practical precedent as to how to apply the abstract words in *Blackwell's Adm'r* granting an exception to the doctrine,” adding that “it is clear that the mere existence of conflict between the law of a case and other decisions does not guarantee the application of an exception.” *Brooks v. Lexington-Fayette Urban Co. Housing Auth.*, 244 S.W.3d 747, 751 (Ky. App. 2007), quoting *Williamson*, 767 S.W.2d at 325.

Here, none of the conditions necessary to recognize the exception have been met. First, there is no disharmony between *Kroger I* and the law in *Wilson* concerning KCRA preemption. (Appellee’s Brief, pp. 8-9). Second, no subsequent cases suggest – nor does Buckley argue – that the preemption principles in *Kroger I* and *Wilson* incorrectly state the law. Third, no injustice could possibly stem from the Court’s adherence to *Kroger I*, thus requiring Buckley to bear the consequences of her conscious decision not to seek discretionary review.

Finally, no “palpable error of fact” has been made. (Appellee’s Brief, p. 15). Buckley has never offered a shred of evidence that in any way differs from the facts

⁵ See, *Frenel v. Com. Dept. of Hwys.*, 361 S.W.2d 280, 282 (Ky. 1962) (finding an erroneous statement of law sufficient to warrant exception to the law-of-the-case rule); *White v. Commonwealth*, 360 S.W.2d 198, 200-02 (Ky. 1962) (clarification of inconsistency and overruling of prior case law which resulted in Defendant’s conviction and 21-year prison sentence, presented sufficient injustice to warrant exception to law-of-the case and reversal of Defendant’s conviction); *Folger v. Com. Dept. Of Hwys.*, 350 S.W.2d 703 (Ky. 1961) (prior decision issued was wrong based on decision in another case, thereby bringing case within the exception to the law-of-the-case rule).

presented to the jury in 2001. The Court of Appeals in *Kroger I* expressly recognized Buckley's argument that her disability discrimination and IIED claims were based on different facts and premised its decision upon Buckley's decision to plead, in 1997, a KCRA disability discrimination and IIED claim arising out of the same set of facts. *Kroger I*, 113 S.W.3d at 647.⁶ Buckley chose not to seek discretionary review of that decision. Thus, "[i]t is the consequence of valid judgments coupled with the operation of a valid legal doctrine – the law of the case doctrine – that binds [Buckley]" and conclusively prevents her from relitigating her IIED claim. *Brooks*, 244 S.W.3d at 753.

D. Buckley's 2004 Amended Complaint Could Not Retroactively Restore The IIED Claims The 2003 Opinion Dismissed.

In any event, Buckley's amendment of the Complaint in this case – including her voluntary abandonment of the 1997 KCRA disability discrimination claim – could not have retroactively impacted the law-of-the-case implications of the preemption holding in *Kroger I*. All the amendment of the Complaint did was *plead* the 1998 KCRA disability discrimination claim for the first time. It did not change the fact that Buckley plead, in 1997, KCRA disability discrimination and IIED claims arising out of the same set of facts, which formed the basis for the Court of Appeals' 2003 Opinion that the law prohibited Buckley from concurrently prosecuting her KCRA disability discrimination and IIED claims. *Kroger I*, 113 S.W.2d at 647. That Opinion – determining the viability of Buckley's IIED claim – is the final and binding law of this case. *Williamson*, 767

⁶ Buckley's dispute is, and has always been, with the Court of Appeals' application of the law to her alleged facts which resulted in the dismissal of her IIED claim. As this Court recognized long ago, legal interpretations of undisputed facts are questions to be decided by the court. *See, e.g., Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965) (Where pertinent facts are undisputed, the validity of a legal defense "can and should be determined by the court as a matter of law.")(emphasis added). As such, the Court of Appeals in *Kroger I* properly decided the legal question of whether Buckley's IIED claim was preempted under KRS Chapter 344 based on the facts alleged.

S.W.2d at 325-26. No after the fact amendment of the Complaint could change that result. *See, e.g., Board of Trustees of the University of Kentucky v. Hayse*, 782 S.W.2d 609, 614 (Ky.), *cert. denied*, 497 U.S. 1025 (1990), overruled on other grounds, *Yanero v. Davis*, 65 S.W.3d 510, 523 (Ky. 2001) (Court of Appeals' rejection of University's sovereign immunity defense was "thereafter the 'law of the case,' binding on remand and binding on this second appeal"; the "effect of its rejection [of the sovereign immunity defense] by reason of the decision of the first appeal was not lost when the same claim was reasserted in a second amended complaint" filed *after* the first appeal).

II. BUCKLEY FAILS TO JUSTIFY THE RIPENESS ARGUMENT UNDERLYING THE COURT OF APPEALS' 2007 OPINION

Buckley glosses over the 2007 Opinion's jurisdiction holding, claiming that "the real point of its opinion was that [Buckley] filed her claim for disability discrimination prematurely." (Appellee's Brief, p. 17). Despite Buckley's post-hoc characterizations of the insufficiency of her 1997 Complaint allegations, that is not dispositive of whether the 1997 Complaint "was not ripe for action, meaning that the circuit court failed to acquire subject matter jurisdiction over it." 2007 Opinion, Tab A at 5-6. Instead, "[r]ipeness" refers to the requirement that there must be a justiciable, *i.e.*, "actual," controversy between the parties for a case to proceed. *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metro. Sewer Dist.*, 72 S.W.3d 918, 921 (Ky. 2002). The United States Supreme Court has added that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). Because ripeness is related to subject matter jurisdiction, whether or not a claim is "ripe" for jurisdictional purposes must be determined from the face of the complaint. *See, e.g.,*

Huie v. Jones, 362 S.W.2d 287, 288 (Ky. 1962) (holding that determination of whether a complaint should be dismissed for lack of subject matter jurisdiction under CR 12.02(a) must be made from an examination of the complaint).

Here, on the face of Buckley's 1997 Complaint – premised upon her factual allegations that she was a “qualified individual with a disability” and that Kroger forced her to “snitch” against fellow employees and refused her request to be relieved, *i.e.*, accommodated, from this alleged requirement – there was nothing contingent or speculative in her pleading that such conduct gave rise to a present, actual claim for KCRA disability discrimination. (Complaint, ¶¶ 10, 11, 12). Buckley alleged an injury and identified the basis for her claim, more than enough to satisfy Kentucky's liberal notice pleading standards. *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006). Taking those allegations as true, as a court must in ruling on a motion to dismiss, Buckley's Complaint, on its face, sufficiently plead the claim as a matter of law.

Buckley's post-hoc attempt to disclaim this pleading, intended to invoke the trial court's jurisdiction in 1997 – but which she now appears to concede had no basis in fact at the time the Complaint was filed – is an impermissible basis upon which, *a decade later*, to revoke a trial court's subject matter jurisdiction over such Complaint. Indeed, having invoked the circuit court's jurisdiction by alleging she was disabled and asserting a KCRA disability discrimination claim in her 1997 Complaint, Buckley was estopped from later withdrawing her allegation that she was disabled in 1997 in an effort “to deprive the court of [the] jurisdiction that [she] invoked.” *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970) (“statements made for the purpose of giving the court jurisdiction,

after they have been acted upon, cannot be withdrawn or contradicted by the party making them for the purpose of taking away such jurisdiction.”).

III. BUCKLEY IMPROPERLY SEEKS REINSTATEMENT OF HER KCRA CLAIM, WHICH SHE FAILED TO PURSUE THROUGH A CROSS-MOTION FOR DISCRETIONARY REVIEW

Buckley devotes the remainder of her argument to reinstating the KCRA disability discrimination claim eliminated in the 2007 Opinion, despite having failed to file a cross-motion for discretionary review on the issue. Buckley claims such a filing was unnecessary because Kroger’s Motion for Discretionary Review somehow preserved the issue. But it did not; even if ultimately dismissed by the Court of Appeals for reasons other than those relied upon by the trial court, Kroger had absolutely no reason to ask this Court to reinstate a claim it successfully defeated.

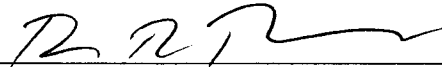
Indeed, Buckley acknowledges that the 2007 Opinion “affirmed the dismissal of [Buckley’s] discrimination claim” and that Kroger “had won in that it had succeeded in getting [Buckley’s] discrimination claim eliminated.” (Appellee’s Brief, p. 12). Yet, without citing any of Kroger’s filings, Buckley asserts that Kroger “asks the Court to overturn the ruling of the Court of Appeals eliminating [Buckley’s] claim for employment discrimination,” inexplicably adding that Kroger is “striving ... mightily to overturn [that] decision.” (*Id.* at 16 & n.31). Nothing could be further from the truth. Having successfully defeated it, Kroger had absolutely no reason to ask this Court to reinstate Buckley’s KCRA claim and its Motion for Discretionary Review plainly did not seek reversal of that portion of the Court of Appeals’ 2007 Opinion. By failing to file a Cross-Motion for Discretionary Review from the portion of the 2007 Opinion adverse to her, Buckley waived the right to seek relief from that ruling before this Court. *See, e.g., Humana, Inc. v. Blöse*, 247 S.W.3d 892, 894 n.1 (Ky. 2008), citing *Buckley v. Wilson*,

177 S.W.3d 778, 781 (Ky. 2005) (portions of Court of Appeals' opinion not affected by Supreme Court's limited grant of discretionary review remained valid and were binding as the law of the case between the parties); *Perry v. Williamson*, 824 S.W.2d 869, 871 (Ky. 1992) ("If the party prevailing in the Court of Appeals wishes further consideration of" issues she lost in the Court of Appeals, she "must file a cross motion for discretionary review" under CR 76.21) (emphasis in original; citations omitted).

CONCLUSION

For the foregoing reasons, as well as those set forth in its Appellant's Brief, Kroger respectfully requests that this Court reverse the Court of Appeals' 2007 Opinion vacating the trial court's April 15, 2004 Order so that Buckley's IIED claim is dismissed as a matter of law.

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