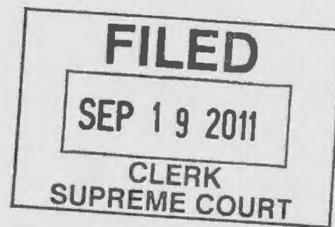

Supreme Court of Kentucky

DOCKET NO. 2010-SC-000430

COURT OF APPEALS CASE NOS. 2007-CA-002112 AND 2007-CA-002177

STEVEN H. KEENEY — **APPELLANT**

v.

On Appeal from the Jefferson Circuit Court
Division 6, Honorable Martin McDonald, Judge
Case No. 06-CI-001717

BRENDA C. OSBORNE;
CAROLINA CASUALTY INSURANCE COMPANY;
AND MONITOR LIABILITY MANAGERS, INC. — **APPELLEES**

REPLY BRIEF FOR APPELLANT

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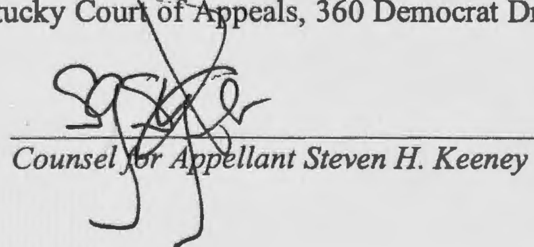
CERTIFICATE OF SERVICE

It is hereby certified that a copy of this Reply Brief for Appellant was sent via First Class, U.S. Mail this 16th day of September, 2011 to: Lee E. Sitlinger, Sitlinger, McGlincy & Theiler, 370 Starks Building, 455 South Fourth Ave., Louisville, KY 40202; Douglas C. Ballantine, Amy Olive Wheeler, and J. Kent Durning, Stoll Keenon Ogden PLLC, 500 West Jefferson St., Ste. 2000, Louisville, KY 40202; Hon. Martin McDonald, Judge, Jefferson Circuit Court, Division 6, Jefferson County Judicial Center, 700 West Jefferson St., Louisville, KY 40202; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



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INTRODUCTION

This appeal (and the companion appeal, No. 000397) present the fundamental errors that permeated this trial, producing a verdict that rests on a complete absence of proof. Black letter law imposed on Osborne the burden of proving causation – by proving the airplane pilot's negligence in a trial-within-a-trial – and resulting damages. She did neither. She did not call a single witness with personal knowledge of the accident, relying instead upon an attorney/expert who did no investigation, who relied solely upon an inadmissible NTSB report and still could not explain the cause of the accident. Her proof of purported damages to personal property was similarly baseless.

This abject failure of proof warranted a directed verdict for Keeney. Instead, the trial court's first erroneous instruction – requiring no finding of the pilot's negligence in the case-within-a-case – mirrored the absence of evidence. Combined with other erroneous instructions – including an instruction permitting recovery for emotional distress in the complete absence of physical contact – the trial court's errors resulted in a verdict against Keeney that must be vacated. Osborne's newly minted argument for shifting the burden of proof to Keeney by invoking *res ipsa loquitur* for the first time on appeal is telling, but was not preserved for consideration by appellate courts.

Those errors were compounded by giving a negligent misrepresentation instruction – disingenuously mislabeled by Osborne as "Fraud and Deceit" – erroneously allowing punitive damages for ordinary negligence.

Keeney was entitled to judgment n.o.v., and this Court should vacate the judgment and direct entry of judgment dismissing all claims against Keeney.

ARGUMENT

I. Because Osborne completely failed to carry her burden of proving liability or damages in her underlying case against the airplane pilot, Keeney was entitled to a directed verdict at trial.

Because the alleged malpractice was a failure to file the underlying lawsuit before the statute of limitation expired, Osborne had the burden of proving that she would have obtained a recovery against the pilot in the underlying lawsuit, had that claim been timely filed. Otherwise, the untimely filing was not the proximate cause of any damages to Osborne. [1] But it is undisputed that the jury instructions in this case required no findings, at all, in the trial-within-a-trial. At a minimum, the erroneous jury instructions entitle Keeney to a new trial.[2]

But, more importantly, Osborne failed to carry her burden of proof on either liability or damages in her underlying claim against the pilot. She did not call a single fact witness to either the crash or the allegedly negligent conduct of the airplane pilot before takeoff. Instead, she relied upon the testimony of a lawyer called as an expert witness on the pilot's alleged negligence. Mr. Hixson conceded that he had done no investigation, nor any witness interviews.[3] He based his testimony solely upon the content of an NTSB report which was not admitted into evidence, itself, because 49 U.S.C. § 1154(b) prohibits the "use" of such

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[1] "[E]very malpractice action does not carry with it a right to monetary judgment. It is the law that a malpractice action against an attorney cannot be established in the absence of a showing that his wrongful conduct has deprived his client of something to which he would otherwise have been entitled." *Mitchell v. Transamerica Ins. Co.*, 551 S.W.2d 586, 588 (Ky. App. 1977).

[2] *See Ford Motor Co. v. Fulkerson,* 812 S.W.2d 119, 124 (Ky. 1991).

[3] VR No. 4: 08/21/07; 04:04:42-04:05:15. Moreover, Osborne's claim that the admissibility of Hixson's testimony, including his testimony about the "ultimate issue" at trial, was not challenged on appeal is simply false. Keeney has directly challenged Hixson's testimony. *See* Keeney's Appellant Brief, pp. 9-10; 30-31 and n. 96. Admissibility aside, accepting Hixson's testimony – which conceded his lack of investigation and inability to identify a cause of the crash – as true, there is still no proof of the pilot's negligence or gross negligence.

reports in civil litigation.[4] And Hixson was unable to determine the cause of the crash, conceding that the plane crashed "for reasons that cannot possibly be explained."[5] On this abject failure of proof, Keeney's motion for directed verdict should have been granted.[6]

In response, Osborne argues that a trial-within-a-trial is not required in a legal malpractice case alleging expired limitations.[7] Indeed, she argues that "little, if any evidence"[8] of liability in the underlying case is necessary to carry her burden of proof, and that "[i]t should be sufficient only for her to prove that she was harmed by his [Keeney's] negligence and the amount of damages comprising that harm."[9]

Like her expert, Osborne's brief admits that the cause of the airplane crash was "unexplained."[10] Yet Osborne asserts in her next sentence: "Uncontroverted evidence contained in the NTSB investigator's factual report provided ample support for the

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[4] Mr. Hixson's testimony should have been excluded as being based on the NTSB report, for which "any use" is prohibited by 49 U.S.C. § 1154(b). RA at 1335-1349, Motion in Limine, 7/23/07; RA at 1725-1730, Opinion & Order, 8/13/07, copy attached as Appendix B to Keeney's Appellant Brief.

[5] VR No. 4: 08/21/07; 01:57:08-01:57:23. Hixson's testimony is analyzed in detail in Keeney's Brief for Appellee in Case No. 2010-SC-000397 (the companion case), pp. 18-23.

[6] *See Carter v. Coalfield Lumber Co.,* 331 S.W.3d 271 (Ky. App. 2010).

[7] Osborne argues that *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. App. 1978) is not supportive of Keeney's position (p. 20) when, in fact, *Daugherty* was a missed statute of limitations case in which the jury was given explicit instructions requiring specific findings in the underlying medical malpractice case-within-a-case, – which is *exactly* the instruction Kenney tendered to the trial court. *See* also Keeney's Appellant Brief at pp. 24-25 and n. 82. Conversely, Osborne contends that the "instructions in this case . . . were identical to the instructions recommended . . ." in *Equitania Ins. Co. v. Slone & Garrett*, P.S.C., 191 S.W.3d 552 (Ky. 2006) Osborne's Appellee Brief, p. 18. But *Equitania* was not a missed statute of limitations case. *See* Keeney's Appellant Brief, pp. 24-25. The *Equitania* Court's approval of the attorney negligence instruction does nothing to suggest that proof of the underlying case is not required in Kentucky – especially in a missed statute of limitations case. In *Chappell v. Kuhlman Elec. Corp.*, 304 S.W.3d 8 (Ky. 2009), which was also not a missed statute of limitations case, the Kentucky Supreme Court determined that because the plaintiff failed to meet her burden of proof by showing she would have prevailed in the underlying case absent the attorneys' alleged negligence, summary judgment in favor of the attorneys was proper. Indeed, the better practice is to bifurcate the trial-within-a-trial from the legal malpractice trial. *McMurtry v. Wiseman,* 237 F.R.D. 167 (W.D. Ky. 2006).

[8] *See* Osborne's Appellee Brief, p. 12.

[9] Osborne's Appellee Brief, p. 21. Osborne's assertion (Osborne's Appellee Brief, pp. 1-2) that all inferences on appeal should be drawn in her favor due to the jury verdict begs the question, because much of this appeal centers around erroneous jury instructions, which are presumed to be prejudicial error in Kentucky. *McKinney v. Heisel,* 947 S.W.2d 32 (Ky. 1997); *Drury v. Spalding*, 812 S.W.2d 713, 717 (Ky. 1991).

[10] Osborne's Appellee Brief, p. 13.

conclusion that [sic] airplane pilot/owner was not only negligent but grossly negligent."[11] Osborne clearly implies that this "conclusion" was reached by the NTSB investigator, but that assertion is untrue. The NTSB Factual Report on which Hixson relied[12] is a mundane recitation of the agency's investigation that makes no conclusions, at all, about the cause of the plane crash. Because federal law required that report to be excluded from evidence, the only evidence Osborne offered was Hixson's "expert testimony," which conceded that the plane crashed "for reasons that cannot possibly be explained."[13]

Admitting her failure to prove the pilot's negligence, Osborne attempts to invoke the doctrine of *res ipsa loquitur* to shift the risk of non-persuasion to Keeney.[14] But Osborne cannot raise *res ipsa loquitur* for the first time on appeal, and it is indisputable that she never raised this issue before the trial court.[15] Moreover, it is well settled in Kentucky that *res ipsa loquitur* does not shift the risk of non-persuasion to the defendant. *Lee v. Tucker*, 365 S.W.2d 849, 851-52 (Ky. 1963). The doctrine relates solely to the burden of going forward. *Id.*; *see also* LAWSON'S KENTUCKY EVIDENCE LAW HANDBOOK (2010), § 10.10(2)(a) ("Res ipsa loquitur has never been treated as a true presumption under Kentucky

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[11] Osborne's Appellee Brief, p. 13. Osborne's repeated claims that liability was admitted defy the record. Liability was never admitted by the pilot and, in fact, attorney Brian Sullivan filed an Answer for the pilot denying all factual allegations of the pilot's negligence. VR No. 3: 8/17/07; 11:40:20-11:50:06.

[12] The NTSB report is Appendix 23 to Osborne's Brief for Appellant in the companion appeal, No. 2010-SC-0397-D).

[13] VR No. 4:08/21/07; 01:57:08-01:57:23.

[14] *See* Osborne's Appellee Brief, p. 13; p. 15, n. 18.

[15] An appellate court "is without authority to review issues not raised or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Accordingly, in order for a judgment to be affirmed on alternate grounds, the issue must have been "properly presented but erroneously rejected by the trial court." *Brown v. Barkley*, 628 S.W.2d 616, 619 (Ky. 1982); *accord Carrico v. City of Owensboro*, 511 S.W.2d 677, 679 (Ky. 1974); *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753, 756 (Ky. App. 1982).

law . . . .").[16] Consequently, Osborne cannot invoke *res ipsa loquitur* for the first time on appeal to excuse her failure to carry her burden of proof.

Osborne's attempt to shift the burden of proof to Keeney due to alleged spoliation of evidence is likewise raised for the first time on appeal. Osborne did not tender a spoliation instruction relating to the alleged unavailability of the airplane wreckage in any of the four sets of jury instructions Osborne submitted to the trial court. Significantly, she did tender (and received) a "missing evidence" instruction concerning Keeney's case files. But her total failure to preserve for appeal the alleged spoliation of the airplane wreckage precludes this Court from considering that argument.[17]

Moreover, there is no evidence in this record that the airplane wreckage was actually unavailable to Osborne, much less that it was discarded through Keeney's negligence.[18] There is likewise no evidence in this record that Osborne's attorney, Mr. Sitlinger, or her expert, Mr. Hixson, ever asked to inspect the airplane wreckage.[19] There simply is no evidence in this record to support a spoliation instruction as to the airplane wreckage.

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[16] Osborne seems to argue that *res ipsa loquitur* is the functional equivalent of negligence *per se*, but that is contrary to Kentucky law. *See Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009).

[17] Osborne's argument that spoliation of the airplane wreckage would have "shifted the burden" to the defendant finds no support in Kentucky law. Like the missing files (lost by Keeney) and missing voicemail messages (lost by Osborne) addressed at trial, the "Missing Evidence" instruction explained that the circumstances created an inference which the jury could accept or reject. *See* RA 1841, Instruction No. 1, attached as Appendix C to Keeney's Appellant Brief. Osborne has cited no Kentucky authority which would suggest that, if it had been raised, the airplane wreckage issue would have resulted in anything more than a similar instruction as to an inference that the jury could accept or reject. Osborne's reliance upon *Galanek v. Wismar*, 81 Cal. Rptr. 2d 236 (Cal. App. 1999) is therefore misplaced.

[18] The record reflects that Keeney instructed the insurance carrier to maintain the wreckage, and the carrier acknowledged this request in writing. Trial Exhibit 23, 07/01/04 Letter; VR No. 2: 08/15/07; 03:57:03-03:57:28; 03:59:37-04:00:33.

[19] The court is free to ignore an assertion if it is not supported by a citation to the record as required by Kentucky Rule of Civil Procedure 76.12(4)(c)(iv) and (v). It is not the burden of the Court to "search the vast record on appeal" to find proof of Osborne's claims. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003).

Finally, Keeney also was entitled to a directed verdict because Osborne failed to carry her burden of proving that she suffered otherwise uncompensated damages as a proximate result of the pilot's alleged negligence. Since Osborne was not entitled to emotional distress damages due to the lack of any physical contact, she is left claiming only damages to personal property. The evidence clearly showed that Osborne had already been compensated by State Farm for her genuine personal property damages,[20] and the additional claims to which she personally testified at trial were not based upon fair market value, as required by Kentucky law, [21] but consisted of incompetent evidence, including hundreds of hours of labor charges for Osborne and her family's time spent on insurance claim preparation.[22] Without any competent evidence of any compensable damages, Osborne failed to carry her burden of proving that she was damaged by the pilot's alleged negligence. Accordingly, Keeney was entitled to a directed verdict.

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[20] Osborne had already received over $80,000 in personal property claims, and Osborne made no effort at trial to identify which items on her list had previously been paid by insurance. *See* VR No. 1: 08/15/07; 03:33:36-03:36:33; VR No. 2: 08/16/07; 04:20:09-04:21:42. Although the jury properly determined that Osborne had been fully compensated for her house, the trial court wrongly allowed the jury to base her personal property recovery on incompetent evidence.

[21] *See, e.g., Louisville & N.R. Co. v. Lankford*, 304 Ky. 192, 200 S.W.2d 297, 299 (1947). Osborne admittedly did not even attempt to consider fair market value for the personal property damage itemization she created. Instead, her itemized personal property damages were comprised of estimated replacement costs from various sources, including friends, family members, the internet and other unknown sources. *See* Trial Exhibit 16, Property List; VR No. 3: 08/20/07; 02:16:25-02:20:50; *see* also VR No. 5: 08/22/07; 01:36:30-01:36:58; 01:38:00-01:38:10; 01:38:17-01:39:06; 01:39:14-01:39:37.

[22] *See* Trial Exhibit 16, the property list compiled by Ms. Osborne and the only purported evidentiary foundation for her personal property claim, improperly included as "property": 100 hours of work for Osborne ($2,500); 8 days missed work for Osborne, although still paid by her employer; 9 days missed work for her sons and a daughter-in-law ($1,560); 3 days missed work for her ex-husband ($1,032). She also added 6% sales tax to all figures, including the labor charges listed. *Id.*

II. The mislabeled "Fraud" instruction was reversible error, and Keeney was entitled to a directed verdict on the fraud claim.

Osborne fails even to address the fact that she tendered Palmore's "Negligent Misrepresentation" instruction and falsely labeled it "Fraud and Deceit."[23] It is undisputed that the instruction tendered by Osborne and given by the trial court totally failed to require the jury to find by "clear and convincing evidence" that Keeney had made a misrepresentation to Osborne that he knew was false at the time he made it, with the intention that she rely upon it. *Flegles, Inc v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009). Instead, the instruction employed a negligence – "should have known" – standard.[24] Kentucky law is clear that the court's failure to instruct the jury on the requisite elements of the fraud claim constitutes reversible error. *See Evola Realty Co. v. Westerfield*, 251 S.W.2d 298, 301 (Ky. 1952).

Furthermore, negligent misrepresentation is synonymous with professional negligence.[25] Both torts provide that a professional has a duty "to exercise the degree of care and skill expected of a reasonably competent [professional/lawyer] acting under similar circumstances."[26] In substance, the trial court merely gave two, redundant professional negligence instructions.[27]

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[23] *See* Keeney's Appellant Brief, pp. 34-37; John S. Palmore & Donald P. Cetrulo, KENTUCKY INSTRUCTIONS TO JURIES (CIVIL) §31.10 Negligent Misrepresentation (2011)(emphasis added); *cf. id* at §31.08 Fraud.

[24] As its name indicates, negligent misrepresentation uses a negligence, "should have known," standard. *See Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575 (Ky. 2004).

[25] *Compare* Palmore & Cetrulo's KENTUCKY INSTRUCTIONS TO JURIES (CIVIL), §21.01 Lawyer Malpractice with §31.10 Negligent Misrepresentation. These form instructions mirror the "Legal Malpractice" instruction and the mislabeled "Fraud and Deceit" instruction submitted to the jury in this case. *See* RA at 1842 and 1844, Jury Verdict Form, 8/27/07, Instructions No. 2 and No. 4, attached as Appendix C to Keeney's Appellant Brief.

[26] *See* Palmore & Cetrulo's, *supra*, at §21.01 and §31.10. Because these two causes of action are redundant, it was therefore improper to submit both of these claims to the jury. *See Trosper Coal Co. v. Crawford*, 152 Ky. 214, 153 S.W. 211 (1913).

[27] Indeed, Osborne's effort to conflate negligent misrepresentation with fraud and deceit is illustrated by her brief, which claims "numerous acts of fraudulent conduct including failing to meet court deadlines, . . . failing to respond to lawful discovery on numerous occasions, failing to respond to a summary judgment motion and

Accordingly, this jury did not find Keeney committed fraud. At most, it found negligent misrepresentation. The fraud verdict must therefore be set aside.

Osborne tacitly concedes the "Fraud" instruction she tendered was erroneous, but nevertheless contends that "any error in the Court's Instructions was clearly non-prejudicial since all of the damages awarded were equally supported by other causes of action." Osborne's Appellee Brief, p. 26.[28] But the refund of her attorneys' fees was not supported by any other claim, and the award of punitive damages was predicated upon the fraud claim. Because punitive damages cannot be awarded for negligent misrepresentation,[29] Keeney is also entitled to a directed verdict on punitive damages for his alleged fraud.

The jury awarded Osborne a refund of the legal fees she paid to Keeney as compensatory damages for the alleged fraud. But, "Kentucky law has not recognized a fraudulent misrepresentation claim where a contract is involved unless the fraud induced the contract." *Thomas v. Brooks*, 2007 WL 1378510, at *2 (Ky. App. May 11, 2007) (unpub.) (copy attached). Expert Linda Hopgood confirmed that Keeney's fee arrangement with Osborne was reasonable.[30] Ms. Osborne agreed to the fee arrangement, and this agreement unquestionably applied to the recovery from State Farm.[31] Accordingly, an attorney fee

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failing to" communicate with Osborne about the case. *Cf. Osborne's* Appellee Brief, p. 23. At best, those are allegations of professional negligence, not intentional misrepresentations made to Osborne with knowing falsity.

[28] The erroneous jury instructions are presumed to be prejudicial, and a claimant bears the burden of demonstrating a lack of prejudice to avoid reversal. *Drury v. Spalding*, 812 S.W.2d 713, 717 (Ky. 1991).

[29] *See Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353 (Ky. App. 1999); see also *Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 581-82 (Ky. 2004).

[30] *See* Hopgood, VR No. 7: 08/24/07; 09:31:18-09:32:06. Linda Hopgood, a legal expert and experienced trial attorney who has mediated thousands of cases, testified that the 20% contingency fee combined with the hourly rate of $75 agreed upon by Keeney and Osborne was reasonable, as she routinely sees contingency fees in the range of 33% to 50%. Id. Even Hixson agreed that Keeney's customary hourly rate of $225 per hour was reasonable, based on his experience. *See* Hixson, VR No. 4: 08/21/07; 03:52:25-03:53:10.

[31] *See* Keeney's Appellant Brief, p. 38, n. 107-108. VR No. 5: 08/22/07; 02:46:33-02:47:09; Trial Exhibit 2, Engagement Letter. Ms. Osborne admitted she did not object when Mr. Keeney received his contingency fees

award in this case cannot be premised upon fraud. Without any compensable loss resulting from fraud, both the fraud verdict and the related punitive damages award must be vacated.

III. Keeney was entitled to a directed verdict precluding any punitive damages award against him for legal malpractice.

The Court of Appeals correctly held that Osborne could not recover punitive damages against Keeney for the alleged negligence of the airplane pilot. The Court of Appeals also correctly held that the punitive damages award against Keeney for legal malpractice could not exceed the $1 million stated in Osborne's interrogatory answers pursuant to CR 8.01(2). But the Court of Appeals erred in permitting even $1 million in punitive damages to remain against Keeney for legal malpractice, for two reasons.

First, both *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) and *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. App. 2009) clearly recognize that "few awards exceeding a single-digit ratio between punitive and compensatory damages" satisfy due process, and "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[32] If the $54,924.04 in personal property damages and the $53,025.39 in legal fees were affirmed, the ratio between the compensatory and punitive award would be nearly 10-to-1. That result is constitutionally impermissible, and must be vacated.

More importantly, Keeney was entitled to a directed verdict precluding an award of punitive damages against him. Clearly, a claim of professional negligence will not support an award of punitive damages. *See* KRS 411.184; *Morton v. Bank of the Bluegrass & Trust*

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from the first checks paid by the insurer: "No, I did not. I was willing to uphold the agreement we had." VR No. 5: 08/22/07; 02:47:14-02:47:27. For further checks, she similarly understood and agreed he would get his agreed upon fees. *Id.* at 02:59:32-03:00:40; 03:16:10-03:16:26.

[32] *State Farm*, 538 U.S. at 425; *McDonald's*, 309 S.W.3d at 299-302 (both citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996)).

Co., 18 S.W.3d 353 (Ky. App. 1999); *Presnell*, 134 S.W.3d 575. Because this jury was instructed only on legal negligence and negligent misrepresentation, there was no legal basis upon which an award of punitive damages could be based.[33] Thus, the award for punitive damages must be vacated as a matter of law. And because Osborne failed to carry her burden of proof on either tort claim, Kenney was entitled to a directed verdict on both compensatory and punitive damages.

CONCLUSION

For the foregoing reasons, as well as those set forth in Keeney's Brief for Appellant, these portions of the Court of Appeals' Opinion should be REVERSED.

> Ordinarily, when the holding is that the defendant's motion for a directed verdict should have been sustained because the plaintiff failed to prove his claim, a judgment n.o.v. will be directed. That is on the theory that the plaintiff had a fair opportunity to establish his claim and is not entitled to a second chance.

Cheshire v. Barbour, 455 S.W.2d 62, 66 (Ky. 1970).

Consequently, the jury's verdict should be VACATED in its entirety, and judgment should be entered dismissing all claims against Mr. Keeney.

Respectfully submitted,

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[33] Even if Osborne was entitled to recover her attorney's fees for breach of contract, *cf.* Osborne's Appellee Brief, p. 26 n. 34, KRS 411.184 (4) provides: "In no case shall punitive damages be awarded for breach of contract."