SUPREME COURT OF KENTUCKY
NO. 83-SC-376-D
(NO. 82-CA-1346-MR)

ALBERT CRAFT AND IRENE CRAFT, MOVANTS.

VS.

ROY RICE, ASHLAND OIL, INC.,AND
ASHLAND COAL, INC., A SUBSIDIARY
OF ASHLAND OIL, INC., RESPONDENTS.

Appeal from Boyd Circuit Court
at Catlettsburg, Kentucky
Honorable Kelley Asbury, Judge

BRIEF FOR MOVANTS

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ATTORNEY FOR MOVANTS.

I hereby certify that a true copy of the foregoing was mailed or hand delivered to: Hon. Kelley Asbury, Judge, Courthouse, Catlettsburg, Ky. 41129; Hon. David O. Welch, P.O. Box 1653, Ashland, Ky. 41105-1653; Hon. Michael J. Farrell, P.O. Box 2688, Huntington, WV 25726; Clerk, Court of Appeals, 403 Wapping St., Frankfort, Ky. 40601; Clerk, Supreme Court of Kentucky, Capitol Bldg., Frankfort, Ky. 40601; as required by SCR 1.200; this 13th day of October, 1983.

GARIS L. PRUITT

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MOTION

Come now the Movants, by counsel, and move the Court to include the following citation in the Brief for Movants:

Tort Liability for Psychic Injuries: Overview and Update. Thomas F. Lambert, Jr., Journal of the Association of Trial Lawyers of America, 37 ATLA L.J. page 1.

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ALBERT CRAFT AND
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VS.

INTRODUCTION AND STATEMENT OF POINTS AND AUTHORITIES.

ROY RICE, ASHLAND OIL, INC.,
AND ASHLAND COAL, INC., A
SUBSIDIARY OF ASHLAND OIL, INC., RESPONDENTS.

INTRODUCTION: This is a brief pursuant to a grant of discretionary review.

Page

C/A

STATEMENT OF FACTS

On March 12, 1976, Albert Craft, Movant, went to work for Larry Addington, Addington Bros. Coal Company, at 53rd Street, a coal dock in Ashland, Boyd County, Kentucky. He went to work there as a weigh master, working on the net weight scale. The setup there is such that a loaded coal truck comes in, is weighed, dumps its coal, and then goes to the next scale where he weighed without the coal and paid on the difference in weight. (Transcript of Evidence p.30; hereinafter referred to as TE and the appropriate page number). The Movant, Albert Craft, continued working there from 1976 until February, 1978. Sometime in late 1976, or the year of 1977, Ashland Coal, a creature of Ashland Oil, Inc., completely bought Addington Bros. Coal Co. This included the dock and weighing station at which Albert Craft worked.

Sometime in late 1977 or early 1978, the Movants, Albert and Irene Craft, noticed some people across from the house, but inside the fence which surrounds the Ashland Coal Dock, sitting in their car watching the house. They were watching the house with binoculars and cameras, and apparently their interest was focused upon the Crafts' house. (TE pp.31-33). They later learned that these people were employees of Ashland Coal, or at least hired by Ashland Coal. This activity continued until May, 1978, when Del Spier, who is Director of Security for Ashland Oil and Ashland Coal, appeared before the Boyd County Grand Jury, with another Security employee named

Lucille Mount, and had Albert Craft and a person named J. C. Wallace, indicted for forgery in the second degree.

The indictment in 1977 accuses Albert Craft of falsely making or completing a weigh ticket, showing that a truck had come in and dumped coal, when in fact, no truck had come in. The second indictment returned, as a result of the activities of employees of Ashland Coal in May, 1978, accuses him of the same thing on another occassion. (TE p.34,36).

At that time, Irene Craft, the other Movant, was working at a truck shop in Catlettsburg, Kentucky. Sometime near or after the second indictment, the Respondent, Roy Rice, started pulling into the gas station across the street from where she worked, and harassing her. Everytime he saw her, he would pick up his C.B.microphone and say, "Lady, this is the man who is going to put your husband in prison". (TE p.36-37). He did that on a continual basis in an effort to harass her. Everytime she was leaving work he would follow her; for a week at a time, he would follow her all the way back to the 53rd Street dock, where they still lived. (TE p.36). During the time he was following her, he would again harass her with telling her that he was going to put her husband into prison. (TE p.37). This was done for no good reason, except to engage in psychological warfare against her in order to put pressure upon her husband. (TE p.36). She had done nothing to Ashland Coal and had no relationship to them. (TE p.55). On one occasion he took his car (a company car belonging to Ashland Coal) and tried to run her out of the road. (TE p.42).

As a result of being followed and being harassed by Roy Rice, who was an employee of Ashland Coal as part of their Security Department, (TE p.75,76,49), she became very sick and nervous, and underwent medical care and treatment. (TE p.37,39,49,41,48).

Because of the behavior of Roy Rice, Albert Craft went to the Boyd County Attorney to seek a warrant for him and was refused. (TE p.55). He then approached the Commonwealth's Attorney and was also refused. (TE p.56). He also approached the Boyd District Judge and was refused. (TE p.55). However, the Commonwealth's Attorney did call Del Spier about Albert Craft's attempt to have Roy Rice indicted for harassment and wanton endangerment. After Del Spier was informed of Albert Craft's visit, only one other incident occurred. It was then that he harassed Albert Craft as a parting shot, and told him he would put him into prison. Because of the intentional harm inflicted upon his wife and himself, he also became very sick. (TE p.58).

Albert Craft was acquitted by the Boyd Circuit Court, on Directed Verdict as to both charges. Irene Craft, on the day the verdict was directed against her in this action, suffered a stroke.

Because they had been harmed by agents, servants or employees of Ashland Coal, they brought this suit.

The Trial Court sustained a Motion for Directed Verdict, stating that the Statute of Limitations barred this action,

because it was an action for personal injury rather than damage to her rights.

ARGUMENT I

THE RIGHT TO BE LEFT ALONE IS A RIGHT, WHETHER IT IS AN INVASION OF PRIVACY OR THE RIGHT TO BE FREE FROM THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY OUTRAGEOUS CONDUCT.

The Court of Appeals found conceptual problems in applying the definition of the **Restatement (Second) of Torts**, Subsection 652A, which says:

> "(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
> (2) The right of privacy is invaded by
> (A) unreasonable intrusion upon the seclusion of another . . . or
> (B) appropriation of the other's name or likeness . . .(not involved herein) or
> (C) unreasonable publicity given to the other's private life . . .(not involved here) or
> (D) publicity that unreasonably places the other in a false light before the public . . . (not involved here)."

Why, if as the Court says on page 7 of its Opinion, "We think they have established the right to be left alone and free from outrageous conduct", doesn't **KRS 413.120(7)** apply?

The matter was directly in issue in **Resthaven Memorial Cemetery v. Volk**, 286 Ky. 291, 150 S.W.2d 908 (1941), and reaffirmed in **Ferguson v. Utilities Elkhorn Coal Co.**, Ky., 313 S.W.2d 395 (1958).

It is respectfully submitted that a Court of Appeals panel is without the authority to overrule an Opinion of the highest Court of the State.

In Resthaven, supra on page 296, the identical issue was before the highest Court. It was dealt with directly.

The Court of Appeal's quote on page 4 of its Opinion under "Appellant's Argument":

> "Resthaven, supra, reasoned that the gist of the action for disinterment of a grave was directed toward 'rights' under the five-year limitation statute rather than toward personal or bodily injuries under the one-year limitation statute."

is logically inconsistent with its holding on page 8:

> "Nevertheless, in adopting the specific tort of outrage under Section 46(1) of the Restatement, we further hold that under the authority of Carr and Columbia Mining, supra, the one-year statute of limitation is applicable."

To return to the question posed above, the only answer is -- it does!

The Restatement (Second), The Interest In Freedom From Emotional Distress. Section 46, Outrageous Conduct Causing Severe Emotional Distress itself, makes the distinction in the commentary in Section K, page 78, Bodily Harm, and says:

> "k. Bodily harm. Normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe. The rule stated is not, however, limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has

in fact been severe emotional distress, bodily harm is not required."

Conceptually, either the tort of Invasion of Privacy (Restatement (Second) Section 652A, 1977 (2)(A) or (B)); or Outrageous Conduct Causing Severe Emotional Distress, (Restatement (Second)) of Torts, Section 46(1)(1965)), describe the wrong done to the Crafts. Neither will support the Court of Appeals holding.

As to the object v. form test discussed by the Court of Appeals in their discussion of Carr v. Texas Eastern Transmission Corp., Ky. 344 S.W.2d 619 (1961) and Columbia Mining v. Walker, Ky., 271 S.W.2d 276 (1954), only a brief review is necessary.

Carr, supra holds simply where the legislature has spoken specifically that damage to livestock is to be brought in one year from the injury to that livestock, that one cannot avoid the limitation by pleading ex contractu. Columbia Mining, supra, is against the position for which the Respondent cites it. The case involved a coal miner who contracted silicosis. Not suprisingly, the Columbia Court held that it was an injury "to the person" (p.277). The Court then applied the approriate tolling rules.

Precious little comfort can be had from Columbia for the Respondent. Silicosis bears little resemblance in the Restatement (Second) sense to Invasion of Privacy or the Tort of Outrageous Conduct Causing Severe Emotional Distress.

The real operative fact is, is there a reason to treat emotional distress differently from "injury to the person"?

The object pursued in the emotional distress torts is that one may not engage in what amounts to "psychological warfare" against a person with impunity.

It is destruction of one's peace and quietude through barbarous conduct that the tort of outrage seeks to redress, as does the tort of invasion of privacy.

Different rules necessarily must govern the treatment of these torts than negligent or intentional infliction of physical injury. The reason for this is that different universes with different laws are involved.

What rules are necessary in the intentional infliction of emotional distress versus personal injury? Often, where the harm is subtle and cumulative that the injury will not be manifest until long after one year.

The measurement from the last act is appropriate but one year isn't.

The one year Statute of Limitations under KRS 413.140(1)(a)(b) is a concession to the insurance industry of Kentucky. Since the intentional nature of the tort generally renders it uninsured, the reason for the limit doesn't exist.

Finally, the Respondent concedes, obliquely however, that "the Court of Appeals' conceptual classification of the personal injury claim was surprising, but unnecessary."

ARGUMENT II

THE RESTATEMENT OF TORTS (SECOND) APPROACH TO OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS IS THE MOST SOUND APPROACH AND SHOULD BE ADOPTED BY THIS COURT.

Section 46 of the Restatement, The Interest in Freedom From Emotional Distress, Outrageous Conduct Causing Severe Emotional Distress, states:

> "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> (b) to any other person who is present at the time, if such distress results in bodily harm."

As the Court can see, the elements of the tort are: first, the conduct complained of must be extreme and outrageous. Secondly, the injury may be inflicted in two separate manners: (a) intentionally, (b) recklessly; and thirdly, the injury that results is emotional distress, and if bodily harm results from the emotional distress, then recovery for such bodily injury. This has been discussed and best described previously wherein Section k, Bodily harm, was discussed earlier in this brief. The drafters of Restatement (Second) also take the approach that where the actor directs the harm toward a third person, the actor is liable if he intentionally or recklessly causes severe emotional distress: (a) to a member of the person's immediate family who is present at the time, whether or not there is bodily harm; and

(b) to any other person who is present at the time, if there was bodily harm. Since this case is not one of those cases involving the zone of contemplated injury, such as set out in Section 2 of 46 of the **Restatement**, it is not being presented to the Court.

In reviewing the states, it appears that the majority of the states now no longer require a physical touching. In surveying the states, it appears that the representative cases as to physical touching, where no impact is required, are: Mississippi, Texas, California, Colorado, Florida, Iowa, Maine, Massachusetts and Vermont. Those states still requiring some apparent touching, however slight, for the tort to be complete are: Illinois, Pennsylvania, District of Columbia, South Carolina, Indiana and Nebraska.

Illinois appears to be in the rule only because it does not permit recovery for the infliction of emotional distress without a touching, unless the infliction of severe emotional injuries was intentional and then it does not require the touching. **Kaiserman v. Bright**, 18 Ill. Dec. 108, 377 N.E.2d 261, 61 Ill. App. 3d 67 (1978). Kentucky, of course, is still listed in the minority of states that have adopted the torts, because of the case of **Deutsch v. Shein**, 597 S.W.2d 141 (1980), because of the irradiation of the fetus case by Justice Lukowsky.

As the Court of Appeals has said, the time has come in Kentucky to recognize the right of redress for outrageous conduct that has been recognized in this state in a hit or

miss fashion in the cases set out in the Court of Appeals Opinion.

It is respectfully submitted that if the conceptual approach adopted in the Restatement and generally endorsed by the majority of the states that have adopted the tort is used in Kentucky, then a sound basis for the right of action exists.

CONCLUSION

It is respectfully submitted to the Supreme Court that the Court of Appeals used the right method to achieve the wrong result. Clearly, the time for redress for such an egregious wrong has come. It has come because it has previously been recognized by the highest court in the state and now needs only to be properly defined. The Statute of Limitations has previously been clearly decided in the cases above that conceptually they are consistent with those cases, and that the Statute of Limitations proper is KRS 413.120(7). The right to maintain an action for personal injuries or injuries to the person, has long been recognized in the State of Kentucky. The Court of Appeals did not have to recognize the new tort of outrageous conduct, if this were an action for personal injuries. It follows that this is an action not for personal injuries or that the Court of Appeals engaged in surplusage. The tort of outrage is clearly a new recognition of a right that has previously been held to fall under the five year statute.

WHEREFORE, it is respectfully submitted that this matter should be remanded to the Trial Court to give the Plaintiffs' their entire day in Court, which they so far have been denied.

Respectfully submitted,

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