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

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

v.

Appeal from Spencer Circuit Court
Consolidated Civil Action Nos. 07-CI-00001 & 07-CI-00010
Hon. Tom McDonald, Judge

TODD HAWES — APPELLEE

BRIEF FOR APPELLEE, TODD HAWES

Respectfully submitted,
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CERTIFICATE OF SERVICE

It is certified that on this 14th day of January, 2011 a true and correct copy of the foregoing was mailed U.S. postage prepaid to: John E. Spainhour, Givhan & Spainhour, PSC, Professional Building, Suite One, 200 South Buckman Street, Shepherdsville, KY 40165; Michael E. Krauser, Krauser & Brown, 325 West Main Street, 2100 Waterfront Plaza, Louisville, KY 40202; Jack Conway, Attorney General, The Capitol, Suite 118, 700 Capitol Avenue, Frankfort, KY 40601, and Hon. Judge Tom McDonald, Spencer Circuit Court, Spencer County Courthouse Annex, P.O. Box 282, Taylorsville, KY 40071. It is further certified that counsel for Todd Hawes has not checked out the Record on Appeal.

COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

Appellee believes that oral argument would be helpful to the Court. The issues presented in this appeal are well-suited to oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

I. Introduction and Procedural History.

On January 14, 2006, Appellant Glenn LaPointe ("LaPointe") shot Appellee Todd Hawes ("Hawes") with a shotgun while Hawes was unarmed, hands outstretched in front of him in fear, and backing away into the middle of the street. (TR 233 - 279, Deposition of Glenn LaPointe, pp. 94-97, hereinafter "LaPointe Depo.") LaPointe was arrested, criminally indicted and pleaded guilty. He subsequently successfully had his guilty plea set aside. *Id.* at 30. After an evidentiary hearing at which the Commonwealth called no witnesses and Hawes was neither a party nor had standing to protect his own interests, the Spencer Circuit Court (the "Criminal Trial Court") dismissed the criminal charges brought by the Commonwealth against LaPointe. (*See generally* Criminal Trial Court March 10, 2008 Opinion and Order.) The court dismissed the charges against LaPointe pursuant to KRS 503.055, KRS 503.080, and KRS 503.085 – even though these statutory provisions as amended did not go into effect until July 12, 2006, nearly seven months after the incident. The Criminal Trial Court nonetheless found that the statutes in question applied retroactively to clothe LaPointe with immunity. (Criminal Trial Court March 10, 2008 Opinion and Order at 2.)

Prior to the dismissal of the criminal proceedings, Hawes filed his own, separate civil suit against LaPointe, also in Spencer Circuit Court (the "Civil Trial Court"), where he requested a jury trial. (Hawes January 2, 2007 Complaint at 4.) LaPointe filed a motion to dismiss based upon the same retroactive application of KRS 503.085 as he filed in the Criminal Trial Court. (*See generally* LaPointe October 1, 2007 Motion to Dismiss Complaint.) LaPointe's motion to dismiss, however, failed to assert that Hawes failed to

state a claim for which relief may be granted. (*Id.*) Hawes objected to LaPointe's motion to dismiss because, though LaPointe's motion was styled as a "motion to dismiss," it actually sought what amounted to a pre-trial hearing, out of the presence of a jury, for the Civil Trial Court to make determinations of fact as to whether LaPointe was entitled to a grant of immunity under KRS 503.085. (Hawes November 30, 2007 Objection to Motion to Dismiss at 1.) Hawes went on to argue that such a request violates Kentucky's jural rights doctrine, that it invades the purview of the jury, that Kentucky law prohibited application of the statutes in this case because they did not fit the facts of the case, and that, in any event, the statutes in question did not fulfill the requirements for retroactive application. (*Id.* at 3-9.)

Solely for the purpose of the pre-trial motion to dismiss, the parties agreed to forego an evidentiary hearing, and to have the Civil Trial Court base its decision on the pre-trial motion to dismiss upon consideration of the entire record of the case as well as upon any additional information which the parties wished the court to consider. (August 5, 2008 Opinion and Order at 1-2.) As a result, Hawes submitted a substantial amount of additional evidence that directly contradicted the previous finding of the Criminal Trial Court and LaPointe's position. (Hawes Brief in Opposition to Motion to Dismiss at 1-2 and attachments thereto.)

Ignoring Hawes' objections to the contrary, and though the Civil Trial Court, itself, had previously recognized that "the facts of this case are in significant dispute," (January 24, 2008 Opinion and Order at 1), the Civil Trial Court proceeded to make determinations of fact on LaPointe's pre-trial motion to dismiss. (March 17, 2008 Opinion and Order at 1-6.) The Civil Trial Court first erroneously held that KRS 503.055, KRS 503.080, and KRS 503.085 may be retroactively applied to this action. (January 24, 2008 Opinion and Order at 1.)

Then, in a subsequent Opinion and Order, the Civil Trial Court adopted and incorporated wholesale the factual findings of the Criminal Trial Court,[1] improperly concluding that KRS 503.055, KRS 503.080, and KRS 503.085, applied retroactively in this case and that LaPointe was justified in his actions, clothing LaPointe with immunity from Hawes's civil claims as well. (*See generally* March 17, 2008 Opinion and Order.) Thus, what began as a pre-trial motion to dismiss pursuant to CR 12, and, after evidence was submitted, what should have become nothing more than a pre-trial motion for summary judgment (pursuant to CR 56), the Civil Trial Court turned *sua sponte* into a bench trial, without the benefit of an actual trial, making its own factual determinations in violation of Hawes' right to have a jury pass on the facts in dispute.

Hawes appealed the Civil Trial Court's decision and requested that the case be remanded for the jury trial to which he is entitled. The Kentucky Court of Appeals vacated the dismissal and remanded the case to the Civil Trial Court. (*See generally* Court of Appeals October 16, 2009 Opinion Vacating and Remanding.) LaPointe then requested, and this Court granted, discretionary review of the decision of the Court of Appeals.

II. Background Facts.

LaPointe was a real estate developer, and in January 2006, he was developing the River Heights subdivision in Spencer County, Kentucky. (LaPointe Depo. at 14.) LaPointe

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[1] As Hawes noted in his Appellate Brief in the Court of Appeals, it was clearly erroneous for the Civil Trial Court to make factual findings in ruling on a pre-trial motion to dismiss, let alone to adopt its finding of facts from a one-sided evidentiary hearing before the Criminal Trial Court. (Hawes Court of Appeals Brief at 15-22.) Hawes, of course, was not a party to those proceedings. He was never informed of the hearing, had no idea the hearing was occurring, and had no right to introduce evidence or cross-examine witnesses. Furthermore, at the hearing, the Commonwealth failed to call any witnesses or even to cross-examine LaPointe. The Commonwealth also failed to introduce (or even to use for impeachment purposes) prior statements of witnesses who drastically changed their stories at the hearing. Accordingly, the factual findings of the Civil Trial Court in a separate criminal proceeding, where the Commonwealth has the burden of proving the criminal charges beyond a reasonable doubt, were markedly one-sided. It was clear error for the Civil Trial Court to adopt and incorporate these findings in a wholesale manner for a separate civil case.

was married to Leah LaPointe who is also a developer and jointly developed the River Heights subdivision with LaPointe. (*Id.*) The LaPointes' hired Shea Moore ("Moore"), a ceramic tile subcontractor, to work in the River Heights subdivision. (*Id.*) During the week of January 9, 2006, Moore hired Hawes to do tile work at several of his work sites, including within the River Heights subdivision. (TR 189 - 231, Deposition of Todd Hawes, p. 22, hereinafter "Hawes Deposition"; TR 303 - 323, Statement of Shea Moore, Spencer County Sherriff's Department, p. 3, hereinafter "Moore Statement."). Moore also hired Tim Martin ("Martin") as a tile layer on that same day. (Moore Statement at p. 3.)

At three or four o'clock in the morning on Friday January 13, 2006, Shea Moore and Leah LaPointe were traveling home together from a concert at a Louisville bar and were involved in a motor vehicle accident. (LaPointe Depo. at p. 36-37.) As a result of the accident Moore and Leah LaPointe were issued citations for public intoxication. (*Id.* at p. 37.) Leah LaPointe was arrested and taken to the Jefferson County Jail. (*Id.* at 39.) Moore was hospitalized to treat his injuries and, as a consequence, failed to arrive at any of his work sites that day. (TR 353 - 376, Statement of Leah LaPointe, Spencer County Sherriff's Department, p. 5, hereinafter "Leah LaPointe Statement.")

Moore had agreed to pay Hawes and Martin on Fridays for their week of work. (Hawes Depo. at 26.) When Moore failed to appear at any work site on Friday, Hawes and Martin began to question his intentions regarding rendering their payment. (*Id.* at 30.) The next day, having had no success in contacting Moore by phone on Friday, Hawes and Martin visited each of the three construction sites they worked that week to locate Moore. (*Id.* at 26 & 31.) Their third and last visit was to the River Heights subdivision. (*Id.* at 38.)

Upon entering the subdivision, Hawes and Martin spotted Moore's van sitting in the driveway of a home close to the entrance. (*Id.* p. 38.) After determining that the van belonged to Moore, Hawes and Martin proceeded to the front door and knocked loudly. (Hawes Depo. at p. 40; TR 330 - 347, Statement of Todd Hawes, Spencer County Sherriff Department, p. 5, hereinafter "Hawes Statement.") After receiving no response, Hawes noticed a "piece of paper above the key [lock, that said] 'contractor's key'." (Hawes Depo. at p. 40; see also Hawes Statement at p. 5.) Moore had previously told Hawes that he was working on "four or five other houses in that subdivision." (Hawes Depo. at p. 40.) With this knowledge, as well as the presence of the contractor key on the door, Hawes assumed that this house was one of those job sites and "pushed the door." (Hawes Statement at p. 5.) It was not until later that Hawes learned that the home was not one of Moore's job sites but the LaPointe home. (See LaPointe Depo. at p. 59.)

Once the door opened Hawes heard a "grinding sound in the back . . . of the house." (Hawes Depo. at 41.) Hawes believed that the sound was "either a saw or a grinder where [Moore] was . . . putting in a new bathroom." (Hawes Statement at p. 5.) Hawes continued into the house while continuously calling out Moore's first name. (Hawes Depo. at p. 41.) The grinding noised stopped shortly thereafter, and Hawes heard someone call out, "I'm back here." (Id. at p. 42.) (Statement of Leah LaPointe at p. 4.) At this point Hawes stepped two feet into the kitchen and was greeted by Leah LaPointe who entered the kitchen from another door. (Id. at p. 42.) At that moment, Hawes became aware that the grinding noise was not a sander, but, rather, was Leah LaPointe using a blow dryer in the back bedroom of the house.

Hawes and Leah LaPointe knew each other from Hawes's work in the neighborhood. Hawes asked Leah LaPointe if Moore "was working inside the house," and Leah LaPointe

told Hawes that Moore was with Glenn LaPointe and another man, Neal Beightol ("Beightol"), in town. (Hawes Depo. at p. 43; LaPointe Statement at p. 6.) Upon learning that the house was not a job site, Hawes apologized for his mistake. (Hawes Depo. at 43.) She responded that Hawes did not frighten her and offered to call Moore on the house phone. (*Id.*) Leah LaPointe called her husband and asked to speak with Moore. (Id.) She did not indicate to him that Hawes or Martin threatened her. (LaPointe Depo. at p. 71; Leah LaPointe Statement at p. 10 & 11; Moore Statement at p. 5.)

On the phone, Moore told Hawes that the house was the developer's home and instructed him to leave the house. (LaPointe Depo. at p. 59.) He told Hawes that he would meet the pair within 20 to 30 minutes at a lot identified as "lot 17," located further into the subdivision. (Hawes Depo. at p. 43.) Hawes and Martin immediately left the house and traveled to the specified lot. (Hawes Depo. at p. 44.) During the phone conversation, Moore did not feel threatened and dismissed an offer from LaPointe to accompany him to pay Hawes and Martin as "unnecessary." (LaPointe Depo. at p. 66.) Moore "was not fearful until" later that day when LaPointe threatened and assaulted Hawes. (See Moore Statement at p. 14.)

After leaving the house, Hawes and Martin traveled to the lot. (Hawes Statement at p. 45.) Suspicious that Moore would evade them, they decided to leave and park at a "stop sign along the main road" of the subdivision that provided them a view of the LaPointe home. (*Id.* at 46 & 48.) Eventually, Moore, LaPointe, and Beightol returned to the LaPointe home and pulled in the driveway. (TR 384 - 412, Statement of Timothy Martin, Spencer County Sherriff's Department, p. 7, hereinafter "Martin Statement at p. __.") Hawes drove up to the house and parked the car on the street. (Hawes Depo. at p. 49.) As LaPointe and

Beightol entered the house, Moore met Hawes and Martin in the driveway and amicably paid them. (*Id.*) The three did not argue, and Hawes "[did not] speak very much" to Moore. (Hawes Depo. at 51; see also Martin Statement at p. 9 (noting that the three were "being real sullen and quiet."))

Meanwhile, LaPointe entered the home and, with little word to his wife, "went to [the] basement and got a 12 gauge Remington pump shotgun and some seven and a half dove shot." (LaPointe Depo. at p. 80.) LaPointe loaded the shot gun as he climbed the stairs. (*Id.*) "Adrenalized" (*Id.* at 82) and "extremely emotional" (Taped Statement of Neil Beightol, Contained in Exhibit Envelopes to the Trial Record, hereinafter "Beightol Statement"), LaPointe exited the garage door, got into his Ford F-250 and began to rev the engine. (Martin Statement at p. 9.) Oblivious to LaPointe's intentions and thinking that he simply wished to drive away, Martin began to walk towards his car to move it from the rear of the driveway. (*Id.* at 10.) LaPointe, then "[drove] as fast as he could get [the truck] to go," (LaPointe Depo. at 90), backed the vehicle "off the driveway, drove around the house, [and] removed [Martin's car]" from the end of the driveway by pummeling into the passenger's side. (*Id.* at pp. 85 and 88). Hawes thought that LaPointe "push[ed] the car about a hundred yards out into a field until it rolled off the front of his truck." (Hawes Depo. at p. 53.) Later estimations by law enforcement revealed that LaPointe pushed the car approximately thirty feet. (LaPointe Depo. at p. 89.)

LaPointe then "swung the truck back around and reparked it" in the driveway. (*Id.*) Shocked, Hawes ran towards the end the driveway and towards the totaled vehicle. (*Id.* at 92.) As LaPointe exited the truck, Hawes began "[w]alking, not running, advancing" from the car toward LaPointe screaming that LaPointe was crazy and asking what he had just

done. (LaPointe Depo. at pp. 93-94.) Upon seeing the shotgun in LaPointe's hand, Hawes began to try to reason with him saying "ain't nobody hurt here." (Hawes Depo. at 53.) LaPointe responded with "there's fixing to be" and leveled the shotgun at Hawes, (*Id.* at 19.), while advancing towards him. (LaPointe Depo. at p. 94.) "In the face of a shotgun pointed at his head [Hawes] . . . [began] to backpedal." (*Id.*) LaPointe continued to advance despite Hawes's retreat. (*Id.*)

LaPointe testified as follows:

> Q....After [Hawes] walked back towards you as you were exiting your Ford pickup truck and you brandished the shotgun and aimed it at him, is it true and correct then ultimately you walked him up the driveway towards the street?...
>
> A. Correct
>
> Q. — he walked backwards the whole time while you aimed a shotgun at him the whole time?
>
> A. Correct.
>
> Q. Where was his hands at the whole time?
>
> A. In front of him.
>
> Q. Right in front of him?
>
> A. Correct.
>
> Q. Palms opened as you just described?
>
> A. Yes.
>
> Q. Fingers spread apart?
>
> A. Correct.

(*Id.* at 101.) LaPointe physically pushed Hawes with the muzzle and backed him up for 30 or 45 seconds until Hawes was in the street. (*Id.* at 103.) As Hawes backed up into the street, LaPointe fired the shotgun and struck Hawes. (*Id.* at 94.)

Following the first shot, Hawes began to beg for his life: "Please don't shoot me. I have a child. I don't know why you're angry. I don't know what the problem is. . . " (Hawes Depo. at p. 54.) LaPointe responded with "many threats, cuss words, . . . [and] a very angry look." (Hawes Depo. at p. 84.) As Hawes continued to back away three or four feet, LaPointe fired the shotgun again. (LaPointe Depo. at p. 104.) Fearful for his life, Hawes began to flee towards another house to get help. (Hawes Depo. at p. 58.) As Hawes continued to retreat, LaPointe shot one final shot into the wrecked vehicle. (LaPointe Depo. at p. 98.)

During the course of this violent event the sole attempts to contact the police were by Martin who hid behind Moore's van as he dialed 911 and the individuals living in the house to which Hawes escaped. (Martin Statement at p. 14; LaPointe Depo. at p. 72; Leah LaPointe Statement at p. 17; Moore Statement at pp. 13-15; Beightol Statement at pp.14 &19.) When the police questioned LaPointe about why he had wrecked the car, he stated that it was to keep Hawes and Martin from leaving. (LaPointe Depo. at 113.) LaPointe, who had previously lived in Texas, told the authorities "that in Texas if you caught someone in your house, you could just shoot them and the police would come drag them away." (Cranmer Dep. at 36.)

ARGUMENT

I. A Prior Criminal Acquittal Has No Bearing Upon a Separate Civil Trial Based Upon the Same Facts.

LaPointe's principal argument is that the Court of Appeals failed to address his argument that his prior acquittal in a criminal prosecution brought by the Commonwealth of Kentucky (the "Commonwealth") should somehow bar Hawes' civil lawsuit against him. (LaPointe Sup. Ct. Brief at 6-7.) Although LaPointe's claim is ostensibly based upon the theory of collateral estoppel, LaPointe also appears to base his argument on a "law of the case" and / or privity theory. Regardless of the theory, LaPointe's argument is utterly unsupportable. Kentucky law is unequivocal that a prior criminal acquittal has no bearing upon a subsequent civil trial on the same facts. This has been settled law in Kentucky since at least 1921. *See Sovereign Camp of the Woodmen of the World v. Purdom*, 143 S.W. 1021 (Ky. 1921).

A. Collateral estoppel does not apply.

Kentucky law is clear that a prior criminal acquittal has no bearing whatsoever on a subsequent civil trial on the same facts. *See Shatz v. American Surety Company of New York*, 295 S.W.2d 809 (Ky. 1955). *Shatz* is directly on point and should be dispositive of the issue. In *Shatz*, the trial court admitted evidence of the defendant's acquittal on a criminal charge that involved the same facts as those being considered in a separate civil suit. *Id.* at 813. On appeal, the Court in *Shatz* found that such admission was error and "require[d] reversal of the judgment." *Id.* at 814. Instructively, the *Shatz* court found that "a judgment of acquittal in a criminal prosecution [is] not competent evidence in a civil suit involving the same facts." *Id.* at 813 citing *Sovereign Camp of the Woodmen of the World v. Purdom*, 143

S.W. 1021 (Ky. 1921); *Bray-Robinson Clothing Co. v. Higgins*, 276 S.W. 129 (Ky. 1925); and *Occidental Ins. Co. v. Chasteen*, 75 S.W.2d 363 (Ky. 1934).

In surveying other jurisdictions, *Shatz* concluded that "[t]he overwhelming weight of authority . . . denies the admissibility of a judgment of acquittal as proof in a civil action involving the same facts." *Id.* at 814. The court explained at length that

> [t]here are sound reasons why a judgment of acquittal should not be admissible in a civil action of this nature. Perhaps most significant is the fact that in the criminal prosecution the jury must find the defendant guilty *beyond a reasonable doubt*; whereas, in the civil proceeding, the plaintiff may prove his case by a *preponderance of the evidence*. Thus the verdict of acquittal does not necessarily decide that the defendant did not commit the acts charged, but is a negative finding that the Commonwealth did not sufficiently prove the commission of a crime. In addition, since the plaintiff was not a party to the criminal proceeding, and since he is entitled to have an independent jury pass upon the merits of his claim, the finding of the criminal jury should not be used against him. Finally, in view of the difference in parties, procedures, and degree of proof required; and the possibility that the prosecution may have been wholly inadequate; in the final analysis the verdict of acquittal is not such a fact as would constitute evidence of defendant's civil non-liability.

Id. at 814 (emphasis added); *see also Westchester Fire Ins. Co. of New York v. Bowen*, 292 S.W. 504, 505 (Ky. 1927) (citing the different standards of proof required in civil actions as compared to criminal prosecutions as one of the reasons civil suits on the same facts are not barred by a prior criminal acquittal).

Notably, *Shatz* went on to explain that the danger in allowing evidence of a prior acquittal is that it affords the lower court "in a close case on the facts, too inviting an opportunity to substitute the finding of the criminal jury for its own judgment." *Id.* (emphasis added). Considering the fact that the lower Civil Trial Court simply adopted wholesale the Criminal Trial Court's findings, *Shatz* is all the more instructive in this case.

Bowen is likewise in concurrence with *Shatz*. In *Bowen* the plaintiff alleged that the defendant committed arson and sued the defendant for damages. *Id.* at 504. The defendant argued that "the question of wrongful burning . . . had been determined" following his acquittal in criminal court. *Id.* at 505. The court held that defendant's acquittal did not foreclose the question of liability in the civil action because of the differing standards of proof required in civil actions compared to criminal prosecutions. *Id.* The court went on to say:

> In a criminal case the jury is required to believe from the evidence beyond a reasonable doubt every fact essential to the guilt of the accused, while in a civil case a jury may find against him if it believes from the evidence that he has brought about the destruction of his property by fire.

Id.

This legal authority puts LaPointe's estoppel argument to rest. The judgment of the Criminal Trial Court cannot bar Hawes' civil claims, and the Civil Trial Court's "substitut[ion of] the finding of the criminal [court] for its own judgment" was clear error. *Shatz*, 295 S.W.2d at 814. As provided in *Bowen* and *Shatz*, the difference in evidentiary standards for criminal and civil cases, coupled with the Commonwealth's inadequate prosecution in the criminal case, indicate that LaPointe's argument is flawed. Hawes was not afforded the opportunity to participate in or attend the dispositive evidentiary hearing in the criminal case. He could not introduce evidence or cross-examine witnesses. (See Ct. of Appeals Brief of Hawes, p. 25.) Hawes was not informed that the hearing would take place. The Commonwealth did not defend Hawes' interests – failing to call any witnesses, cross-examine LaPointe, impeach witnesses who changed their statements at trial, or call neutral parties to the stand. The defects in the Commonwealth's handling of the case not only show

that the Hawes did not have a full and fair opportunity to litigate the issue of LaPointe's liability, but also make clear that he is not in privity with the Commonwealth, as discussed more fully below.

Moreover, none of the authority cited in LaPointe's brief support his position that a complaining witness in a criminal action is barred from pursuing a civil action against the criminal defendant; nor do the cases involve estoppel in a civil action based on a judgment from a criminal court. (LaPointe Sup. Ct. Brief at 6-7.) Each of the cases cited by LaPointe, instead, address civil lawsuits involving the same civil litigants. See *Sedley v. City of West Buechel*, 461 S.W.2d 556, 559-60 (Ky. 1971) (involving a civil matter first decided by a federal court and then brought before a state civil court); *Cartmell v. Urban Renewal and Cmty. Dev. Agency of the City of Maysville*, 419 S.W.2d 719, (Ky. 1967) (finding that civil plaintiffs could not challenge the condemnation of their property by a state agency when the issue had been addressed and decided in a previous condemnation proceeding); *Newark Insurance Company v. Bennett*, 355 S.W.2d 303, 304 (Ky. 1962) (involving one civil action that raised the question of whether an admission by one party binds another party argued to be in privity with the former); RESTATEMENT (SECOND) OF JUDGMENTS §27 (by its very terms is limited to "subsequent action between the parties" of a prior suit; Hawes was not a "party" to the criminal prosecution).

In fact, one of the cases LaPointe cites in support of his position provides the direct opposite. *See Sedley*, 461 S.W.2d at 559. In *Sedley*, the court noted that collateral estoppel or issue preclusion requires that "the party against whom *res judicata* is pleaded had a realistically full and fair opportunity to present his case." *Id.* (emphasis added). Hawes had no such opportunity.

LaPointe's argument does not withstand the test of established Kentucky law. The Criminal Trial Court's judgment does not bar Hawes's civil action any more than the Civil Trial Court's legal conclusions could act to bar this Court's analysis on appeal. Thus, LaPointe's assertion that some form of collateral estoppel should apply to bar Hawes' civil claims is without support or merit.

B. The "law of the case" doctrine does not apply.

In addition, LaPointe argues, without a shred of authority, that the findings and holdings of the Criminal Trial Court in a separate criminal proceeding should somehow become the "law of the case" for a subsequent, yet separate, civil trial – in effect dictating to the Civil Trial Court, Court of Appeals, and now to this Court, what the proper application of law to fact is. (*See* LaPointe Sup. Ct. Brief at 6 ("the final decision and order entered by Judge Hickman in the criminal case established the law of the case in this companion [*sic*] civil case and on this appeal").

LaPointe's position is unsupportable – he cites no case law – and actually turns the "law of the case" doctrine on its head. In fact, LaPointe's use of "law of the case" doctrine is entirely misplaced. Setting aside for the moment the fact that Hawes, as discussed below, was not even a party to the prior criminal proceeding and, thus, cannot be bound by it, the law of the case is not dictated by a lower court to an appellate court, but rather the other way around. The "law of the case" doctrine 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." *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 244 S.W.2d 747, 751 (Ky. App. 2007) (emphasis added) quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291

S.W.2d 539, 542 (Ky. 1956). The outcome of the criminal case simply has no effect on this civil matter, and certainly does not dictate to this Court (or the Civil Trial Court or the Court of Appeals for that matter) what the interpretation of the law is.

The practical effect of LaPointe's position would be absurd. Appellate courts would be required to accept a lower court's legal conclusions regardless of how erroneous they may be, making the appeal of a lower court's decision moot. Not only does LaPointe's assertion seriously muddle the law of the case doctrine, but, as noted above in *Shatz*, it is also in direct conflict with other applicable Kentucky law. *Shatz*, 295 S.W.2d at 814. LaPointe's law of the case claim simply lacks merit or support.

C. There was no privity between the Commonwealth and Hawes.

LaPointe also asserts that Hawes was somehow in privity with the Commonwealth in the criminal proceedings, and that Hawes failed to appeal the Criminal Trial Court's decision. (LaPointe Sup. Ct. Brief at 7.) There is no convincing support for this proposition. Without belaboring the point, it is a rudimentary fact of criminal law that the Commonwealth does not represent the victim of an alleged crime, but rather represents the State.

> [U]nlike torts and contracts, the criminal law involves *public* law. That is, although the direct and immediate victim of a crime typically is a private party . . . a crime involves more than a private injury: a crime causes "social harm," in that the injury suffered involves a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. For this reason, crimes are prosecuted by public attorneys representing the community at large, and not by privately retained counsel.

Joshua Dressler, Understanding Criminal Law 1 (3rd ed. 2001).

This is duly illustrated by the fact that Hawes would have had no standing to appeal the result of the criminal proceedings even if he had wanted to do so. *See Schroering v.*

McKinney, 906 S.W.2d 349, 350-351 (Ky. 1995) ("[T]he Commonwealth is the sole entity which has a judicially recognizable interest in the prosecution of criminal cases. KRS 15.725(1). While the legislature has granted victims certain rights, KRS 421.500, this statute does not include the right to participate as a party in a criminal action." (emphasis added).) Moreover, *Bennett* provides that "'absolute identity of interest is essential to privity. The fact that two parties as litigants . . . happen to be interested in proving or disproving the same facts creates no privity between them.'" 355 S.W.2d at 304 (*quoting* 24 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 747 (2nd ed.) (emphasis supplied). Except that, here, Hawes was not even a party to the prior criminal proceeding.

Simply put, Hawes "was not a party to the criminal proceeding, and . . . is entitled to have an independent jury pass upon the merits of his claim." *Shatz* at 814. There is no privity.

III. KRS 503.055 Is a Substantive Amendment to Prior Law and, Thus, Does Not Apply Retroactively.

A. *Rodgers* is directly on point and should be dispositive of the issue of the retroactive application of KRS 503.055.

The events that form the basis for Hawes' civil law suit occurred in January of 2006. The statutory law upon which LaPointe attempts to rely for his defense was not effective until July of 2006. As the Court of Appeals found, relying heavily upon a recent opinion by this Court, KRS 503.055 and KRS 503.085 are substantive amendments to Kentucky law.[2] *See Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009). Thus, they do not apply

[2] LaPointe admits as much in both his Motion for Discretionary Review and in his Supreme Court Brief. In his Motion for Discretionary Review, LaPointe states that "[t]hese 2006 amendments and enactments change the law of self defense, defense of others, and defense of property." (LaPointe Motion for Disc. Rev. at 7.) In his Supreme Court Brief, LaPointe admits that "the provisions of KRS 503.085 which extensively amended the defense of provisions of KRS Chapter 503 are prospective and are not to be retroactively applied." (LaPointe Sup. Ct. Brief at 1.) LaPointe also admits that *Rodgers* is "a controlling opinion" on the matter. (*Id.*)

retroactively. *Id.* at 750-751. LaPointe should, therefore, not receive the benefit of these new statutory enactments under any circumstance – especially where, as here, there is no dispute in the record that LaPointe shot Hawes while Hawes was unarmed, backing away with hands raised, and in the street.

This is not an issue of first impression. In making its determination, the Court of Appeals relied upon and cited extensively to *Rodgers*. (*See* October 16, 2009 Opinion at 9-12.) In *Rodgers*, this Court directly addressed the retroactive application of KRS 503.055 and KRS 503.080. In doing so, this Court found that these amendments

> were substantive law changes and are not retroactive. Thus persons whose conduct occurred prior to the July 12, 2006 effective date of these amendments but whose trials were not concluded are entitled to immunity only for actions in conformity with the version of the applicable statute . . . in effect at the time they acted.

(October 16, 2009 Opinion at 10) (quoting *Rodgers*, 285 S.W.3d at 753) (emphasis added by Court of Appeals in its Opinion). Again, citing to *Rodgers*, the Court of Appeals went on to conclude that both the Criminal and Civil Trial

> courts clearly failed to recognize that KRS 503.055 was . . . not in effect at the time of the incident in question and, since it is deemed to be a substantive change in the law, cannot be applied retroactively. . . Thus, we conclude that the trial court clearly erred in dismissing the civil action against LaPointe on the grounds that his conduct was lawful and justified under KRS 503.080 and KRS 503.055.

(October 16, 2009 Opinion at 12) (emphasis added) *citing Rodgers*, 285 S.W.3d at 753. Thus, *Rodgers* is dispositive of the issue.

LaPointe, however, argues that this Court's decision in *Rodgers* is of no import because it was rendered after the Criminal Trial Court's decision in this case. (*See* LaPointe Supreme Ct. Brief at 1.) Yet, this makes the erroneous assumption that a substantive

amendment to prior law does not become substantive until there is a later judicial pronouncement to that effect. The issue, however, is not whether the case law in question was decided prior to the lower court's determination, but rather whether the statute in question is substantive or procedural. If substantive, which *Rodgers* simply confirms that it is, then the statute does not apply retroactively. A subsequent judicial pronouncement that the statute in question is, indeed, substantive, does not make it so, but rather only confirms what it was all along – a substantive change to prior law that only applies prospectively.

Thus, KRS 503.055 was substantive when drafted and did not need a judicial pronouncement in order to make it so – though *Rodgers* certainly puts the issue to rest. Whether *Rodgers* had been decided before or after the decision in this case is a non-issue. *Rodgers* simply made clear what should have been apparent to the Criminal and Civil Trial Courts in this case from the beginning. The Court of Appeals decision, as it is based directly on this Court's decision in *Rodgers*, should accordingly be upheld.

IV. The Civil Trial Court Violated Hawes' Right to a Jury Trial and Committed Clear Error When it Made Findings of Fact on LaPointe's Pre-trial Motion, Especially Where Those Facts Were Adopted Wholesale from a Separate Criminal Proceeding.

Regardless of LaPointe's contention that "Hawes agreed to the method of trial and the disposition of this case, allowing Judge McDonald to sit as the trier of fact," (LaPointe Sup. Ct. Brief at 10), nothing could be farther from the truth. Hawes consistently objected to any effort by the Civil Trial Court to make findings of fact, specifically pointing out where the facts were in dispute, and arguing that it would be a violation of his right to a jury trial and an illegal usurpation of the purview of the jury.[3] The Civil Trial Court, itself, on at least

[3] *See* Hawes November 30, 2007 Objection to Motion to Dismiss at 4 ("[LaPointe's] argument would deprive Hawes of his constitutionally-protected right to trial by jury"); *also* Hawes March 7, 2008 Brief in Opposition at 7 ("LaPointe argues that . . . the case should be dismissed without a jury ever having an

one occasion also recognized that "the facts of this case are in significant dispute." (January 24, 2008 Opinion and Order at 1.)

While it is true that on February 25, 2008 during a telephonic conference with the Civil Trial Court, Hawes and LaPointe agreed to a certain set of procedures (the "Agreement") regarding the Civil Trial Court's consideration of LaPointe's Motion to Dismiss, the substance of that Agreement does not support LaPointe's contention. The February 25, 2008 Agreement provided in essence:

> 1) That [Hawes and Lapointe] both waived their right to an evidentiary hearing on the Motion to Dismiss;
> 2) That [Hawes and Lapointe] both consented to having the court base its decision [on the Motion to Dismiss] upon consideration of the entire record of this case as well as upon the record of the criminal case against Mr. LaPointe;
> 3) That the parties were given the opportunity to submit any additional information which they wished the court to consider to the court and opposing counsel.

(TR 761 - 762, August 5, 2008 Opinion and Order denying motion to alter, amend, or vacate (emphasis added).) From the plain language of the Agreement and the underlying record in this case, two things are abundantly clear. First, Hawes did not waive his right to a jury trial. Second, Hawes did not agree that the Civil Trial Court could make findings of fact on a pre-trial motion to dismiss, especially where those facts were in dispute and adopted wholesale from the findings of fact in a separate criminal evidentiary hearing. By making findings of fact on a pre-trial motion to dismiss, especially where those facts were in dispute, the Civil Trial Court effectively and impermissibly turned a pre-trial dispositive motion into a bench

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opportunity to adjudicate the factual disputes in this case. Hawes has maintained that this violates Kentucky's jural rights doctrine"); *and* Hawes March 27, 2008 Motion to Alter, Amend, or Vacate at 3 ("The procedure that the Court employed in this case – making factual determinations and not permitting a jury trial to occur – directly violated the civil rules and interpreted KRS 503.085 in a manner that violates the Kentucky Constitution.")

trial, thereby violating the fact-finding purview of the jury and Kentucky's jural rights doctrine.

A. Hawes did not waive his right to a jury trial.

First, Hawes did not waive his right to a jury trial. Hawes simply agreed to forego an "evidentiary hearing" on LaPointe's Motion to Dismiss. Hawes did so for at least two reasons. First, the Civil Trial Court agreed to make its decision based upon the entire record, including any additional information submitted by either party that they wanted the court to consider. Hawes, as discussed more fully below, submitted a number of additional items of evidence for the Civil Trial Court's consideration that directly undermined LaPointe's motion to dismiss. As a result, there would have been no new or additional information to provide to the Civil Trial Court in an evidentiary hearing. Second, as Hawes argued before the Civil Trial Court and as discussed more fully below in Part C of this section, any findings of fact by the Civil Trial Court on a pre-trial motion out of the presence of a jury would violate Hawes' right to a jury trial and the Kentucky jural rights doctrine.

In any event, under Kentucky law a party can waive his or her right to a jury trial only when that party fails to make a demand for one. *See Louisville and Jefferson County Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007); *Loy v. Whitney*, 339 S.W.2d 164, 166 (Ky. 1960); *Williams v. Whitaker*, 293 S.W.2d 627, 627-28 (Ky. 1956). Moreover, CR 38.04 provides that "a demand for trial by jury . . . may not be withdrawn without the consent of the parties."

There is no dispute that Hawes expressly demanded a "trial by jury." Nor did Hawes ever agree to waive his right to a jury trial. In fact, the record provides only evidence of the opposite – Hawes unequivocally asserted and maintained his desire for a jury trial

throughout the trial court proceedings. Hawes requested a trial by jury in his initial Complaint and reiterated that request in his Amended Complaint. (See TR 1-6, Complaint and TR 106-113, Amended Complaint.) Hawes also argued that KRS 503.085 violates the Jural Rights Doctrine in his response to LaPointe's Motion to Dismiss. (See TR 92-101, Plaintiff's Objection to Defendant's Motion to Dismiss and Request to Amend Answer and Counterclaim.) Most importantly, Hawes made this same argument in pleadings filed in response to the Agreement made during the February 25, 2008 telephone conference.[4] The facts simply do not support the notion that Hawes agreed to waive his right to a jury trial. LaPointe has conceded elsewhere that Hawes is entitled to a jury trial and has never addressed Hawes' arguments under the Jural Rights Doctrine or the Kentucky Rules of Civil Procedure. (LaPointe Ct. of Appeals Brief at p. 10.) Rather, LaPointe has only argued waiver. *Id.*

What is clear is that the phrase "waived their right to a jury trial" appears nowhere in the Agreement. What is also clear is that agreeing to forego an evidentiary hearing on a pre-trial motion to dismiss is not the same as waiving one's right to a jury trial.

B. Hawes did not agree that the Civil Trial Court could make findings of fact on a pre-trial motion to dismiss, especially where those facts were in dispute and adopted wholesale from the findings of fact in a separate criminal evidentiary hearing.

Second, Hawes did not agree that the Civil Trial Court could make findings of fact on a pre-trial motion to dismiss, especially where those facts were in dispute[5] and adopted wholesale from the findings of fact in a separate criminal evidentiary hearing. In so doing,

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[4] Hawes March 7, 2008 Brief in Opposition at 7 ("LaPointe argues that . . . the case should be dismissed without a jury ever having an opportunity to adjudicate the factual disputes in this case. Hawes has maintained that this violates Kentucky's jural rights doctrine".)

[5] The Civil Trial Court, itself, on at least one occasion also recognized that "the facts of this case are in significant dispute." (January 24, 2008 Opinion and Order at 1.)

the Civil Trial Court committed numerous errors. First, by making findings of fact, the Civil Trial Court effectively and impermissibly turned a pre-trial dispositive motion into a bench trial, without the benefit of the trial. Second, it impermissibly usurped the fact-finding role of the jury. Third, it impermissibly adopted the findings of fact from a separate and demonstrably one-sided criminal proceeding.

1. The Civil Trial Court impermissibly turned a pre-trial motion into what amounted to a bench trial, without the trial.

Pursuant to Kentucky law and the Civil Rules, "[f]or the purpose of testing the sufficiency of the complaint [on a motion to dismiss] the pleading must not be construed against the pleader and the allegations must be accepted as true. The court should not dismiss unless it appears the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim." *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968)(*citing Ewell v. Central City, Ky.*, 340 S.W.2d 479 (1960)) (emphasis added). On a motion to dismiss, it is not for the Civil Trial Court to make findings of fact, but rather to accept the allegations in the complaint as true. The Civil Trial Court did not do that in this case. It instead accepted additional disputed evidence outside of Hawes' pleading and weighed that evidence for an ultimate decision.

In the event that either party presented to the Civil Trial Court material outside of the pleading, as both parties did here, then the Civil Trial Court was required to treat the motion as one for summary judgment. Specifically, CR 12.02 states that

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Id. Pursuant to CR 56.03, on a motion for summary judgment the Civil Trial Court shall only grant the motion "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (emphasis added). "In passing upon a motion for summary judgment, it is no part of the court's function to decide issues of fact but only to determine whether there are such issues to be tried." *Mitchell v. Jones*, 283 S.W.2d 716, 718 (Ky. 1955) (emphasis added). "The trial court must examine the evidentiary material, not in order to decide any issue of fact but only to determine if a real issue does exist. It is not necessary that there must be many genuine issues of fact; it is sufficient to deny the granting of a summary judgment even though the genuine issue of a material fact may be small." *Green v. Bourbon County Joint Planning Comm'n*, 637 S.W.2d 626, 630 (Ky. 1982) (emphasis added). In addition, "[t]he trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (*citing Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)).

On LaPointe's motion, whether treated as one to dismiss or for summary judgment, the Civil Trial Court was prohibited by Kentucky law and the Civil Rules from making findings of fact. The Civil Trial Court in this instance, not only made findings of fact in the nature of a bench trial, but did so without actually providing the parties with a trial. And, as mentioned above, there can be no doubt that facts were in dispute as the Civil Trial Court, itself, on at least one occasion also recognized that "the facts of this case are in significant

dispute." (January 24, 2008 Opinion and Order at 1.) By doing so, the Civil Trial Court illegally usurped the province of the jury by rendering judgment regarding disputed issues of fact.

2. Issues of Fact and Credibility Are Within the Province of the Jury.

Kentucky courts have long held that "the right of decision on every issue of fact is exclusively for the jury." *Thomas Jefferson Fire Ins. Co. of Louisville v. Barker*, 251 S.W.2d 862, 863 (Ky. 1952) (citing *Shell v. Town of Evarts*, 178 S.W.2d 32 (Ky. 1944) (emphasis added). The Civil Trial Court's actions defied this principal and improperly circumvented the province of the jury when it decided disputed issues of fact and credibility without any authority to do so. *See Bohannon v. Bushmeyer*, 291 S.W.2d 44, 45 (Ky. 1956) ("The determination of questions of fact and the credibility to be given the witnesses testimony are properly within the province of the jury to decide.")(citing *Baker's Adm'r v. Frederick*, 243 S.W.2d 921 (Ky. 1951). Indeed, in the Civil Trial Court's March 17, 2008 Opinion and Order it explicitly recognized its lack of authority in this regard, stating that ". . . this legislation is unfortunately ambiguous, at best. It is devoid of any guidance regarding the procedure to be utilized for determining the applicability of immunity, including standard of proof or even who should make the ultimate determination." *Id.* (emphasis added).

Rather than render judgment on disputed issues of fact and credibility, the Civil Trial Court should have allowed a jury to decide the evidentiary issues in this case. For instance, in *Lynn Mining Co. v. Kelly* there existed questions of fact regarding the expiration of the applicable statute of limitations. 394 S.W.2d 755, 759 (Ky. 1965). The court found that the ultimate determination was to be decided by a jury:

> Where the pertinent facts are not in dispute, the validity of the defense of the statute of limitations can and should be

> determined by the court as a matter of law. Where, however, there is a factual issue upon which the application of the statute depends, it is proper to submit the question to the jury. It could best be done by having the jury render a special verdict under CR 49.01.

Id. at 759 (internal citations omitted)(emphasis added). Here, as the Civil Trial Court, itself, on at least one occasion also recognized, "the facts of this case [were] in significant dispute." (January 24, 2008 Opinion and Order at 1.)

Similarly, there exists issues of disputed fact regarding the application of KRS 503.085 in this case. Both parties presented the Civil Trial Court with different factual accounts of the events giving rise to this litigation. Rather than issuing evidentiary findings – without any support to do so – the Civil Trial Court should have allowed a jury to decide KRS 503.085's applicability to this case.

3. The Findings of Fact Adopted by the Civil Trial Court Were One-sided and Genuinely in Dispute.

In addition to circumventing the province of the jury, the Civil Trial Court adopted findings of fact from a one-sided evidentiary hearing taken by the Criminal Trial Court – findings of fact that Hawes consistently and genuinely disputed. For instance, in compliance with the February 25, 2008 agreement, Hawes submitted, along with his brief in opposition to LaPointe's Motion to Dismiss, the following materials for the Civil Trial Court to consider in opposition to LaPointe's proferred evidence:

1) The deposition of Todd Hawes
2) The deposition of Glenn A. LaPointe
3) The deposition of Russell Cranmer (the lead officer in the criminal prosecution of LaPointe)
4) Video of LaPointe's entry of a guilty plea on September 18, 2006 (court subsequently set aside, although this still constitutes an admission for purposes of the civil case)
5) Video of evidentiary hearing on motion to dismiss in the Criminal Trial Court
6) Transcript of police interview of Shea Moore from day of shooting

7) Transcript of police interview of Leah LaPointe from day of shooting
8) Transcript of police interview of Timothy Martin from day of shooting

(Hawes Brief In Opposition to Motion to Dismiss at p. 1-2).

In providing this additional evidence, Hawes assumed that the Civil Trial Court would, according to the agreement and according to law, make its own independent review of the underlying facts and take "the entire record" under consideration when making its own independent decision. Never did Hawes consider that the Civil Trial Court would turn LaPointe's motion to dismiss into a bench trial and merely adopt whole cloth the factual findings of the Criminal Trial Court's evidentiary hearing – one in which Hawes was not even a party to protect his own interests.

Hawes was never informed of the criminal hearing, had no idea the hearing was occurring, was not represented by counsel, and had no right to introduce evidence or cross-examine witnesses even if he would have been aware of the proceedings. Furthermore, the Commonwealth did not adequately defend its own position, much less Hawes'. The Commonwealth failed to call any witnesses or cross-examine LaPointe. The Commonwealth failed to introduce (or even to use for impeachment purposes) prior statements of witnesses who dramatically changed their testimony at the hearing. The Criminal Trial Court did not hear testimony from Martin — the one witness who was present during the events at issue and not connected to either party. Accordingly, the factual findings of the Criminal Trial Court were markedly one-sided and, in several areas, false. It was error for the Civil Trial Court to adopt these findings and to maintain its position even after Hawes filed his Motion to Vacate, Alter, or Amend pointing out these facts.

Specific findings of the Criminal Trial Court, which were adopted by the Civil Trial Court, were erroneous and contradicted by statements by LaPointe's own witnesses and by LaPointe himself. The following are but a few of the more egregious examples:

1) **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 of 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.**

(March 17, 2008 Opinion and Order.) The criminal court did not hear testimony from Jason Border and accepted an affidavit from LaPointe as definitive proof. The purported evidence is inadmissible hearsay from an affidavit of LaPointe. This evidence was also inadmissible under KRE 402, 403, and 404(b) and extraordinarily unreliable. The Circuit Court erred by relying on this information.

2) **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... Hawes stated to Mrs. LaPointe... that they refused to leave until somebody paid them their money.**

(March 17, 2008 Opinion and Order.) The Circuit Court's findings are dramatically different from the story Leah LaPointe told law enforcement immediately after these events and from the account of Martin — a neutral witness who is not connected to either party.

An hour after the shooting, Leah LaPointe told law enforcement the following:

> Todd actually entered my home. I was in my back bedroom. He entered through my front door and went through my house to my bedroom where I was blow-drying my hair and had the television on. And he asked me in a very stern voice where Shea Moore was....I was surprised that somebody had entered my home, but I had recognized him, so I called him by name and asked him what he was doing and he said he was seeking Mr. Moore and needed to talk to him, that he had some of his tools and that he wanted to get paid from Shea for the prior days work. And at that point I was still sitting in my

> bedroom and he seemed agitated, so I didn't feel comfortable, especially since he entered my home without...me answering my door. So I talked with him and had him move into the kitchen/living room area.
>
> Q. Did he give you any problem when you asked him to move to the living room?
>
> A No. As I was standing up I told him...that it was not...a good idea to just walk into somebody's home, no matter what the situation was...and it's a good thing that my dogs weren't there because they would have...you know.
>
> Q What was his reply to that?
>
> A. He said: "Yes I know." Then...he backed into there and I said: "Let me call Mr. Moore on the phone." Actually asked him to put the tools in the garage and to leave. And he said that he wasn't going to do that. And I said let me call Shea...so you can talk to him...So I did that on my home phone and they conversed for probably about three minutes....

(Statement of Leah LaPointe at pp. 4-5.) Leah LaPointe also explained to Hawes that "the day before Shea had gotten into an accident..." and that that is why Shea had not been able to meet with Hawes the day before. (*Id.* at 5.) Moore got on the phone and told Hawes he would pay him when he got there. (*Id.* at 6.) Leah LaPointe handed the phone to Hawes to talk with Moore and Leah LaPointe heard Hawes say, "Yeah, I'm sorry for coming in here." Hawes left the premises after Leah LaPointe got off the phone with Shea. (*Id.*) There is simply no valid support for the finding that Leah LaPointe repeatedly asked Hawes to leave the house and her police statement contradicts that finding.

Martin's statement to law enforcement also contradicts this finding. Martin's only connection with Hawes is that he worked with him for three days. His only connection with the LaPointes is this incident. He is a completely unbiased witness. In his taped statement to law enforcement, he stated that Leah LaPointe "said hi when I come in" and after she talked

on the phone she said "you'all wait for him, but you can't wait in here. (Statement of Martin at pp. 5-6.) We said: "Of course not. We'll wait – we'll go outside and wait in the car." (*Id.* at 7.)

There is no support from the evidence presented immediately after the incident that Leah LaPointe "repeatedly" told Hawes to leave the home.

3) **LaPointe had exited the vehicle, ordered Hawes and Martin off his property, and entered his home where he retrieved a shot gun....[After ramming Hawes' car] LaPointe exited his truck holding his shot gun and ordered Hawes and Martin off the property, which was approximately the fourth time they had been told to leave the LaPointe property. Hawes and Martin refused to comply and began approaching while holding his shot gun... LaPointe again ordered Hawes to leave his property. Hawes then began backing away toward the street and off the 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 ... Martin refused to leave after the first two shots were fired and was standing near LaPointe's residence when LaPointe was interacting with Hawes ...**

(March 17, 2008 Opinion and Order.) These findings are contradicted by statements taken by law enforcement officers from Moore and Martin immediately after the shooting, as well as the deposition testimony of LaPointe.

First, the proof is clear that LaPointe never told Hawes or Martin to get off of his property before ramming their car. Moore, in his taped statement just after the incident, stated that when he and LaPointe arrived at the LaPointe home Hawes and Martin did not immediately pull into the driveway. (*See* Moore Statement at pp. 7-8.) Rather, LaPointe began to bring groceries inside before Hawes and Martin pulled into the driveway. (*Id.*)

> Q Did [LaPointe] talk to them when they come up, or did he just go into the house?
>
> A Well, they didn't come up to me. When we all got out of the vehicle I'd gone into the house, Glen had gone into the house and then I came back outside. They didn't immediately back up [into the drive]...[W]e all went in the house, we had groceries. We all went into the house and then I came back

outside and they came walking up to me and I gave them the money....

Q ....Did they drive the car up to you?

A Well, no, they backed the car into the driveway and then got out of the car and [walked to me]

* * * *

Q Did you guys have any kind of confrontation? Did you argue, fuss, or anything like that?

A I mean, we didn't have to, it was already, you know, beforehand discussed.

Q I'm saying, but when you paid them nothing happened?

A No, I just handed them the money...we weren't arguing.

Q They were prepared to go about their business; is that correct?

A I guess you could say that, yeah.

Q So then Glen comes out of the house; right?

A Right.

Q What did Glen say when he come out?

A **Glen didn't say anything. Glen got into his truck....Glen came out while I was paying the guys. I don't know because...they were still standing there talking to me and then the truck hit the car....**I had money for Todd and money for Tim and I was handing them money and the next thing I know I heard wham and that was the impact....I was pretty shell shocked.

(*Id.* at 8-10.) Clearly, according to Moore's statement right after the shooting, there is no support for LaPointe's fabrication that he told Hawes and Martin to leave the property.

Martin's statement similarly contradicts the Circuit Court's findings. There is no support for the conclusion that Martin refused to comply with an order from LaPointe to

leave. Martin's statement was similar to Moore's. In addition, Martin fled in terror from the scene.

Most tellingly, LaPointe's deposition also contradicts the Circuit Court's findings. Yet, the Commonwealth did not impeach LaPointe with his prior testimony and did not cross-examine him at the hearing.

LaPointe testified during his deposition that as he drove home he understood that Hawes had left the house and was outside of the house waiting for payment. (LaPointe Depo. at p. 60.) LaPointe talked to his wife, and "she didn't say anything...about being threatened or feeling threatened." (*Id.* at 71.) There were no calls to the police because there was no emergency. (*Id.* at 72.)

When LaPointe arrived at his home ten minutes later, Hawes and Martin were sitting in their car, which was parked on the street. (*Id.* at 73.) After driving past the car and pulling into his driveway, LaPointe parked and proceeded to take his dogs and groceries into the house through the garage. (*Id.*) Meanwhile, Hawes and Martin pulled in at the end of the driveway and walked toward the garage and Martin. (*Id.* at 77.) After retrieving his "12 gauge...shotgun and some seven and a half dove shot," (*Id.* at 80) LaPointe went back through the garage. (*Id.* at 82.) He observed Moore "[t]alking to Mr. Hawes and Mr. Martin," and Moore paying them near the garage door. (*Id.* at 83.) LaPointe saw no pushing, no yelling, no screaming, no arms raising, and no physical antics. (*Id.* at 84.)

Getting into the car, LaPointe drove his pickup "[a]s fast as [he] could get it to go," through the grass, around the house and "removed their car from" the driveway — moving it approximately 30 feet. (*Id.* at 85-90.) He then pulled the truck back into the driveway and "reparked it where it was originally." (*Id.*)

After exiting the truck, LaPointe leveled the loaded shotgun at a shocked Hawes. (*Id.* at 94.) LaPointe advanced on him, pointed the shotgun at Hawes's head, and Hawes began to backpedal. (*Id.*) As Hawes continued to back away from LaPointe — his hands in the air — LaPointe fired the shotgun and struck Hawes. (*Id.*) As Hawes begged for his life, LaPointe fired the shotgun a second time. (*Id.* at 96-97.) Hawes then turned and ran. (*Id.*)

Taking just these examples of genuinely disputed issues of material fact into consideration, the Civil Trial Court clearly committed error when it made findings of fact on a pre-trial motion to dismiss.

V. The Civil Trial Court Committed Several Legal Errors in Its Application of KRS 503.080 and KRS 503.055.

Even if the Civil Trial Court properly served as the trier of fact (which it did not), and even if KRS 503.055 were applied retroactively (which it should not be), the Civil Trial Court still erred as a matter of law by holding "that the use of force employed by LaPointe was both justified and lawful under KRS 503.080 and KRS 503.055." (March 17, 2008 Opinion and Order.) However, contrary to LaPointe's assertion otherwise this holding is in direct contradiction with the law and available facts in the record. (October 16, 2009 Opinion and Order at 12-13.) For several reasons, the Civl Trial Court's application of KRS 503.080 KRS 503.055 is in error, as neither statute applies to the instant case by their own terms.

First, as the Court of Appeals found, the evidence in the record simply does not support the Civil Trial Court's 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." (October 16, 2009 Opinion and Order at 12-13.) The Court of Appeals saw clear error in the lower court's finding that LaPointe's conduct was justified and

lawful, given the utter lack of factual support in the record. Specifically, the Court of Appeals was "troubled by the trial court's determination that LaPointe's conduct was justified and lawful." (October 16, 2009 Opinion and Order at 12.) It went on to state that

> In fact, there does not appear to be any dispute that at the time LaPointe fired his gun, Hawes was backing into the street. We are compelled to agree with Hawes that under the trial court's interpretation of KRS 503.055, a person would be permitted to inflict deadly force upon another individual who had forcibly and unlawfully entered his home days, months, or even a year earlier. Certainly, this was not the legislature's intent, as such an interpretation would lead to an absurd result.

(*Id.* (emphasis added).) In any event, Hawes was out of the dwelling at the time of the shooting. To interpret this statute as permitting a person to shoot a person who had forcibly and unlawfully entered a dwelling in the past but was not currently in the dwelling would be nonsensical and would result in court-approved vigilante justice. Under such an interpretation, a person would be permitted to inflict deadly force on an individual who had forcibly and unlawfully entered a dwelling a year earlier.

Second, for KRS 503.080 to apply, at the time LaPointe fired the shotgun, force must have been "immediately necessary" to prevent criminal activity. *Id.* The undisputed proof is that, at the time LaPointe shot the gun, Hawes was in the street backing away from LaPointe unarmed and with his hands raised. Force was not necessary at all, and certainly not immediately so. As a matter of law, there is no legal right to shoot someone who is standing in the middle of a public street.

Third, KRS 503.080 only applies if the shooter shoots to prevent the "commission of criminal trespass, robbery, burglary, or other felony involving the use of force, or under

those circumstances permitted pursuant to KRS 503.055." *Id.* The Civil Trial Court held that LaPointe was "justified" under KRS 503.055. KRS 503.055 provides,

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Id. Thus, while the language of KRS 503.080 only implicates KRS 503.055 if there is some other crime that the shooting prevents, KRS 503.055 only applies to situations where a person is either "in the process of unlawfully and forcibly enter[ing] a dwelling" or already has unlawfully and forcibly entered the dwelling but is still in the dwelling. *Id.* The proof here is that, at the time LaPointe shot Hawes, Hawes was backing away and in the street with his hands outstretched in front of him. For this reason alone, neither KRS 503.080 nor 503.055 does not apply.

Finally, the law is clear that KRS 503.080 does not apply when the shooter does not intend to shoot the victim. For instance, in *Raney v. Com*monwealth, 2007 WL 188992 (Ky. 2007),[6] the Kentucky Supreme Court held that KRS 503.080 did not apply where the use of force was accidental because KRS 503.080 concerns intentional activity. *Id.* Here,

[6] Pursuant to CR 76.28, a copy of this case is attached as Appendix F.

LaPointe's own testimony makes clear that he did not intend to shoot Hawes; therefore, KRS 503.080 does not apply.

For all of these reasons, the Civil Trial Court committed error in its application of the law to the facts. Thus, this Court should uphold the Court of Appeals' Opinion vacating and remanding the Civil Trial Court's decision.

CONCLUSION

For each of the reasons stated above, the Court should uphold the Court of Appeals' Opinion vacating and remanding the Civil Trial Court's Opinion and Order. The Court should also find that Hawes did not waive his right to a jury trial and that the Civil Trial Court's findings of fact on a pre-trial motion to dismiss were prohibited by law.

Respectfully submitted,

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