RENDERED: NOVEMBER 20, 2026; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0625-MR

JEFFREY SCOTT JAMES — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MELISSA L. BELLOWS, JUDGE
ACTION NO. 22-CI-002747

FRANK LONGLEY; DEVILLE HOMES, INC.; AND LSC INC.-S7 — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ECKERLE, A. JONES, AND L. JONES, JUDGES.

JONES, A., JUDGE: This appeal arises from a physical altercation between the Appellant, Jeffrey Scott James, and one of the Appellees, Frank Longley, at a residential construction site in Middletown, Kentucky. James subsequently filed a civil action against Longley, LSC Inc.-S7 ("LSC"), and Deville Homes, Inc. ("Deville Homes") (collectively "Appellees"), seeking damages for injuries he allegedly suffered during his scuffle with Longley. The Jefferson District Court, as

part of a separate criminal proceeding against Longley arising from the same incident, determined that Longley was immune from criminal prosecution pursuant to KRS[1] 503.085(1). Concluding that it was bound by the district court's immunity determination in the criminal action, the circuit court concluded that Longley was likewise immune from James's civil action and entered summary judgment in his favor. The circuit court also entered summary judgment in favor of LSC and Deville Homes.

The principal question presented is whether a court's determination that an individual is immune from criminal prosecution under KRS 503.085(1) conclusively establishes that individual's immunity from civil suit arising from the same conduct. We conclude that it does not. Although KRS 503.085(1) provides immunity from both criminal prosecution and civil suit for the legally justified use of force, the statute does not make a determination of immunity in one proceeding conclusively binding in the other. Nor may the criminal court's findings in the criminal proceeding be given preclusive effect with respect to the plaintiff in a civil suit.

Accordingly, we vacate the summary judgment entered in favor of Longley and remand this matter for the circuit court to independently consider whether Longley is entitled to civil immunity. We likewise vacate the summary

[1] Kentucky Revised Statutes.

judgment entered in favor of LSC insofar as genuine issues of material fact remain concerning whether Longley acted within the scope of his employment. However, we affirm the summary judgment entered in favor of Deville Homes and the disposition of James's independent negligent hiring, retention, and supervision claim against LSC. We therefore affirm in part, vacate in part, and remand for further proceedings consistent with this Opinion.

I. BACKGROUND

In November 2021, Longley was employed as an equipment operator for LSC, a position he had held for approximately three years. His duties included operating heavy equipment, laying out job plans, and excavating basements. LSC performed excavation work for various builders, including Deville Homes. Longley's supervisor at LSC was Micah Newman.

On November 17, 2021, LSC assigned Longley to perform excavation work on property owned by Deville Homes in the Lake Forest subdivision of Middletown, Kentucky.[2] Longley was tasked with excavating a basement and moving the displaced dirt to an adjoining lot to allow other contractors access to the construction site. Deville Homes owned three adjoining lots, and Longley was excavating the middle lot and depositing the dirt on the lot to its right. James

[2] Although the circuit court identified November 21, 2021, as the date of the incident, James's complaint and the other filings in the record consistently identify November 17, 2021, as the relevant date. We use the latter date throughout this Opinion.

owned property adjacent to the lot where Longley was depositing the dirt. According to James, Longley was depositing the excavated dirt too close to certain trees located on James's property.

That morning, James approached Longley to express concerns that the excavation work was encroaching upon his property. The two exchanged words, and Longley directed James to contact Deville Homes if he had further concerns about the work.[3] Later that afternoon, James returned to the construction site. James entered an excavated area where Longley was operating heavy equipment and approached Longley to discuss the matter further as he believed that Longley was continuing to damage his property. Another verbal confrontation ensued, which escalated into a physical altercation between the two men. Although the parties agree that Longley pushed James, their accounts of the circumstances surrounding the confrontation and the ensuing physical contact differ markedly. James maintains that Longley was the aggressor and used excessive force against him. Longley maintains that he acted in self-defense after James entered the excavation area, confronted him in a threatening and hostile manner, and refused repeated requests to leave. James alleges that he sustained physical injuries during the altercation.

[3] During his deposition, Longley explained that he told James to contact Deville Homes as opposed to LSC because there was a sign on the property with Deville Homes's phone number on it.

On June 2, 2022, James filed the underlying civil action in Jefferson Circuit Court against Longley, LSC, and Deville Homes. James sought damages for the injuries he allegedly sustained. He also asserted claims against LSC and Deville Homes based on theories of vicarious liability and negligent hiring, retention, training, and supervision. The parties thereafter engaged in written discovery and depositions.

Meanwhile, criminal proceedings arising from the November 17, 2021, incident were initiated against Longley on July 29, 2023, in Jefferson District Court, Case No. 23-M-009040. On December 4, 2023, Longley moved for immunity from criminal prosecution pursuant to KRS 503.085(1), asserting that his use of force was legally justified. At a hearing on December 5, 2023, the Commonwealth orally moved to dismiss the criminal charges with prejudice, without stipulating that probable cause was lacking. Although Longley did not oppose dismissal of the charges, he requested that the district court first adjudicate his immunity motion. The Commonwealth objected, maintaining that its decision not to prosecute rendered the immunity question moot.

The district court took the matter under advisement. In an order entered on February 2, 2024, the district court concluded that it retained authority to decide Longley's pending immunity motion notwithstanding the Commonwealth's request for dismissal. Relying on *Rodgers v. Commonwealth*,

285 S.W.3d 740 (Ky. 2009), the district court applied the standard governing criminal immunity under KRS 503.085, which requires consideration of whether probable cause exists to believe that the defendant's use of force was unlawful.

In so doing, the district court observed that the Commonwealth's submissions consisted principally of the criminal citation and the investigating detective's complaint. Longley, in turn, had submitted property deeds, the complaint filed in James's civil action, and deposition testimony from James and Longley. Based on those materials, the district court recounted the circumstances of the parties' encounters, including James's entry onto the construction site, his confrontation with Longley in the excavation area, and Longley's asserted concern for his safety.

Of particular significance, the district court noted that the Commonwealth had elected not to prosecute the charges and had offered no substantive argument that probable cause existed to believe Longley's use of force was unlawful. The district court stated:

> The Commonwealth makes no argument that there is, in fact, any probable cause which weighs heavily on the Court. But more importantly, the Court cannot find in good conscience that the use of force was not legally justified and as such, finds the Defendant [Longley] immune from prosecution.

Record ("R.") at 231.

Accordingly, the district court expressly determined that Longley was immune from criminal prosecution under KRS 503.085 and dismissed the charges with prejudice. *Id*. James, although listed as the complaining witness, was not a party to the criminal proceeding.

Following the district court's ruling, Longley moved for summary judgment in the civil action on April 19, 2024. He argued that the district court's determination of criminal immunity conclusively established his immunity from James's civil claims arising from the same incident. LSC and Deville Homes separately moved for summary judgment on April 24 and April 26, 2024, respectively. In addition to relying on Longley's immunity, they asserted that the evidence was insufficient to establish independent or derivative liability on their parts.

By that time, the parties had conducted substantial discovery. Longley had been deposed on May 9, 2023, and LSC's president, Luke Schultz, had been deposed on November 27, 2023. During those depositions, Longley identified Chris Osborne of Deville Homes as an individual who had provided instructions concerning the excavation project, while Schultz identified Micah Newman as having greater knowledge of Longley's work. James subsequently maintained that summary judgment was premature because he had not obtained

testimony from those individuals. The record, however, does not reflect any attempt to depose either witness before the summary judgment motions were filed.

On July 19, 2024, the circuit court entered an Opinion and Order granting summary judgment in favor of Longley and Deville Homes. The circuit court concluded that Longley's immunity from criminal prosecution under KRS 503.085(1) also rendered him immune from James's civil action. It further concluded that James had failed to produce sufficient evidence to impose liability on Deville Homes. The circuit court, however, initially denied LSC's motion for summary judgment.

James thereafter moved to alter, amend, or vacate the judgment entered in favor of Longley and Deville Homes. LSC likewise sought reconsideration of the denial of its motion for summary judgment. Following further proceedings, the circuit court entered separate Opinions and Orders on April 23, 2025. The circuit court denied James's motion, reaffirming its conclusion that it was bound by the district court's immunity determination. However, the circuit court granted LSC's motion for reconsideration, concluding that even assuming LSC could be held liable for Longley's conduct notwithstanding his immunity, the evidence was insufficient to support a judgment against LSC.

This appeal followed. Additional facts will be discussed below as necessary to our analysis.

II. STANDARD OF REVIEW

We review the circuit court's grant of summary judgment *de novo* because it involves only questions of law and the existence of disputed material facts. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Summary judgment is appropriate only when "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." CR[4] 56.03. In determining whether summary judgment was properly granted, we must view the record in the light most favorable to the nonmoving party and resolve all doubts in that party's favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Additionally, the interpretation of KRS 503.085 presents a question of law, which we review *de novo*. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011).

[4] Kentucky Rules of Civil Procedure.

III. ANALYSIS

James raises several challenges to the circuit court's entry of summary judgment in favor of Appellees. His principal argument concerns the circuit court's determination that Longley's immunity from criminal prosecution under KRS 503.085 conclusively established his immunity from James's civil action. James also challenges the dismissal of his claims against LSC and Deville Homes, contending that genuine issues of material fact remain concerning their liability and that summary judgment was premature because discovery had not been completed. We address the immunity question first, followed by the claims against LSC and Deville Homes.

A. Longley's Immunity Under KRS 503.085(1).

James first argues that the circuit court erred by concluding that the district court's determination of Longley's immunity from criminal prosecution conclusively established his immunity from James's civil action. Specifically, James maintains that KRS 503.085 does not provide that a determination of immunity in a criminal proceeding is binding in a subsequent civil action and that he cannot be bound by findings made in a proceeding to which he was not a party and in which he had no full and fair opportunity to litigate the issue.

In granting summary judgment in favor of Longley, the circuit court concluded that "[a]ccording to the language of KRS 503.085(1), Longley is

immune from civil suit if found immune from criminal prosecution under the same set of facts. . . . The Court . . . finds no convincing reason to vacate the District Court's Order." R. at 601.

The circuit court thus interpreted KRS 503.085 as making the district court's determination of criminal immunity dispositive of Longley's immunity from James's civil action and moreover treated the matter as if the district court's order were before it as part of an appeal. When James subsequently challenged that conclusion, the circuit court acknowledged his procedural, due process, and substantive concerns but nevertheless reaffirmed its determination that Longley was entitled to summary judgment.

In its April 23, 2025, Revised Opinion and Order, the circuit court explained:

> The Court recognizes and very much appreciates the procedural, due process, and substantive concerns raised by Mr. James. However, whether the District Court's apparent belief that it was required by law to rule on Mr. Longley's immunity motion, whether the available record was sufficiently complete to allow the District Court to make the necessary findings with any degree of confidence, whether the Commonwealth's advocacy was such that Mr. James was given a full and fair opportunity to litigate the immunity issue, whether the District Court fully appreciated the ramifications of doing so (*i.e.* that the ruling was not and could not be limited to the pending criminal case against Mr. Longley), or whether the District Court's ultimate decision to grant a motion for immunity under KRS 503.085 in a case with such

> disparate factual accounts of the precipitating event was erroneous, are not issues before this Court.

R. at 676-77. The circuit court continued:

> This case came before the Court on a motion for summary judgment and not on appeal from the District Court, or for a *de novo* ruling as to whether Mr. Longley qualifies for immunity under KRS 503.085. As such, and in ruling on the motion, the Court is obliged to accept the District Court's determination that Mr. Longley does qualify for immunity under KRS 503.085 regardless of whether or not the Court agrees with that ruling. *Rodgers v. Commonwealth*, 285 S.W.3d 740 (2009). That determination having been made, he is as a matter of law immune from criminal prosecution *and* civil action arising out of his use of force against Mr. James on November [17], 2021. Accordingly, even when viewing the evidence of record in the light most favorable to Mr. James, it would not be possible for him to prevail on his claims against Mr. Longley at trial.

Id. at 677.

We agree with the circuit court that it was not sitting in review of the district court's criminal immunity determination. Likewise, whether the district court correctly granted Longley immunity from criminal prosecution is not before us. The issue before us is whether the circuit court correctly determined that it was required to accept the district court's ruling in the criminal case as dispositive of Longley's immunity from James's separate civil action. We disagree with that conclusion because, as explained below, neither the language of KRS 503.085 nor the principles governing issue preclusion support it.

We begin with the language of KRS 503.085, which provides:

> (1) A person who uses force as permitted in KRS 503.050,[5] 503.055,[6] 503.070,[7] and 503.080[8] is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
>
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

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[5] KRS 503.050 relates to the use of force in protection of oneself.

[6] KRS 503.055 relates to the use of force regarding the protection of dwellings, residences, or occupied vehicles.

[7] KRS 503.070 relates to the use of force in the protection of another person.

[8] KRS 503.080 relates to the use of force to protect one's dwelling, building, or upon real property in his or her possession or in the possession of another person for whose protection he or she acts.

KRS 503.085.

Our primary objective in interpreting a statute is to give effect to the intent of the General Assembly. *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 577 (Ky. 1994). We begin with the statutory language, giving its words their ordinary meaning and considering the statute as a whole. *Torian v. City of Paducah*, 739 S.W.3d 579, 582 (Ky. 2025). We may not add language to a statute that the General Assembly did not include. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

By its plain terms, KRS 503.085(1) provides immunity from both criminal prosecution and civil action to a person whose use of force is legally justified under the enumerated provisions of KRS Chapter 503. The statute thus recognizes two forms of immunity arising from the same substantive justification for the use of force. Significantly, however, it does not provide that a judicial determination of immunity in a criminal proceeding conclusively establishes immunity in a subsequent civil action. Nor does it state that findings made in a criminal proceeding are binding upon an individual who was not a party to that proceeding.

Reading all parts of KRS 503.085 together, we discern no legislative intent to make a criminal court's determination of immunity automatically dispositive in a civil action. Had the General Assembly intended such a result, it

could have expressly provided that a determination of immunity from criminal prosecution would conclusively establish immunity from civil liability arising from the same conduct. It did not do so. Rather, the statute conditions immunity upon the legally justified use of force, not upon the existence of a prior judicial determination in a different proceeding.

This distinction is particularly significant because criminal and civil proceedings involve different parties, serve different purposes, and are governed by different procedural standards. The Commonwealth prosecutes criminal offenses on behalf of the public, whereas a civil plaintiff seeks redress for an alleged injury to private rights. Nothing in KRS 503.085 suggests that the General Assembly intended to bind a private plaintiff to a criminal immunity determination obtained in a proceeding in which that plaintiff had no right to control the presentation of evidence or legal arguments.

Our interpretation finds persuasive support in *Kumar v. Patel*, 227 So. 3d 557 (Fla. 2017), in which the Supreme Court of Florida considered substantially similar statutory language and addressed the precise question presented here. Florida's self-defense immunity statute, like KRS 503.085(1), provides that a person whose use of force is legally justified is immune from both criminal prosecution and civil actions. *See* FLA. STAT. § 776.032(1). The Florida statute also contains a provision authorizing an award of attorney's fees and related

expenses in a civil action when a court finds the defendant immune from prosecution. *See* FLA. STAT. § 776.032(3).[9]

In that case, two men, Kumar and Patel, became embroiled in a barroom dispute that turned physical. During the altercation, Patel struck Kumar in the face with a glass, permanently blinding his left eye. After Patel was indicted with felony battery, he moved to dismiss the charges against him based on immunity pursuant to FLA. STAT. § 776.032(1). The criminal court determined that Patel was entitled to statutory immunity and dismissed the charges with prejudice. Kumar subsequently brought a civil action seeking damages for his injuries. Patel asserted that the criminal court's determination necessarily established his immunity from the civil action. Although the trial court rejected that argument, the intermediate appellate court agreed with Patel and directed that immunity be granted. The Florida Supreme Court reversed.

Examining the statutory language, the *Kumar* court concluded that a determination of immunity from criminal prosecution did not automatically confer immunity from a subsequent civil action. 227 So. 3d at 559-61. The Florida

[9] Florida amended its self-defense immunity statute in 2017 to add subsection (4), which places the burden on the party opposing criminal immunity to overcome a *prima facie* claim by clear and convincing evidence. *See* 2017 Fla. Laws ch. 2017-72 § 1; FLA. STAT. § 776.032(4). The amendment did not alter the provisions governing immunity from criminal prosecution and civil action or the award of attorney's fees in civil proceedings. *See* FLA. STAT. § 776.032(1), (3). Indeed, the Florida Supreme Court expressly considered the amendment in *Kumar*, observing that the differing burdens of proof further supported separate determinations of criminal and civil immunity. 227 So. 3d at 561.

Supreme Court reasoned that although the statute afforded protection against both criminal prosecution and civil action, it did not provide that an immunity determination in one proceeding was binding in the other. The court also considered the statutory provision authorizing attorney's fees in civil actions as consistent with a separate judicial determination of civil immunity.

We find *Kumar* persuasive because the Florida statute and KRS 503.085 employ substantially similar language and establish the same substantive protections. Both statutes provide immunity from criminal prosecution and civil action for legally justified force, yet neither expressly provides that a criminal immunity determination conclusively resolves the issue in a subsequent civil proceeding. We agree with the Florida Supreme Court that the statutory grant of both forms of immunity does not, without more, establish that a determination of one necessarily controls the other.

Accordingly, we conclude that KRS 503.085 does not, by its own operation, render a determination of criminal immunity binding in a subsequent civil action arising from the same use of force.[10] Whether a prior determination

[10] We recognize that a panel of this Court previously reached a contrary conclusion in *Albright v. Childers*, Nos. 2017-CA-000669-MR and 2017-CA-000670-MR, 2019 WL 1412490, at *2-3 (Ky. App. Mar. 29, 2019) (unpublished). There, the panel concluded that a determination of criminal immunity under KRS 503.085 barred a subsequent civil action arising from the same conduct, both under the statute itself and through collateral estoppel. However, the Supreme Court of Kentucky subsequently vacated that opinion, holding that this Court lacked jurisdiction to entertain the interlocutory appeal from the denial of immunity. *Childers v. Albright*, 636 S.W.3d 523, 525-28 (Ky. 2021). The Supreme Court did not reach the question of substantive

may nevertheless have preclusive effect presents a separate question governed by the principles of issue preclusion, which we address below.

In *Rodgers*, 285 S.W.3d at 740, the Supreme Court of Kentucky addressed the procedure for determining immunity from criminal prosecution under KRS 503.085. The Court explained that the statute does not require a trial court to conduct an evidentiary hearing or resolve disputed factual questions concerning the defendant's justification for using force. Rather, immunity from criminal prosecution is determined by whether probable cause exists to believe the defendant's use of force was unlawful. *Id.* at 754-56. If probable cause exists, the prosecution may proceed, leaving the defendant to assert justification as a defense at trial. Conversely, if probable cause is lacking, the defendant is entitled to immunity from prosecution.

Importantly, *Rodgers* addressed only the procedures governing claims of immunity from criminal prosecution. In adopting the probable cause standard,

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immunity. Accordingly, the vacated opinion does not control our resolution of the issue presented here. Moreover, we disagree with the underlying premise of the prior panel's collateral estoppel analysis that the Commonwealth's interests in a criminal prosecution are identical to those of the injured party in a subsequent civil action. The Commonwealth prosecutes criminal offenses to vindicate the public interest in enforcing its criminal laws, whereas a civil plaintiff seeks redress for injuries to private rights. These distinct interests cannot be equated merely because both proceedings arise from the same conduct. Nor can the Commonwealth's opportunity to litigate the question of criminal immunity substitute for the civil plaintiff's right to a full and fair opportunity to litigate the defendant's entitlement to civil immunity. Finally, we are aware that Associate Judge Eckerle was the trial judge in the *Albright* criminal case and thus had no involvement in the appeal. Likewise, Judge Eckerle was the original presiding judge in the matter *sub judice* shortly before her election to this Court. It does not appear that she made any substantive rulings in the case, and no one has sought to recuse her.

the Supreme Court relied upon KRS 503.085(2), which expressly governs law enforcement investigations and arrests, and extended that standard to prosecutors and courts determining whether criminal charges may proceed. 285 S.W.3d at 754-55. The Court did not consider the procedures governing immunity from civil actions, much less whether a criminal immunity determination would bind a plaintiff in subsequent civil litigation. Accordingly, *Rodgers* does not resolve the question presented here.

The probable cause standard adopted in *Rodgers* is rooted in the criminal process and serves to determine whether a prosecution may proceed. It is not the standard governing summary judgment in civil litigation. Rather, CR 56 requires the court to determine whether, viewing the evidence in the light most favorable to the nonmoving party, any genuine issue of material fact remains and whether the moving party is entitled to judgment as a matter of law. Consequently, a determination that probable cause is lacking to believe a defendant's use of force was unlawful does not necessarily establish that the defendant is entitled to immunity from civil liability as a matter of law.

Thus, although both proceedings concern whether a defendant's use of force was legally justified, they do not necessarily involve the same judicial inquiry. A criminal court's determination that probable cause is lacking to believe the use of force was unlawful does not necessarily establish that, viewing the

evidence in the light most favorable to the civil plaintiff, no genuine issue of material fact exists concerning justification. The former determines whether the Commonwealth may proceed with a criminal prosecution; the latter determines whether the defendant has established entitlement to judgment as a matter of law in a civil action.

The distinction is particularly significant here. The district court expressly applied the probable cause standard articulated in *Rodgers* when it determined that Longley was immune from criminal prosecution. Moreover, the Commonwealth had moved to dismiss the charges with prejudice and did not substantively oppose Longley's claim of immunity. The district court specifically observed that the Commonwealth had presented no argument establishing probable cause to believe Longley's use of force was unlawful. Its determination therefore resolved Longley's entitlement to immunity from criminal prosecution under the standard applicable to that proceeding. It did not resolve whether the evidence, viewed in the light most favorable to James, established Longley's entitlement to immunity from the civil action as a matter of law. *Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286, 291 (Ky. 2012) ("[A] motion for summary judgment is generally an appropriate method for the trial court to determine whether immunity applies.").

These differences also bear upon whether the district court's determination may be given preclusive effect in this litigation. We now turn to that

question. We next consider whether the district court's determination that Longley was immune from criminal prosecution nevertheless precluded James from litigating Longley's entitlement to immunity in this civil action under the doctrine of collateral estoppel.

Collateral estoppel, also known as issue preclusion, prevents the relitigation of an issue of fact or law that was actually litigated and necessarily determined in a prior proceeding. *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459, 465 (Ky. 1998). The essential elements of collateral estoppel are: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the party against whom estoppel is asserted having had a full and fair opportunity to litigate; and (4) a prior losing litigant. *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997) (citing *Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky. 1970)). These requirements ensure that a litigant is not bound by a determination reached in a proceeding in which that litigant lacked a meaningful opportunity to protect his or her interests.

Here, James was not a party to the criminal proceeding against Longley. That proceeding was prosecuted by the Commonwealth, which alone possessed the authority to determine whether to pursue criminal charges, what evidence to present, and what arguments to advance. Although James was the alleged victim of Longley's conduct, he had no corresponding authority to direct

the prosecution or litigate Longley's entitlement to criminal immunity. His interest in obtaining compensation for his alleged injuries was distinct from the Commonwealth's interest in enforcing its criminal laws. Accordingly, the Commonwealth's opportunity to litigate the issue of criminal immunity cannot be treated as the equivalent of James having had a full and fair opportunity to litigate his own claims.[11]

The circumstances of the criminal proceeding underscore this distinction. The Commonwealth had already moved to dismiss the charges against Longley with prejudice and maintained that his motion for immunity was moot. Rather than substantively contesting his claim of justification, the Commonwealth declined to advance an argument establishing probable cause to believe Longley's use of force was unlawful. Indeed, the district court expressly noted the absence of such an argument in its order granting immunity. Whatever the Commonwealth's

[11] Our conclusion is consistent with *Hurbert by and through Barineau v. Green*, ___ So. 3d ___, 2025 WL 2553447 (Ala. Sep. 5, 2025) (per curiam) (not yet released for publication). Although not identical to KRS 503.085, Alabama's self-defense immunity statute similarly confers immunity from both criminal prosecution and civil action without expressly providing that a criminal immunity determination is binding in subsequent civil litigation. *See* ALA. CODE § 13A-3-23(f)(1). In *Hurbert*, the Alabama Supreme Court concluded that a prior criminal immunity determination did not preclude the injured party from pursuing a subsequent civil action under principles of *res judicata* or collateral estoppel. The court further recognized that entitlement to civil immunity must be independently evaluated under the applicable civil summary judgment standard, and that while the civil court is not precluded from considering the criminal judgment, it is not bound by it. *Id.*

reasons for pursuing dismissal, its litigation decisions were not James's to make and cannot fairly be attributed to him.

Moreover, we disagree with the underlying premise of the prior panel's collateral estoppel analysis in *Albright* that the Commonwealth's interests in a criminal prosecution are identical to those of an injured party in a subsequent civil action. The Commonwealth prosecutes criminal offenses to vindicate the public interest in enforcing its criminal laws, whereas a civil plaintiff seeks redress for injuries to private rights. These distinct interests cannot be equated merely because both proceedings arise from the same conduct. Nor can the Commonwealth's opportunity to litigate criminal immunity substitute for the civil plaintiff's right to a full and fair opportunity to litigate the defendant's entitlement to civil immunity.

The differences between the proceedings extend beyond the identity and interests of the parties. As previously discussed, the district court's determination was ostensibly governed by the probable cause standard articulated in *Rodgers*.[12] Its ruling established that Longley was entitled to immunity from

[12] In *Commonwealth v. Bennett*, 553 S.W.3d 268, 273 (Ky. App. 2018), we observed that "[i]t is possible to establish probable cause of unlawfulness at the same time evidence justifying self-defense exists. However, after such probable cause is shown, the prosecution must proceed and the fact-finder must weigh the evidence of self-defense to decide whether it is a complete defense, an imperfect defense, or not justified." Here, however, it is significant that the Commonwealth had seemingly abandoned the case, and did not make any arguments regarding probable cause, even though it must have believed such cause existed when it decided to pursue the charge against Longley in the first instance.

criminal prosecution under that standard. It did not determine whether, viewing the evidence in the light most favorable to James, Longley was entitled to judgment as a matter of law in the civil action. Thus, even though the proceedings arose from the same encounter and implicated the same substantive justification statutes, the questions presented were not necessarily identical for purposes of issue preclusion.

We need not determine whether the differences in the applicable procedural standards would, standing alone, defeat collateral estoppel. James's lack of a full and fair opportunity to litigate the issue in the criminal proceeding is sufficient to preclude application of the doctrine. To hold otherwise would permit the Commonwealth's discretionary decisions concerning a criminal prosecution to extinguish the private rights of an individual who neither controlled nor participated as a party in that proceeding.

Accordingly, the district court's determination that Longley was immune from criminal prosecution did not collaterally estop James from contesting Longley's entitlement to immunity in this civil action. The circuit court therefore erred insofar as it treated the district court's criminal immunity ruling as conclusively establishing Longley's entitlement to civil immunity under KRS 503.085.

Having concluded that the district court's criminal immunity determination was neither binding under KRS 503.085 nor entitled to preclusive effect under the doctrine of collateral estoppel, we turn to the appropriate disposition.

The circuit court did not independently determine whether Longley was entitled to immunity from civil action under KRS 503.085. Rather, it concluded that the district court's prior determination of criminal immunity was binding and, on that basis, granted summary judgment in Longley's favor. Because the circuit court proceeded from an erroneous legal premise, it did not reach the substantive question of whether the evidence, viewed under the standards governing summary judgment, established Longley's entitlement to civil immunity.

Accordingly, we vacate the circuit court's judgment insofar as it granted summary judgment in Longley's favor on the basis of the district court's determination of probable cause in the criminal action pursuant to KRS 503.085(1) and remand for the circuit court to consider that question in the first instance. In doing so, the circuit court must independently evaluate the evidence, viewing it in the light most favorable to James and without affording preclusive effect to the district court's criminal immunity determination. We express no opinion as to whether Longley ultimately may establish entitlement to civil immunity.

B. Claims Against LSC.

James also challenges the circuit court's entry of summary judgment in favor of LSC. He alleged that LSC was vicariously liable for Longley's conduct under the doctrine of *respondeat superior* and independently liable for negligently hiring, training, supervising, and retaining him. We address these theories separately.

1. Vicarious Liability.

Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for the tortious conduct of an employee committed within the scope of employment. *Papa John's International, Inc. v. McCoy*, 244 S.W.3d 44, 50-51 (Ky. 2008). The controlling inquiry is whether the employee's conduct was undertaken, at least in part, to further the employer's business or instead arose from purely personal motives unrelated to that business. *Id.* The mere fact that an employee's wrongful conduct occurs during working hours or at the workplace does not establish that the employee acted within the scope of employment. *Hensley v. Traxx Management Co.*, 622 S.W.3d 652 (Ky. App. 2020); *Feltner v. PJ Operations, LL*C, 568 S.W.3d 1, 5-7 (Ky. App. 2018).

Nevertheless, an employee's intentional or wrongful use of force does not necessarily place the conduct outside the scope of employment. In *Dennert v. Dee*, 215 S.W.2d 575 (Ky. 1948), the Court recognized an employer's liability for

an assault committed by an employee while maintaining order at the employer's establishment. Similarly, in *Frederick v. Collins*, 378 S.W.2d 617 (Ky. 1964), the Court recognized liability arising from an employee's use of force while protecting the employer's business. These decisions illustrate that the nature of the employee's conduct, including whether it was intentional or excessive, is not necessarily dispositive. Rather, the relevant consideration is whether the conduct was sufficiently connected to the employee's performance of duties undertaken for the employer's benefit.

Here, the record establishes that Longley was performing excavation work at a construction site where LSC had been engaged by Deville Homes. The parties dispute the precise nature of Longley's relationship with LSC. Although LSC's president, Luke Schultz, characterized Longley as an independent contractor who operated his own business, Longley testified that he considered himself employed by LSC. The characterization of Longley as an independent contractor for tax purposes does not, standing alone, resolve whether an employment relationship existed for purposes of *respondeat superior*.[13]

[13] In *Brooks v. Grams, Inc.*, 289 S.W.3d 208 (Ky. App. 2008), this Court reasoned that there were at least nine factors determining whether an agency relationship exists, but "[t]he right to control is considered the most critical element in determining the principal's liability for the tortious acts of an agent." *Id*. at 212 (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003)).

The circumstances surrounding the confrontation likewise present a question concerning the scope of Longley's work. The encounter arose while Longley was performing excavation work, and the evidence indicates that he directed James to leave the construction site and not return. Although Longley maintained that his subsequent use of force was motivated by concern for his personal safety, the record also permits an inference that his confrontation with James was undertaken, at least in part, to protect the worksite and facilitate the continuation of the excavation project.

LSC relies upon *McCoy*, *Hensley*, and *Feltner* to argue that Longley's alleged assault was a personal act unrelated to his assigned duties. Those authorities establish that an employer is not liable merely because an employee's conduct occurs in connection with employment. They do not, however, foreclose liability where the employee's conduct may have been motivated, at least in part, by an effort to further the employer's business. Unlike conduct undertaken solely for personal purposes, Longley's efforts to remove James from the construction site arguably bore a relationship to the work he was performing.

Viewing the evidence in the light most favorable to James, we conclude that genuine issues of material fact remain concerning the nature of Longley's relationship with LSC and whether his conduct fell within the scope of

that relationship. Accordingly, summary judgment was inappropriate on James's claim seeking to hold LSC vicariously liable for Longley's conduct.

2. Negligent Hiring, Training, Supervision, and Retention.

James separately alleged that LSC was directly negligent in hiring, training, supervising, and retaining Longley. Unlike *respondeat superior*, these theories impose liability for the employer's own negligence rather than liability derived solely from the employee's wrongful conduct. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 733 (Ky. 2009); *Feltner*, 568 S.W.3d at 6. "To succeed on a negligent hiring and retention claim, the plaintiff must prove[:] (1) the employer knew or reasonably should have known that an employee was unfit for the job for which he was employed, and (2) the employee's placement or retention at that job created an unreasonable risk of harm to the plaintiff." *Ritchie v. Turner*, 559 S.W.3d 822, 842 (Ky. 2018).

Here, James identified no evidence establishing that LSC knew or reasonably should have known that Longley posed an unreasonable risk of engaging in the conduct alleged. Nor did he identify a particular deficiency in LSC's training or supervision that created a foreseeable risk of the injuries he sustained. The occurrence of the confrontation itself, without evidence of negligence attributable to LSC, is insufficient to establish these independent claims.

James nevertheless contends that summary judgment was premature because additional discovery was necessary. In particular, he sought to obtain testimony from Micah Newman, whom Schultz identified during his November 27, 2023, deposition as having greater knowledge concerning Longley's work and the excavation project.

Kentucky law does not require that discovery be completed before summary judgment may be entered. Rather, the opposing party must have been afforded an adequate opportunity to conduct discovery. *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979); *Suter v. Mazyck*, 226 S.W.3d 837, 841-42 (Ky. App. 2007).

James commenced this action on June 2, 2022. LSC did not move for summary judgment until April 24, 2024, nearly twenty-three months later. Moreover, Schultz identified Newman during his November 27, 2023, deposition, approximately five months before LSC filed its motion. The record does not indicate that James attempted to schedule Newman's deposition during that period. James attributed his failure to complete discovery, in part, to the litigation concerning Longley's claim of immunity. However, the first motion concerning that issue was not filed in the civil action until April 19, 2024, nearly five months after Schultz identified Newman. James offered no adequate explanation for his failure to pursue the deposition during the intervening period or otherwise

demonstrate that he had been denied a reasonable opportunity to obtain the evidence he believed necessary.

Under these circumstances, we cannot conclude that the circuit court prematurely entered summary judgment merely because James had not completed the discovery he desired. Having been afforded an adequate opportunity to develop his claims, James was required to identify evidence sufficient to create a genuine issue of material fact concerning LSC's alleged independent negligence. He failed to do so.

Accordingly, we affirm the circuit court's entry of summary judgment in favor of LSC on James's claims of negligent hiring, training, supervision, and retention. However, we reverse the judgment insofar as it dismissed James's claim against LSC under the doctrine of *respondeat superior* and remand that claim for further proceedings consistent with this Opinion.

C. Deville Homes.

Finally, James challenges the circuit court's entry of summary judgment in favor of Deville Homes. He contends that genuine issues of material fact exist concerning Deville's control over Longley and that summary judgment was premature because he had not completed discovery.

As previously discussed, an employer may be held vicariously liable for an employee's tortious conduct committed within the scope of employment.

Papa John's International, Inc., 244 S.W.3d at 50-51. However, the imposition of liability under the doctrine of *respondeat superior* requires an employment or agency relationship in which the alleged employer possesses the requisite right to control the manner in which the work is performed. *See Nazar v. Branham*, 291 S.W.3d 599, 606-07 (Ky. 2009).

The evidence establishes that Deville retained LSC to perform excavation work at the construction site where the altercation occurred. James nevertheless maintains that Deville exercised sufficient control over Longley to support vicarious liability. In support, James relies upon his deposition testimony that Longley repeatedly referred to Deville's owner, Chris Osborne, as his boss. James further testified that Longley stated Osborne had instructed him concerning the excavation work and directed James to contact Osborne with any complaints. James Deposition at 55, 57, 59. Longley likewise acknowledged that he generally referred complaints concerning the excavation work to Osborne or Deville.

Viewed in the light most favorable to James, this testimony supports an inference that Deville exercised some authority over the excavation project. It does not, however, establish that Deville possessed the right to control the manner in which Longley performed his work. Indeed, LSC's president, Luke Schultz, explained that Deville contacted LSC when excavation work was needed and provided the specifications for the project. LSC, through Micah Newman, then

selected the individual who would perform the excavation and communicated the assignment to that individual. Thus, while Deville identified the work to be performed and supplied the project's requirements, LSC determined who would perform the work and arranged for its execution.

The distinction is significant. Even accepting James's testimony that Longley referred to Osborne as his boss and attributed instructions concerning the excavation to him, the evidence does not establish that Deville possessed the right to direct the manner and means of Longley's performance. An owner's authority to identify the work to be accomplished, provide specifications, or receive complaints concerning a project is not equivalent to the right to control the physical conduct of the individual performing the work. *See Nazar*, 291 S.W.3d at 606-07. Nor does Deville's ownership of the property, without more, establish an employment relationship sufficient to impose vicarious liability for Longley's alleged tortious conduct.

James's independent claims of negligent hiring, training, supervision, and retention likewise fail. James identified no evidence that Deville undertook responsibility for hiring, training, or supervising Longley individually, knew or reasonably should have known that he posed an unreasonable risk of harm, or otherwise breached a duty owed to James in connection with Longley's conduct.

Deville's retention of LSC to perform excavation work does not, standing alone, establish these independent claims.

Finally, James maintains that summary judgment was premature because he had not deposed Osborne. However, Longley was deposed on May 9, 2023, at which time James was aware of Osborne's identity and the potential significance of his testimony. Deville did not move for summary judgment until April 26, 2024, nearly eleven months later. Despite this substantial period, James identified no effort to schedule Osborne's deposition or any circumstance preventing him from obtaining the testimony.

For the reasons previously discussed concerning the opportunity to conduct discovery, we cannot conclude that summary judgment was premature merely because James had not obtained testimony from a witness whose identity and potential knowledge had been disclosed months earlier.

Accordingly, we affirm the circuit court's entry of summary judgment in favor of Deville Homes.

IV. CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's judgment insofar as it dismissed James's claims against Deville Homes and his claims against LSC for negligent hiring, training, supervision, and retention. We vacate the judgment insofar as it granted summary judgment in favor of Longley

based on KRS 503.085 and likewise vacate the dismissal of James's vicarious liability claim against LSC.

On remand, the circuit court shall independently determine whether Longley is entitled to civil immunity under KRS 503.085, applying the standards governing summary judgment under CR 56 without affording preclusive effect to the district court's criminal immunity determination. The circuit court shall also conduct further proceedings concerning LSC's potential vicarious liability consistent with this Opinion.

ALL CONCUR.

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