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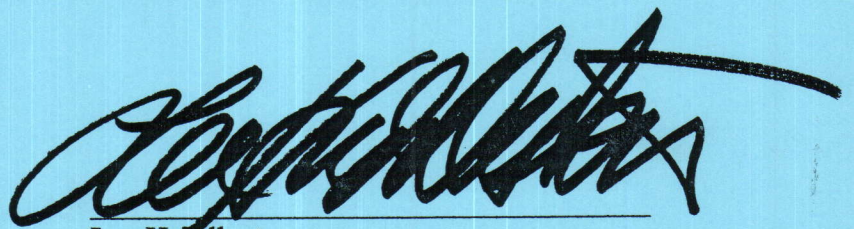
**SUPREME COURT OF KENTUCKY**

THE KROGER COMPANY, doing business) )  
as COUNTRY OVEN BAKERY, ) )  
Appellant, ) )  
versus ) ) No. 2008-SC-000415-DG  
JOANNE BUCKLEY, ) )  
Appellee ) )

**BRIEF FOR APPELLEE**

**On discretionary review of Kentucky Court of Appeals No. 2006-CA-002244-MR  
and Civil Action No. 97-CI- 00504, Warren Circuit Court, Division I**

Service of this Brief was effected by mailing copies to the Honorable Steve Alan Wilson, Judge of Warren Circuit Court, Division I, Warren County Justice Center, 1001 Center Street, Bowling Green, Kentucky 42101; Samuel Givins, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; and Mr. Brent R. Baughman and Ms. Melissa Norman Bork, Greenbaum, Doll & McDonald PLLC, 3500 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40102; this 17<sup>th</sup> day of August 2009. The record on appeal was not withdrawn from the Clerk of the Warren Circuit Court.



Lee Huddleston  
Counsel for Appellee, Joanne Buckley

**HUDDLESTON & HUDDLESTON**  
Attorneys at Law PLLC  
Post Office Box 2130  
Bowling Green, Kentucky 42102-2130  
(270) 781-9870

## STATEMENT CONCERNING ORAL ARGUMENT

Appellee agrees that oral argument would be helpful to the Court and the parties. Accordingly, Appellee requests that the Court permit oral argument in this appeal.

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## COUNTERSTATEMENT OF THE CASE

For the Court's convenience this Counterstatement of the Case has been divided into three sections: Facts Pertaining To Emotional Distress, Facts Pertaining To Discrimination, and Procedural History.

**Facts Pertaining To Emotional Distress:** When Appellee, Joanne Buckley, (hereinafter referred to as "Joan" or "Appellee") first came into contact with The Kroger Company, doing business as Country Oven Bakery (hereinafter referred to as the "Bakery," "Kroger," or "Appellant") in 1981, she brought with her a history of hard work willingly performed. [Tape 2; 12/06/01; 3:55:57-56:38] This manifested itself in consistently excellent attendance, pride in the quality of her performance, and a complete absence of even the slightest disciplinary measure over the years. [Tape 2; 12/06/01; 4:43:14-50:43; 4:51:20-45; 5:20:23-33] As an intelligent worker, not just a drone, Joan also brought with her an assertiveness and willingness to push for improvements. [Tape 2; 12/06/01; 4:50:55-51:10] Twice during her employment with the Bakery Joan's assertiveness resulted in her open support for unionization of her fellow employees. [Tape 1; 12/5/01; 4:05:37-06:02; 4:11:58-17:26; 4:22:55-24:29; Tape 2; 12/06/01; 4:34:35-41:18; Plt. Ex. 11] While Country Oven managers were not foolish enough to directly retaliate against Joan for her union activities, those efforts and Joan's willingness to point out other issues apparently did not endear her to the managers. [*Id.*]

In 1987 Joan was able to get the job of "Bread and Roll Divider Relief." [Tape 2; 12/06/01; 4:17:41-18:10] In that job Joan performed three tasks along a portion of the frozen bread and roll line as other employees on the line took their breaks in the morning and afternoon and at lunch. [Tape 2; 12/06/01; 4:07:10-10:29] In 1994 Joan complained that another job on

the line, Mixer Relief, was being paid more and her hourly rate should be raised. [Tape 2; 12/06/01; 4:11:35-12:21; 4:17:41-18:10] The Bakery's response was to allow the Mixer Relief and Divider Relief workers to trade off with each other as they saw fit, with the higher hourly rate being paid to whomever was performing the task of mixer relief on any particular day. [Tape 2; 12/06/01; 4:12:22-14:05; 4:15:03-16:47; 5:01:00-58]

In 1996 Joan's team member on Bread and Roll Relief was Jack Garmon (hereinafter referred to as "Jack"). By the time he began working with Joan, Jack had developed clinically serious manic-depression. [Tape 2; 12/06/01; 4:52:08-20; 4:55:37-56:41] Joan had been told that Jack was dangerously "crazy," and Jack confirmed to Joan that he had recently been hospitalized twice for his manic-depression. [Id.] Especially when he failed to take his medication, Jack could be very aggressive and agitated. [Tape 2; 12/06/01; 4:57:05-50; 4:59:50-5:00:55] As Joan patiently trained Jack, she had to be extremely careful and "handle him with kid gloves." [Id.]

The Bakery gave the concept of teamwork significant lip service. [Tape 2; 12/06/01; 4:58:47] As an employee who genuinely tried hard to do what her employer wanted, Joan took the call for teamwork seriously. [Tape 2; 12/06/01; 4:57:-59:43] When she realized that Jack was making mistakes, Joan would step in and correct the mistakes. [Id.]

In May of 1996 Jack and Joan were packing frozen dough into boxes when Jack forgot to put labels into the boxes. [Tape 2; 12/06/01; 5:11:24-13:05; 5:16:49-18:16] Jack told the regular workers who were returning from their break but was afraid to tell the supervisor, even though Joan urged him to do so. [Id.] The failure to include labels was a relatively common problem with the regular workers and was easily corrected. [Tape 2; 12/06/01; 4:13:06-16:00; 5:37:26-43]

The next Monday, May 6, 1996, Joan and Jack were called upstairs to talk with their bosses. [Tape 2; 12/06/01; 5:19:05-20:22] The Bakery's normal disciplinary procedure was to give verbal warnings, then written warnings, and only then to suspend. [Tape 2; 12/06/01; 5:20:34-21:11] In this instance the Bakery's managers immediately gave both Jack and Joan a five day suspension even though Joan had not made the mistake and had told Jack to report it. [Tape 2; 12/06/01; 5:21:12-29] This began a bizarre series of events that slowly and surely destroyed Joan's mental health. Joan was next ordered by the managers to violate the Bakery's avowed policy of teamwork and no longer help Jack avoid mistakes. [Tape 2; 12/06/01; 4:58:47; 5:42:32-46] Yet she was also told by the managers that she would be punished when Jack made a mistake, just as she had been with the suspension. [Tape 2; 12/06/01; 5:22:51-23:24; 24:06-12; 5:31:37-39:08; Tape 3; 12/06/01; 6:22:09-23:52; Plt. Exs. 15, 18] In addition, Joan was ordered to report to management every mistake Jack made and every mistake she saw anyone else in the plant make. [*Id.*] This last task, to "snitch" on everybody else in the plant was different from what was expected of all other employees and was intended to hide the fact that the managers were trying to set Jack up to be fired. [*Id.*] In other words, the Bakery managers demanded that Joan perform a virtually impossible task: let Jack fail, report every failure, and get punished, herself, for Jack's failures, all while being threatened with death on a daily basis by a person with bi-polar disorder. This absurd situation was compounded by Joan's well-founded terror of Jack, a known mental patient, and his repeated threats to "take care" of whoever was "stabbing him in the back." [Tape 2; 12/06/01; 4:52:08-20; 4:55:45-57:50; 4:59:50-5:00:55; 5:43:38-44:25; 5:44:47-49:59; Tape 3, 12/6/01; 6:11:53-12:26] Joan justifiably felt that the Bakery would do nothing to protect her since she knew that another employee had pulled a knife and threatened everyone on the very same bread and roll line shortly before and he had only gotten a

verbal warning. [Tape 2; 12/06/01; 5:47:29-48:08] Joan was helpless to escape this life-threatening as well as livelihood-threatening dilemma. [Tape 2; 12/06/01; 4:24:17-28:45; 4:31:07-36; 4:32:14-34] Besides being the only breadwinner in her family, Joan had another characteristic that made her vulnerable to the managers' torture. [*Id.*] Unlike other people who would have recognized that the managers were putting her in an impossible dilemma, Joan felt doubly compelled to keep trying to comply. [*Id.*] As a child Joan had been subjected to sexual abuse. [*Id.*] Her coping mechanism as a child was to be totally compliant with authority figures. [*Id.*] While it might have worked for Joan as a child, the coping mechanism was destructive when as an adult she was confronted by managers who were willing to insist that she endanger herself

During the summer and fall of 1996, Joan followed the orders she had been given. [*E.g.*, Tape 3; 12/06/01; 6:11:37-52; Tape 3; 12/07/01 a.m.; 11:53:24-50; 11:54:13-42; Tape 3; 12/07/01 p.m.; 12:13:58-14:59; Plt. Exs. 30, 32, 38] And every time she dutifully reported mistakes by Jack or other employees to the managers, she literally cried, begged, and pleaded to not be forced to violate her principles and endanger her life. [Tape 2; 12/06/01; 5:22:00-50; 5:23:26-25:45; 5:39:10-40:47; 5:41:47-42:31; 5:50:10-51:27; Tape 3; 12/6/01; 6:11:53-12:26; Tape 3; 12/07/01; 12:12:40-13:50; Plt. Ex. 37] The managers' response was to just publically laugh at her. [Tape 2; 12/06/01; 5:40:15-47] By October of 1996 Joan had to go to her primary physician for help. [Tape 3; 12/06/01; 6:12:37-13:50] He diagnosed her with Post Traumatic Stress Disorder. [Plt. Exs. 16, 17] Realizing that Joan's condition was more serious than he could handle as an internist, Dr. James Jarvis referred her to a psychiatrist. [Tape 3; 12/06/01; 6:43:35-53] After a couple of tries with two other psychiatrists, in December of 1996 Joan starting getting treatment from Dr. William Thornton, a Bowling Green psychiatrist. [Tape 3,

12/06/01; 6:44:12-46:22; 6:49:11-19] With Dr. Thornton's considerable help, Joan was able to barely stay alive and keep working until April of 1997. [Tape 3; 12/06/01; 6:49:20-50:13; 6:57:39-55] By that time the effects of the actions by the Bakery's managers had reached their maximum level of destruction and Joan was forced to go on full-time medical leave. [Tape 3; 12/07/01 a.m.; 11:57:00-17; 11:57:31-54] Joan's condition had gotten so bad that she could not function. [*Id.*] Her depression and overwhelming fear were so strong that they put her life at risk. Thus from May of 1996 until April of 1997, a specific set of Bakery managers, Theresa Howard, George Flowers, Ken Felix, John Madison, and Jim Bennett, subjected Joan to bizarre torture including demanding that she perform virtually impossible tasks that genuinely endangered her life and intentionally or recklessly caused her to experience severe emotional and mental distress.

**Facts Pertaining To Discrimination:** For almost a year, while Joan was on full-time medical leave trying to recover from the severe post traumatic stress disorder caused by the managers, there was essentially no contact between Joan and the Bakery. In March of 1998 an entirely new situation arose. Joan asked Dr. Thornton if he felt that she could survive going back to work. [Tape 3; 12/06/01; 6:57:37-56; 7:00:19-39] Reluctantly he agreed to let her try as long as Joan would not be subjected to the same bizarre torture that caused her to get sick in the first place. [Tape 3; 12/06/01; 6:58:37-59:16; 7:01:16-2:32; Plt. Ex. 20] Dr. Thornton's cautious permission was translated by Joan's counsel into a letter to the Bakery's counsel, dated March 10, 1998, asking that she be allowed to return to work with the accommodations specified by Dr. Thornton. [Tape 3; 12/06/01; 7:02:48-04:49; Plt. Ex. 21, Appendix H] Counsel's letter was referred to the Bakery's head of personnel, not any of the managers who had been involved with the infliction of mental distress. [Tape 3; 12/06/01; 7:11:15-59; Plt. Ex. 22] The head of

personnel reportedly conducted a study and concluded that the Bakery would not be willing or able (depending on your perspective) to make the accommodations and let Joan return to work. [*Id.*] Counsel for the Bakery then wrote to Joan's counsel on April 7, 1998, refusing to make the accommodations or allow Joan to return to work in any other capacity. [*Id.*] Thus, in 1998, within a two month period, and consisting of only two letters to and from the Bakery's counsel and a decision by a newly involved person (who may not have even been employed at the Bakery in 1996-97), the Bakery through its head of personnel committed disability discrimination.

**Procedural History:** When the complaint was filed on May 6, 1997, Joan was still employed by the Bakery, was on full-time medical leave, and had not tried to return to work or been turned down by the Bakery. Nevertheless, using the "shotgun approach," Joan's counsel filled the Complaint with numerous alleged causes of action including employment discrimination. Subsequently it became clear that the facts in 1996 and 1997 up to the time the Complaint was filed **only** supported **one** cause of action, intentional or reckless infliction of mental distress. A claim for discrimination was certainly not ripe at that time because Joan was still employed by the Bakery and was not a qualified individual with a disability seeking a reasonable accommodation<sup>1</sup>. A year later in 1998, while the original case was pending and being prepared for trial Joan **did** try to go back to work, as indicated above, and surprisingly the Bakery refused to let her return, finally giving rise in 1998 to a genuine cause of action for employment discrimination on account of disability. Unfortunately the Complaint was not amended to

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<sup>1</sup> The Bakery has included Joan's application for Social Security disability benefits as an appendix to show that Joan did consider herself disabled at the time. That argument ignores the holding in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 143 L.Ed.2d 966, 119 S.Ct. 1597 (1999). "Disabled" for Social Security purposes is different from "disabled" for discrimination purposes.

remove the factually-unsupported claim of employment discrimination in 1996 and substitute the factually-supported claim of disability discrimination that actually occurred in 1998. Apparently neither of the parties' counsel nor the trial judge noticed the discrepancy, and the case was tried as though the Compliant had been corrected<sup>2</sup>. At the trial, counsel for the Bakery did not object to trying the 1998 discrimination claim because there was no mention of it in the Complaint. Nor did counsel insist or even mention that the Complaint should be amended to correctly reference the facts. It was the very situation contemplated by the drafters of CR 15.02.<sup>3</sup>

The case was tried before a jury in December of 2001. Based on the facts that occurred in 1996 the jury found for Joan on the intentional infliction of mental distress claim<sup>4</sup>. Based on the facts that occurred in 1998 the jury found for Joan on the disability discrimination cause of action<sup>5</sup>. The jury awarded compensatory damages of \$518,584.44 and punitive damages of \$1,250,000.00. The Bakery appealed that judgment.

When the first appeal was argued, try as he might, counsel for Joan could not effectively communicate to the Court of Appeals panel that the facts that supported the intentional infliction of mental distress claim all occurred in 1996 and 1997 and were committed by a certain set of managers, while the facts that supported the disability discrimination claim all occurred in 1998 and were committed by a different person. At the time of the first appeal the Bakery disagreed

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<sup>2</sup> See, Philipps, *Ky. Prac.*, 5<sup>th</sup> Ed & Supp, Vol. 6, Civil Rule 15.02; *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136, 145-46 (Ky. 1991)

<sup>3</sup> CR 15.02 provides that: "When issues not raised by the pleadings are tried by express or implied consent of the parties, **they shall be treated in all respects as if they had been raised in the pleadings.** Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party **at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.**" [Emphasis added]

<sup>4</sup> At page 3 of its Brief the Bakery acknowledged that Joan had only relied on facts from 1996 to support her intentional infliction cause of action.

<sup>5</sup> At pages 2 and 3 of its Brief the Bakery acknowledge that Joan relied only on facts from 1998 to support her discrimination cause of action.

but now admits that the two causes of action were supported by two distinct sets of facts<sup>6</sup>. Counsel could not get the panel to look at the actual facts that were proven at the trial. Instead, the panel looked at the Complaint which counsel had failed to amend back in 1998 when the real disability discrimination had happened. The Complaint read as though the facts supporting the intentional infliction claim and the discrimination claim were the same. Since the panel seemed to be stuck on the language of the original Complaint, even though CR 15.02 had effectively taken care of the problem, Counsel requested leave to formally amend the language of the Complaint to conform to the actual testimony given during the trial. That request was denied. Based on the language of the Complaint rather than the testimony at trial and counsel's inability to clarify the factual confusion between 1996 and 1998, the panel incorrectly concluded that the two causes of action were based on the same set of facts. The panel then applied the law of *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001) which held that since the tort of intentional or reckless infliction of mental distress was a "gap-filler," it would be preempted by statutory actions or other traditional torts based on the same set of facts<sup>7</sup>.

Counsel for Joan did not move the Supreme Court to grant discretionary review for what at the time appeared to be good reasons. After the trial of this case, the Supreme Court had eliminated punitive damages in discrimination cases<sup>8</sup>. Unfortunately the punitive damages instruction used at the trial made it impossible to determine whether the \$1,250,000 in punitive damages had been awarded for the intentional infliction cause of action or the discrimination cause of action. Consequently an appeal to the Supreme Court would almost certainly have resulted in a remand to retry the case with punitive damages only being allowed for the intentional infliction claim. Thus a motion for discretionary review would have only added years

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<sup>6</sup> Brief for Appellant, pp. 2-3

of delay in getting the case retried. Plus, the Court of Appeals had not actually ruled that Joan was precluded from pursuing her intentional infliction claim; the panel only reiterated the holding in *Wilson* that intentional infliction of mental distress would be preempted by a discrimination claim based on the same set of facts<sup>9</sup>. At the same time, counsel for Joan knew that Judge Lewis, who had heard all the evidence, would remember that the events in 1996-97 that supported the intentional infliction claim were entirely separate from the events in 1998 that supported the discrimination claim. So, to try to get the case retried before Joan died of old age, counsel chose to return to the trial court and immediately move to amend the Complaint to clarify the language that had misled the panel of the Court of Appeals. Based on the trial judge's familiarity with the actual facts of the case, Judge Lewis did allow the amendment so that the Amended Complaint specifically separated the two events and the two causes of action. Unfortunately, Judge Lewis, who was familiar with the facts, took senior status and Judge Wilson, who was new to the bench and to the facts, was assigned to retry the case. It was certainly no insult to a brand new trial judge to state that he read the Opinion of the Court of Appeals to do what the Court of Appeals could not do, settle the facts as well as the law. The language of the Opinion actually did read the way Judge Wilson interpreted it.

Counsel for Joan argued to Judge Wilson that with the Amended Complaint it was now obvious that the two causes of action were not based on the same set of facts and that the holding in *Wilson* no longer applied. Counsel also argued that the Court of Appeals did not presume to predict what facts would be proven at the second trial but only ruled that if the facts were the same, the holding in *Wilson* would preempt the intentional infliction claim. Nevertheless, based on the language of the Court of Appeals opinion, Judge Wilson ruled that the discrimination

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<sup>7</sup> 75 S.W.2d at 239; 5/30/03 Opinion, pp. 7-9

<sup>8</sup> *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003)

cause of action did preempt the intentional infliction claim even though with the Amended Complaint it was then obvious that the two actions were based on the different sets of facts, occurred in different years, and were committed by different people<sup>10</sup>.

Rather than go through a futile retrial and years of appeals, counsel for Joan filed an original CR 76.36 action with the Court of Appeals asking that its opinion be clarified so that Judge Wilson could make the correct decision. Counsel asked the Court of Appeals to acknowledge that it had the power to determine the law and apply it to the facts, but when the a case was sent back for retrial, the Court of Appeals could not dictate what facts might or might not be proven at the second trial. If the facts proven at the second trial were different from the facts proven at the first trial, the law determined by the Court of Appeals might or might not still be applicable. Counsel tried to get the Court of Appeals to admit that it says what the law is under various circumstances; the jury says what the circumstances are based on the proof presented at the second trial; and the trial judge applies the law espoused by the Court of Appeals to those circumstances to which the law properly applies. Rather than addressing the merits of this argument, the Court of Appeals ruled that counsel for Joan had not shown that such extraordinary relief was necessary and that the issue could be adequately address in a regular appeal<sup>11</sup>. An appeal to the Supreme Court resulted in an affirmance of the Court of Appeals ruling<sup>12</sup>. The Supreme Court agreed that Joan had an adequate remedy by regular appeal even though it might take multiple appeals and seventeen years<sup>13</sup>.

Back at the trial level the parties prepared to try the remaining cause of action for disability discrimination. But before the case could be tried, the Bakery moved the trial court for

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<sup>9</sup> 75 S.W.2d at 239

<sup>10</sup> 4/15/04 Order; 9/29/06 Order

<sup>11</sup> 8/5/04 Order

<sup>12</sup> 11/23/05 Opinion

summary judgment on the disability claim. Surprisingly, despite an enormous record of evidence, numerous disputes regarding material facts, a favorable jury verdict, and rulings by the previous trial judge denying post-judgment motions, the trial court granted the Bakery's motion<sup>14</sup>. In addition to urging the trial court to vacate or amend its ruling on the disability claim, counsel moved the trial court to reinstate the intentional infliction claim. Counsel argued that if the disability cause of action was not a valid claim then it could not possibly preempt the intentional infliction cause of action. Counsel asked if the intentional infliction claim could be haunted (preempted) by the ghost of the discrimination claim. Nevertheless, Judge Wilson rejected all of Joan's motions<sup>15</sup>. Notice of Appeal was filed on October 24, 2006.

On appeal from the trial court's summary judgment of the discrimination claim and refusal to allow Ms. Buckley to pursue her intentional infliction claim, good fortune finally smiled on the case. The presiding judge of the first panel of the Court of Appeals was Judge Daniel Guidugli. The presiding judge of the second panel of the Court of Appeals was Senior Judge Daniel Guidugli. This made it possible for counsel for Joan to finally convince the judges that the sets of facts for the two causes of action were entirely different and that *Wilson* was not applicable. Judge Guidugli even acknowledged that in the opinion. Judge Guidugli wrote: "There is no dispute that Buckley needed to amend her petition [complaint] because the facts which support her discrimination claim took place after the filing of the original petition [complaint]. In fact, she pleaded continuously with this court and the circuit court to recognize that the claims were based on two separate series of events. **We agree that this is the situation** and therefore find that Buckley's original discrimination claim was filed prematurely<sup>16</sup>."

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<sup>13</sup> *Id.*

<sup>14</sup> 8/11/06 Order

<sup>15</sup> 9/29/06 Order

<sup>16</sup> Opinion 11/30/07, p. 5; emphasis added

But Joan's good fortune was mixed. The second panel affirmed the dismissal of her discrimination claim though not because there was any lack of issues of material facts. The panel did, however, correctly note that, even if only one set of facts had supported both causes of action, once the discrimination claim was eliminated there was nothing to subsume the intentional infliction claim and therefore the law of *Wilson* would not apply. The panel did not change the law of *Wilson*. It simply recognized that the change in the facts rendered *Wilson* no longer applicable.

Despite the fact that the Bakery had won in that it had succeeded in getting Joan's discrimination claim eliminated, the Bakery moved the Court of Appeals for rehearing. The Court of Appeals denied the motion and the Bakery moved the Supreme Court for discretionary review.

## ARGUMENT

### I. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW-OF-THE-CASE DOCTRINE REGARDING APPELLEE'S INTENTIONAL OR RECKLESS INFLECTION OF EMOTIONAL DISTRESS CLAIM

A. **Law Not Facts:** By its very name the law-of-the-case doctrine deals with the law – not the facts. When an appellate court determines the law and applies it to a certain set of facts, if on retrial the same set of facts are proven, the law as determined by the appellate court would have to apply<sup>17</sup>. If, however, on retrial a different set of facts were to be proven, the law

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<sup>17</sup> *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989); *Inman v. Inman*, 648 S.W.2d 847, 849, 852 (Ky. 1982); *Gossett v. Commonwealth*, 441 S.W.2d 117, 118 (Ky. 1969); *Frenel v. Commonwealth, Dept. of Highways*, 361 S.W.2d 280 (Ky. 1962); *Folger v. Commonwealth*, 350 S.W.2d 703 (Ky. 1961); *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)

discussed by the appellate court may or may not be applicable<sup>18</sup>. Appellate courts determine the law<sup>19</sup>. Juries determine facts<sup>20</sup>. This point is found in a phrase that is usually included in a statement of the rule, "... upon a retrial in which the evidence is substantially the same ....<sup>21</sup>" In *Inman* the Court made the distinction even clearer when it wrote that the law-of-the-case, "... **applies to the determination of questions of law and not questions of fact**<sup>22</sup>." The Court went on to write that the principle applies if, "... on a retrial after remand, there was no change in the issues or evidence....<sup>23</sup>" Even in the unpublished opinion of *Seabold v. Estate of Harbin ex rel. Pugh*, 2006 WL 954025 (Ky. App.), cited by the Bakery, then judge, now Chief Justice Minton, made the same point when he wrote: "And because the case before us on appeal is squarely on all fours with **the facts**, the parties, and the issues involved in the probate case, we are bound by the circuit court's appellate opinion, erroneous though we believe it may be<sup>24</sup>."

**B. Exception To The Doctrine:** *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539 (Ky. 1956) is the leading case that clearly articulates the exception to the law-of-the-case doctrine<sup>25</sup>. After noting the many cases from throughout the United States that recognized an exception, the Court stated: "All of these cases reflect an accelerating trend to make an exception to the general rule where it clearly appears that the result of the error to be cured far outweighs any harm that may be done in the particular case, **especially where no rights have accrued or become vested and no substantial change has been made in the**

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see also, CR 49.01, 49.02, 52.01, *Commonwealth Trans. Cabinet v. Taub*, 766 S.W.2d 49, 52 (Ky. 1989)

<sup>21</sup> *E.g.*, *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989)

<sup>22</sup> 648 S.W.2d at 849; emphasis added; see also, *Lake v. Smith*, 467 S.W.2d 118 (Ky. 1971), *Siler v. Williford*, 375 S.W.2d 262, 263 (Ky. 1964), *Reibert v. Thompson*, 302 Ky. 688, 691, 194 S.W.2d 974, 975 (1946)

<sup>23</sup> *Id.*

<sup>24</sup> Emphasis added

<sup>25</sup> 291 S.W.2d at 542-44; by convention the case is usually referred to as *Blackwell's Adm'r*

status of the parties by reason of the former decision.<sup>26</sup>” In the case at bar no rights accrued or became vested and no substantial change was made in the status of the parties between the first and second Court of Appeals decisions. In *Blackwell's Adm'r* the Court quoted with approval from a decision out of the Missouri Supreme Court: “But there are exceptions to the rule as well recognized as the rule itself. Those exceptions evidence a flexibility adjusting the rule to needs of refined justice by the exercise of a high and discriminating judicial power. \*\*\* Whether from grace or right when cogent and convincing reasons appear, such as lack of harmony with other decisions and where no injustice or hardship would flow from a change, or where by inadvertence principles of law have been incorrectly declared the first time, or mistake of fact has been made, or injustice to the rights of parties would be done by adhering to the first opinion, then the exceptions to the rule have play, and it is our duty to re-examine and correct our own errors on the second appeal in the same case.<sup>27</sup>” The exception set out in *Blackwell's Adm'r* has been used and cited from 1956 through the present day<sup>28</sup>. In his dissent in *Taylor v. Commonwealth*, Justice Keller noted that “The law-of-the-case doctrine ... ‘is not an inexorable command, or a constitutional requirement, but is, rather, a *discretionary policy* which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so<sup>29</sup>.’”

C. **Application:** The Court of Appeals did not presume to change the law-of-the-case doctrine or act outside of its jurisdiction. The Court of Appeals correctly applied the doctrine as

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<sup>26</sup> 291 S.W.2d at 543; emphasis added

<sup>27</sup> 291 S.W.2d at 542; emphasis added

<sup>28</sup> E.g., *Gossett v. Comm.*, 441 S.W.2d 117, 118 (Ky. 1969); *Frenel v. Comm. Dept. of Highways*, 361 S.W.2d 280, 282 (Ky. 1962); *White v. Comm.*, 360 S.W.2d 198, 202 (Ky. 1962); *Folger v. Comm. Dept. of Highways*, 350 S.W.2d 703 (Ky. 1961); see also, *Brooks v. Lexington-Fayette Housing Auth.*, 244 S.W.3d 747, 752-54 (Ky. 2007); *Taylor v. Comm.*, 63 S.W.3d 151, 167, 172, 169-70 (Ky. 2001); *Bd of Trustees of Univ. of Ky. v. Hayse*, 782 S.W.2d 609, 616 (Ky. 1989); *Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1983); *Lake v. Smith*, 467 S.W.2d 118, 121 (Ky. 1971)

<sup>29</sup> 63 S.W.3d at 170; emphasis in the original

it was authorized and empowered to do. The Court of Appeals did not “revive” Joan’s infliction cause of action. The cause of action was never dead. By sending the case back for retrial, the Court of Appeals made it possible for Joan to clarify the facts. When Joan did clarify the facts, the Court of Appeals appropriately and graciously acknowledged that *Wilson* no longer applied. The above-cited cases on the doctrine make it abundantly clear that on retrial it is not unusual for the parties to prove different facts than in the first trial. That is simply a collateral benefit and burden of having to retry a case. If the facts proven at the first trial were to be considered immutable, the Court of Appeals would have locked in the Bakery’s liability for employment discrimination and just sent the case back to determine if the damages assessed by the jury were attributable to the discrimination. On retrial the Bakery got the benefit of changing the facts so that the law of employment discrimination might not apply while Joan got the benefit of changing the facts so that the preemption of *Wilson* would not apply. The benefit and burden cut both ways. Also, in its first decision the Court of Appeals made a clear and palpable error of fact. To its credit, the panel in the second appeal, lead by the same Judge Guidugli, recognized and acknowledged its previous error. Even if the law-of-the-case doctrine had applied, the Court of Appeals had the discretion to use the exception to the doctrine. Clearly there had been a significant mistake of fact. The parties had not changed their positions in the interim. And, without any doubt, applying the doctrine blindly would have worked an extreme injustice while not moving the case along one second faster. The Court of Appeals properly used its discretion and that use of discretion should not be overturned.

## II. THE COURT OF APPEALS INCORRECTLY ELIMINATED APPELLEE'S EMPLOYMENT DISCRIMINATION CAUSE OF ACTION

The Bakery asks the Court to overturn the ruling of the Court of Appeals eliminating Joan's claim for employment discrimination. "Oh, yes, Brer Fox, hang me just as high as you will, but PLEASE don't throw me in that briar patch!!" Of course Joan would be pleased if the Court were to overturn the Court of Appeals on this issue.

When this case was begun counsel for Joan included a claim for employment discrimination for the purpose of redundancy and for the considerable attorney's fees that would be accumulated. In hindsight that decision has been the bane of an otherwise relatively straightforward action for intentional or reckless infliction of emotional distress. That hindsight has colored counsel's attachment to the discrimination claim. Once again, rather than filing a motion with the Court for discretionary review, counsel preferred to return to the trial level as quickly as possible while Joan is still living.

Counsel for the Bakery has faulted Joan for not filing a cross motion for discretionary review<sup>30</sup>. But such a motion was unnecessary. The Bakery had already done it. If the Bakery succeeds then Joan will pursue both causes of action<sup>31</sup>. If the Bakery fails then Joan will pursue only her intentional infliction cause of action. The considerable damages will be essentially the same in either situation.

The only conceivable reason that the Bakery would want to assist Joan in saving her discrimination claim, after having fought so hard to eliminate it, is the false hope that it could

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<sup>30</sup> *E.g.*, Brief for Appellant, p. 6 n. 3

<sup>31</sup> The only way that the Court or the Court of Appeals on remand could fail to reverse the trial court's summary judgment of the discrimination claim would be to overturn *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991) and all of its progeny. Also, since the Bakery is striving so mightily to overturn the decision

still subsume Joan's intentional infliction claim and prevent Joan from being awarded punitive damages again. But now that the Court of Appeals has recognized and acknowledged in writing that the two causes of action are not based on the same actions, same actors, or same times, it should be clear that *Wilson* is not applicable. Even counsel for the Bakery has acknowledged that the two causes of action are based on separate sets of facts<sup>32</sup>.

Although the Court of Appeals wrote in terms of "jurisdiction," the real point of its opinion was that Joan filed her claim for disability discrimination prematurely. There is no question that the facts supported that conclusion. The Court of Appeals relied on *Lilly v. O'Brien*, 224 Ky. 474, 6 S.W.2d 715 (1928) for the proposition that, "An amended petition relates back to the original petition, and, if the original action was filed prematurely, it must be dismissed, carrying the amendments with it"<sup>33</sup>. Thus, according to the Court of Appeals, Joan's amendments were a nullity.

The Bakery responded by citing CR 15.03(1). That rule provides that an amendment relates back to the date of the original pleading when the newly asserted claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The intentional infliction claim in the Amended Complaint did relate back to the same facts as set out in the original Complaint, but then that claim was adequately set out in the original Complaint as well. The discrimination claim in the Amended Complaint, however, was based on a set of facts entirely different from the facts in the original Complaint. This was necessarily so since the factual basis for the amended discrimination claim had not occurred when the original Complaint was drafted.

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of the Court of Appeals eliminating the discrimination claim, is the Bakery prepared to concede that the summary judgment was improperly granted?

<sup>32</sup> Brief for Appellant, pp. 2-3

<sup>33</sup> 6 S.W.2d at 718

Since the discrimination claim asserted in the original Complaint was virtually a nullity, instead of ineffectually trying to amend the original Complaint Joan could have filed a new civil action and asked that it be consolidated with the original action. The problem with that approach was that the statute of limitations had run by the time the Amended Complaint was filed. The discrimination occurred in March of 1998 and the amendments were filed in January of 2004, more than five years after the event. But, all was not loss. In December of 2001 both the intentional infliction and the discrimination claims were tried before a jury in the circuit court. The trial was well within the five years allowed by the statute of limitations. CR 15.02 provides that, “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues<sup>34</sup>.” There is absolutely no question that the discrimination cause of action tried to the jury was the actual one that occurred in 1998. The Bakery’s objection to trying the discrimination claim was not founded on any deficiency in the pleadings. If the Bakery had objected at trial or before on the basis of the pleadings, the third sentence of CR 15.02 would have given Joan the opportunity to formally amend the pleadings at that time. The Court should also note that the first sentence of CR 15.02 does not say that the pleadings are considered to have been amended. The rule states that the issues are considered to have been raised already by the pleadings, the original pleadings.

As an officer of the Court, counsel for Joan must also draw the Court’s attention to CR 15.03(2) and 15.04, which may counter the argument in the previous paragraph. CR 15.03(2)

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<sup>34</sup> Emphasis added

appears to contemplate amendments that add new causes of action since it refers to amending within the period provided by law for commencing the action against the defendant. The 2001 trial would have met that time requirement. But, Subsection 2 also requires that the amendment arise out of the facts asserted in the original complaint if the amendment is to relate back to the date of the original complaint. But, in this case there was no necessity for an amendment to relate back to the date of the original complaint. Thus CR 15.03 is not relevant because there was no need or effort to relate the discrimination cause of action back in time. Also, the first sentence of CR 15.02 does not speak of amendments; the issues are treated as though they had been pled from the beginning.

It could be argued that CR 15.04 counters the CR 15.02 idea that the trial cured the problem with the pleadings. If, in effect, adding the 1998 cause of action for discrimination was “supplemental pleading” rather than an amendment to the pleadings, CR 15.04 might apply. The definition “transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented” certainly does match the 1998 discrimination cause of action. CR 15.04 does not have the same language as CR 15.02. Counsel would argue, however, that the practical idea in CR 15.02 that errors in form (*i.e.*, the pleadings) should be considered overridden or cured by the actions of the parties (“no harm – no foul”) should extend to “supplements” as well as “amendments” because there is no logical or practical reason to do otherwise. And, as pointed out, above, the first sentence of CR 15.02 does not say that the problem is cured by implied amendment or supplement. The issues are simply treated as though they had been raised by the pleadings.

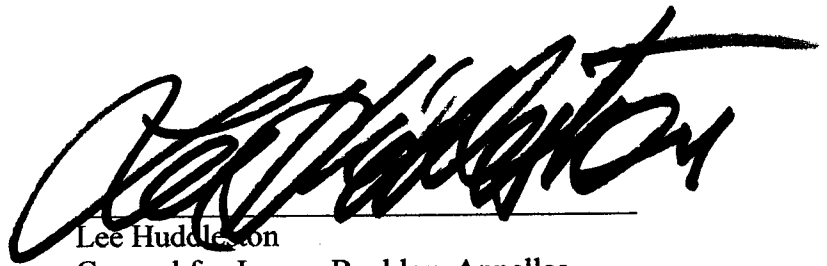
## CONCLUSION

In its 2007 decision the Court of Appeals correctly applied the law-of-the-case doctrine. The panel recognized and acknowledged that the Joan's intentional infliction claim and her discrimination claim were not based on the same facts, and, accordingly, the law of *Wilson* was no longer applicable. The panel did not ignore years of precedents and accede to the Bakery's wish to convert the principle into the "facts-of-the-case" doctrine. The panel also had the discretion to use the exception to the law-of-the-case doctrine even if the doctrine had locked in the facts on retrial. The Court of Appeals did not abuse its discretion.

Unfortunately, the panel also over-solved the problem by simply eliminating Joan's discrimination claim, thus removing any possible preemption. Of course Joan would like to retry her discrimination cause of action. After twelve years, so far, the accumulated attorney's fees are considerable. CR 15.02 should have solved the problem of the unamended complaint. That is the very purpose of that rule.

Appellee, Joanne Buckley asks the Court to affirm the decision of the Court of Appeals correctly recognizing her intentional infliction cause of action and to reverse the Court of Appeals for mistakenly dismissing her employment discrimination cause of action.

Respectfully submitted to the Court this 17<sup>th</sup> day of August 2009.



Lee Huddleston  
Counsel for Joanne Buckley, Appellee

***HUDDLESTON & HUDDLESTON***  
Attorneys at Law PLLC  
Post Office Box 2130  
Bowling Green, Kentucky 42102-2130  
Phone (270) 781-9870  
Fax (270) 842-1659