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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000180-MR

CARL E. SMITH, M.D., F.A.A.P., PLLC
AND DR. CARL SMITH, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
ACTION NO. 16-CI-00052

JULIE LEWIS — APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND KRAMER, JUDGES.

KRAMER, JUDGE: Carl Smith, individually ("Dr. Smith"), and his medical practice, Carl E. Smith, M.D., F.A.A.P., PLLC ("PLLC"),[1] appeal a jury verdict and post-trial order entered in Harlan Circuit Court in favor of Julie Lewis for retaliatory hostile work environment, the tort of outrage, front pay, and attorney

[1] Appellants omit the middle initial "E." when identifying Carl Smith, individually.

fees and costs. For the reasons discussed below, we affirm in part and reverse in part.

FACTUAL HISTORY

Dr. Smith is a pediatrician who opened his PLLC, a solo medical practice, in 1994. He owns the PLLC and employs an office manager and nurses.

Julie is a registered nurse who started working for Dr. Smith and the PLLC in 1997. Julie made no complaints of sexual harassment until the few years leading up to her resignation in July 2013. In those last years, Dr. Smith acted inappropriately toward Julie, such as asking her to come to his house when his wife was out of town, buying her gifts she did not request or accept, and making sexual comments toward her. Dr. Smith does not dispute many of Julie's allegations.

PROCEDURAL HISTORY

Julie sued Dr. Smith and the PLLC alleging: (1) wrongful discharge; (2) sexual harassment hostile work environment; (3) the tort of outrage; (4) retaliation and retaliatory hostile work environment; and (5) invasion of privacy.

Shortly before trial, Julie voluntarily dismissed her invasion of privacy claim. Upon motion for summary judgment, the trial court dismissed the wrongful discharge claim finding it subsumed by Julie's Kentucky Civil Rights Act ("KCRA") claims.

Trial lasted four days. At the close of Julie's proof and at the close of all proof, Dr. Smith and the PLLC made motions for directed verdict, which the trial court denied.

The jury was instructed on the three remaining claims: (1) KRS 344.040 sexual harassment; (2) KRS 344.280 retaliatory hostile work environment; and (3) the tort of outrage. Finding the PLLC had less than eight employees, the jury did not reach the sexual harassment claim. For the second claim, the jury found Dr. Smith and the PLLC subjected Julie to a retaliatory work environment and compensated her $50,000 in embarrassment and humiliation and $26,474.43 in lost wages.[2] For the third claim, the jury found Dr. Smith committed the tort of outrage and compensated Julie $75,000 for severe emotional distress and $0 in punitive damages. The trial court entered judgment consistent with the jury's verdict.

After the verdict, the parties filed post-trial motions. Dr. Smith and the PLLC filed a motion for judgment notwithstanding the verdict ("JNOV"), and Julie filed a motion for attorney fees and costs, as well as front pay. Subsequently, the trial court denied Dr. Smith and the PLLC's JNOV and entered a supplemental

[2] The jury verdict apportioned $50,000 to be paid by Dr. Smith and $26,474.43 to be paid by the PLLC.

judgment awarding Julie $77,200 in attorney fees, $4,917.70 in costs, and $16,640 in front pay. The total judgment was $250,232.13. This appeal followed.

ANALYSIS

I. Retaliation

A. Kentucky's Retaliation Statute Permits Individual Liability.

Dr. Smith and the PLLC argue Julie's retaliation claim should have been dismissed because the PLLC had less than eight employees.[3] Dr. Smith and the PLLC urge this Court to apply the "employer" definition applicable to KRS 344.040, the discrimination statute, to KRS 344.280, the retaliation statute. When interpreting statutes, we use a *de novo* standard of review. *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 612 (Ky. 2004).

Dr. Smith and the PLLC confuse the requirements for a *discrimination* claim with a *retaliation* claim. While both claims are available under the KCRA, only discrimination requires an employer to have eight or more employees to be liable. The retaliation statute, on the other hand, permits liability against a "person" under the KCRA.

[3] In their prehearing statement, Dr. Smith and the PLLC argued the jury had insufficient proof to find retaliation. In their appellate briefs, however, Dr. Smith and the PLLC abandon this argument and only advance the legal question that they are not liable for retaliation because the PLLC had less than eight employees.

To understand the distinction, we must begin with a discussion of discrimination.[4] Kentucky's Civil Rights Act, codified in KRS Chapter 344, is the substantial equivalent of the Federal Civil Rights Act. The basic purpose of KRS Chapter 344 is "[t]o safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability…." KRS 344.020(1)(b). Here, Julie claimed her employer, the PLLC, discriminated against her on the basis of sex, in violation of KRS 344.040.

For Julie to pursue a sex discrimination claim, however, she had to prove that the PLLC qualified as an "employer." "Employer" is defined as "a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year…." KRS 344.030(2).

While the parties stipulated the PLLC had at least six employees, Julie argued two more individuals, Brenda Back (housekeeper/janitor) and Caleb Kohnle (who worked on the floors), were "employees" of the PLLC. In their verdict, the jury decided these individuals were not employees. Thus, the jury correctly skipped the instruction on discrimination, and Julie was unable to recover under this claim.

[4] For completeness, Julie did not file a cross appeal on her discrimination claim.

Dr. Smith and the PLLC argued otherwise, but the trial court correctly held Julie did not need to prove Dr. Smith and the PLLC had eight or more employees for the jury to decide the retaliation claim. Retaliation is not confined by the "employer" definition. Rather, that statute permits a "person" to be individually liable for retaliation.

Kentucky courts, as well as our federal brethren, have repeatedly addressed whether an individual can be held liable under the KCRA. The confusion supposedly lies in the fact that the KCRA is based on Title VII of the Federal Civil Rights Act of 1974. Under Title VII, an individual cannot qualify as an "employer" and, therefore, cannot be liable for claims arising under Title VII. However, the Kentucky Supreme Court and the Sixth Circuit have limited this general proposition. Under the KCRA, an individual can be liable for retaliation. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 793-94 (6th Cir. 2000); *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 808 (Ky. 2004).

Simply put, Kentucky's retaliation statute is not the same as the federal retaliation statute. While Kentucky's Civil Rights Act was based on the Federal Civil Rights Act (Title VII), it does not mirror it. *Morris*, 201 F.3d at 794. Title VII forbids retaliation by an "employer," while Kentucky law forbids retaliation by a "person." 42 U.S.C. § 2000-e-3(a); KRS 344.280.

The retaliation provision of the KCRA states "it shall be an unlawful practice for a person, or for two (2) or more persons to . . . retaliate . . . ." KRS 344.280. "Person" is defined in the KCRA to include "one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations . . . ." KRS 344.010(1). Accordingly, Dr. Smith is a "person," as is the PLLC because a corporation is included within the definition of a "person." And, therefore, Kentucky permits "persons," like Dr. Smith and the PLLC, to be held liable for retaliation. *Morris*, 201 F.3d at 793-94.

Dr. Smith and the PLLC rely on two cases, *Pucke v. J.A. Stevens Mower Co., Inc.*, 237 S.W.3d 564 (Ky. App. 2007), and *Owens v. Ward*, 2009 WL 482097 (E.D. Ky. February 25, 2009), to support their argument that retaliation can only be found against an "employer" of eight or more employees. However, both cases are distinguishable, as explained below.

In *Pucke*, Cynthia Pucke sued her former employer, J.A. Stevens, and its two sole shareholders, Ronald Garnett and Dana Lambelz, for (1) gender discrimination; (2) sexual harassment; (3) retaliation; (4) wrongful discharge; and (5) intentional infliction of emotional distress. Shortly after being hired by this small company with seven employees, Pucke began a sexual relationship with Lambelz, who was her immediate supervisor. Lambelz often threatened to fire Pucke during turbulent times in their relationship, and Pucke knew her future

employment depended upon her continued participation in the sexual relationship. After Lambelz ended the relationship, he fired Pucke.

In their summary judgment motion, defendants argued Pucke's first three claims were based on alleged violation of KRS Chapter 344 and should be dismissed because defendants did not meet the definition of an "employer." Defendants further argued in their motion that the remaining common law claims should be dismissed as being preempted by KRS Chapter 344. The trial court granted defendants' motion, and Pucke appealed.

On appeal, for unexplained reasons, Pucke conceded that defendants did not meet the definition of "employer" and, therefore, did not challenge the dismissal of her discrimination, harassment, and retaliation claims. Pucke only challenged the dismissal of the wrongful discharge and IIED claims. While unclear, the court assumes Pucke filed a notice of appeal regarding the dismissal of her entire case, but later conceded the dismissal of her three KCRA claims in the briefs. Accordingly, the only issues for the court to decide that day were the dismissal of Pucke's wrongful discharge and IIED claims. Without any argument on appeal regarding the KCRA claims, this court affirmed the uncontested dismissal of those claims.

The *Pucke* case does not stand for the proposition that no KCRA claims are available when an employer has less than eight employees. That was

not the issue before the *Pucke* court, and Dr. Smith and the PLLC incorrectly rely on that case.

Likewise, the second case Dr. Smith and the PLLC cite, *Owens*, is distinguishable. *Owens* is an unpublished, federal district court opinion dealing with a motion to dismiss and different circumstances than this case. Nonetheless, we will briefly address this case.

In *Owens*, plaintiff *admitted* he could not meet the eight employee definition, but argued the numerosity requirement (the minimum number of employees to qualify as an "employer") was unconstitutional. To prove plaintiff "opposed a practice declared unlawful by" the KCRA, the district court held he must have a "reasonable and good faith belief" that discrimination by an employer with less than eight employees is "unlawful." *Id.* at *7. By admitting he knew the employer had less than eight employees, the district court found plaintiff had no "reasonable and good faith belief" for filing his claim.[5]

This procedural dismissal of a retaliation claim, while used in federal courts, is not used in Kentucky state courts. The Kentucky Supreme Court has clearly held that a plaintiff alleging retaliation under the KCRA is not required to plead or affirmatively prove she acted in good faith when she opposed a practice

[5] In the *Owens* opinion, defendants moved to dismiss the case, but the federal district court ordered the motions be converted to summary judgment motions and for the parties to brief the constitutionality of the numerosity requirement.

declared unlawful under the KCRA. *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 580 (Ky. 2016). Instead, a plaintiff is presumed to be acting in good faith. Moreover, the retaliation statute itself has no explicit requirement that a plaintiff affirmatively prove his good faith in pursuing a civil rights matter. "KRS 344.280(1) is otherwise clear and unambiguous, and so in keeping with our practice of interpreting statutory provisions faithfully to their text, we will not read into KRS 344.280(1) an element of good faith which the legislature did not put there." *Id.* at 581 (citing *Wilburn v. Commonwealth*, 312 S.W.3d 321, 328 (Ky. 2010)). Accordingly, Dr. Smith and the PLLC's reliance on *Owens* is misplaced. Julie is presumed to have acted in good faith in pursuing her civil rights claims against Dr. Smith and the PLLC.[6]

Despite Dr. Smith and the PLLC's contention, the Kentucky Supreme Court has resolved this issue: the Kentucky retaliation statute permits recovery against a "person" for KCRA violations. In *Brooks*, 132 S.W.3d 790, Sandra Brooks claimed her former employer, the Housing Authority, and three individuals unlawfully discriminated against her based on her race and unlawfully retaliated against her for filing a discrimination claim. Brooks lost on the discrimination claim, but won on the retaliation claim. On appeal, Brooks argued the trial court

[6] Even if Kentucky did not have a good faith presumption, Julie presented evidence at trial to prove the PLLC had eight or more employees.

erred in dismissing her retaliation claims against the three individuals allegedly responsible for retaliating against her. The Kentucky Supreme Court held that, while individuals can be liable for unlawful retaliation, the issue was moot because Brooks already had a judgment against the Housing Authority for her retaliation claim. Therefore, Brooks had no relief on this issue against the three individual agents of her employer. *Id.* at 808.

Here, Julie has a judgment against both Dr. Smith and the PLLC for retaliation. This is because Dr. Smith, as the individual, and the PLLC, as the employer, retaliated against Julie. We have not previously dealt with this scenario. For guidance, we turn to Justice James Keller's concurring opinion in *Brooks*, where he delved into this issue of individual liability for retaliation. While Justice Keller agreed with the majority that the issue was moot in *Brooks*, as the Housing Authority would satisfy the judgment and fully compensate Brooks for her injuries, he went further and explained the trial court erred when it dismissed Brooks' claims against the individuals. "[I]t is long-standing, black-letter law that a principal and an agent are, under normal circumstances, jointly liable for the agent's actions." *Id.* at 812-13. The Housing Authority's vicarious liability was "irrelevant to the separate question of whether [the three individuals] were individually liable for acts of retaliation prohibited by KRS 344.280(1)." *Id.* at

813. Justice Keller would have permitted Brooks to pursue her retaliation claims against the defendants, *collectively*. We agree.

Here, the trial court did exactly as Justice Keller suggested. The trial court instructed the jury that they could find both Dr. Smith and the PLLC retaliated against Julie. The trial court further instructed the jury to apportion damages between Dr. Smith and the PLLC. The jury determined both Dr. Smith and the PLLC retaliated against Julie, finding Dr. Smith responsible for $50,000 in embarrassment and humiliation damages and the PLLC responsible for $26,474.43 in lost wages.

Based on the clear language of KRS 344.280, Julie's retaliation claim against both Dr. Smith and the PLLC was proper as they are both "persons." *Morris*, 201 F.3d at 793-94. Accordingly, the judgment for Julie's retaliation claim is affirmed.

B. Award of attorney fees and costs is affirmed.

Dr. Smith and the PLLC argue that, should the retaliation claim be vacated, Julie's attorney fees and costs, which flowed from the retaliation claim, pursuant to KRS 344.450, should also be vacated. As we affirm the retaliation claim, we affirm the attorney fees and costs award.

II. Tort of Outrage ("IIED")

Dr. Smith[7] next claims that Julie's tort of outrage claim failed on the merits or, alternatively, was subsumed by her KCRA claims. We review these alternative arguments under two different standards of review, which we discuss as we analyze each issue below.

A. The merits of Julie's IIED claim supports the jury verdict.

As noted, the jury found in Julie's favor on her tort of outrage claim, and the trial court denied Dr. Smith's motions for directed verdict and for JNOV. When reviewing evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict or for JNOV. *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 25 (Ky. 2017). "[T]he considerations governing a proper decision on a motion for judgment notwithstanding the verdict are exactly the same as those . . . on a motion for a directed verdict." *Id.* (quoting *Cassinelli v. Begley*, 433 S.W.2d 651, 651-52 (Ky. 1968)). Additionally, all evidence favoring the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight to be given to the evidence, these being functions reserved to the trier of fact. *Id.* Moreover, the nonmoving party "is

[7] The IIED claim was only against Dr. Smith, individually, so this section of the opinion refers only to Dr. Smith.

entitled to all reasonable inferences which may be drawn from the evidence." *Id.* (quoting *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990)). In other words, we will not disturb the jury verdict and trial court's rulings unless the proof in favor of Julie is such that no reasonable juror could have found in her favor. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

The tort of intentional infliction of emotional distress ("IIED"), also known as the tort of outrage, was first recognized in *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). To recover, plaintiff must show: (1) defendant's conduct was intentional and reckless; (2) the conduct was so outrageous and intolerable so as to offend generally accepted standards of decency and morality; (3) a causal connection between defendant's conduct and the emotional distress suffered; and (4) the resulting emotional distress was severe. *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 2-3 (Ky. 1990). The Court will first address Dr. Smith's argument that his conduct was not outrageous and then examine his argument that Julie's emotional distress was not severe.

1. Dr. Smith's conduct was outrageous.

Kentucky courts have turned to the RESTATEMENT (SECOND) OF TORTS § 46 (1965) to assess whether IIED is actionably extreme and outrageous. *Craft, supra*. An action lies for conduct that is truly "outrageous and intolerable;" an

action will not lie for "petty insults, unkind words and minor indignities." *Brewer v. Hillard*, 15 S.W.3d 1, 6 (Ky. App. 1999).

Pursuant to this standard, proof of outrageous conduct sufficient to support an IIED claim has been found in previous employment cases. In *Brewer*, plaintiff sued for same-sex harassment in the form of frequent incidents of lewd name calling coupled with multiple unsolicited and unwanted requests for homosexual sex. This Court held plaintiff presented sufficient evidence to prove IIED. And, in *Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229 (Ky. App. 2001), plaintiff was subjected to almost daily racial indignities for several years. In that case, this Court held plaintiff presented sufficient evidence to prove outrageous conduct.

Here, Dr. Smith admits his conduct was distasteful, offensive, or at times vulgar. He admits to inappropriately touching Julie, but claims it was not "sexual touching." Dr. Smith further admits he made sexual comments to Julie; he discussed his private sex life with Julie; he made comments about Julie's appearance, including her breasts; and he invited Julie to his house when his wife was not there. Yet, Dr. Smith argues this conduct was not "outrageous."

Julie, on the other hand, claims Dr. Smith's conduct was outrageous. She cites several examples, including: Dr. Smith told Julie's husband, Wendell Lewis, that if Dr. Smith's wife was dead and Wendell was dead, he would pursue

Julie romantically. Dr. Smith told Julie that he was thinking of her when his third child was being born because Julie could not have children herself. Dr. Smith placed information in Julie's medical chart[8] about her premature atrial contractions even though Julie saw a cardiologist, not Dr. Smith, for this condition. Dr. Smith also wrote in Julie's medical chart that she was in menopause even though Julie was not. Dr. Smith told his employees that Julie was depressed and having mental issues. These employees testified they thought Dr. Smith was attempting to discredit Julie's complaints of harassment. Dr. Smith followed Julie and her co-workers to McDonald's to bring her a raincoat because it had started to rain. Dr. Smith went to Julie's parents' house, uninvited, to clean their pool after he overheard her talking to coworkers about her parents' pool problems.

Dr. Smith compares his behavior to the nurse's behavior in *Seitz*, 796 S.W.2d 1, and argues his conduct was similarly not sufficiently outrageous. In the *Humana* case, a patient delivered a stillborn baby and the nurse told her to "shut up" because she was disturbing other patients. After the nurse wrapped the deceased baby in a bed sheet, the patient asked where she was taking the baby and the nurse told her: "Honey, we dispose of them right here at the hospital." *Id.* at 2-3. The Kentucky Supreme Court held, while the nurse showed lack of compassion,

[8] Dr. Smith kept a medical chart on Julie because he saw her as a patient. The PLLC did not provide health insurance, so Dr. Smith claimed he saw his employees for health problems as a substitute benefit.

her conduct did not take place over an extended period of time and was not "beyond all decency." *Id.* at 3-4.

In this case, Dr. Smith's conduct did occur over an extended period of time, and was more like the conduct complained of in *Brewer* and *Wilson*. For almost two years, Julie told Dr. Smith to stop his behavior and be more professional. She also reported Dr. Smith's conduct to the office manager. In 2012, after the incident where Dr. Smith asked Julie to come to his house when his wife was not home, the office manager documented Dr. Smith's conduct in a report, noting Dr. Smith had been making Julie very uncomfortable over the past several months. Julie's husband even spoke to Dr. Smith about his behavior toward Julie. After this incident, Dr. Smith began asking Julie if he was "being a good boy?" Dr. Smith's pattern of conduct continued, culminating in September 2013, when Julie resigned after Dr. Smith berated her in front of a patient for not staying after work on Friday to take his surgery staples out of his shoulder and not answering his texts or calls that weekend asking her if she had forgotten her "last patient."

At trial, the trial court instructed the jury on the elements of IIED, including whether Dr. Smith's conduct "clearly exceeded the bounds of common

decency as would be observed in any civilized community."[9] The jury unanimously found Dr. Smith's conduct was outrageous. Taking the evidence in a light most favorable to Julie, as the prevailing party, we will not disturb the jury's verdict. Accordingly, we conclude the trial court did not abuse its discretion in denying Dr. Smith's JNOV as to this element of IIED.

2. Julie's emotional distress was severe.

Next, Dr. Smith argues Julie's testimony was not sufficient to demonstrate severe emotional distress.[10] To prove Julie suffered severe emotional

[9] The jury instruction read: "You may find for Plaintiff and against Defendant, Carl E. Smith, under the tort of outrage if you believe from the evidence that: (1) Defendant Carl E. Smith, beginning in 2012 and continuing until September 2013 inappropriately touched the Plaintiff, made inappropriate remarks or statements to the Plaintiff, made inappropriate remarks about the Plaintiff, and undertook other conduct against the Plaintiff during the course of her employment that were either intended by him to cause emotional distress to her or, if he did not actually so intend, nevertheless knew or had reason to know that such distress would result, but did not care whether it would or not; (2) That such remarks or statements or other actions did in fact cause Plaintiff to suffer severe emotional distress; and (3) That such conduct on the part of Carl E. Smith clearly exceeded the bounds of common decency as would be observed in any civilized community."

[10] In his brief, Dr. Smith noted Julie presented no expert testimony to prove her emotional distress. However, he did not raise the lack of expert testimony during directed verdict motions or in his JNOV. Furthermore, Dr. Smith failed to preserve the lack of expert testimony issue in his prehearing statement. While the Court acknowledges the standard set forth in *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012), regarding expert proof of emotional distress, Dr. Smith has waived any argument for reversal under this standard. CR 76.03(8). Furthermore, we recognize that claims for emotional damages coupled with KCRA claims, like Julie's, "are less likely to be fraudulent than those advanced under a free-standing claim of intentional or negligent infliction of emotional distress." *Demetre*, 527 S.W.3d at 39. In cases that do not allege the free-standing torts of intentional or negligent infliction of emotional distress, "we have historically relied on our trial courts and the jury system to evaluate the evidence and determine the merits of the alleged claims." *Id.* (citing *Curry v. Fireman's Fund Ins. Co.,* 784 S.W.2d 176, 178 (Ky. 1989) ("Throughout the history of Anglo-American law, the most important decisions societies have made have been entrusted to duly empaneled and properly instructed juries. Decisions as to human life, liberty and public and private property have been routinely made by jurors and

distress, she must demonstrate distress that is "substantially more than mere sorrow." *Gilbert v. Barkes*, 987 S.W.2d 772, 777 (Ky. 1999). Emotional distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." RESTATEMENT (SECOND) OF TORTS § 46, comment j. "The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Id.* Notably, the "intensity and duration of the distress are factors to be considered in determining its severity," and while severe distress must be proved, "the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." *Id.*

At trial, Julie presented proof that she suffered from atrial contractions, which is a cardiac condition where the heart skips a beat. Julie's cardiologist told her this condition was due to stress, which she attributed to Dr. Smith's conduct. Julie also testified of nightmares and crying as a result of Dr. Smith's conduct. Julie also took anti-depressants, although she admitted she began taking this medicine several years earlier to deal with her grandmother's death and a difficult adoption. Due to her severe emotional distress and Dr. Smith's unrelenting conduct, Julie quit her job with the PLLC. She did this even though

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extraordinary confidence has been placed in this decision-making process.")). We see no compelling reason to depart from this view.

she needed her paycheck to pay bills and had no other job lined up at the time. She further testified how much she loved working with pediatric patients and considered her co-workers at the PLLC like sisters. Yet, the emotional distress eventually caused her to resign.

The jury heard evidence about the totality of the circumstances surrounding Julie's claims, and it was a factual issue for the jury to decide whether Julie suffered any emotional distress due to Dr. Smith's conduct. As stated, the jury unanimously found in Julie's favor for this claim. We conclude Julie presented sufficient proof to sustain the jury's award of emotional distress damages. Accordingly, the trial court did not abuse its discretion in denying Dr. Smith's JNOV as to this element of IIED.

B. Julie's KCRA claim preempts her IIED claim.

Having affirmed the judgment as to the merits of the IIED claim, we now address Dr. Smith's argument that Julie's IIED claim was preempted and subsumed by her KCRA claims. In reviewing this legal issue, we apply a *de novo* standard of review. *Wheeler & Clevenger Oil Co., Inc.* 127 S.W.3d at 612.

Dr. Smith argues that, pursuant to *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 285 (Ky. App. 2009), Julie's IIED claim was subsumed by her KCRA claim. Essentially, Dr. Smith argues the two claims allow damages for the same harm – emotional harm. Thus, he contends Julie should be barred from recovering

her $50,000 verdict for humiliation and embarrassment damages for retaliation, while also recovering her $75,000 verdict for severe emotional distress damages for IIED.

Generally, a plaintiff cannot make a claim for IIED for the same conduct that gives rise to a KCRA claim. The KCRA already permits recovery for emotional damages such as humiliation and embarrassment. *McNeal v. Armour & Co.*, 660 S.W.2d 957, 958-59 (Ky. App. 1983). Therefore, when a plaintiff has an existing form of recovery for emotional distress under the KCRA, the claim for IIED is subsumed by the statutory cause of action. *Messick v. Toyota Motor Mfg., Kentucky, Inc.*, 45 F.Supp.2d 578, 582 (E.D. Ky. 1999); *see also Ogborn*, 309 S.W.3d at 286 (opining it is a "well-established principle" that IIED claims are preempted by KCRA claims).

Here, Julie asserted KCRA claims in the form of discrimination (KRS 344.040) and retaliation (KRS 344.280). She was successful in her retaliation claim against Dr. Smith, which allowed her to recover damages for embarrassment and humiliation damages. However, Julie argues she should also have been allowed to recover for severe emotional distress against Dr. Smith, and that *Wilson*, 75 S.W.3d 229, allows such a claim against an individual defendant.

In *Wilson*, we indeed held an IIED claim against an individual is not preempted by KRS 344 claims. In *Wilson*, an African-American worked at Lowe's

and alleged: (1) racial discrimination against Lowe's under KRS 344; (2) hostile work environment against Lowe's; and (3) IIED against Lowe's, as well as three supervisors, who were also named defendants. While this Court held Wilson's IIED claim against Lowe's was subsumed by his KRS Chapter 344 claims, we held Wilson's IIED claims against the three individuals were not subsumed by the KRS Chapter 344 claims against Lowe's.

The difference between *Wilson* and this case, however, is that Julie recovered under the KCRA against both the PLLC and Dr. Smith. And, she recovered for IIED against Dr. Smith. Thus, Dr. Smith's argument that Julie has a double recovery against him is well taken.

This reasoning is supported by our decision in *Kroger Co. v. Buckley*, 113 S.W.3d 644 (Ky. App. 2003), which we decided two years after *Wilson*. In *Buckley*, Joanne Buckley sued her employer, Kroger, and five individual supervisors alleging disability discrimination, retaliation, as well as IIED. At the close of Buckley's case, the trial court dismissed all claims against the individual defendants. Thus, only the disability discrimination and IIED claims remained. The jury returned a verdict in favor of Buckley on both claims against Kroger. On appeal, this Court held that, pursuant to *Wilson*, Buckley's discrimination claim preempted her IIED claim. Although Buckley argued that her discrimination claims were different from her IIED claim, we concluded she used the same facts

to support both her discrimination and IIED claims. As such, we vacated the judgment and remanded the case for a new trial. We remanded for a new trial, as to the discrimination claim, because the jury was only instructed to return one damage award, representing the combined damages of both the discrimination and IIED claims. Thus, it was impossible to sever the damages. Based on our holding in *Buckley*, Julie cannot concurrently recover under her KCRA claim and IIED claim against Dr. Smith.

Our holding in *Buckley* is somewhat confused because it was rejected by *Bargo v. Goodwill Industries of Ky., Inc.*, 969 F.Supp.2d 819 (E.D. Ky. 2013), a federal district court opinion. In that case, plaintiffs sued their employer for discrimination, and sued their employer and its employees for IIED. Although the district court dismissed plaintiffs' IIED claims as facially deficient, in a footnote, the district court addressed defendants' alternative argument that plaintiffs' IIED claims were preempted and subsumed by their KCRA claims. In footnote 3, the district court acknowledged the holding in *Buckley*, but stated *Wilson* controlled. The district court held that IIED claims against individuals are not subsumed by a discrimination claim against the employer. Therefore, the district court stated plaintiffs' IIED claims, brought solely against the individual defendants, would not have been preempted by their KCRA claims. *Id.* at n 3.

The *Bargo* decision would seem to support Julie's argument that her IIED claim against Dr. Smith was not preempted because Dr. Smith is an individual. However, the *Bargo* court made a distinction between the two types of defendants in that case. Plaintiffs could recover from the individual defendants for IIED, but that was because their KCRA claims were only against the employer defendant. The *Bargo* court did not hold plaintiffs could pursue both KCRA and IIED claims against the individual defendants.

As an individual defendant, Dr. Smith was held liable for KCRA retaliation. Regardless of the distinction between discrimination and retaliation, they are both claims under the KCRA, and Julie recovered under the KCRA. Although Julie sued Dr. Smith, individually, for both KCRA retaliation and IIED, she had to choose her avenue for recovery against that individual. She cannot recover under both claims against the same defendant.

This conclusion is supported by another federal district court opinion, *Watts v. Lyon County Ambulance Service*, 23 F.Supp.3d 792 (W.D. Ky. 2014). In *Watts*, a former employee sued his employer and five individuals for various claims, including discrimination and IIED. The district court held Watts' IIED claim against his employer was preempted by his Title VII and KCRA claims because the basis for his IIED claim was the same as for his Title VII and KCRA claims. *Id.* at 813. Although not raised by the parties, the district court evaluated

whether Watts' IIED claim against the individual was also preempted. The district court acknowledged that, previously, the KCRA only subsumed IIED claims against employers, not individuals. *Id.* at 814. However, Watts could have and did file civil rights claims against the individual. Interestingly, the employer (Ambulance Service Board) was a "political subdivision," which met the statutory definition of an "employer." (Title VII's definition of "employer" includes "a political subdivision of the Commonwealth." KRS 65.664.) And, dispositive to this case, the individual defendants were "agents" of this employer and, thus, also met the statutory definition of "employer." (Title VII's definition of "employer" also includes "any agent of such a [political subdivision]." 42 U.S.C. § 2000e(b).) Therefore, Watts could sue both the employer and individuals for KCRA claims. As a result, Watts' IIED claim against the individual defendants was preempted by his KCRA claims against those same individual defendants.

Based on the foregoing, we hold Julie's IIED claim against Dr. Smith was subsumed by her KRS Chapter 344 claim for retaliation against Dr. Smith. Accordingly, we reverse Julie's IIED judgment.

III. Front Pay

Dr. Smith and the PLLC claim the trial court erred in awarding $16,640 in front pay to Julie. Dr. Smith and the PLLC cite no law to dispute the

propriety of the award.[11] Instead, their complaint revolves around how the front pay was calculated.

Front pay is the money an employee lost between the time of judgment and reinstatement of her job or in lieu of reinstatement. *Brooks*, 132 S.W.3d at 806. Whether front pay should be awarded and, if so, the amount, are issues for the trial court and not the jury. We review such awards for abuse of discretion. *Highlands Hosp. Corp. v. Preece*, 323 S.W.3d 357, 367 (Ky. App. 2010).

Julie presented evidence she earned $17.90 per hour, working 32 hours per week at the PLLC. At the time of trial, Julie worked for the Harlan County Health Department earning $16.30 per hour, working 40 hours per week. The trial court awarded Julie the difference between her wages at the PLLC and the Harlan County Health Department, based on a 40-hour work week, for five years.[12]

Dr. Smith and the PLLC complain the front pay was miscalculated by using a 40-hour work week, instead of a 32-hour work week. While the trial court can reduce front pay when the employee fails to mitigate damages by diligently

[11] Failure to cite any legal authority in support of an argument advanced on appeal is a grievous error that will likely result in waiver of the argument. *Bailey v. Bailey*, 399 S.W.3d 797 (Ky. App. 2013); *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).
[12] Dr. Smith and the PLLC does not dispute the five-year period used to calculate the front pay award.

seeking other employment, Julie testified she applied to several jobs after leaving the PLLC. She was foreclosed from some jobs, like working in the pediatric department at the local hospital, because Dr. Smith was one of the two pediatricians in the county and she would have inevitably had to have seen Dr. Smith attending to patients there. However, Julie presented proof that she diligently sought, and obtained, other employment after resigning from the PLLC.

The trial court acted within its discretion in awarding Julie $16,640 in front pay based on the yearly difference between her wages while employed by the PLLC and her current job. Thus, the front pay award is affirmed.

IV. Administration of Trial

For his final argument, Dr. Smith and the PLLC claim the trial judge prejudiced them by excessively interrupting Dr. Smith's testimony at trial. As an initial matter, Dr. Smith and the PLLC violated CR[13] 76.12(4)(c)(v) by making no reference to when, if ever, they made a request for a new trial or other relief in the underlying action for this alleged error. Dr. Smith and the PLLC cite no record to show they raised a concern with the trial judge that Dr. Smith was unable to fully testify at trial. Likewise, in none of the post-trial briefing does Dr. Smith and the PLLC complain that Dr. Smith's testimony was interrupted.

[13] Kentucky Rule of Civil Procedure.

The purpose of CR 76.12(4)(c)(v) is "to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal." *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990) (quoting 7 Bertelsman and Phillips, *Kentucky Practice*, CR 76.12(4)(c)(iv) [now (v)], Comment 4 (4th ed.1989PP)). When an appellant fails to comply with CR 76.12 with respect to a particular argument, an appellate court is free to disregard that argument, rather than strike the entire brief. *Dixon v. Commonwealth*, 263 S.W.3d 583, 587 n. 11 (Ky. 2008). However, the exercise of an appellate court's authority to strike an argument is discretionary. *Simmons v. Commonwealth*, 232 S.W.3d 531, 533 (Ky. App. 2007). We will not exercise our authority to strike so that we may address the merits of this argument.

A careful review of the record indicates the trial judge's management of trial was well within the bounds of permitted conduct. Dr. Smith and the PLLC's rights were not affected. Dr. Smith repeatedly rambled during his direct testimony, providing many superfluous details irrelevant to the question being asked. Early on, at the bench, Julie's counsel objected to Dr. Smith's meandering testimony noting he did the same thing during his deposition and she worried the jury would see her "jumping up all day long objecting." Dr. Smith's attorney explained that Dr. Smith is an "odd fellow." Finding this no excuse, the trial judge warned Dr. Smith's attorney to keep Dr. Smith "on point."

Despite this warning, Dr. Smith continued to drift. The trial judge would apologize to Dr. Smith for interrupting, but direct him to answer the question. Dr. Smith's own counsel would interrupt Dr. Smith to say: "let's not talk about this." After one hour of this type of testimony, the trial judge called the attorneys to the bench and asked Dr. Smith's counsel to "reign him in," as Dr. Smith was "the most non-responsive witness I've ever seen." Indicating the court was about to take its morning break, the trial judge requested Dr. Smith's counsel speak with his client during that time.

After the break, Dr. Smith continued to drift in his testimony discussing, *i.e.* his ex-girlfriend working for a shoe store in Lexington or Michael Jordan's injury when he played for the Chicago Bulls. At times, the trial judge interjected: "just answer the question, please." Lost in his own testimony, Dr. Smith would ask: "what was the question?"

Although the trial judge had to warn Dr. Smith to "just answer the question" several times, Dr. Smith testified for a full three hours. Any lack of cohesion in the telling of his story was due to Dr. Smith's own making. The trial judge kept his interruptions brief and neutral. During Dr. Smith's testimony, the trial judge only gave one admonition to the jury, which seemed to be for Dr. Smith's benefit. In response to the question of whether Dr. Smith did anything to "make it worse" for Julie, Dr. Smith testified: "I'm obviously making her

uncomfortable now, but she's asking for it." The trial court admonished the jury to disregard the phrase: "she's asking for it."

Also, the trial judge specifically reminded the jury to not infer anything from his words or gestures. For instance, on the first day of trial, the trial judge specifically told the jury: "anything I say is not evidence." And, before the first witness began testifying, the trial judge told the jury: "I'll be taking lots of notes up here. Don't pay any attention to me." He further advised the jury to not read into any facial expressions he may make, accidentally or otherwise. "Just listen to the witness."

Given the brief interruptions and the trial judge's specific instructions to the jury to only listen to the evidence, we conclude the trial judge did not prejudice Dr. Smith and the PLLC. If anything, the trial court was patient with Dr. Smith given Dr. Smith's own disrespect toward the court and jury. On the second day of trial, Dr. Smith kept the jury and judge waiting as he was late returning from lunch. During trial, Dr. Smith openly played on his cellular telephone. During his testimony, Dr. Smith continually referred to the office manager as the Glenn Close character from the movie, *Fatal Attraction*.

A judge does need not to be an "automaton or robot or mere umpire." *Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992). While a judge should leave the development of the case to the lawyers, a

judge "does not sit upon a bench as a silent and passive spectator of what is going on, but sits to administer the law and guide the proceedings before him." *Id.* In addition, the trial court needs to control the timing in the courtroom, which is what the trial judge here was doing. *See Couch v. Commonwealth*, 256 S.W.3d 7, 12 (Ky. 2008). A judge "may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion. Only when the judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial." *U.S. v. Hawkins*, 661 F.2d 436, 450-51 (5th Cir. 1981).

A trial judge has a large degree of discretion in conducting trial. Unless an abuse occurs, we do not interpose to control the exercise of such discretion. *Montgomery*, 836 S.W.2d at 416.

CONCLUSION

For the reasons stated above, the judgment of the Harlan Circuit Court is affirmed in part and reversed in part.

CLAYTON, CHIEF JUDGE, CONCURS

COMBS, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I dissent from the majority opinion only with respect to the issue of whether the IIED claim is subsumed and pre-empted by the KCRA claim. I

believe that *Wilson v. Lowe's Home Ctr*., 75 S.W.3d 229 (Ky. App. 2001), governs this issue and would clearly permit the IIED claim to proceed. Thus, I would affirm the ruling of the trial court and the jury verdict *in toto*.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE:
Sherif Guindi Knoxville, Tennessee	Cheryl U. Lewis Hyden, Kentucky