

SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000244-D

FILED

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SUPREME COURT CLERK

VERONICA JEWELL

APPELLANT/MOVANT

VS.

KENTUCKY SCHOOL BOARD ASSOCIATION

APPELLEE/RESPONDENT

APPEAL FROM DECISION OF THE COURT OF APPEALS,
ACTION 2006-CA-001995-MR. and
WHITLEY CIRCUIT COURT ACTION 04-CI-0006

I hereby certify that the Brief for Amicus Curiae, Kentucky Justice Association, has been served this 21st day of November, 2008, by first class mail, postage prepaid, on the following, in accordance with CR 76.12 (5) and CR 76.12(6).

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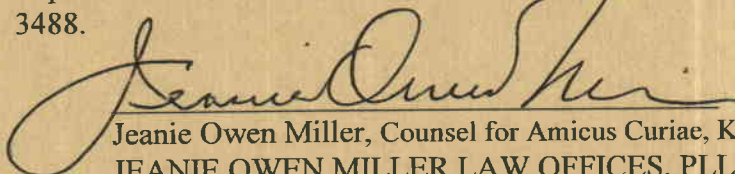
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I further certify that I have not withdrawn the record on appeal. I have on this date mailed an original and nine copies via the U.S. Mail, to the Hon. Susan Stokley Clary, Clerk of the Supreme Court, Room 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601-3488.



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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	i
SOCIAL POLICY QUESTION: Who should get the benefit: the injured worker or the tortfeasor?	1

TABLE OF AUTHORITIES

<u>O'Bryan v Hedgespeth</u> , 892 S.W.2d 571 (Ky. 1995)	1
<u>Baptist Healthcare Systems, Inc. v. Miller</u> , 177 S.W. 3d 676 (Ky. 2005)	1
<u>Krahwinkel vs. Commonwealth Aluminum Corp.</u> , 183 S.W.3d 154 (Ky., 2005)	2,3,4,5
<u>Cincinnati Insurance Company vs. Samples</u> 192 S.W.3d 311 (Ky., 2006)	2
<u>G & J Pepsi-Cola Bottlers, Inc. vs. Fletcher</u> , 229 S.W.3d 915 (Ky. App., 2007)	2
<u>AIK Selective Self Insurance Fund vs. Mary E. Minton</u> , 192 S.W.3d 415, 418 (Ky., 2006)	4
KRS 342.700	2,3,4,5

SOCIAL POLICY QUESTION
WHO SHOULD RECEIVE THE BENEFIT:
THE INJURED VICTIM OR THE TORTFEASOR?

The overarching question in the case below is one of social policy. The courts in Kentucky for many years have held that a negligent wrongdoer should not get the benefit of collateral source payments made to an injured plaintiff. See O'Bryan v Hedgespeth, 892 S.W.2d 571 (Ky. 1995) Additionally, the courts have found that if indeed there is any "windfall", as a result of a double recovery, that windfall should not inure to the culpable wrongdoer. See Baptist Healthcare Systems, Inc., v. Miller, 177 S.W.3d 676 (Ky. 2005) where this court discussed this longstanding rule:

First, the wrongdoer should not receive a benefit by being relieved of payment for damages because the injured party had the foresight to obtain insurance. Second, as between the injured party and the tortfeasor, any so-called windfall by allowing a double recovery should accrue to the less culpable injured party rather than relieving the tortfeasor of full responsibility for his wrongdoing. Third, unless the tortfeasor is required to pay the full extent of the damages caused, the deterrent purposes of tort liability will be undermined. Id.

Recent court rulings have eroded these longstanding rules against rewarding the tortfeasor when the injured party receives payments for loss of income, disability or medical expenses from a collateral source. The case below, if allowed to stand, would add yet another astonishing result to the already confusing, convoluted and unjust state of the law as it relates to injured workers who seek redress against a 3rd party tortfeasor.

Should the negligent tortfeasor receive the windfall benefit from a jury's award of damages that resulted in "double recovery"? Despite previous opinions to the contrary, this

Court, in a sharply divided decision, answered “yes” in Krahwinkel v Commonwealth Aluminum Corp., 183 S.W.3d 154 (Ky. 2005). The train wreck of cases that have followed have resulted in ongoing and misplaced statutory interpretation.

In Krahwinkel, *supra*, this Court held that KRS 342.700 was to be interpreted as meaning that if an injured worker, after receiving workers compensation benefits, pursued the 3rd party wrongdoer, any duplication of damages awarded by the jury (if not pursued by the workers compensation payor) **would be credited to the wrongdoer**. There is some dicta in Krahwinkel to suggest that if the workers compensation carrier assigned their statutory subrogation to the injured worker then the wrongdoer would not receive credit for those assigned payments.¹

The Krahwinkel progeny of cases have resulted in one miscarriage of justice after another. See Cincinnati Insurance Co. v. Samples, 192 S.W.3d 311 (Ky. 2006) where this Court concluded that if an injured worker cannot recover damages duplicating his workers compensation benefits from the wrongdoer, he cannot recover those same damages from the UIM carrier. But also see also G&J Pepsi-Cola Bottlers, Inc. v. Fletcher, 229 S.W.3d 915 (Ky.App. 2007). These erroneous statutory interpretations have resulted, as predicted, in unreasonable, unworkable and ultimately, unjust results in 3rd party tort claims when a workers compensation claim is applicable pursuant to KRS 342.700.

¹ That is not to say that the employer/insurer could not assign its subrogation rights to the worker, as was done Weinberg v. Crenshaw, 896 S.W.2d 22 (Ky.App.1995). However, there was no assignment in this case — only a decision by Intech, for whatever reason, to forego its subrogation rights.

The case at bar case presents the illogical, although predictable, outcome of the Krahwinkel decision. Justice Scott in his well reasoned dissent, joined by two other justices, noted:

In dissenting, I would ask how would an assignment of an employer/insurer's "subrogation rights" to the Appellant make any difference in this instance (as suggested), since the logic of the majority opinion gives pre-eminence to the language of KRS 342.700(1), which states "[b]ut, he shall not collect from both," and then allows the defendant/obligor to "offset" the items subject to subrogation—since they weren't claimed by the subrogor (pursuant to the compensation settlement). This logic totally ignores the very next part of KRS 342.700(1), **which gives the right to prevent any "double recovery" to the specific entities named therein who "[p]aid the compensation, or having become liable therefore, may recover it." Under no stretch of the imagination is the Appellee one of the named entities.** Moreover, there was a settlement agreement in this case, between the Appellant and the employer (through its compensation carrier), which clearly envisioned that the Appellant would get the benefits of the subrogation items, even though no specific written assignment was prepared or executed.

The civil courts and administrative tribunals of this Commonwealth depend on "settlements" as much to manage and alleviate their dockets as do our criminal courts on "plea bargains." Undue interference with these mechanisms depletes our resources and ultimately redounds to the detriment of our citizens. The settlement between the Appellant and the employer/insurer met the settlement goals set by each and was acceptable to the Board; that is until this "stumbling block." As pointed out by Appellant's counsel at oral arguments—had the majority opinion been law at the time—there would have been no settlement to start with! This is the wrong way to go to get to the right place. (Emphasis added) Krahwinkel, supra, J.Scott dissent joined by CJ Lambert and J Wintersheimer

In the case below the injured worker, through very competent legal counsel, did everything she could to protect her legal rights. She entered into a settlement agreement in her contested workers compensation claim and thereafter pursued the tortfeasor. What she bargained for was her right to be compensated in full in a tort action, strapped with all of the attenuating risks and expense of a jury trial - including the risk of a zero verdict. As

part of her workers compensation settlement, she negotiated a lump sum payment, out of which she paid collateral medical payments, abandoned several statutory rights including vocational retraining, her right to reopen etc. in exchange for the **assignment** of those benefits.

What she would receive, if this Court of Appeals decision is upheld, is a jury verdict that will be **offset** by the workers compensation payments (despite the assignment), a verdict that will be **offset** by the \$20,000.00 BRB (despite the denial of payment of those benefits - rendering them not "payable") and the **offset** of the \$25,000.00 liability coverage of the tortfeasor (despite the UIM carrier not substituting those benefits and thereby protecting its subrogation claim against the tortfeasor per KRS 304-39 *et.seq.*) and **no credit** for attorneys fee and expenses (despite KRS 342.700(1) and **AIK Selective Self-Insurance Fund v. Minton** 192 S.W.3d 415 (Ky. 2006)).

What the injured workers of the Commonwealth of Kentucky will be left with, if this decision and its reasoning is allowed to stand, is essentially no recourse when a 3rd party wrongdoer injures him/her while in the scope of his/her employment. Ironically, the employers and workers compensation obligors will also suffer, given that this result will preclude those entities from the benefits of KRS 342.700 and any "consideration" to offer an injured worker in settlement negotiations. Moreover, the public policy codified in KRS 342.700, and the "deterrent purposes of tort liability will be undermined."

As predicted and well stated in Chief Justice Lambert's dissent in **Krahwinkel**;

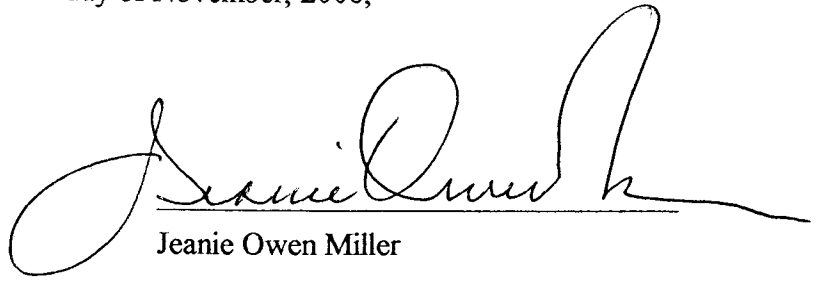
Clearly KRS 342.700(1) is for the benefit of employers or their workers compensation carriers to permit them to recover sums the law requires them to pay as a result of the fault of a third party. Its purpose is to make whole the workers' compensation carrier by reimbursing it and imposing the actual cost on the actual tortfeasor for the tortfeasor's share of the workers' compensation benefit paid. The entire premise of the Workers Compensation Act is to protect employees by ensuring immediate payment for injuries sustained while in the course and scope of employment. Though its purpose is to guarantee payment without considerations of the fault of the employer, it does not circumscribe an injured worker's legitimate tort claim against a third-party tortfeasor.

Here the majority reaches an unreasonable result by turning the statute on its head and allows the **wrongdoer a windfall** (emphasis added) Krahwinkel, *supra* at 164, dissent CJ Lambert in which J Scott and J Winterscheimer join.

The innocent injured workers of the Commonwealth deserve the benefits statutorily enacted by the Kentucky General Assembly. Being able to fully recover for the damages caused by the wrongdoer puts the costs of those damages squarely where they belong, the with tortfeasor. This case and the Krahwinkel line of cases usurps the rights of not only the injured worker but the employer of that injured worker. It rewards the wrongdoer and extracts any reason to attempt to collect damages as envisioned in the statute. Additionally, it removes any incentive to settle workers compensation claims - indeed making it impossible for an injured worker to retain those damages rightfully awarded to him by a jury.

This Court must right this wrong and clarify the law. KJA respectfully requests that this honorable Court answer the questions posed by this case – who should get the benefit, the injured worker or the negligent wrongdoer?

Respectfully submitted, this the 21st day of November, 2008,

A handwritten signature in cursive script, reading "Jeanie Owen Miller", written over a horizontal line.

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