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 — **APPELLANT**

V.

REPLY 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

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CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the Reply Brief for Appellant was mailed U.S. postage prepaid this 14th day of February, 2011 to Hon. R. Kenyon Meyer and Ebony L. Glenn, Dinsmore & 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 on appeal.

John E. Spainhour
Counsel for Appellant

MAY IT PLEASE THE COURT:

The Appellant, Estate of Glenn LaPointe, for its Reply Brief herein states:

ARGUMENT

I. LaPointe disagrees with Hawes characterization of the proceeding before Judge McDonald.

What started as a motion to dismiss became an evidentiary hearing on the whole case. In lieu of trial the parties agreed to submit the matter for final decision on the exhaustive record that had been created in the related criminal case and in this case, including the Hawes version of events. Each party, by agreement with the court, was permitted to submit addition evidence.

The Court of Appeals correctly found there was agreement:

> "Inexplicably, Hawes now argues that even though he plainly consented to the ... procedure with regard to the evidentiary hearing, he did not forfeit his right to a jury trial. While such may be true had the trial court not granted the motion to dismiss, we fail to perceive how Hawes could be entitled to a jury trial once the trial court concluded dismissal of the case was appropriate. Thus, we find no merit in Hawes' claims were violated by a procedure he specifically agreed to." Hawes v. LaPointe, 2008-CA-001559, pg. 5.

II. The finding by final judgment in Commonwealth v. Hawes does collaterally estop a finding to the contrary concerning the application of KRS 503.085.

Hawes cites a number of cases for the proposition that evidence of an acquittal in a criminal case cannot be introduced into evidence in subsequent civil litigation involving

the same conduct.[1] Such rule is historically well founded. Proof in the criminal prosecution requires evidence of guilt beyond reasonable doubt. The absence of evidence of guilt beyond a reasonable doubt is not the equivalent to evidence of civil culpability by a preponderance of evidence.

However, prior law does not apply after the judicial finding of immunity has been made under KRS 503.085. The trial court found facts by a preponderance of evidence clothed LaPointe with immunity. The court found him so protected. The statute grants both civil and criminal immunity.[2] Immunity in the criminal prosecution applies to a civil claim arising from the identical transaction.

III. Privity need not be absolute.

Hawes claim that privity requires absolute identity of interest is not well taken. (Appellee Brief, pg. 16). Absolute identity of interest is not required. Moore v. Commonwealth, 954 S.W.2d 317 (Ky. 1997). All necessary elements required in Moore are present here:

1. The issue is identical. The evidence shows by a preponderance that LaPointe acted in self protection or protection of others.

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[1] Sovereign Camp of the Woodman of the World v. Purdom, 143 S.W. 1021 (Ky. 1921), Shatz v. American Surety Company of New, 295 S.W.2d 909 (Ky. 1955), Bray-Robinson Clothing Co., v. Higgins, 276 S.W. 129 (Ky. 1925), Occidental Ins. Co., v. Chasteen, 75 S.W.2d 363 (Ky. 1934).

[2]LaPointe does not suggest that "the law of the case doctrine" precludes inquiry on retroactivity of KRS 503.085. The criminal conviction was not appealed. LaPointe simply states that both trial courts applied the statute and found that LaPointe was immune under the facts presented. Both trial courts applied the same statute and each did not accept Hawes version of the facts.

2. Final decision or judgment on the merits is found in the former action. There was a final order dismissing the Indictment against LaPointe.

3. The issue decided was necessary in the former action which the estopped party was given full and fair opportunity to litigate. The Court heard Hawes statement to the sheriff. LaPointes' actions were the same in both actions. While such condition would not likely reoccur because of the holdings in Rodgers v. Commonwealth, 285 S.W.3d 740 (Ky. 2009). Rodgers had not then been decided and the court had a trial by agreement of the parties and made findings in the application of the immunity statute to LaPointe.

4. There was a prior losing litigant in the former action, the Commonwealth.

IV. Regardless of when there is estoppel or issue preclusion, the parties agreed to have the trial court make a finding on disputed evidence by submission and in lieu of a trial and the finding is supported by the record.

There is no evidentiary hearing necessary to decide a motion to dismiss or a summary judgment. By consenting to a hearing, the parties submitted the case on the issue of liability on its merits to Judge McDonald. Judge McDonald gave Hawes the opportunity to testify again and had before it all testimony which either party thought necessary in the second proceeding. The reason Hawes didn't offer more testimony is that he had said all there was to be said. His complaint is the court did not believe his testimony or accept his excuses. Hawes version of the events was afforded a full and fair hearing twice. There was no more evidence either side wanted the court to consider. When such a decision is then rendered, it should not be set aside on appeal unless clearly erroneous.[3]

With the Court hearing all of the evidence, it could reasonably be concluded that

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[3]LaPointe has filed an extensive and documented record of undisputed facts. (See Appellants Brief, Appendix F).

LaPointe was acting in self defense or self protection. LaPointe did not know if Hawes was armed. He did know they had entered his home without invitation and stayed there. He did know Hawes was instructed to go to the work site to get paid. He did know they came back onto his property and blocked his driveway so he could not leave. He knew they had then been paid and were still there. Even though backing up, Hawes was still facing him and confronting him while drawing him away from Martin who was still there (and possibly armed) and at LaPointe's back. Judge McDonald reasonably concluded from the evidence that Lapointe was privileged to act in self protection. He was entitled to find the same facts as did Judge Hickman and from the same evidence. The criminal trial record was admitted in evidence without objection from Hawes. It contained Hawes statement to the sheriff.

CONCLUSION

The Opinion of the Court of Appeals should be reversed and the Opinion Dismissing Hawes Complaint should be affirmed.

Instead of having a jury trial, the parties agreed for the trial judge to decide the case on the complete record of both cases. Hawes had the right to submit anything else he wanted and cannot complain about his agreement to let the court decide. His complaint is the finder of fact, two times, did not believe his excuse or explanation.

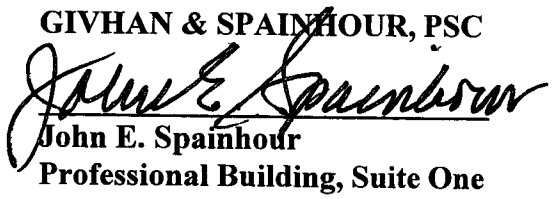
Two judges sitting as the finder of facts have looked at the evidence and found LaPointe privileged to act in protection of himself and others. Hawes has no proper complaint that the trial courts believed LaPointe's version and not his version.

The trial courts were trying to apply self defense principles without the hindsight

benefit of subsequent adjudication concerning retroactivity of KRS 503.085. The findings that LaPointe was immune in the prior criminal actions properly precludes a contrary result herein.

Respectfully submitted,

GIVHAN & SPAINHOUR, PSC



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