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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-001559-MR  
AND  
NO. 2008-CA-001590-MR

TODD HAWES

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM SPENCER CIRCUIT COURT  
v. HONORABLE TOM MCDONALD, SPECIAL JUDGE  
ACTION NOS. 07-CI-00001 & 07-CI-00010

GLENN A. LAPOINTE

APPELLEE/CROSS-APPELLANT

### OPINION VACATING AND REMANDING

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BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Appellant/Cross-Appellee, Todd Hawes, appeals from an order of the Spencer Circuit Court dismissing his civil action against Appellee/Cross-

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellant, Glenn LaPointe, seeking damages for assault, battery, and emotional distress. LaPointe has cross-appealed from the trial court's denial of attorney fees. For the reasons set forth herein, we vacate the order of dismissal and remand the matter to the trial court for further proceedings.

This case stems from events that occurred on January 14, 2006. Hawes and another individual, Tim Martin, were employees of Shea Moore, a subcontractor who works for LaPointe. Hawes, Martin, and Moore were constructing a residence on Lot 17 in the River Heights Estates subdivision in Spencer County. On January 13, 2006, Hawes and Martin left the work site prior to receiving their weekly pay from Moore. The following day, Hawes and Martin went in search of Moore to collect their pay. After being unable to locate Moore at another worksite in Indiana, the pair traveled to the River Heights subdivision, where they observed Moore's vehicle in front of LaPointe's residence, also located in the subdivision. Hawes knocked on the door and, after receiving no response, entered the home. Hawes stated that he heard what he thought was a power saw, and believed that the house was under construction. In fact, the LaPointe home was fully furnished, and the noise Hawes heard was Mrs. LaPointe's hairdryer.

Upon entering the home, Hawes passed through the kitchen and into a bedroom where Mrs. LaPointe was drying her hair. Mrs. LaPointe ordered Hawes to leave the house but he returned to the kitchen and called for Martin to enter the house as well. Hawes told Mrs. LaPointe that they were looking for Moore because he owed them money. Mrs. LaPointe informed him that Moore

and LaPointe had gone to the grocery, but offered to call them. Mrs. LaPointe thereafter contacted LaPointe on his cell phone and had Hawes speak with Moore. Moore advised Hawes that he was en route to Spencer County, to leave the LaPointe house and meet him at the worksite to be paid.

Hawes and Martin thereafter left the LaPointe house in their vehicle, but returned a short time later and parked on the street in front of the house. When LaPointe and Moore returned several minutes later, Hawes pulled his truck in front of LaPointe's driveway thereby blocking in LaPointe's vehicle. Moore got out of the vehicle, spoke with Hawes and Martin, and paid them the money owed. At the same time, LaPointe also exited his vehicle and ordered Hawes and Martin off of his property. LaPointe went into his house where he retrieved and loaded a shotgun. He then walked back outside, got into his truck and proceeded to drive it around the house before striking Hawes' truck from behind, pushing it away from the end of the driveway. LaPointe exited his vehicle, still holding the shotgun, and again told Hawes and Martin to get off of his property. As Hawes began backing down the driveway into the street, LaPointe fired two shots into the pavement. Some of the shots ricocheted off of the pavement, striking Hawes in the leg. As Hawes fled, LaPointe fired a final shot into Hawes' vehicle.

In February 2006, LaPointe was indicted for first-degree assault, first-degree wanton endangerment, and first-degree criminal mischief. On January 2, 2007, Hawes filed a civil action against LaPointe in the Spencer Circuit Court seeking damages for assault, battery, and intentional infliction of emotional

distress. In October 2007, LaPointe filed motions to dismiss both the criminal indictment and the civil action based upon KRS 503.085, which was enacted by the legislature in July 2006.

On March 10, 2008, the trial court<sup>2</sup> dismissed the criminal indictment, finding that LaPointe “was in reasonable fear of imminent peril of death or bodily harm and his use of defensive force was justified and lawful for purposes of KRS 503.080 and KRS 503.055[,]” and therefore “the immunity from criminal prosecution pursuant to KRS 503.085 applies in the current action.” In so doing, the court concluded that “KRS 503.085 is a remedial statute which may be applied retroactively.” On March 17, 2008, Hawes’ civil action was dismissed on the same grounds. Following the denial of his motion to alter, amend or vacate, Hawes appealed to this Court as a matter of right.

On appeal, Hawes first argues that the trial court erroneously violated his right to a jury trial by granting LaPointe’s motion to dismiss. Hawes contends that the trial court treated the motion as a motion for summary judgment, despite the fact that there were disputed issues of fact and law.

In its order denying Hawes’ motion to alter, amend or vacate based on this same argument, the trial court found:

The Court considers the telephone conference of February 25, 2008, between the Court and counsel, to be of paramount importance to the resolution of this issue. This conference call was referenced by the Court in its

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<sup>2</sup> Judge Charles Hickman presided over the criminal matter. The civil action was assigned to Special Judge Tom McDonald.

March 17, 2008 decision and discussed at length during the hearing on this motion.

There is no dispute as to the content of that conference call. On July 31, 2008, during the hearing on this motion, both counsel noted that they had agreed to the following during the conference call on February 25<sup>th</sup>.

- 1) That they both waived their right to an evidentiary hearing on the Motion to Dismiss.
- 2) That they both consented to having the court base its decision 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.

It is axiomatic that by agreeing to the preceding procedures, the parties are barred from objecting to those procedures after receiving an affirmative waiver of other procedural objections.

Inexplicably, Hawes now argues that even though he plainly consented to the above-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 that dismissal of the case was appropriate. Thus, we find no merit in Hawes' claims that his rights were violated by a procedure he specifically agreed to.

Next, Hawes contends that the trial court erroneously applied KRS 503.085. Hawes argues that contrary to the trial court's determination, the

legislature did not intend the statute to be retroactive, and further that LaPointe's conduct was not lawful and justifiable under KRS 503.080 and KRS 503.055 so as to invoke the immunity of KRS 503.085.

Effective July 12, 2006, the Kentucky General Assembly, through Senate Bill 38, extensively amended the defense provisions of KRS Chapter 503. Among the changes was the enactment of KRS 503.085, which provides in pertinent part:

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 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.

Essentially, through KRS 503.085, the legislature has declared that one is free from criminal prosecution and civil liability for using force if such use was justified under the law.

In addition to modifying several other defense provisions, Senate Bill 38 also contained another new provision, KRS 503.055, which 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.

(2) The presumption set forth in subsection (1) of this section does not apply if:

(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;

(b) The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used;

(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a peace officer, as defined in KRS 446.010, who enters or attempts to enter a dwelling, residence, or vehicle 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 entering or attempting to enter was a peace officer.

(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

Not only did KRS 503.055 expand the circumstances in which the use of deadly force is justified, but it also did away with the former “duty to retreat.”

As previously noted, the amendments and enactments to KRS Chapter 503 became effective July 12, 2006, some six months after the incident in question. KRS 446.080 provides that “[n]o statute shall be construed to be retroactive, unless expressly so declared[.]” by the legislature. The prevailing rule in Kentucky is that where a statute creates new rights or duties, it should be presumed that the legislature intended for the statute’s application to be prospective only. *Peach v. 21 Brands Distillery*, 580 S.W.2d 235, 236 (Ky. App. 1979). Kentucky courts strictly construe this rule and deviate only when the statute at issue is remedial or procedural. *Leeco, Inc. v. Crabtree*, 966 S.W.2d 951, 953 (Ky. 1998); *Peabody Coal Co. v. Gossett*, 819 S.W.2d 33, 36 (Ky. 1991). Remedial statutes relate “to remedies or modes of procedure, which do not create new or take away vested



rights, but only operate in furtherance of the remedy or confirmation of such rights.” *Kentucky Insurance Guaranty Association v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000) (quoting *Gossett*, 819 S.W.2d at 36).

Recently, in *Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 (Ky. 2009), our Supreme Court addressed the retroactive application of the new amendments to KRS Chapter 503:

At least in cases such as this one, that do not involve a peace officer, [KRS 503.085] does not constitute substantive law; it has nothing to do with who is entitled to use self-defense or under what circumstances self-defense is justified. It is, rather, purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or others, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial. By declaring that one who is justified in using force “is immune from criminal prosecution,” and by defining “criminal prosecution” to include “arresting, detaining in custody, and charging or prosecuting the defendant,” the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well. With KRS 503.085, the General Assembly has created a new procedural bar to prosecution, and that bar, like other procedural statutes, is to be applied retroactively.

Before turning to implementation of the immunity afforded by KRS 503.085, it bears noting that the statute grants immunity to a person who “uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080”. But KRS 503.055 is a wholly new substantive statute pertaining to “Use of defensive force regarding dwelling, residence, or occupied vehicle-Exceptions.” and, as previously discussed, is not to be applied retroactively.

Similarly, the 2006 amendments to KRS 503.050 (self-protection); 503.070 (protection of others); and 503.080 (protection of property) 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, (i.e. self-protection, protection of others, protection of property) in effect at the time they acted.**

*Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 (Ky. 2009) (footnote omitted) (emphasis added).

In dismissing the criminal indictment and the civil action against LaPointe, both trial courts found that his actions were justified and lawful under KRS 503.080 and KRS 503.055, and thus he was immune from prosecution pursuant to KRS 503.085. The trial court handling the civil matter basically relied upon the findings and rationale of the criminal court, which opined:

Pursuant to 503.080(2)(b), a person may use deadly force against another “under circumstances permitted pursuant to KRS 503.055.” KRS 503.055 provides that a “person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm . . . if: “the person against whom the defensive force was used (1) “**had** unlawfully and forcibly entered a dwelling, residence,” . . . and (2) “the person who uses defensive force knew or **had** reason to believe that an unlawful and forcible entry or unlawful and forcible act . . . **had** occurred.” It is important to note that KRS 503.055 uses the past tense “had” which allows an individual to justifiably use force after the unlawful and forcible entry into the dwelling has taken place, as it did in the current action. There is a presumption in KRS 503.055(4) which states:

A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

In the current action, Hawes unlawfully and forcibly entered the LaPointe residence. The second part of the analysis pursuant to KRS 503.055(1)(b) provides that LaPointe, the individual who used defensive force, had reason to believe that the unlawful and forcible entry had occurred. Herein, LaPointe was informed by his wife, Mrs. LaPointe, of Hawes' illegal entry into their home and his continued presence on the LaPointe property and refusal to leave after LaPointe returned to his home is sufficient evidence that LaPointe had reason to believe that Hawes had made an unlawful and forcible entry into his residence. Therefore, LaPointe has shown pursuant to the terms of KRS 503.055(1) that he was in reasonable fear of imminent peril of death or bodily harm and his use of defensive force was justified and lawful for the purposes of KRS 503.080 and KRS 503.055.

Both trial courts engaged in an analysis of KRS 503.085, and properly concluded that the statute was remedial and thus retroactive. However, the courts clearly failed to recognize that KRS 503.055 was also 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 to this case. Rather, LaPointe was entitled to immunity only for actions in conformity with the version of the applicable statute in effect at the time he acted. *Rodgers*, 285 S.W.3d at 753. 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.

Notwithstanding the erroneous application of the law, we are troubled by the trial court's determination that LaPointe's conduct was justified and lawful. We find no evidence in this record to support a finding that LaPointe held a "reasonable fear of imminent peril or great bodily harm," when he returned to his property and found Hawes and Martin standing in the driveway. In fact, there does not appear to be any dispute that at the time LaPointe fired his gun, Hawes was backing into the street. We are compelled to agree with Appellant 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.

Finally, LaPointe argues in his cross-appeal that pursuant to KRS 503.085 a trial court has no discretion in awarding attorneys' fees if immunity is found to exist. And, that because he was found to be immune from civil and criminal prosecution, he is entitled to such. However, because we have concluded that the trial court improperly applied the immunity statute, we need not reach the merits of this issue.

For the foregoing reasons, we vacate the Spencer Circuit Court's order of dismissal. Hawes' civil action against LaPointe is reinstated and the matter is remanded for further proceedings in accordance with the Chapter 503 substantive defense provisions at the time of the January 2006 incident.

ALL CONCUR.

BRIEFS FOR APPELLANT/  
CROSS-APPELLEE:

R. Kenyon Meyer  
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-  
APPELLANT:

Thomas B. Givhan  
Michael E. Krauser  
Louisville, Kentucky