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

BY: GARIS L. PRUITT
Attorney at Law
500 Price Bldg.
P. O. Box 405
Ashland, Ky. 41105-0405

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

FILED

OCT 14 1983

JOHN C. SCOTT
CLERK
SUPREME COURT

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.

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.

GARIS L. PRUITT
ATTORNEY FOR MOVANTS
P. O. BOX 405
ASHLAND, KY. 41105-0405

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.

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

ALBERT CRAFT AND
IRENE CRAFT, MOVANTS,

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

STATEMENT OF FACTS 1

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 4

Restatement (Second) of Torts,
Subsection 652A 4

KRS 413.120(7). 4

Resthaven Memorial Cemetary v. Volk,
236 Ky. 291, 150 S.W.2d 908 (1941) 4

Ferguson v. Utilities Elkhorn Coal Co.,
Ky., 313 S.W.2d 395 (1958) 4

Carr v. Texas Eastern Transmission Corp.,
Ky. 344 S.W.2d 619 (1961) 6

Columbia Mining v. Walker, Ky.,
271 S.W.2d 276 (1954) 6

C/A

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 7

Kaiserman v. Bright, 18 Ill. Dec. 108, 377 N.E.2d 261, 61 Ill. App. 3d 67 (1978) 9

Deutsch v. Shein, 597 S.W.2d 141 (1980) 9

CONCLUSION 10

APPENDIX

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,

GARIS L. PRUITT
ATTORNEY FOR MOVANTS
P. O. BOX 405
ASHLAND, KY. 41105-0405

FILED
1982 FEB 12 AM 11:03
CIRCUIT COURT CLERK

IN THE
BOYD CIRCUIT COURT
BOYD COUNTY, CATLETTSBURG, KENTUCKY

DIVISION I

FILE NO. 80-CI-343

ALBERT CARFT AND IRENE CRAFT — PLAINTIFFS

VS — TRIAL ORDER AND JUDGMENT

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

This case coming on for trial, came the plaintiffs, Albert Craft and Irene Craft, and their attorney, Hon. Garis L. Pruitt, and the defendants, Roy Rice, Ashland Oil, Inc. and Ashland Coal, Inc., a subsidiary of Ashland Oil, Inc. and their attorneys, Hon. David O. Welch and Hon. Michael J. Farrell, and each side announced ready for trial.

Thereupon to try the issue came the following named jury, to-wit: William K. Willis, Robert Garver, Arnold Hanners, Marjorie Spears, Anna Barrow, Thelma Smith, Cheryl McKenzie, Charles Riggsby, James E. Woods, Chester Prater, Ten Anderson, Lewis Chaffin, Reginald Johnson and Demita Reed, who were duly selected and sworn according to law. It is ordered that Cathy Simpson, official court recorder, report the trial of this case according to law.

The plaintiffs and the defendants then made their opening statements and the noon adjourning hour having arrived, the jury was duly admonished by the Court with instructions to return into the courtroom at 1:00 p.m.

Court resumed, the jury returned from the noon hour, roll call was waived and the plaintiff introduced their testimony in chief and rested.

At the close of the plaintiffs' testimony in chief, the defendants moved for a directed verdict and the Court having considered the same does hereby SUSTAIN the same and directs a verdict for the defendants on the complaint of the plaintiffs against the defendants on the grounds of the statute of limitations barring this cause of action.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiffs receive nothing from the defendants; that the complaint of the plaintiffs is dismissed at the cost of the plaintiffs.

Witness my hand this the 11th day of February, 1982.

Kelley Asbury

KELLEY ASBURY, JUDGE
BOYD CIRCUIT COURT, DIVISION I

I hereby certify that a true and correct copy of the foregoing Order was mailed to:

1. Hon. Garis L. Pruitt, P. O. Box 405, Ashland, Kentucky 41101, Attorney for the Plaintiffs;

2. Hon. David O. Welch, P. O. Box 1653, Ashland, Kentucky 41101, Attorney for the Defendants;

3. Hon. Michael J. Farrell, P. O. Box 2688, Huntington, West Virginia 25726.

This the 12th day of February, 1982.

RUSSELL E. COMPTON, CLERK
BOYD CIRCUIT COURT

BY: Kaye Ross D.C.

OPINION RENDERED: April 22, 1983; 10:00 a.m.
TO BE PUBLISHED

APR 25 1983

Commonwealth Of Kentucky

Court Of Appeals

NO. 82-CA-1346-MR

APPELLANTS

[redacted] CRAFT and IRENE CRAFT

OPINION RENDERED: April 22, 1983; 10:00 a.m.
TO BE PUBLISHED

APR 25 1983

Commonwealth Of Kentucky

Court Of Appeals

NO. 82-CA-1346-MR

ALBERT CRAFT and IRENE CRAFT — APPELLANTS

v

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY ASBURY, JUDGE
ACTION NO. 80-CI-343

ROY RICE, ASHLAND OIL, INC.,
and ASHLAND COAL, INC.,
a Subsidiary of ASHLAND OIL, INC. — APPELLEES

AFFIRMING

* * * * *

BEFORE: GUDGEL, McDONALD and MILLER, Judges.

McDONALD, JUDGE: This case involves a dispute over whether there was a cause of action and, if so, whether a one-year or five-year statute of limitation is applicable. The trial court directed a verdict for appellees and dismissed the action as barred by the one-year statute of limitation for personal injury.

Albert Craft, an employee of Ashland Coal, Inc., was indicted for forgery in the second degree for allegedly making or completing a false weigh ticket showing that a

truck had dumped coal when in fact it had not. A jury acquitted Albert Craft of the charge.

The basis for this lawsuit is founded upon what was done to the Crafts, principally Irene, pending the criminal trial of Albert. The Crafts filed suit alleging that from May to July, 1978, Roy Rice, the former Sheriff of Boyd County and a servant and employee of Ashland Coal, Inc., a subsidiary of Ashland Oil, Inc., embarked upon a course of outrageous conduct in that he harassed Irene Craft by following and watching her, telling her over the CB radio that he would put her husband in prison, and on one occasion running her vehicle into the opposing lanes of traffic with his own vehicle. It was alleged that Rice would park across the street from Irene's place of employment and her residence and keep her under surveillance. During this period of time the Crafts also began receiving phone calls from unknown sources. We consider Albert Craft's complaints trivial because only one incident was alleged in which Rice talked with Albert Craft on the CB radio.

It was stated that Rice, in committing these acts for the appellees, did so maliciously with the intent to intimidate and harass the appellants. Mr. Craft complained of mental anguish, and Mrs. Craft complained of chronic diarrhea, colitis, a nervous condition and mental anguish; however, there was at no time any direct contact or impact (touching) made upon the appellants by Roy Rice. Cf. Brown v. Crawford, 296 Ky. 251, 177 S.W.2d 1 (1943).

The Crafts' allegations were supported by their testimony, medical proof, and two other witnesses. Mr. Rice was called by appellants to testify, primarily as to his employment by Ashland Coal. The trial court directed a verdict for the appellees at the close of the Crafts' proof, thereby dismissing the complaint as barred by the one-year statute of limitations. The appellees conceded at oral argument that we must, for the purposes of this appeal from the directed verdict, consider the allegations as true.

The issue before us is whether the one-year limitation of K.R.S. 413.140(1)(a),(b)or (c) applies, as found by the trial court. Appellants urge us to hold that this action is controlled by K.R.S. 413.120(7), "An action for injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated," which has a five-year limitation.

K.R.S. 413.140(1) provides for one-year limitation in the following instances:

> (a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant.
>
> (b) An action for injuries to persons, cattle or other livestock by railroads or other corporations.
>
> (c) An action for malicious prosecution, conspiracy, arrest, seduction, criminal conversation or breach of promise of marriage.

It is undisputed that the complaint was filed much more than one year after the last act complained of happened. The Crafts argue that the above-quoted statute does not apply because their action is one of injury to their rights

under K.R.S. 413.120(7) rather than for personal injuries. Appellees argue that the action, if any, is one for personal injury under K.R.S. 413.140(1)(a),(b),(c).

Appellant's Argument

Appellants maintain that a tort was committed by appellees even though there was no impact or touching. Their cause of action is compared to the rights of plaintiffs in cases dealing with grave desecration. In Resthaven Memorial Cemetery v. Volk, 286 Ky. 291, 150 S.W.2d 908 (1941), for example, a recovery was allowed where there was a disinterment of a body without the family's permission. The injured heirs, although not impacted or touched, suffered mental pain and anguish. The court said,

> The phrase, 'an action for an injury to the person of the plaintiff,' in the statute quoted, refers to those cases where the personal injury is the gist of the action; such as actions for assault and battery, and the like.

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.

Again, in Ferguson v. Utilities Elkhorn Coal Co., Ky., 313 S.W.2d 395 (1958), our highest court applied the five-year statute in an action where a coal company had dumped refuse on some graves.

The analogy of the appellants' argument is that since there was no direct contact or touching, and because the

Crafts had a right to be left alone, their "rights" had been violated by Roy Rice; thus, the five-year limitation statute applies, as in Resthaven and Ferguson, supra.

Appellees' Argument

The appellees' position is that no cause of action accrued at all. Their motion for directed verdict was based on this argument and the statute of limitation argument. Appellees maintain that there was no tort committed, but if there was, the one-year limitation applied. They cite Carr v. Texas Eastern Transmission Corporation, Ky., 344 S.W.2d 619 (1961), which holds that it is the object rather than the form of the action which controls in determining the limitation period. The form of the action may be contract or tort. The object of the action is the relief demanded, such as damages for injuries. See also Columbia Mining Co. v. Walker, Ky., 271 S.W.2d 276 (1954).

Appellees say that because the Crafts sought damages for physical and mental injuries, the object of their suit was not compensation for violation of rights but for personal injury. Thus, the one-year statute applies.

Conclusion

We conclude, as the appellants urge, that an actionable tort was committed. Albert and Irene Craft's testimony, unchallenged as it was, supports the fact that a civil wrong was committed against them. Prior to this time Kentucky has not adopted the tort of "outrage"; however, our highest court has approved redress for outrageous conduct when the

need has arisen. For example, in grave desecration cases the tort is not specifically named but is derived from a theory of trespass, and in cases where humiliating methods of debt collection are used the tort is called invasion of privacy. See Resthaven Memorial Cemetery, supra; Ferguson, supra; Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); and Voneye v. Turner, Ky., 240 S.W.2d 588 (1951).

We have tried without success to adjust the described conduct in this case within the definition of invasion of privacy. Restatement (Second) of Torts § 652A (Invasion of Privacy) (1977) states:

> (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].

Under invasion of privacy, the nearest we come to our fact situation is § 652B, intrusion upon a seclusion. This is described as,

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if his intrusion would be highly offensive to a reasonable person.

The Restatement comments refer to cases where the defendant has entered upon the plaintiff's property or

leasehold, or where the defendant has used binoculars to peer in on the plaintiff or tapped the plaintiff's telephone. So we must search elsewhere for a definition of the tort committed in the present action.

There is no question that the Crafts, in order to recover damages, must establish that they have a legal right to them. Haney v. Stamper, 277 Ky. 1, 125 S.W.2d 761 (1939). We think they have established the right to be left alone and free from outrageous conduct. The criminal law provides penalties for harassment in K.R.S. 525.070. We believe there should be a corresponding tort for this type of conduct. (The Crafts were unable to obtain criminal warrants against Roy Rice in the local courts.)

It is our conclusion, and we so hold, that Roy Rice's conduct, as testified about, met the definition of outrage as found in Restatement (Second) of Torts § 46(1) (1965), Outrageous Conduct Causing Severe Emotional Distress:

> (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.

Such conduct described in this case is a gross deviation from the generally accepted standards of decency and was calculated to cause harm either physically or mentally. The conduct described as non-actionable in Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903), and Browning v. Browning, Ky. App., 584 S.W.2d 406 (1979), one a sexual intercourse solicitation and the latter an intentional infliction of emotional

injury, is now subject to re-examination.

We also conclude that the physical contact rule reaffirmed in Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980), is not violated because the tort of outrage is based on willful conduct and not simple negligence. 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.

The judgment is affirmed.

GUDGEL, JUDGE, CONCURS WITH RESULT.

MILLER, JUDGE, CONCURS.

ATTORNEY FOR APPELLANTS:

Garis L. Pruitt
500 Price Building
P. O. Box 405
Ashland, Kentucky 41101

ATTORNEYS FOR APPELLEES:

Michael J. Farrell
Jenkins, Fenstermaker,
Krieger, Kayes & Farrell
P. O. Box 2688
Huntington, West Virginia
25726

David O. Welch
Welch, McDermott and Purdom
P. O. Box 1653
Ashland, Kentucky 41101-1653

Supreme Court of Kentucky

83-SC-376-D
(82-CA-1346-MR)

SEP 15 1983

ALBERT CRAFT AND
IRENE CRAFT

MOVANTS

V.

BOYD CIRCUIT COURT
#80-CI-343

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

RESPONDENTS

ORDER GRANTING MOTION FOR DISCRETIONARY REVIEW

The motion of Albert Craft and Irene Craft for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire record in this proceeding, File No. 82-CA-1346-MR.

ENTERED September 14, 1983.

Robert F. Stephens

Chief Justice

Brief Due: 10-14-83!