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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000591-MR
AND
NO. 2011-CA-000641-MR

OSCAR CHERRY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 06-CI-00877

CITY OF BOWLING GREEN, KENTUCKY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Oscar Cherry, a voluntarily retired former Deputy Fire Chief for the Bowling Green Fire Department ("BGFD"), has appealed from the judgment of the Warren Circuit Court following a jury trial dismissing his claims

against the City of Bowling Green, Kentucky, for damages resulting from work restrictions placed upon him by the Fire Chief. The City of Bowling Green has cross-appealed from the same judgment. Upon careful review of the record, the law, the briefs and having heard oral arguments, we affirm.

Cherry began his career with the BGFD in 1977. He rose through the department and attained the rank of Deputy Chief of Operations before his retirement in early 2007. During the time relevant to the issues raised in this appeal, the Fire Chief was Gerry Brown. Cherry and Brown had been acquainted since high school and were hired by the BGFD around the same time. When Brown became Fire Chief in 1998, he recommended Cherry to succeed him as deputy chief.

Cherry's employment with the fire department was not without incident. He accepted a voluntary suspension in 1998 following his reporting to the scene of a fire while intoxicated. In 2003 or 2004, he failed to respond to a double fatality fire in accordance with department policy and later admitted his absence was due to the fact that he had been drinking. He became increasingly erratic in his work behavior, including cursing, threatening, bullying, and "terrorizing" fellow employees. He would report to duty for several days in a row in what appeared to be the same tattered clothing and appeared unbathed and generally unkempt.

In the spring of 2005, questionable purchases appeared on Cherry's city-issued procurement card. These purchases were brought to Brown's attention. An investigation revealed several personal purchases had been made with the procurement card, including alcohol, groceries and honey bees. Brown reported his findings to the mayor and city attorney to apprise them of the issue. Pursuant to KRS[1] 95.450(2), the mayor reviewed the information and preferred charges against Cherry to the Bowling Green City Commission.

Following a hearing, the City Commission found Cherry guilty and suspended him without pay for two weeks, ordered restitution, and suspended Cherry's procurement card privileges. No appeal was taken from that order. Within a few days, Brown received reports that Cherry had the smell of alcohol on his breath during the hearing, and became concerned Cherry was struggling with an alcohol problem. Brown discussed the matter with each of the city commissioners individually and the city attorney to determine the proper course of action to be taken. As a result of these discussions, Brown issued a memorandum to Cherry on May 23, 2005, outlining several restrictions which would be put in place upon his return from the previously imposed suspension. The memorandum restricted Cherry by: 1) prohibiting him from serving as acting fire chief in Brown's absence or responding to any emergency scene; 2) reassigned his primary office location from headquarters to the Westside station; 3) took away his take-

[1] Kentucky Revised Statutes.

home vehicle; 4) specified his work hours, and 5) discussed the appropriate appearance, uniforms and availability by cell phone or emergency radio while on duty. Brown characterized the orders contained in the memorandum as consistent with Cherry's primary job responsibilities as Deputy Chief of Operations.

Brown clarified his earlier memorandum in a second letter dated May 27, 2005, which indicated the previous orders were to be effective until such time as Cherry's work performance could be reevaluated and sufficient progress had been made to warrant their modification or rescission. The second notice also reiterated the City Commission's previous ruling that Cherry's procurement card privileges had been revoked and reminded him of the availability of the employee assistance program to assist with any personal issues that could possibly be hampering his job performance. Cherry took no action to challenge Brown's orders. Although he was aware of the availability of seeking a hearing pursuant to KRS 95.450 and the fire department's grievance process, Cherry did not pursue either avenue of relief.

Brown retired from the BGFB on August 1, 2006, and an interim chief, Walter Jordan, was appointed. Jordan did not rescind Brown's orders in regard to Cherry, seeking only to keep the department running until a permanent chief was appointed. Cherry did not request Jordan remove or revise the orders.

On November 1, 2006, Assistant Chief Greg Johnson was chosen over Cherry and another internal candidate as the new Fire Chief for the BGFD. Soon

thereafter, Johnson rescinded the majority of Brown's orders. He maintained Cherry's job location at the Westside station and continued the city's prohibition on Cherry's procurement card privileges. Johnson stated he wanted to get a "fresh start" with Cherry and believed lifting the orders would aid in that task. Johnson shifted some of Cherry's responsibilities to other members of the department and appointed him as the lead on the department's accreditation process, a time-consuming task, based on Cherry's strong organizational and writing skills. In response, Cherry announced his retirement effective February 1, 2007.

During this tumultuous period, on June 13, 2006, Cherry filed suit in Warren Circuit Court asserting: Brown's orders issued in May of 2005 constituted double punishment for his misuse of the procurement card and constituted continuing or serial violations of his rights; improprieties in the selection process for a new fire chief; and he was the victim of retaliation and constructive discharge based on a verbal counseling session he received after making disparaging remarks about then-Assistant Chief Greg Johnson to a local newspaper. The City of Bowling Green removed the action to the United States District Court for the Western District of Kentucky.[2] Following discovery, the City sought and was granted summary judgment on all claims by a memorandum opinion and order of Judge Joseph McKinley, Jr., entered on September 2, 2008.[3] Cherry appealed the

[2] Cherry amended his complaint multiple times in the federal court proceedings, each time adding new claims. Because the procedural history of each of these amendments is not pertinent to this appeal, we have listed all of the issues without regard to when they were raised.

[3] *Cherry v. City of Bowling Green*, No. 1:06-CV-092, slip op. (W.D. Ky. Sept. 2, 2008).

dismissal of his claims to the Sixth Circuit Court of Appeals which affirmed the District Court's opinion on Cherry's claims under 42 U.S.C. § 1983. Uncertain whether Cherry had a claim under KRS 446.070 and KRS 95.450 or whether there was evidence to support any such claim, the federal Court of Appeals vacated that portion of the District Court's decision and remanded the matter to the federal District Court for further consideration or remand to the state courts. The District Court refused to exercise jurisdiction and remanded the case to the Warren Circuit Court.

On remand, the sole issue before the trial court was whether Brown's May 2005 orders necessitated a hearing under KRS 95.450. That statute states in pertinent part:

> (1) Except as provided in subsection (5) of this section no member of the police or fire department in cities of the second and third classes or urban-county government shall be reprimanded, dismissed, suspended or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination or violation of law or of the rules adopted by the legislative body, and only after charges are preferred and a hearing conducted as provided in this section.

The remainder of the section includes strict timelines which must be followed and the manner in which hearings are to be conducted.

The City moved for summary judgment, arguing that based on the plain language of the statute and the holding in *Hockensmith v. City of Frankfort*, 723 S.W.2d 855 (Ky. App. 1986), Brown's orders did not—and could not—

constitute a reprimand.[4] Further, the City contended Cherry had not suffered any of the other punishments listed in the statute that would trigger the necessity of convening a hearing, nor had he alleged or shown any evidence of damages resulting from Brown's orders.

Cherry responded to the summary judgment motion and persisted in his insistence that the punishment meted out by Brown's orders constituted a reprimand, or at the very least, a constructive suspension of duties or reduction in grade. He argued he had been subjected to disparate treatment, citing to numerous instances of other individuals improperly using their city-issued procurement cards and receiving no formal punishment. He contended Brown had a personal vendetta against him and was seeking to ensure Cherry would never be named fire chief. He posited that Brown accomplished this task in contravention of the requirements of KRS 95.450 by issuing the orders rather than proceeding through the normal process of preferring charges and convening a hearing.

The trial court denied the City's motions for summary judgment and set the matter for jury trial on February 15-17, 2011. A jury ultimately returned a verdict in favor of the City and a judgment was entered in conformity with the verdict. Cherry timely appealed to this Court and the City filed a cross-appeal from the same judgment.

[4] The City argued that *Hockensmith* specifically stated that KRS 95.450 did not apply "to a 'reprimand' by a superior officer to a subordinate officer." As Brown was the Fire Chief and charged with maintaining order within the department, his orders to Cherry—his subordinate—did not qualify as a "reprimand" of the sort envisioned by KRS 95.450 necessitating a hearing.

Before this Court, Cherry raises four allegations of error in seeking reversal. First, he argues the trial court erred in granting the City's motion *in limine* to exclude evidence of other instances of city employees improperly using procurement cards and the punishment meted out to those employees. Next, he contends the trial court improperly failed to grant him a directed verdict on the issue of his entitlement to a hearing pursuant to KRS 95.450. Third, he alleges the trial court's instructions to the jury were flawed. Finally, Cherry argues the Claims Against Local Government Act[5] (CALGA) unconstitutionally prohibits a plaintiff from recovering punitive damages from a municipality.

On cross-appeal, the City first claims the trial court erred in concluding KRS 95.450 applied to orders issued by a fire chief. Next, the City argues the trial court erred in granting Cherry a trial on damages as he never sought a hearing before the City Commission and that body was never permitted the opportunity to consider the effect of Brown's orders. Finally, the City contends KRS 446.070 does not provide a cause of action for alleged violations of KRS 95.450 and the trial court erred in so finding. Based on our disposition of Cherry's claims, we believe the issues raised on cross-appeal are moot and require no discussion.

Cherry first contends the trial court erred in granting the City's motion *in limine* to exclude testimony and evidence of other employees' misuse of city

[5] KRS 65.2001 et seq.

procurement cards. The standard of review of decisions to admit or exclude evidence is for an abuse of discretion. *Clephas v. Garlock*, 168 S.W.3d 389, 393 (Ky. App. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted); *see also Kuprion v. Fitzgerald,* 888 S.W.2d 679, 684 (Ky. 1994). The test is not whether we as an appellate court would have decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Reversal is warranted only if the error, unless corrected, would prejudice the substantial rights of a party. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky. App. 2007). There must exist a substantial possibility that the jury verdict would have been different had the excluded evidence been allowed to be presented. *Crane v. Commonwealth*, 726 S.W.2d 302 (Ky. 1987); CR[6] 61.01, KRE[7] 103.

Cherry contends the jury was entitled to hear that numerous other employees had improperly used their city procurement cards for personal purchases and that they were merely required to reimburse the City for those charges. He alleges this evidence was critical to an understanding of Brown's motivation in issuing the May 23 and May 27, 2005, orders. Cherry believes that

[6] Kentucky Rules of Civil Procedure.

[7] Kentucky Rules of Evidence.

had the jury been permitted to hear that he was the only city employee to be disciplined for such an infraction the result of the trial would have been different. We disagree.

The trial court correctly concluded that the proffered evidence dealt solely with the issue of Cherry's inappropriate use of his procurement card, that the City Commission had previously dealt with that issue, and that no appeal had been taken from those proceedings. Further, the trial court correctly determined that the sole issue before it was Cherry's entitlement to a second hearing based on Brown's orders. Although the evidence regarding other employees may have been relevant in the first hearing before the City Commission, it had no bearing on the matter at bar. Additionally, because all issues relating to the first hearing had been argued and decided in the federal proceedings, the law of the case doctrine prohibits them from being raised again in this matter. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007) (quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)). As the trial court's decision was clearly based on sound legal principles, we cannot say there was an abuse of discretion.

We are similarly unconvinced by Cherry's unsupported argument that the result of the trial would have been different had the evidence been allowed. The jury was charged to determine whether the mandates of KRS 95.450 required the convening of a hearing prior to the issuance of Brown's orders, and if so, what

damages flowed from the failure to do so. The proffered evidence was not only irrelevant to that determination, it would merely have served to confuse the jury and possibly inappropriately inflamed their passions. We cannot condone such a result. The trial court correctly excluded the evidence.

Next, Cherry argues the trial court erred in failing to grant him a directed verdict and rule as a matter of law that Brown's orders constituted a reprimand or reduction in grade for which he was entitled to a hearing under KRS 95.450. He contends the facts in support of his motion were undisputed and required such a ruling. We disagree.

> When a directed verdict is appealed, the standard of review on appeal consists of two prongs. The prongs are: "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke,* 967 S.W.2d 16, 18–19 (Ky. 1998). "A motion for directed verdict admits the truth of all evidence which is favorable to the party against whom the motion is made." *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung,* 754 S.W.2d 855, 860 (Ky. 1988), citing *Kentucky & Indiana Terminal R. Co. v. Cantrell,* 298 Ky. 743, 184 S.W.2d 111 (1944).
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> Clearly, if there is conflicting evidence, it is the responsibility of the jury, the trier of fact, to resolve such conflicts. Therefore, when a directed verdict motion is made, the court may not consider the credibility or weight of the proffered evidence because this function is reserved for the trier of fact. *National,* 754 S.W.2d at 860 (citing *Cochran v. Downing,* 247 S.W.2d 228 (Ky. 1952)).

Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 215 (Ky. App. 2009).

Although Cherry insists there were no disputed factual issues, the record clearly reflects a dispute as to whether Brown's orders constituted a reprimand or reduction in grade. The City vehemently argues they did not. Cherry obviously disagrees. The briefs and arguments of counsel are littered with factual allegations tending to support their relative positions. Cherry believes Brown's orders stripped him of the essential duties of being a fireman. The City counters that Cherry's position was one of support of firefighting operations and the orders changed nothing substantive relating to those duties. Each party cites to evidence in support of their arguments. For purposes of this appeal, we deem it unnecessary to restate each instance of conflicting evidence cited by the parties. Suffice it to say that numerous instances appear in the record. Combined, the parties spend nearly ten pages of their briefs discussing these factual matters. In his brief, Cherry even attempts to undermine the jury verdict by pointing to conflicting evidence adduced at trial. Thus, the record plainly contradicts Cherry's allegation that no disputed facts existed. In light of the same, the trial court was constrained from directing a verdict in Cherry's favor. *Hornung,* 754 S.W.2d at 860. There was no error.

Cherry next alleges the trial court erred in failing to properly instruct the jury. He contends the trial court's instruction improperly stated that his entitlement to a hearing was a question of fact, rather than one of law, in that it

allowed the jury to determine whether Brown's orders constituted a reprimand and/or reduction in grade. Again, we disagree with Cherry's argument.

Allegations of error in instructing the jury are considered questions of law that we review *de novo*. *Peters v. Wooten*, 297 S.W.3d 55, 64 (Ky. App. 2009). Instructions are intended to furnish guidance to the jury in their deliberations and to aid them in arriving at the correct verdict. *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652, 208 S.W.2d 940, 943 (1948). However, when the source of an instruction can be directly traced to a proposed instruction tendered by a party, that party is precluded from arguing that the instructions given were erroneous. *Kendall v. Cleveland Crane & Engineering Co.*, 555 S.W.2d 817 (Ky. App. 1977).

In response to the City's motion for summary judgment, Cherry alleged that there were issues of fact to be determined by the jury with respect to his entitlement to a hearing. Consistent with that position, Cherry tendered instructions to the trial court which defined the terms "reprimand" and "reduction in grade" which the trial court adopted almost verbatim in instructing the jury. Likewise, Cherry tendered proposed instructions setting forth the language of KRS 95.450 which the trial court incorporated into the final instructions given to the jury. These are the same instructions Cherry now claims are infirm. As stated previously, a party will not be heard to complain on appeal regarding defects in the

jury instructions when the trial court issues instructions consistent with those tendered by that party. *Id*.

Finally, Cherry contends the CALGA unconstitutionally limits or prohibits a plaintiff from recovering punitive damages from a municipality. The City argues Cherry's claim was untimely and without merit. We agree with the City.

This constitutional challenge was raised for the first time at the conclusion of the second day of trial and only *after* the City had closed its proof. Although the case had been pending for nearly five years, Cherry admitted his motion had been prepared earlier that day. Further, Cherry admitted the notice requirements of CR 24.03 and KRS 418.075(1)[8] had not yet been complied with but that he would be serving the Attorney General that evening. The Attorney General declined to intervene by written notice filed on March 4, 2011, nearly two weeks after the trial had concluded and one week prior to the trial court's entry of its final judgment. Apart from a brief argument made at the time of filing the motion, Cherry did not seek a hearing on his motion, nor did he request the trial court amend its judgment to include a ruling on the constitutional challenge.

Our review of the record reveals that although the trial court allowed the filing of the motion and heard Cherry's argument, no specific ruling was made nor requested. It is well-settled that a trial court must be given the opportunity to

[8] Read in tandem, the rule and statute require a party challenging the constitutionality of an act of the General Assembly to serve a copy of the pleading on the Attorney General who is entitled to intervene in the matter to argue on behalf of the Commonwealth.

rule before an issue may be considered on appeal, and the failure of a litigant to bring an alleged error to the trial court's attention is fatal to that argument on appeal. *Hines v. Carr,* 296 Ky. 78, 176 S.W.2d 99 (1943). We conclude that the trial court's failure to issue a ruling on Cherry's constitutional challenge was not brought to its attention and it was therefore not given a meaningful opportunity to rule. Thus, this issue is not properly before us.

Nevertheless, even absent the procedural improprieties, we conclude Cherry's contention is without merit. The basis of Cherry's constitutional challenges emanates from the concurring opinion in *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003), wherein former Justice Martin Johnstone indicated his belief that punitive damage awards are allowable against cities and municipal corporations, and Justice William Cooper, in a dissent, posited that the majority holding left "for another day the issue of the constitutionality of KRS 65.2001 as applied to municipalities by KRS 65.200(3). . . ." Cherry believes today is that day; we do not.

As the trial court correctly noted, there can be no reasonable question that punitive damages are not recoverable against a municipality or its agencies under the plain language of the CALGA. In *Louisville Metro Housing Authority v. Burns*, 198 S.W.3d 147 (Ky. App. 2005) (*discretionary review denied* August 17, 2006), a panel of this Court discussed the holding in *Phelps* and concluded punitive damages under the CALGA are available only against entities that cannot

meet the criteria necessary to be categorized as an agency of a municipality; such damages cannot be awarded against the municipality or its agencies. This is the black-letter law in this Commonwealth. The Supreme Court of Kentucky had the opportunity to change or modify this holding by granting the petition for discretionary review in *Burns*. It did not and we must assume that the holding is correct. We are not inclined to accept Cherry's invitation to re-write the law and reverse the clear course charted by binding precedents.

Having found no error in the proceedings below, we believe the City's arguments on cross-appeal are moot. Thus, it will not be necessary to discuss the issues raised therein or the propriety of that part of the judgment from which the cross-appeal is prosecuted.

For the foregoing reasons, the judgment of the Warren Circuit Court is AFFIRMED.

ALL CONCUR.

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