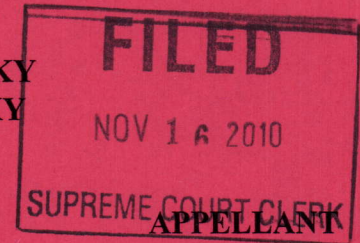


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-000033-DG



LAWRENCE A. LaPOINTE, AND
THOMAS B. GIVHAN, CO-
ADMINISTRATORS OF THE ESTATE
OF GLENN A. LaPOINTE, DECEASED

V. BRIEF FOR APPELLANT

TODD HAWES

APPELLEE

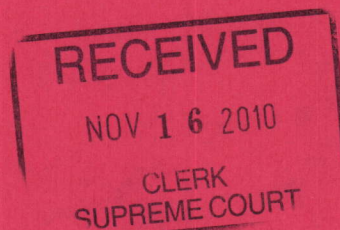
APPEAL FROM SPENCER CIRCUIT COURT
CONSOLIDATED ACTION NOS. 07-CI-00001 & 07-CI-00010
HON. TOM MCDONALD, SENIOR STATUS TRIAL JUDGE


John E. Spainhour
GIVHAN & SPAINHOUR, PSC
Professional Building, Suite One
200 South Buckman Street
Shepherdsville, KY 40165
(502) 543-2218; (502) 955-6165
Fax: (502) 955-7000
Counsel for Appellant

Michael E. Krauser
KRAUSER & BROWN
325 West Main Street
2100 Waterfront Plaza
Louisville, KY 40202
(502) 588-9000
Fax: (502) 588-9007
Co-Counsel for Appellant

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the Brief for Appellant was mailed U.S. postage prepaid this 15th day of November, 2010 to Hon. R. Kenyon Meyer and Ebony L. Glenn, Dinsomore & Shohl, LLP, 1400 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202, Attorneys for Todd Hawes; Hon. Jack Conway, Attorney General, The Capitol, Suite 118, 700 Capitol Avenue, Frankfort, KY 40601; and Judge Tom McDonald, Senior Status Special Judge, Spencer Circuit Court, Spencer County Courthouse Annex, P.O. Box 282, Taylorsville, KY 40071. It is further certified that counsel has not checked out the record.




John E. Spainhour
Counsel for Appellant

INTRODUCTION

Appellant, the Estate of Glenn LaPointe appeals from an Opinion of the Kentucky Court of Appeals that vacated an Opinion and Order of the Spencer Circuit Court dismissing a civil negligence assault and battery complaint against LaPointe. Appellant asserts the finding of the trial court in the civil case and the related criminal case clothe Lapointe immunity under the self protection and protection of others statutes (KRS 503.050, 503.055, 503.070, 503.080 and KRS 503.085).

STATEMENT CONCERNING ORAL ARGUMENT

Appellant desires oral argument. This case presents matters of first impression on the effect of findings of immunity in the prosecution of a criminal case and whether such findings collaterally estop the related civil complaint.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE	1
KRS 503.085	1
<u>Rodgers v. Commonwealth</u> , 285 S.W.3d 740 (Ky. 2009)	1
ARGUMENT	6
A. A finding of immunity under KRS 503.055, KRS 503.070, KRS 503.070 and KRS 503.085 by a preponderance of evidence in a criminal prosecution collaterally estops a related civil complaint based on the same conduct.	6
KRS 503.055	6, 7, 8

KRS 503.070	6
KRS 503.080	6, 7, 8
KRS 503.085	6, 7, 8
<u>Restatement 2d of Judgments</u> §27 (1982)	7
<u>Newkirk Insurance Company v. Bennett</u> , 355 S.W.2d 303 (Ky. 1962) ...	7
<u>Cartwell v. Urban Renewal and Community Development Agency</u> , 419 S.W.2d 719 (Ky. 1967)	7
<u>Sedley v. City of West Beuchel</u> , 461 S.W.2d 556 (Ky. 1971)	7
<u>Rodgers v. Commonwealth</u> , 285 S.W.3d 740 (Ky. 2009)	8
B. The trial Court acted within it discretion to accept the case with the agreement of counsel, for full adjudication on cross-motions. The trial courts' decision is not clearly erroneous and is fully supported by the evidence.	
	8
<u>Moore v. Asente</u> , 110 S.W.3d 336 (Ky. 2003)	10
C. The Trial Court erred in declining to award costs, expenses and attorney fees to LaPointe.	
	10
KRS 503.055	10, 11
KRS 503.060	10
KRS 503.070	10, 11
KRS 503.080	10, 11
KRS 503.085(3)	10
CONCLUSION	11

APPENDIX

A. Opinion Vacating and Remanding, The Kentucky Court of Appeals

- B. Opinion and Order of the Spencer Circuit Court, Hon. Tom. McDonald,
Senior Status Special Judge
- C. Order Granting Discretionary Review
- D. Order Denying Petition for Rehearing
- E. Order of Appointment of Thomas B. Givhan and Lawrence LaPointe as
Co-Administrators of the Estate of Glenn A. LaPointe
- F. Table of Undisputed Facts with references to the Record.

STATEMENT OF THE CASE

Appellant, The Estate of Glen LaPointe is hereafter referred to as "LaPointe".¹
Respondent Todd Hawes is hereafter referred to as "Hawes".

Mr. LaPointe understands and appreciates the observations that the provisions of KRS 503.085 which extensively amended the defense provisions of KRS Chapter 503 are prospective and are not to be retroactively applied. Rodgers v. Commonwealth, 285 S.W.3d 740 (Ky. 2009). This decision, as a controlling opinion, had not been rendered at the time the underlying criminal and civil cases were adjudicated at trial. At the time that the civil case was adjudicated, the decision in LaPointe's criminal prosecution was final, had not been appealed and was not subject to modification, amendment or revision. Judge Hickman retroactively applied the self defense and defense of others standards to the actions of the parties.

LaPointe can do no better than to adopt the recitation of material facts found by Judge McDonald as follows:

"In addition to this pending civil action, it should be noted that a criminal indictment was returned against Defendant LaPointe for the identical conduct which is the subject matter of this action. In a very well reasoned Opinion and Order, the trial court in the criminal action recounted the facts of this case, which this Court hereby adopts and incorporates by reference, to wit:

The events of January 14, 2006 at LaPointe's residence stemmed out of circumstances arising on Friday, January 13,

¹

Glenn La Pointe died intestate on March 20, 2010 in a farm accident. Thomas B. Givhan and Lawrence LaPointe are his Co-Administrators by order of the Bullitt District Court, a certified copy of which is attached as Appendix E

2006. The victim herein, Todd Hawes (hereinafter "Hawes"), and Tim Martin (hereinafter "Martin") were employees of Shea Moore (hereinafter "Moore"), a subcontractor who works for LaPointe. LaPointe did not know either Hawes or Martin. Hawes, Martin, and Moore were constructing a residence on Lot 17 in the River Heights Estates subdivision in Spencer County. On January 13, 2006, Hawes and Martin left the work site prior to receiving their weekly pay from Moore. The next day, Hawes and Martin went in search of Moore to obtain their weekly pay. First, Hawes and Martin visited a work site in Indiana looking for Moore. Apparently, the pair exhibited such aggressive behavior in their search for Moore that the contractor at the Indiana site, Jason Border, contacted his friend, Deputy Sheriff Neil Johnson of Oldham County, for advice on how to proceed with the pair should they return to the site. The information regarding Jason Border comes by way of the affidavit of LaPointe entered into the record herein because Border could not be located and served with a subpoena for him to testify at the hearing.

Hawes and Martin traveled to the River Heights subdivision in Spencer County to the work site in search of Moore. Hawes and Martin then observed Moore's vehicle in front of LaPointe's residence which is also located River Heights subdivision at Lot 51. Neither LaPointe or Moore were present at the residence at the time Martin and Hawes arrived. LaPointe, Moore and Lapointe's supervisor, Neal Beightol, after working on a project in the subdivision were invited to LaPointe's house for supper. LaPointe, Moore and Beightol had traveled to a nearby Wal-Mart in Louisville, Kentucky on Bardstown Road to buy groceries for dinner at the time Martin and Hawes arrived at the LaPointe residence. Leah LaPointe (hereinafter "Mrs. LaPointe") was home alone at the LaPointe residence and had just finished a shower. She was sitting before a mirror in her bedroom blow drying her hair while clothed only in a shirt and underwear when she observed in the mirror a man entering her bedroom. Hawes had entered the LaPointe home and Mrs. LaPointe knew nothing of his presence inside her home until he appeared in her bedroom. Hawes stated that he had knocked on the door to the LaPointe house after observing Moore's vehicle in the driveway of the home, had received no response to his

knocks, and entered the house. [Hawes]² stated that he believed he heard a saw or power tools which made him believe the house was under construction and was being worked on, although in truth the sound was Mrs. LaPointe's hair dryer. The LaPointe house was not under construction, was fully furnished and there were signs of habitation such as clothes apparent in the home. To reach the LaPointe's bedroom, Hawes passed through the front hall, family room and kitchen. Hawes did not have permission to enter the LaPointe home and entered without the knowledge of the occupant, Mrs. LaPointe. Mrs. LaPointe repeatedly told Hawes to leave the house. Hawes eventually left the bedroom, but remained in the kitchen of the home refusing to leave the residence. Martin who had remained outside originally, then entered the LaPointe home at the entreaty of Hawes.

Hawes stated to Mrs. LaPointe that Moore owed them money, they had seen Moore's vehicle out front, and that they refused to leave until somebody paid them their money. Mrs. LaPointe contacted the trio in Louisville by cell phone and had Moore talk to Hawes by phone. Moore informed Hawes that they were enroute to Spencer County, to leave the LaPointe house and meet him at the work site to be paid. Hawes and Martin left the LaPointe home and drove off in their vehicle, but very soon thereafter returned and parked in front of the LaPointe home. Mrs. LaPointe, keeping phone contact with LaPointe and Moore, locked all of the doors and windows subsequent to Hawes and Martin leaving the residence, however, the trio returning from Louisville lost phone reception enroute and Mrs. Lapointe then observed Hawes and Martin return to the property. LaPointe, Moore and Beightol arrived at the LaPointe residence approximately seven to fifteen minutes after Hawes and Martin left the LaPointe residence. When LaPointe's vehicle, in which Moore and Beightol were also passengers drove into LaPointe's driveway, Hawes and Martin moved their car to block the driveway to prevent any of the vehicles parked in LaPointe's driveway from leaving. Moore got out of LaPointe's vehicle, conversed with Hawes and Martin paid

²Appellant believes that the Court meant Hawes instead of LaPointe as stated in the Opinion and Order.

them the money owed for their weekly pay. LaPointe had exited the vehicle, ordered Hawes and Martin off his property, and entered his home where he retrieved a shot gun from the basement and loaded the gun. Lapointe then walked back outside, drove his truck around the house and struck Hawes' vehicle with great force crumpling the rear of the vehicle, rendering it undriveable, and removing the obstacle from the end of his driveway. LaPointe exited his truck holding his shot gun and ordered Hawes and Martin off of his property, which was approximately the fourth time they had been told to leave the LaPointe property. Hawes and Martin refused to comply and LaPointe began approaching while holding his shot gun. LaPointe again ordered Hawes to leave his property. LaPointe at this juncture fired his shot gun into the asphalt pavement of the street. Hawes continued to refuse to leave the area and claimed LaPointe had shot him. LaPointe again shot into the pavement and Hawes finally left the area heading in the direction of Highway 44. Martin refused to leave even after the first two shots were fired and was standing near LaPointe's residence when LaPointe was interacting with Hawes. Martin argued with LaPointe, asking LaPointe if he was going to shoot him. LaPointe shot another time into Hawes' vehicle and Martin finally left. Beightol then left the scene to summon law enforcement. LaPointe's expert at the hearing on this motion, Ronnie Freels, testified that there was evidence that two rounds had been fired into the street and that some of the shot ricocheted off of the pavement. It appears that some of the shot ricocheted off the pavement and struck Hawes in the leg.

LaPointe claims that he was justified in his use of force because of the unlawful, forcible entry of Hawes into his home, Hawes' and Martin's repeated refusals to leave LaPointe's home and property, and their aggressive actions and demeanor. Hawes and Martin were both told repeatedly to leave LaPointe's property by Mrs. LaPointe after they made an unlawful and forcible entry into the LaPointe home, when Moore told them to leave and meet him at Lot 17 to get their money, by LaPointe when he returned to his home to find that Hawes and Martin had returned to the property, and by LaPointe after he had retrieved his shot gun from his home. Hawes and Martin repeatedly failed to comply with the requests to leave the LaPointe's property, even after they had

obtained the money owed to them by Moore. It is notable that the LaPointes did not have anything to do with the money owed to Hawes and Martin. Hawes entered the LaPointe home without permission only because Moore's vehicle was parked in the driveway. Hawes' and Martin's actions were aggressive in that they forcibly and without permission entered an occupied residence, refused to leave until they were paid money that was owed by an individual that did not reside at the residence they had invaded, repeatedly refused orders to leave the home and property that they had unlawfully entered, and capped off their aggressive maneuvers in debt collection by barricading the LaPointe's driveway with Hawes' vehicle." (See Opinion and Order, Appendix B)

Some additional facts were found in Judge McDonald's Order and Opinion; that were not noted in the underlying criminal case.

"As previously noted, Plaintiff Hawes entered Defendant's home without permission. However, he stated that he believed the house was unoccupied and under construction at the time, despite the fact that the home was fully furnished and clothes were in the home. While any other reasonable person would have assumed the home was occupied, any doubt was resolved when Mr. Hawes encountered Mrs. LaPointe in a state of undress drying her hair in the bedroom. After initially refusing her demands to leave the bedroom, he eventually retreated to the kitchen. When Mr. LaPointe arrived he repeatedly instructed Mr. Hawes to leave his property and Mr. Hawes refused." (See Opinion and Order, Appendix B)

No claim is made by Hawes that the trial judge made the quality of error necessary to upset the trial court's findings. Errors, if any, are not clearly erroneous.

Opinion and Order Dismissing Hawes complaint was entered January 24, 2008. (Appendix B, R., P. 496-502) Supplemental Opinion and Order was entered August 5, 2008. (R., P. 761-762). Hawes' Notice of Appeal was filed on August 8, 2008. LaPointe cross

appealed regarding his claim for costs, expenses and attorney fees allowed under the new immunity statute. (R.V. 5, p. 76)

The Kentucky Court of Appeals rendered a "To be Published" Opinion Vacating and Remanding on October 16, 2009. (Appendix A) The Court of Appeals correctly concluded Hawes waived his right to jury trial by agreement to submit the matter for decision on the record. However, the Court of Appeals misconstrued the evidence when it reversed and remanded for trial, holding that the trial judge improperly applied the immunity statute (Appendix A, Opinion , page 13). The Court of Appeals did not address the collateral estoppel argument raised by La Pointe. La Pointe's Petition for Rehearing and Modification for Extension of Opinion was denied (Appendix D) and his Petition for Discretionary Review was granted on September 15, 2010 (Appendix C)

ARGUMENT

A. A finding of immunity under KRS 503.055, KRS 503.070 KRS 503.080 and KRS 503.085 by a preponderance of evidence in a criminal prosecution collaterally estops a related civil complaint based on the same conduct.

The Court of Appeals did not address the collateral estoppel and defensive estoppel arguments asserted by LaPointe. LaPointe argued that the final decision and order entered by Judge Hickman in the criminal case established the law of the case in this companion civil case and on this appeal. The amendments and provisions of KRS 503.085 are retroactively applied to the parties in both cases as a matter of law.

Judge Hickman adjudged LaPointe immune by final judgment in the criminal

prosecution. For purposes of appeal, it is LaPointe's position that the retroactive application of KRS 503.080, KRS 503.085 and KRS 503.055 has become the law of this case. Hawes did not plead, nor has he cited any part of the record or evidence, that establishes the Court's findings of fact are in any way clearly erroneous. Many of the facts are not disputed. An extensive recitation of undisputed facts with references to the record is attached as Appendix F.

The Commonwealth and Hawes are in privity. They have a mutuality of interest. They each wanted LaPointe convicted in the criminal prosecution. The evidence that each offered was fully exposed in each case. Persons connected together or having a mutual interest in the same actions are in privity.

"When an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim." Restatement 2d of Judgments §27 (1982).

All of the elements necessary to sustain LaPointe's defensive estoppel of Hawes' claims are present:

1. The parties are the same. (Hawes is the Complaining Witness as victim and Plaintiff as victim).
2. The facts are identical.
3. A final decision was made on the merits of the prior criminal case.
4. Identical facts and issues were actually litigated and determined in the prior case (The trial court in the civil action adopted the facts found in the prior case as his own and made additional findings).
5. A losing prior litigant exists.
6. A full and fair opportunity to litigate has occurred. (The Commonwealth Attorney tried the prior case with the Sheriff in attendance. Both Hawes and Martin's statements to the Sheriff were in evidence in both cases).

Kentucky Law recognizes estoppel. Newkirk Insurance Company v. Bennett, 355

S.W.2d 303 (Ky. 1962); Cartwell v. Urban Renewal and Community Development Agency, 419 S.W.2d 719 (Ky. 1967); Sedley v. City of West Beuchel, 461 S.W.2d 556 (Ky. 1971)

A full and fair opportunity to litigate does not mean that Hawes had a personal right to the opportunity to litigate. Exact identity of parties is not necessary for privity if there exists an identity of interest. Hawes' complaint, both with respect to the criminal case and with respect to the civil case, is that the Court did not believe his testimony. Both Courts disbelieved Hawes' version of events and believed LaPointe's. The Court of Appeals never addressed, in any fashion, the estoppel arguments raised. Those arguments preclude a finding against LaPointe in the civil case between these parties. Rodgers v. Commonwealth, 285 S.W.3d 740 (Ky. 2009) notwithstanding, the provisions of KRS 503.080 and 503.085 and 503.055 apply.

B. The trial Court acted within its discretion to accept the case, with the agreement of counsel, for full adjudication on cross-motions. The trial courts' decision is not clearly erroneous and is fully supported by the evidence.

The Court of Appeals indicates:

"...we are troubled by the trial court's determination that LaPointe's conduct was justified and lawful. We find no evidence in the record to support a finding that LaPointe held a "reasonable fear of imminent, peril or great bodily harm" when he returned to his property and found Hawes and Martin standing in the driveway. In fact there does not appear to be any dispute that at the time LaPointe fired his gun, Hawes was backing into the street." (Appendix B, p. 12-13)

LaPointe submits that the record contains absolutely overwhelming evidence of felonious conduct by Hawes and Martin. They entered the LaPointe home and confronted

Mrs. LaPonte while she was clad only in her underwear. Although Hawes and Martin were instructed in no uncertain terms to leave the LaPointe home and to meet at the work site for payment, they refused to do so. Moreover, Hawes and Martin made a second unlawful entry into the close of LaPointe's home and blocked LaPointe and his family from leaving by blocking the driveway with their truck. After Moore paid them their wages, despite LaPointe's repeated directions to leave his property, they refused to leave, even at gunpoint and even after the shotgun discharged. Hawes and Martin had no legitimate purpose to enter or to stay. When Hawes started to back away, Martin continued to stay and refused to leave. LaPointe had an entirely reasonable fear that either Hawes, Martin or both were armed. He knew they had, only minutes before, entered his home and had confronted his wife. They had been paid and had gotten what they ostensibly came to get but they still would not leave. Evidence of self defense and the use of justifiable force in the record is overwhelming. Two Courts, each acting as the trier of fact on evidence before them, found by a preponderance of evidence that LaPointe's conduct was justified. Their findings are well supported in the record. There is no showing that those finding are clearly erroneous.

Both courts find that after four directions to leave:

"Hawes then began backing away towards the street and off the property. LaPointe, at this juncture fired his shotgun into the asphalt pavement of the street. Hawes continued to refuse to leave and complained LaPointe had shot him. LaPointe again shot into the pavement and finally Hawes left the area heading in the direction of Highway 44. Martin refused to leave after the first two shots were fired and was standing near LaPointe's residence when LaPointe was interacting with Hawes... (See: McDonald Opinion and Order, Appendix D, p. 4 and 5; Hickman Opinion and Order, R., P.10)

Hawes' and Martin's actions were aggressive in that they forcibly and without permission entered an occupied residence, refused to leave until they

were paid money that was owed by an individual that did not reside at the residence they had invaded, repeatedly refused orders to leave the home and property that they had unlawfully entered, and capped off their aggressive maneuvers in debt collection by barricading the LaPointe's driveway with Hawes' vehicle." (See: Hickman Opinion and Order, R., P. 11; McDonald Opinion and Order, Appendix D, p. 5-6)

Arguendo, even if the former self defense statutes apply, the retroactive application of the new self defense statute is harmless error, given the evidence supporting the lower court's findings of self defense on LaPointe's part and misconduct by Hawes and Martin. The Court of Appeals properly found that Hawes agreed to the method of trial and the disposition of this case, allowing Judge McDonald to sit as the trier of fact. (R.V. 5, p. 761)

The trial court acted within his jurisdiction and pursuant to the agreement of the parties, to determine the issue of LaPointe's self defense, defense of others, and the defense of his property from repeated invasion. Judge McDonald was compelled to apply the amended self defense and defense of others provisions by the holdings in the prior criminal case. Even if Judge McDonald were not bound by the doctrine of estoppel, the evidence supports a finding by the court in favor of LaPointe, based on pre-existing self defense law. Judge McDonald acted within his jurisdiction and discretion. His findings are not clearly erroneous and should not be disturbed on appeal. Moore v. Asente, 110 S.W.3d 336 (Ky. 2003)

C. The Trial Court erred in declining to award costs, expenses and attorney fees to LaPointe

The trial Court declined to award LaPointe attorney fees.(Appendix B) It had applied the immunities of KRS 503.055, KRS 503.060, KRS 503.070 and KRS 503.080 (self

notification, protection of others and protection of property). That statute is clear and unambiguous.

(3) The court **shall** award reasonable attorney fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by plaintiff, if the court finds the defendant is immune from prosecution as provided in subsection (1) of this section.” KRS 503.085(3) [Emphasis supplied]

Subsection (1) of the statute relates to the use of force permitted in KRS 503.050, KRS 503.055, KRS 503.070 and KRS 503.080. It is plain error under the statute to fail to award LaPointe attorney fees, costs and expenses.

CONCLUSION

This Court should reverse the Opinion of the Court of Appeals and Reinstate the Opinion and Order dismissing Hawes’ Complaint. It should remand this matter for the consideration and assessment of costs, expenses and attorney fees against Hawes. The prospective application of KRS 503.085 in other cases is not controlling in this case. The law of the case is fixed by the trial court in the criminal case. The trial court applied immunities to LaPointe and Hawes in a final judgment. Two trial courts held LaPointe acted in self protection and was immune . This court should not disturb such opinion when well supported by the evidence. To do otherwise would produce opposite results on identical facts and evidence.

The Court of Appeals misconstrues the total facts in this case. Both the trial courts, as finder of fact and acting within their respective jurisdictions, have found

LaPointe's actions justifiable, regardless of the version of self defense applied.

Respectfully submitted,

GIVHAN & SPAINHOUR, PSC

A handwritten signature in black ink, appearing to read "John E. Spainhour", is written over the printed name.

**John E. Spainhour
Professional Building, Suite One
200 South Buckman Street
Shepherdsville, KY 40165
(502)543-2218;(502) 955-6165
Fax: (502)955-7000**

And

**Michael E. Krauser
KRAUSER & BROWN
325 West Main Street
2100 Waterfront Plaza
Louisville, KY 40202
(502) 588-9000
Fax: (502) 588-9007**