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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000423-MR

TIMOTHY SPARKS — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE DAVID E. MELCHER, JUDGE
ACTION NO. 09-CI-01769

ROLA HENSON — APPELLEE

AND NO. 2011-CA-000518-MR

ROLA HENSON — APPELLANT/CROSS-APPELLEE

v.

CROSS-APPEAL FROM BOONE CIRCUIT COURT
HONORABLE DAVID E. MELCHER, SENIOR JUDGE
ACTION NO. 09-CI-01769

TOWNE MOTORS, INC., D/B/A
KERRY TOYOTA AND
TIMOTHY SPARKS — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART;
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Timothy Sparks appeals from a jury verdict and judgment in favor of Rola Henson on her claim for wrongful discharge in violation of public policy. Henson cross-appeals from the trial court's directed verdict in favor of Towne Motors, Inc. d/b/a Kerry Toyota (Kerry Toyota) on her wrongful discharge claim and from the trial court's directed verdict in favor of Kerry Toyota and Sparks on her defamation claim. After careful review, we affirm in part and reverse and remand in part.

Kerry Toyota is a motor vehicle dealer, and Toyota Motor Sales, U.S.A., Inc. (TMS) is a motor vehicle distributor. TMS distributes Toyota cars and trucks to Kerry Toyota pursuant to a contract known as the Toyota Dealer Agreement (TDA). On January 5, 2000, TMS granted Kerry Toyota a TDA with a term of six years. TMS has a regional office in Cincinnati, Ohio, which supports and monitors Toyota dealerships, including Kerry Toyota, which is located in Northern Kentucky. TMS evaluates dealers for TDA renewals and also evaluates the individuals nominated to be approved general managers of those dealerships. David W. Fournier is the manager of the TMS department responsible for such evaluations.

Toyota dealers are evaluated on a number of criteria, including customer satisfaction. Every Toyota dealer has a customer satisfaction score which is indexed (CSI). TMS sets benchmarks for Toyota dealers for their CSI scores. If a Toyota dealer is below that benchmark, then it is considered to be in the "red light," which is unacceptable to TMS. In addition, if a dealer's CSI score is in the bottom ten percent of the dealers operating within a region, then that is also not acceptable to TMS.

On January 14, 2004, TMS sent a letter to the owner of Kerry Toyota, advising him that Kerry's CSI score was unacceptable. On December 23, 2004, Kerry Toyota replaced the previous acting general manager with the Appellant, Sparks. On November 3, 2005, TMS sent Kerry Toyota a letter specifically identifying Kerry Toyota's CSI score as a deficiency. This deficiency would plague Kerry Toyota and Sparks for the next several years as they tried to get Kerry Toyota's TDA renewed for a six-year term and Sparks approved as the general manager of Kerry Toyota.

On December 12, 2005, TMS began to formally extend Kerry Toyota's TDA scheduled for expiration on January 4, 2006. On February 2, 2006, Kerry Toyota's owner met privately with TMS and asked why Kerry Toyota's TDA was being extended rather than renewed. One of the reasons Mr. Fournier gave was Kerry Toyota's chronically deficient CSI performance, which also barred Sparks from being approved as the general manager of Kerry Toyota.

Rola Henson began working for Kerry Toyota in June of 1993. In 2008, she was the fleet manager for Kerry Toyota, and her primary job responsibility was to sell and deliver vehicles for commercial accounts. In 2005 or 2006, Sparks called a meeting with his managers, including Henson. At that meeting, Sparks informed his managers that all of their jobs were at stake if Kerry Toyota's CSI did not improve. Subsequently, as Henson alleges, Sparks devised a scheme to illicitly obtain a better CSI. Upon purchase, new car sales customers received a document known as Purchase/Lease Surveys (Customer Survey). TMS sends a Customer Survey to new car purchasers to gauge their overall purchase experience at a dealership. Customer Survey results are a critical part of a dealer's CSI score.

Henson claims that Sparks' scheme was multifaceted and evolved over time. The first part involved bribing customers with free oil changes or a free tank of gas to bring in the Customer Survey TMS sent to them. Sparks would screen the Customer Surveys and input good scores through the internet.

Another part of Sparks' alleged scheme involved misreporting addresses for unhappy customers so that they never received a Customer Survey from TMS. TMS relied upon Kerry Toyota to provide correct customer address information for the purpose of sending its Customer Surveys to customers. Accordingly, Sparks ordered his sales managers to place the phrase "no survey" or "NS" on desk logs tracking sales next to the name of an unhappy customer. Kerry

Toyota would then report incorrect addresses to TMS for those customers flagged with "no survey" or "NS" so that they would not receive a Customer Survey.

After the meeting on November 2, 2006, between Kerry Toyota's owner and TMS, TMS sent Kerry Toyota periodic correspondence reiterating the fact that its CSI score remained in the bottom ten percent and was unacceptable. Due to Kerry Toyota's chronic deficiency in CSI performance, its TDA was not renewed for the next two and one-half years.

On February 6, 2008, more than two years after the original expiration date of Kerry Toyota's TDA, TMS met with Kerry Toyota's owner and Sparks concerning the dealership's chronic CSI deficiency. TMS advised them that Kerry Toyota was still not eligible for a 6-year TDA renewal and that Sparks would not be approved as the general manager for the dealership. Kerry Toyota's owner was upset and disagreeable. He asked for time to correct the deficiency because Sparks had implemented new practices. TMS agreed to extend Kerry Toyota's TDA for three more months.

Finally, on May 8, 2008, TMS sent Kerry Toyota a letter indicating that Kerry Toyota's CSI performance had improved and TMS intended to prepare a 6-year TDA renewal. The letter further stated that Sparks would be approved as the general manager of Kerry Toyota. In July 2008, Kerry Toyota's 6-year TDA renewal was finalized.

However, in August 2008, TMS discovered that Kerry Toyota had a high rate of undeliverable Customer Surveys for the previous twelve months. TMS

investigated Kerry Toyota and concluded that Kerry had intentionally misreported customer address information to manipulate TMS's Customer Survey system for purposes of securing a 6-year renewal of Kerry Toyota's TDA and approval of Sparks as the general manager.

On September 2, 2008, TMS met with Sparks and Kerry Toyota's owner. At that meeting, Mr. Fournier told Sparks and Kerry Toyota's owner that TMS had determined that Sparks coordinated the deliberate effort to circumvent TMS's Customer Survey program. Mr. Fournier further communicated that TMS intended to issue a "180-day letter" to Kerry Toyota, which was sent on September 3, 2008. It advised Kerry Toyota of this serious issue and threatened to terminate Kerry Toyota's TDA. In addition, TMS wanted an explanation of how the fraudulent manipulation occurred, as well as who designed and implemented the fraud.

After that meeting, Sparks returned to Kerry Toyota. Later that day, Mrs. Henson arrived at Kerry Toyota and proceeded to the sales office for a meeting with Sparks and Kerry Toyota's managing director. During that meeting, Sparks kept saying that TMS wanted his head and that it had to do with Customer Surveys. Kerry Toyota's managing director then stated that TMS could not prove Kerry Toyota intentionally manipulated TMS's Customer Survey system.

The next day, September 3, 2008, Henson was called to another meeting with Sparks and Kerry Toyota's managing director, as well as Kerry Toyota's attorney. Kerry Toyota's attorney reiterated the managing director's

comment from the previous day that TMS could not prove that Kerry Toyota manipulated the Customer Survey system. Kerry Toyota's managing director and attorney spent the majority of the meeting trying to figure out how to cover up the fraud.

Later that day, Henson alleges that Sparks began making disconcerting comments to her in an attempt to distance himself from the fraud he had orchestrated. These comments continued into the next day. For example, Sparks stated to Henson that Kerry Toyota needed to convince TMS that he did not have any involvement in the fraud. Sparks further stated that the lower Kerry Toyota went down the totem pole, the safer it would be for everyone. Sparks then allegedly told Henson he wanted her to fraudulently misrepresent to TMS that she was the problem. Henson refused to make those fraudulent misrepresentations to TMS on behalf of Kerry Toyota and Sparks.

The next morning, September 5, 2008, Henson arrived at Kerry Toyota's motor vehicle dealership. Sparks and Kerry Toyota's managing director were meeting in Sparks' office. Henson was called into the meeting, where the managing director had the 180-day letter in hand. Sparks asked Henson if she knew how serious the 180-day letter was and accused her of being negligent, paranoid, irrational, and of needing medication for her hormones. He proceeded to take her keys to the dealership, so she asked if she was being terminated. Kerry Toyota's managing director told her to consider it a 30-day vacation. Twelve days

later, on September 17, 2008, the dealership fired both Henson and her husband, who also worked at the dealership.

Thereafter, Kerry Toyota and Sparks communicated to TMS that they had conducted an investigation of the manipulation of the TMS Customer Surveys at their motor vehicle dealership. They further communicated that Henson was terminated, along with her husband. In effect, Kerry Toyota and Sparks identified Henson and her husband as designing and implementing the fraudulent manipulation of TMS's Customer Survey system.

In October 2008, Henson presented evidence to TMS that Sparks designed and implemented the manipulation of Customer Surveys at Kerry Toyota. This evidence was consistent with TMS's previously formed conclusions. On December 18, 2008, TMS met with Kerry Toyota's owner, who stated that Mr. and Mrs. Henson were fired because they were the source of the problem. Mr. Fournier acknowledged Kerry Toyota's position. Mr. Fournier continued with his presentation and provided Kerry Toyota's owner with exhibits illustrating his point that Henson's position to the contrary was validated. Mr. Fournier explained that the dealership had engaged in intentional conduct to circumvent the Customer Survey system for purposes of securing a 6-year TDA renewal and approval of Sparks as general manager. Kerry Toyota's owner ultimately agreed that Sparks was responsible for the manipulation, stated that he could not trust him, and that he would remove him from the general manager position at Kerry Toyota. Sparks was removed as general manager of Kerry Toyota two weeks later.

Henson commenced this action on July 23, 2009. In her complaint, she asserted causes of action for outrage, intentional infliction of emotional distress, defamation, wrongful discharge in violation of public policy, race discrimination, sex discrimination, and age discrimination against both Kerry Toyota and Sparks. Kerry Toyota and Sparks answered, denying the allegations and asserting affirmative defenses.

The trial court granted Henson's unopposed motion to file an amended complaint expanding the allegations of her wrongful discharge claim to include additional state and federal statutory bases for her claim. Kerry Toyota and Sparks filed an amended answer, maintaining their denials and affirmative defenses.

Kerry Toyota and Sparks filed a motion for summary judgment on November 12, 2010, seeking dismissal of all counts of Henson's amended complaint. Henson filed her memorandum in opposition on December 12, 2010. By order dated December 16, 2010, the trial court granted the motion for summary judgment on Henson's race, sex, and age discrimination claims, denied the motion as to the remaining claims, and consolidated the outrage and intentional infliction of emotional distress claims. On December 21, 2010, Kerry and Sparks filed a motion for reconsideration and/or clarification regarding the identification of the statutes under which Henson's wrongful discharge claim would proceed to trial. This motion was granted in part and denied in part on January 7, 2011. The trial court determined that Henson's wrongful discharge action may be supported by

policy violations found in Kentucky Revised Statutes (KRS) 190.015 regarding fraudulent records in the auto industry and KRS 517.050 regarding falsification of business records.

Kerry and Sparks subsequently filed a motion *in limine* on December 29, 2010, seeking to preclude the jury from hearing or considering evidence regarding front-pay and evidence of the parties' wealth, income, or financial condition. The trial court denied the parties' front-pay motion and denied the motion regarding the parties' wealth insofar as it concerned the past and present income of Henson and the past income of Sparks.

The case then proceeded to trial. At the end of Henson's case-in-chief, Kerry Toyota and Sparks moved for a directed verdict on the three causes of action which had survived their motion for summary judgment. The trial court granted the motion with respect to Henson's defamation and intentional infliction of emotional distress claims, but denied it as to the wrongful discharge claim. The trial court further denied the parties' motion that the front-pay portion of Henson's damages claim be dismissed.

Kerry and Sparks renewed their motion for directed verdict on the wrongful discharge and front-pay claims at the close of all the evidence. The trial court denied this motion. The jury returned a verdict for Henson against Sparks in the amount of $85,000.00 for lost wages and $175,000.00 for lost future wages, for a total judgment of $260,000.00. The jury awarded nothing for embarrassment, humiliation, or mental anguish.

On January 14, 2011, Sparks filed a motion for a judgment notwithstanding the verdict, and Kerry Toyota moved for entry of judgment in accordance with its motion for directed verdict made at the close of the evidence. Henson responded to these motions and filed a motion for a new trial against Kerry Toyota. On February 28, 2011, the trial court entered its order, judgment, and supplemental judgment in which it granted Kerry's motion for directed verdict, denied Henson's motion for new trial against Kerry, denied Sparks' motion for judgment notwithstanding the verdict, denied Henson's motion for pre-judgment interest, and granted costs to Henson.

On March 4, 2011, Sparks filed his notice of appeal to this Court, and Henson followed with her cross-appeal on March 18, 2011.

Sparks' first argument is that the circuit court erred in its determination that KRS 517.050 and/or KRS 190.010, *et seq*. provide a basis for a common law claim of wrongful discharge in violation of public policy. As statutory construction is an issue of law, we review it *de novo*. *Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001).

In support of his argument that the trial court erred by allowing Henson's common law wrongful discharge claim to go forward, Sparks argues that she was an at-will employee and that none of the exceptions to the terminable at will doctrine apply. *See Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). To invoke an exception to the terminable at will doctrine, it must be established that: (1) the discharge was

contrary to a fundamental and well-defined public policy as evidenced by existing law; and (2) that policy is evidenced by a constitutional or statutory provision. *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985).

Sparks argues that when an employee claims discharge as a result of the exercise of a right conferred by statute, the statute must be one which has the primary purpose of providing statutory protection to the worker in his employment situation. *Grzyb*, *supra*, at 400. Consequently, Sparks contends, a statute that is intended to generally protect the public does not have the primary purpose of benefitting employees. *Shrout v. The TFE Group*, 161 S.W.3d 351, 354 (Ky. App. 205). Sparks argues that KRS 517.050 and KRS 190.015 are general protection statutes unrelated to protecting Henson as an employee.

Henson argues that Sparks ignores *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 416 (Ky. 2010), the Kentucky Supreme Court's most recent pronouncement of the common law tort of wrongful discharge in violation of public policy. Instead, Henson argues, Sparks contends that the statute must provide a specific remedy in order for a plaintiff to successfully prove wrongful termination under its guise. We agree with Henson that *Hill* indicates otherwise.

In *Hill*, the defendant pressured one of the plaintiffs to lie at an unemployment hearing. After that plaintiff refused to lie, the defendant began a campaign of harassment and intimidation, culminating with the termination of that plaintiff's employment, as well as her husband's employment. *Id.* Similarly, when

Henson refused to be a part of the scheme to cover up the manipulation of TMS's Customer Survey system, she was terminated along with her husband.

In *Hill*, the Supreme Court clarified the difference between a common law tort claim for wrongful discharge and a statutory based claim for wrongful discharge where the statute both declares the public policy and specifies the remedies available to the aggrieved party (e.g. The Kentucky Civil Rights Act). *Id*. at 421. A common law tort claim for wrongful discharge in violation of public policy exists where (1) the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law; and (2) that policy is evidenced by a constitutional or statutory provision. *Id*. at 420-21. In addition, the alleged reason for the discharge of the employee must be (1) the employee's failure or refusal to violate a law in the course of employment; or (2) the employee's exercise of a right conferred by well-established legislative enactment. *Id*. at 421-22.

The two situations are distinct from each other. *Id*. at 422. Henson's common law claim for wrongful discharge involves the first situation, whereas the second situation was at issue in *Firestone, supra*, which Sparks relies heavily on in his brief. *Hill*, 327 S.W.3d at 420-21 ("Firestone provided a similar exception where the termination was motivated by a desire to punish an employee for 'seeking benefits to which he is entitled to by law', specifically workers' compensation"). Like in *Hill*, Henson's common law wrongful discharge claim is based on the first situation—her refusal to violate a law in the course of employment. Her claim is not based on the second situation—exercise of a right

conferred by well-established legislative enactment, which was the situation in *Firestone*. Therefore, the extensive discussion in Sparks' brief about the second situation—discharge for exercise of a right conferred by well-established legislative enactment—is not instructive on the issues presented in this appeal.

Henson never claimed that prohibition against falsification of business records, the public policy underlying KRS 517.050, provides a private right of action. However, the underpinning of Henson's wrongful discharge claim is the public policy against false business documentation. As in *Hill*, where KRS Chapter 523, perjury and related offenses, provided a clear, strong legislative expression of public policy against perjury, KRS 517.050 provides a clear public policy against falsification of business records. Thus, we see no error with the trial court's determination that KRS 517.050 provides a basis for Henson's common law tort claim for wrongful discharge in violation of public policy.

Sparks also argues in his brief that Henson's wrongful discharge claim under KRS 517.050 fails because falsifying addresses does not constitute falsifying business records. However, Henson's wrongful discharge claim is based on Sparks' demand that she make fraudulent misrepresentations to TMS in response to the 180-day letter to cover up the scheme at Kerry Toyota. This demand required some type of written communication from Kerry Toyota to TMS. Indeed, Kerry Toyota ultimately responded to the 180-day letter through written correspondence.

A written communication from Kerry Toyota to TMS constitutes a business record. KRS 517.010(2). Henson's authoring or participation in producing a false writing containing misrepresentations about the fraud at Kerry Toyota violates the public policy against fraudulent business records contained in KRS 517.050. Thus, the Appellees' termination of Henson for refusing to create (or participate in creating) a false business record falls squarely within the first situation described in *Hill*—where the alleged reason for the discharge of the employee was the employee's failure or refusal to violate a law in the course of employment. *Hill*, *supra*, at 422.

The common law tort of wrongful discharge in violation of public policy does not require that a statute evidencing the public policy have the primary purpose of protecting the employee. *Id*. at 421-22. The perjury statute involved in *Hill* did not have the primary purpose of protecting employees. Therefore, Sparks' assertion that the primary purpose of KRS 517.050 is to prevent the keeping of fraudulent business records and not to protect employees is irrelevant.

Further, analysis of Henson's wrongful discharge claim under KRS 190.010, *et seq*., the Motor Vehicle Sales Act, is the same. KRS 190.015, titled "Public Policy Declared," expressly states:

> The legislature finds and declares that the distribution and sale of vehicles within the state vitally affects the economy of the state and public interest and the public welfare, and that in order to promote the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license vehicle manufacturers, distributors, or wholesalers, brokers and

> auctioneers, and factory or distributor representatives, and to regulate and license dealers of vehicles doing business in this state, *in order to prevent frauds*, impositions, and other abuses upon its citizens, and to protect and preserve investments and properties of the citizens of this state.

(Emphasis added). Based on the specific language of the Act, the public policy of the Commonwealth is to prevent fraud at motor vehicle dealerships, such as Kerry Toyota. Of particular importance, fraudulent misrepresentations to a distributor, such as TMS, are strictly prohibited. *See* KRS 190.045 (4)(c)(3).

While Henson was an employee at Kerry Toyota, her superiors asked her to violate the Act, which is contrary to the public interest and welfare. Her refusal to lie to TMS prevented the Appellees from escaping the consequences of the fraud they perpetrated on the public and protected future customers from becoming victims. We see no error in the trial court's determination that KRS 190.010, *et seq.*, provides a basis for Henson's common law wrongful termination claims.

Next, Sparks argues that the trial court erred by determining that front pay was available relief for Henson in a wrongful termination case. Again, Sparks argues that in statute-based wrongful discharge actions, equitable relief, including front pay, is only available if the enabling legislation authorizes the equitable remedy. Sparks relies on *Highlands Hospital Corporation v. Castle*, 2010 WL 2787906, (Ky. App. 2010), in support of this proposition. However, Henson's common law wrongful discharge claims was not a statute-based claim, and instead

was a claim under a clearly recognized public policy, and thus Sparks' reliance on *Highlands* is misplaced.

Henson's claim for wrongful discharge did not seek statutorily provided equitable relief in the form of front pay. Rather, she sought compensatory damages on her common law tort claim for lost future earnings. This type of compensatory damage was awarded in *Hill* and upheld by the Supreme Court on appeal. Front pay, on the other hand, is a substitute for reinstatement, an equitable remedy which is specifically provided for by statute, such as the Kentucky Civil Rights Act. *See, e.g., Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 806 (Ky. 2004). Sparks argues that when *Hill* was decided in 2010, the Court was interpreting a 2003 jury instruction, and thus would not have applied the analysis in *Brooks*, as it was not the law in 2003. While we certainly agree with this notion, it simply does not affect our analysis here. *Brooks* applies to statutory-based claims for wrongful discharge, whereas Henson pursued a common law claim under a well recognized public policy, as evidenced by two statutes.

Sparks' reference to KRS 446.070 is also not instructive. That statute deals with negligence claims, not wrongful discharge claims. Indeed, the Supreme Court recently stated that the statute was enacted to codify common law negligence per se. *St. Luke Hospital, Inc. v. Straub*, 354 S.W.3d 529 (Ky. 2011). Thus, KRS 446.070 has no application whatsoever to Henson's common law tort claim for wrongful discharge or the recoverability of lost future earnings.

Simply put, the trial court did not err by determining that lost future wages was a compensable damage item for Henson. The jury balanced the wages Henson received from her current job against the wages she would have received had the Appellees not wrongfully discharged her. Given the testimony of an economic expert and the evidence about how long it took Henson to find another job, the jury made the determination regarding Henson's lost future earnings and properly awarded her compensatory damages.

Next, Sparks argues that the trial court erred by permitting the jury to hear evidence of the income or wealth of the parties. In support of this argument, Sparks contends that Kentucky Courts have long held that parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation and relies on *Hardway Management Co. v. Southerland*, 977 S.W.2d 910 (Ky. 1998).

A review of the record indicates that no evidence was introduced regarding the wealth of any of the defendants, or the Appellees herein. No evidence was introduced regarding the income of Kerry Toyota, Kerry Toyota's owner, or Kerry Toyota's managing director. Likewise, there was no evidence introduced at trial regarding the income of Sparks for 2005, 2006, or 2007, his first full three years as acting General Manager for Kerry Toyota. The only evidence introduced at trial was Sparks' income as acting general manager for Kerry Toyota (not any other sources) for 2008, the year that Henson was terminated. The evidence was introduced to show motive, intent, and bias in covering up his fraud and

wrongfully terminating Henson. *See Rawlings v. Walker*, 2005 WL 1415356 (Ky. App. 2005) (acknowledging that evidence of the financial condition of a party was relevant to rebut assertions about why an employee was fired).

Sparks cites an unpublished case by this Court, *Prescott v. Yates*, 2011 WL 3962616 (2010-CA-1051), where we determined that the introduction of evidence of the opposing party's wealth was an abuse of discretion and prejudiced the outcome of the case. *Prescott* involved a defamation case where the reference was not to the defendant's income or wealth but to the defendant family's personal wealth. *Id*. at 1-3. Such evidence had no bearing on the defendant's motive, intent, or bias whatsoever. Rather, it was done solely to characterize the defendant as an arrogant child of a rich man who could afford to pay a large sum. This is significantly different from the case at bar where evidence of Sparks' 2008 income, and not his wealth in general, was introduced to show his motive, intent, or bias in covering up his fraud and terminating Henson for refusing to also cover up the fraud.

The trial court limited the financial evidence of Sparks to his 2008 income from Kerry Toyota. We see no error with the trial court's admission of limited evidence of Sparks' income from Kerry Toyota as acting general manager for 2008 for the purpose of establishing his motive and intent, as well as rebutting his assertion that Henson was fired for insubordination and negligence.

Henson cross-appeals and presents four issues for review. Three of them arise from the trial court's post-trial order entered February 28, 2011. The other

issue arises from the trial court's directed verdict for the Appellees on her defamation claim at the close of her case-in-chief.

First, Henson argues that the trial court erred when it failed to award Henson prejudgment interest on the jury's damage award for past earnings. The trial court denied the motion, holding that Henson's claim was an unliquidated claim and neither concepts of equity nor fairness demanded the imposition of prejudgment interest in this case.

Whether to award prejudgment interest is a matter left to the discretion of the trial court, and we review for an abuse of discretion. *Fields v. Fields*, 58 S.W.3d 464, 467 (Ky. 2001). A trial court may award prejudgment interest at the rate of 8% per annum pursuant to KRS 360.010. The jury awarded Henson $85,000.00 in past lost earnings. Henson argues that past earnings are awarded to make the claimant whole and ordinarily include prejudgment interest. *E.E.O.C. v. Kentucky State Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996). Henson contends that a past earnings award without prejudgment interest does not fully reimburse an employee for the value of their unlawfully withheld wages, because it does not compensate the employee for the lost use of those wages for the time period prior to the jury's verdict. *Id*. at 1099. Without an award of prejudgment interest, Henson argues, the non-complying party is essentially benefitting because he/she has the use of his employee's money for the time period leading up to the jury's verdict. *Id*.

Sparks counters that prejudgment interest was not warranted in this case, relying on *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136 (Ky. 1991), wherein the Kentucky Supreme Court adopted the rule that prejudgment interest may be appropriate as "consequential damages" in tort and contract cases. However, the court noted with approval comment (a) to §913 of the Restatement (2d) of Torts, which states:

> Ordinarily, if the sum due is sufficiently definite, so that the tortfeasor has reason to know the amount he should pay, or its approximate amount, it would be unjust not to allow interest from the time when he should have made payment. On the other hand, if the amount is unliquidated, justice may not require the payment, particularly if the injured person has discouraged settlement by making exorbitant demands or has delayed in filing suit.

Id. at 144. *See also 3D Enterprises Contracting Corporation v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 450 (Ky. 2005). Sparks argues that in the instant case, the sum due was not definite, and the jury's verdict confirms this point. Henson's economist testified that her past wage loss was $94,664.00. The jury awarded her $85,000.00. Thus, the sum was not definite or a liquidated amount and prejudgment interest was not warranted. Sparks also argues that Henson made high settlement demands prior to trial, specifically that she initially demanded $750,000.00 and other compensation. We agree with the trial court and Sparks that prejudgment interest was not appropriate in this case. The trial court did not abuse its discretion in declining to award prejudgment interest to Henson.

Henson next argues that the trial court erred when it failed to award her prejudgment interest on the jury's damage award for future earnings. Henson argues that because Sparks made no reasonable settlement offers to her after his motion for summary judgment was denied, prejudgment interest is appropriate. While we agree that Sparks did not make any meaningful settlement efforts, we cannot say that the trial court abused its discretion in declining to award prejudgment interest on Henson's claims for lost future compensation. Henson points to no authority in Kentucky that would support her argument that prejudgment interest even can be awarded in this context.

Henson next argues that the trial court improperly granted the Appellees' motion for directed verdict on her defamation claim. The legal standard for obtaining a directed verdict is very strict:

> A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds can differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the Court may not consider the creditability of evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or

> prejudice. In such a case, a directed verdict should be given. Otherwise the motion should be denied.

Colorama, Inc. v. Johnson, 295 S.W.3d 148, 153 (Ky. App. 2009). We agree with Henson that the trial court erred in granting a directed verdict on her defamation claim.

During Henson's case in chief, Kerry Toyota's managing director testified that Kerry Toyota told TMS that Henson designed and implemented the fraud taking place at the dealership. Kerry Toyota's managing director further testified that Sparks was the individual who communicated this information to TMS. Mr. Fournier confirmed that Kerry Toyota made these statements to TMS about Henson. Mr. Fournier further testified that Kerry Toyota's owner made similar statements during a meeting with him in December 2008.

A claim for defamation exists when a defendant uses: (1) defamatory language; (2) about the plaintiff; (3) which is published; (4) and which causes injury to reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004). It is for the jury to determine whether a defamatory meaning was attributed to the communication by those who received it. *Id*. Defamatory language is published when it is intentionally or negligently communicated to someone other than the party defamed. *Id*. at 794. Injury to reputation includes injuring a person in his business or occupation. *Id*. at 793 fn. 37.

Examining the elements, the testimony of Kerry Toyota's managing director and Mr. Fournier provided proof that defamatory language was used by the

defendants about Henson. The same testimony satisfied the third element—that the defendants published the defamatory language about Henson to third parties. With regard to the fourth element, spoken words are slanderous per se if they impute unfitness to perform job duties. *Id*. at 794-95. Where defamation per se exists, injury to reputation is presumed. *Id*. at 794.

Based on the foregoing, we agree with Henson that she offered proof in her case-in-chief on every material issue to her claim for defamation. In so doing, she established a *prima facie* case for defamation which the trial court should have submitted to the jury. It was error as a matter of law for the trial court to enter a directed verdict on Henson's defamation claim. Accordingly, we reverse the trial court's entry of a directed verdict in favor of the defendants in this regard and remand for a new trial on Henson's defamation claim.

Finally, Henson argues that the trial court erred when it did not grant her motion for a new trial on her wrongful discharge claim against Kerry Toyota and instead granted Kerry Toyota a directed verdict. At the end of Henson's case in chief, the trial court denied Kerry Toyota's motion for directed verdict on her common law claim for wrongful discharge. At the close of all the evidence, the trial court once again denied Kerry Toyota's motion for a directed verdict. Thereafter, the matter was submitted to the jury. They were unable to reach a verdict on Henson's claims against Kerry Toyota by a vote of five to seven. Subsequently, the trial court granted Kerry Toyota a directed verdict on Henson's claims of wrongful discharge.

Under Civil Rule of Procedure (CR) 50.02, "if no verdict was returned the court may direct entry of the judgment as if the requested verdict had been directed or may order a new trial." Henson argues that the trial court should have granted a new trial rather than enter a directed verdict on behalf of Kerry Toyota. In support of this argument, Henson contends that there was not a complete absence of proof on her claim against Kerry Toyota.

Kerry Toyota argues that the trial court properly entered a directed verdict in its favor after the jury was unable to reach a verdict on the issue. In support of this, Kerry Toyota contends that the court did not give a vicarious liability charge and advised counsel that it would not be given. Given the absence of that vicarious liability instruction, Kerry Toyota would only be responsible for its own corporate conduct. The trial court concluded that the evidence indicated that Sparks acted in his own self interest and that there was not sufficient evidence to indicate that Sparks was advancing Kerry Toyota's interest at the express or implied directive of Kerry Toyota.

We agree with the trial court and Kerry Toyota that after the jury was unable to reach a verdict, the trial court had to either order a new trial or enter a directed verdict. Given the lack of evidence to support that Kerry Toyota was responsible for Sparks' actions, the trial court did not err in granting a directed verdict in its favor.

Based on the foregoing, we reverse the trial court's directed verdict in favor of Sparks on Henson's defamation claim. In all other respects, we affirm the rulings and judgment of the Boone Circuit Court in this matter.

ALL CONCUR.

BRIEF FOR APPELLANT TIMOTHY SPARKS:

R. Gary Winters
Ian R. Smith
William M. Cussen
Cincinnati, Ohio

BRIEF FOR APPELLEE/CROSS-APPELLANT ROLA HENSON:

Deepak K. Desai
J. Robert Linneman
Brian P. O'Connor
Cincinnati, Ohio