RENDERED: JUNE 14, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000610-MR

AMERICAN NATIONAL UNIVERSITY OF KENTUCKY, INC. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 11-CI-04922

COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, in his official capacity as
ATTORNEY GENERAL OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: American National University of Kentucky, Inc. ("National") appeals the Fayette Circuit Court's final judgment that it "willfully" violated the Kentucky Consumer Protection Act ("KCPA") by publishing false, deceptive, and

misleading statements on its website about its students' post-graduate employment rates. National contends the trial court erred by finding that it was liable for the actions of the company that created its website. National also argues the trial court erroneously defined "willful" under the KCPA, employed the wrong standard of proof, and abused its discretion by imposing a $20.00 civil penalty for every day the misleading employment figures remained on its website. For reasons stated below, we affirm most of the trial court's findings of fact and conclusions of law. However, we hold the trial court's "per day" method of calculating KCPA violations was an abuse of discretion. Hence, we affirm in part, reverse in part, and remand for a new penalty consistent with this opinion.

I. Background and Procedural History

National is a privately owned "career college" with six campuses in Kentucky offering programs designed to train students for specific jobs in an array of fields. National's target candidates are non-traditional students who are already employed but are seeking to improve their career prospects by completing a program offered by National.

National's accreditor requires it to collect and report data regarding its graduates' employment status. The accreditor specifically required National to calculate its "placement rate" by reporting if each graduate was either employed in their field of study; employed in a related field; employed out of their field of

study; unemployed; or not available for employment. National also calculated what it deemed an "employment rate" based on the percentage of its graduates who were employed. The "employment rate" did not distinguish between graduates who were employed in their field of study, a related field, or were employed out of their field of study. As a result, the employment rate was usually considerably higher than the placement rate reported to the accreditor. From January 2, 2008, to February 23, 2011, National posted the employment rate on the "Success Rates" page of its website. During this time period, National's website did not explain how this employment rate was calculated or disclose that it was higher than the placement rate reported to its accreditor. The "Success Rates" was "updated" on February 23, 2011, to include an explanation of how it was calculated. The employment rate was permanently removed from National's website on September 28, 2011.

The Attorney General, acting on behalf of the Commonwealth, sued National under the KCPA. The Complaint alleged that National "willfully" violated the KCPA by advertising false, misleading, and deceptive employment rates and was therefore subject to civil penalties under KRS[1] 367.990(2). The Attorney General sought the maximum civil penalty under the KCPA ($2,000 per violation) for every day the employment rate was posted on National's website.

[1] Kentucky Revised Statutes.

The Attorney General brought other claims under the KCPA, but they are not pertinent to this appeal.

Discovery commenced and National alleged that its website was created and controlled by employees for a company called National College Services, Inc. ("NCSI"). Although NCSI is a separate corporate entity ostensibly created to provide administrative, technological, and marketing services to National, it is wholly owned by Frank Longaker, who is the sole owner of National and serves as the president of both companies. Multiple employees for National and NCSI were deposed who alleged that NCSI employees were responsible for all decisions relating to the content and design of National's website, including the decision to publish graduate employment rates. However, NCSI's Executive Vice-President conceded that there was not a written contract between the two companies. Instead, they had "verbal agreement" based on "a definition of roles."

Both parties subsequently moved for summary judgment relating to National's liability for the actions taken by NCSI. National contended that the evidence showed NCSI was an independent contractor; therefore, it was entitled to summary judgment because all of the alleged KCPA violations were premised on actions taken by NCSI. The Attorney General moved for summary judgment on the grounds that the undisputed evidence showed NCSI was National's agent. The trial court found NCSI was National's agent because "the same individuals possess

the same level of control over both entities" and there existed "such a close business operation that the two entities do not even have a contract delineating the roles and obligations of each respective entity."

The trial court made three other pretrial rulings relevant to this appeal. First, it noted that the term "willful" was not defined under the KCPA. As a result, it employed the following definition provided by Black's Law Dictionary (10th ed. 2014):

> Voluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong. The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious, evil*, or *corrupt.*

(Emphasis original). Second, it rejected National's argument that the Attorney General had to prove a KCPA violation by clear and convincing evidence. The trial court concluded the ordinary standard of proof in civil cases, preponderance of evidence, applied to consumer protection actions. Third, it determined KCPA violations based on misleading or deceptive information published on the internet could be sanctioned on a "per day" basis, meaning National could be penalized $2,000 for everyday its employment rate remained online.

Following a ten-day bench trial, the trial court found the posting of the employment rate on National's website from January 2, 2008 to February 22, 2011,

was a willful violation of the KCPA. The trial court concluded the updated page existing from February 23, 2011 to September 28, 2011, also violated the KCPA, but the violation was not willful. The trial court imposed a civil penalty of $22,960.00, $20.00 for every day the misleading placement rate was posted online from January 2, 2008 to February 22, 2011. On appeal, National challenges the trial court's decision regarding its agency relationship with NCSI, the definition of "willful," the standard of proof in KCPA cases, and its per day method of calculating violations.

II. Agency Issue

The evidence regarding National's relationship with NCSI is not contradictory or conflicting; therefore, NCIS's status as either an independent contractor or National's agent is a question of law subject to *de novo* review. *Nazar v. Branham*, 291 S.W.3d 599, 606 (Ky. 2009).

A principal is liable for the negligent acts of its agent but generally is not held liable for the conduct of an independent contractor. *Id.* "An individual is the agent of another if the principal has the power or responsibility to control the method, manner, and details of the agent's work. If, however, an individual is free to determine how work is done and the principal cares only about the end result, then that individual is an independent contractor." *Id.* at 606-07 (internal citations omitted). Factors the court should consider include the following:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc., 91 S.W.3d 575, 579 (Ky. 2002). Although the "chief criterion" is the right to control the details of the work, no single factor is determinative. *Id.* at 580. Each case must be decided on its own facts. *Id.*

The following facts regarding the relationship between National and NCSI are not disputed. Frank Longaker is the owner and president of both

companies. There are no Board minutes for either company. From 2005 to 2012, the same individuals who served on National's Board simultaneously served on NCSI's Board. The two companies use the same software, which contains information about National's students. Employees for both companies can enter and extract information from this software. The signature lines in emails sent by NCSI's employees simply state "National College." In addition to the lack of a written contract between the two companies, the "definition of roles" that allegedly characterized their verbal agreement is not contained in any writing.

Despite the overlap of leadership, National argues the trial court erred by finding that NCSI was its agent because the evidence showed that National played no role in creating the website or posting the employment rate. Although that may be true, "the right to control, not the fact of control, is the relevant consideration." *Western Fire Truck, Inc. v. Emergency One, Inc.*, 134 P.3d 570, 575 (Colo. App. 2006). The commentary to the *Restatement (Second) of Agency* § 220, cmt. d (1958), explains that "the control or right to control needed to establish the relation of master and servant may be very attenuated." The commentary uses as an example a full-time cook who remains a servant although it is understood the employer will exercise no control over the cooking. *Id.*

Thus, the trial court correctly found that National's and NCSI's ownership structures, as well as the lack of a formal contract, gave National the

right to control NCSI, even if National elected not to assert that control in matters regarding its website. The other factors relevant to an agency analysis are either unhelpful to National or weigh in favor of a finding that NCSI was National's agent. For example, no evidence has been provided that a significant degree of skill was required for NCSI's services. National also provided the software for NCSI's work, and it is difficult to distinguish the difference between the business of National—administering "educational operations" for its Kentucky campuses—from the purported business of NCSI—providing administrative, technological, and marketing services for those campuses.

National also complains the trial court's finding that NCSI was National's agent disturbed the legal fiction of corporate separateness. We disagree. The Attorney General is not attempting to use the assets of NCSI to collect on a judgment against National, or vice versa. The trial court held only that National was vicariously liable for NCSI's actions. Accordingly, we affirm the trial court's finding that NCSI was National's agent; therefore, it is liable for the contents of its website, even if it was created and maintained by employees for NCSI.

Our opinion should not be construed as holding that the use of an independent contractor is a defense under the KCPA. The determination of the agency issue simply makes it unnecessary to determine whether National would be liable even if NCSI was an independent contractor. Whether a defendant has a

non-delegable duty under the KCPA to ensure its website is not "false, misleading, or deceptive" is a question that is not answered by this opinion.

III. Kentucky Consumer Protection Act

The KCPA makes unlawful "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade[.]" KRS 367.170(1). Courts are to give the KCPA "the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts." *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 821 (Ky. 1988). The trial court's pretrial rulings regarding the definition of "willful" under KCPA, the proper standard of proof, and the per day method of calculating violation are issues of statutory interpretation. These are questions of law reviewed *de novo*. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011).

a. Willful Violation

The KCPA permits a court to impose civil penalties after it finds a person has "willfully used a method, act, or practice declared unlawful by KRS 367.170[.]" KRS 367.990(2). The term "willful" is not defined under the KCPA. "Where no specific definition is provided for terms contained in a statute, Kentucky law instructs that words of a statute shall be construed according to their common and approved usage[.]" *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557, 559 (Ky. 2010) (internal quotation marks omitted). Like the trial

court, this Court has previously endorsed the definition of "willful" provided in Black's Law Dictionary when the statute in question does not define the term. *Jones v. Dougherty*, 412 S.W.3d 188, 193 (Ky. App. 2012).

Nonetheless, National argues that a willful violation under the KCPA requires evidence of "intent to deceive or injure consumers." However, "it is settled that a showing of evil purpose or criminal intent is not a necessary prerequisite to a determination of statutory liability in a civil proceeding, and that a 'willful' statutory violation may occur when the conduct in question is simply marked by careless disregard whether or not one has the right so to act." *Couch v. Natural Resources and Environmental Protection Cabinet*, 986 S.W.2d 158, 163 (Ky. 1999) (internal quotation marks omitted). The Kentucky Supreme Court has also already held that proof of actual deception is not necessary for a KCPA violation. *Telcom Directories, Inc. v. Commonwealth ex rel. Cowan*, 833 S.W.2d 848, 850 (Ky. App. 1991). National's argument that intent to deceive is necessary for a KCPA violation has no support in Kentucky law.

In the alternative, National cites *Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538 (Ky. 2013), for the argument that a willful violation of the KCPA requires proof of intentional or, at the very least, grossly negligent conduct. In *Keaton*, the appellants argued a funeral home committed a "clear violation" of the KCPA by failing to "provide the contractually agreed upon

services of burying their mother in the correct plot[.]" *Id.* at 545. In affirming the trial court's award of summary judgment in the funeral home's favor, we held that "[n]ot every failure to perform a contract is sufficient to trigger application of the Consumer Protection Act. The statute requires some evidence of 'unfair, false, misleading or deceptive acts' and does not apply to simple incompetent performance of contractual duties unless some element of intentional or grossly negligent conduct is also present." *Id.* at 546 (internal quotations omitted). Thus, *Keaton* addressed when failing to provide contractual services could rise from a simple breach of contract case to a KCPA violation. It did not hold that KCPA actions based on misleading advertising require proof of intentional or grossly negligent conduct. Accordingly, we hold the trial court correctly found that a misleading advertisement can constitute a willful violation of the KCPA where there is proof of "a conscious wrong or evil purpose on part of the act, or at least inexcusable carelessness whether the act is right or wrong."

b. Burden of Proof

National argues the Commonwealth should have been required to prove a willful KCPA violation by clear and convincing evidence. It contends *Aesthetics in Jewelry, Inc. v. Brown, ex rel. coexecutors,* 339 S.W.3d 489 (Ky.

App. 2011), is dispositive.[2] In *Aesthetics in Jewelry*, a jeweler was sued by a merchant's estate under three theories of liability: fraud, negligent misrepresentation, and an alleged violation of the KCPA. *Id.* at 490. On appeal, the estate argued the trial court erred by denying it a directed verdict on all of its claims. *Id.* at 495. This Court then affirmed the trial court, holding there was insufficient evidence the jeweler made material misrepresentations to the merchant. *Id.* at 496. The Court then stated, without explanation, that the burden of proof for all three theories of liability was clear and convincing evidence. *Id.* at 495. The Commonwealth contends the language in *Aesthetics in Jewelry* regarding the burden of proof was mere dicta. It also argues that implying a higher evidentiary burden would run contrary to the Kentucky Supreme Court's directive to liberally construe the KCPA to accomplish its remedial purpose. We agree that *Aesthetics in Jewelry*, to the extent it imposed a clear and convincing evidence standard of proof, was contrary to the Kentucky Supreme Court's directives regarding the KCPA.

Although many statutes[3] explicitly impose a clear and convincing evidentiary standard, the KCPA does not specify a party's burden of proof. "In

[2] National requested the trial court employ a clear and convincing evidence standard of proof, but never brought *Aesthetics in Jewelry* to the trial court's attention. The Attorney General does not contend that National's argument regarding the proper standard of proof was not preserved for appellate review.

[3] *See, e.g.*, KRS 397.1004; KRS 202A.0819.

civil actions, proof by a preponderance of the evidence normally determines the rights of the parties." *Woods v. Commonwealth*, 142 S.W.3d 24, 43 (Ky. 2004) (internal quotations marks omitted). "[T]o adjudge differently in this class of cases would be disregarding a plain elementary principle applicable to the trial of civil causes." *Aetna Ins. Co. v. Johnson*, 74 Ky. 587, 593 (1874). However, due process requires a heightened standard of proof in civil cases when the individual interests at stake are "particularly important" and "more substantial than mere loss of money." *Woods*, 142 S.W.3d 24, 43 (quoting *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 1808, 60 L. Ed. 2d 323 (1979)). Situations which require proof by clear and convincing evidence include termination of parental rights, unfitness of a natural parent for custody of a child, proof of lost will, and fraud. *Id.* at 44.

Aesthetics in Jewelry correctly stated the standard of proof for common-law fraud. *Pezzarossi v. Nutt*, 392 S.W.3d 417, 419 (Ky. App. 2012). But that heightened standard is based on the legal presumption of innocence and honesty. *Goerter v. Shapiro*, 254 Ky. 701, 72 S.W.2d 444, 445 (1934). The Kentucky Supreme Court has already held that evidence can be sufficient to find a KCPA violation even if it would not have supported a verdict for common-law fraud. *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 905 (Ky. 2008). For that reason, other jurisdictions have refused to impose a higher standard of proof for

actions brought under their consumer protection statutes. *See, e.g.*, *Dunlap v. Jimmy GMC of Tucson, Inc.*, 666 P.2d 83, 88-89 (Ariz. App. 1983); *Ray v. Ponca/Universal Holdings, Inc.*, 913 P.2d 209, 212 (Kan. App. 1995). Moreover, National has not cited, and we have not found, any cases suggesting that the interest at stake under the KCPA—injunctions and monetary sanctions—are particularly important under Kentucky law and more substantial than mere loss of money. *See State by Humphrey v. Alpine Air Products, Inc.*, 500 N.W.2d 788, 792 (Minn. 1993) (holding that the preponderance of the evidence standard for claims brought under consumer protection statutes comports with constitutional guarantees of due process). To the extent that *Aesthetics in Jewelry* required proof by clear and convincing evidence for KCPA claims, it did so contrary the Kentucky Supreme Court's directives relating to the statute's remedial purpose, as well as principles applicable to the trial of civil causes generally. We therefore decline to follow it as binding precedent on the correct standard of proof and affirm the trial court's conclusion that KCPA claims need only be proven by a preponderance of evidence.

c. Per Day Sanction

The trial court found that the posting of the employment rate from January 2, 2008 to February 22, 2011, was a willful KCPA violation and imposed a sanction of $20.00 per day. The amount of civil sanctions imposed by a trial court

is reviewed for an abuse of discretion. *Large v. Oberson*, 537 S.W.3d 336, 339 (Ky. App. 2017). "A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles." *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007).

KRS 367.990(2) provides that after a court has found a willful KCPA violation, then "the Attorney General, upon petition to the court, may recover, on behalf of the Commonwealth, a civil penalty *of not more than two thousand dollars ($2,000) per violation*[.]" Although this subsection does not explicitly permit a court to impose sanctions on a per day basis, subsection (8) of KRS 367.990, states that "[i]n addition to the penalties contained in this section, the Attorney General, upon petition to the court, may recover, on behalf of the Commonwealth a civil penalty of not more than the greater of five thousand dollars ($5,000) or two hundred dollars ($200) *per day for each and every violation* of KRS 367.175." (Emphasis added). Moreover, other statutes imposing civil penalties for various offenses explicitly state each day a violation occurs shall constitute a separate offense. *See, e.g.*, KRS 39E.990; KRS 61.8746. The legislature was clearly aware of its ability to authorize sanctions on a "per day" basis in excess of $5,000. However, it declined to do so and expressly placed limits on the monetary sanction that can be imposed per violation. "Where a statute is intelligible on its face, the courts are not at liberty to supply words or

insert something or make additions however just or desirable it might be to supply an omitted provision." *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415, 418 (Ky. 2006). Accordingly, there is no basis in the KCPA for a trial court to impose sanctions in excess of the amounts provided for in KRS 367.990 by concluding the violation stretched over a certain amount of days.

The sanctions imposed on National is tenable only if a separate consumer protection violation occurs every day a defendant fails to remove or correct a false or misleading advertisement it published online. The Attorney General has not cited a case from any jurisdiction reaching such a conclusion. Instead, the Attorney General cites cases in which defendants were sanctioned every time a deceptive or misleading advertisement appeared in a newspaper or aired on a television or radio program. *See, e.g.*, *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 974-75 (Colo. 1993); *State v. Menard, Inc.*, 358 N.W.2d 813, 815 (Wisc. App. 1984). In those cases, the defendants would have made a separate and conscious decision to allow the publication to run each time. That is, a separate act of misfeasance. The same is not necessarily true for information that a defendant fails to remove from the internet. The fact that the employment rate remained on National's website for a certain length of time was not, on its own, grounds for the trial court to find multiple "willful" KCPA violations.

The trial court instead relied on a policy argument when rationalizing its decision to impose sanctions on a per day basis. Recognizing the dearth of cases dealing with misleading information published online, the trial court concluded "some creativity and flexibility" was necessary when crafting a remedy. As it explained,

> This [per day] approach places the emphasis on the entity that published the information while also recognizing that the publisher may not skirt liability by hiding behind the theory of a single publication, consistent with the policy behind the KCPA of penalizing and deterring improper deceptive behavior.

The trial court's reasoning adroitly acknowledges the challenge of protecting Kentucky consumers from "false, misleading, or deceptive" information appearing on the internet. Still, courts cannot add language intentionally omitted from a statute on the grounds it better accounts for technology the legislature did not anticipate when enacting legislation. Accordingly, we hold the trial court abused its discretion by imposing a sanctioned based on the number of days the willfully misleading employment rate was available on National's website.

Although we can find no support for the trial court's "per day" method of calculation violations, we are not convinced by National's argument that the evidence in this case supported, at most, the finding of a single KCPA violation. We agree with the trial court that some creativity is permitted in determining what constitutes a violation in order to effectuate the legislature's

intent that the KCPA "in the hands of the Attorney General, be a flexible and effective means of combating abusive trade practices however novel their forms or well disguised their sources." *Commonwealth ex rel. Chandler v. Anthem Ins. Companies, Inc.*, 8 S.W.3d 48, 55 (Ky. App. 1999). Such flexibility is necessary because consumer protection statutes are intended to provide an effective deterrent for any type of violation. *See U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 231, 95 S. Ct. 926, 932, 43 L. Ed. 2d 148 (1975) ("The legislative history also makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation."). The only limitation upon a trial court is that that every KCPA violation must be based on separate, affirmative act or decisions by the defendant.

We therefore provide the following guidance on how trial courts may impose sanctions "per violation" under the KCPA for material published online. We agree with National that a parallel can be drawn between KCPA violations relating to online material and defamation actions based on online material. In the context of internet-based defamation claims, federal courts have rejected arguments that a new cause of action occurs every day that defamatory material remains online. Instead, federal courts continue to follow the "single publication" rule. Under this rule, the original publication of online material constitutes a single

cause of action. However, these courts have recognized that the single publication rule is not applicable when a defendant edits or adds to material published online:

> An exception to the single-publication rule is the doctrine of republication. Republishing material—including publishing a second edition or a book or periodical, editing and republishing defamatory material, or placing it in a new form—resets the statute of limitations. Restatement (Second) of Torts § 577A cmt. c, d. This exception provides the plaintiff with a remedy where the defendant edits and retransmits the defamatory material, or distributes the defamatory material for a second time with the goal of reaching a new audience. *E.g.*, *Firth*, 775 N.E.2d at 466–67. The narrow question in this case is whether posting new information to a defamatory website resets the statute of limitations under the republication doctrine. As the Supreme Court of Kentucky has not spoken on this issue, the court relies on persuasive authority from other jurisdictions.
>
> The mere act of editing a website to add unrelated content does not constitute republication of unrelated defamatory material that is posted on the same website. *Firth*, 775 N.E.2d at 466. Similarly, mere technical changes to a website, such as changing the way an item of information is accessed, is not republication. *Churchill*, 876 A.2d at 317, 319. These rules are consistent with a public policy that encourages the free transmission of information and ideas. *See*, *e.g.*, *Mitan*, 243 F.Supp.2d at 721; *Firth*, 775 N.E.2d at 467. In contrast, where substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred. *Cf. Firth*, 775 N.E.2d at 466; *Churchill*, 876 A.2d at 319–20. To hold otherwise would give a publisher *carte blanche* to continue to publish defamatory material on the Internet after the statute of limitations has run in the first instance.

In re Davis, 347 B.R. 607, 611-12 (W.D. Ky. 2006). Although the single publication rule is primarily concerned with determining when the statute of limitations should begin to run, it recognizes that a defendant may commit additional acts of misfeasance by editing and adding to online content. It also acknowledges that the offending party in a case such as this made a conscious decision to violate the KCPA by editing its website and electing to keep false and misleading statements available online. This approach goes to the heart of the penalties found in the KRS 367.990 and "the broad protection the KCPA provides to consumers according to its stated purposes and our case law." *Craig & Bishop, Inc.*, 247 S.W.3d at 904. Accordingly, we hold that in addition to the original publication, additional KCPA violations may be found whenever a defendant edits or adds substantive material to a website that is related to the information originally found to run afoul of the KCPA.

We note that the Attorney General's motion for summary judgment alleged that hundreds of edits, publications, or new items were created on National's website in the folder containing the "Success Rates" subfolder during the time period in which the trial court found National's employment rate was published in willful violation of the KCPA. Whether these changes to National's website were related to the misleading employment rate, and constituted willful violations of the KCPA, are factual matters to be decided by the trial court. On

remand, the trial court may request the parties produce additional evidence relating to the number of times National edited its website from January 2, 2008 to February 22, 2011. The trial court should then make a factual finding regarding how many of the edits added or removed substantive material relating to the willfully misleading employment rate. The number of such edits shall constitute the number of KCPA violations committed by National. The amount of money National will be fined for each separate violation shall be left to the trial court's discretion.

IV. Conclusion

We affirm the trial court's finding that NCSI was National's agent. We also affirm the definition of "willful" it employed for KCPA claims, as well as the use of preponderance of evidence as the correct standard of proof. Accordingly, we affirm the finding that National willfully violated the KCPA. However, we conclude the trial court abused its discretion by employing a "per day" method of calculating KCPA violations. Accordingly, we vacate the portion of the trial court's judgment relating to the amount of sanctions imposed. The case is remanded to the Fayette Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Albert F. Grasch, Jr.
James L. Thomerson
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Albert F. Grasch, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Leah Cooper Boggs
Todd E. Leatherman
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Todd E. Leatherman
Frankfort, Kentucky