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KENTUCKY DEFAMATION AND PRIVACY LAW — THE LAST DECADE

by David A. Elder

INTRODUCTION

In the last decade¹ a number of important United States Supreme Court decisions have been issued dealing with the law of defamation² and privacy.³ During this same period, Kentucky courts have dealt with a wide range of common law and constitutional issues of defamation and privacy law, issuing a number of important opinions dealing with these topics which are of considerable interest to the Kentucky practitioner. This article will critically analyze the Kentucky developments in the context of an analysis of the significant United States Supreme Court decisions and of defamation-privacy developments nationally during this same period.

THE PUBLIC V. PRIVATE STATUS DISTINCTION

As is well-known, the Supreme Court, in New York Times Co. v. Sullivan,⁴ adopted a rule requiring public officials⁵ to prove constitu-

¹. Although not citable as precedent under Ky. R. Civ. P. 76.28(4)(c), unpublished opinions are briefly discussed herein where appropriate for illustrative reasons. For an analysis of Kentucky law and the Constitutional decisions through 1983 see DAVID A. ELDER, KENTUCKY TORT LAW: DEFAMATION AND THE RIGHT OF PRIVACY (1983).
⁵. Id. at 279-80. On the criteria applicable in determining which public employees are public officials see Rosenblatt v. Baer, 383 U.S. 75 (1966), where the Court stated that the “public official” status applies “at the very least” to public employees who “have, or appear to the public to have, substantial responsibility for or control over the conduct of public affairs” or “[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . .” Id. at 85-86. In a qualifying footnote the Court emphasized, however, that plaintiff’s position “must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular
tional actual malice, defined as knowing or reckless disregard of falsity, by evidence of "convincing clarity" as a precondition to collecting damages as to matters impugning them in their public capacities or reflecting on their fitness for their public positions. Later, the Court extended the same standards to public figures and candidates and candidate-incumbents for public office. In 1971, the New York Times decision reached its zenith and the Court plurality extended the same demanding standard to all plaintiffs, regardless of status, who were involved in matters of public or general interest or concern in the ill-fated decision of

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8. Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-65 (1967). (A well-known college football coach and a retired general who had thrust himself into the desegregation controversy at "Ole Miss" were held to be public figures).

A short three years later, the Court repudiated the *Rosenbloom* subject matter approach in the famous case of *Gertz v. Robert Welch, Inc.*, rejuvenating the status approach and the public versus private person distinction. The latter dichotomy was justified in part by the access that public persons have to the means and modes of response but, more importantly, by the "compelling normative consideration" that such public persons have assumed the risk of enhanced media and public scrutiny. As to individuals not coming within the public official classification, the Court concluded that a person could nonetheless be considered a public figure under the *Gertz* criteria in one of two ways, as an all purpose or general public figure or as a vortex or limited purpose public figure.

In applying the two subcategories, the Court has clearly expressed a decided preference for the vortex or limited purpose variety and has narrowly construed this category to exclude from the public figure status the following persons: a locally prominent attorney who represented the family in a controversial civil rights-wrongful death action brought against a police officer, a socialite with a nationally prominent name.
involved in a well-publicized and sensational divorce case despite the fact that she held numerous press conferences during the proceeding, a person held in contempt for voluntarily refusing to respond to a grand jury subpoena looking into Soviet espionage; a research scientist and recipient of substantial federal funding given the "Golden Fleece of the Month Award" by the defendant U.S. Senator.

As the aforesaid synthesis evidences, the Court has clearly rejected the suggestion that vortex or limited purpose public figure status can be met by plaintiff's mere voluntary association with a newsworthy or controversial issue. For example, both of the plaintiffs in Gertz and Wolston were held to be private persons despite their voluntary participation in courses of conduct certain to and in fact receiving substantial media attention. Indeed, the Court majority has clearly seemed to adopt a stringent approach that one dissenter has characterized as requiring the public plaintiff veritably to "mount a rostrum" to influence a preexisting public controversy.

Two recent important Kentucky Supreme Court decisions and one federal decision have appropriately applied this narrow construction of the vortex or limited public figure concept found in Gertz and its progeny. In Yancey v. Hamilton, the Kentucky Supreme Court correctly concluded that plaintiff-arrestee's detention on a matter of public interest, i.e., as a suspect involved in a double murder, was legally insufficient for public figure status. However, it remanded for a factual determination as to whether plaintiff had purposefully confessed to brutal murders he did not commit, thereby voluntarily thrusting himself into the vortex of an existent public controversy. In another decision, Warford v.

19. Id. at 454-55, n.3.
22. Wolston, 443 U.S. at 167. On the dubious cases adopting a "course of conduct" approach see Elder, supra note 2, § 5:9[D].
24. 786 S.W.2d 854 (Ky. 1989).
25. Id. at 859. This is the general rule and clear mandate of the United States Supreme Court decisions. See generally Elder, supra note 2, § 5:11[A].
26. Yancey, 786 S.W.2d at 859. See also J. & C. Inc. v. Combined Communications Corp. Inc., 14 Med. L. Rep. (BNA) 2162, 2164-65 (Ky. Ct. App. 1987)(A businessman and a joint venture were limited purpose public figures as to a preexisting controversy concerning transportation, storage, and use of waste sludge where plaintiffs attempted to influence the controversy through public appearances and issuance of "press kits" to the media.), cert. denied, 488 U.S. 826 (1988). See generally Elder, supra note 2, §§ 5:11[D],[E] (concerning the
Lexington Herald-Leader Co., the same court held that an assistant basketball coach/recruiter for the University of Pittsburgh was not a limited purpose public figure, concluding that the nationwide interest concerning recruitment of college athletes “lack(ed) the specificity or particularity required” to meet the “public controversy requirement.”

The court also rejected the suggestion that the plaintiff’s voluntary involvement in a course of conduct in recruiting athletes necessarily resulted in an assumed risk of media scrutiny. Lastly, in White v. Manchester Enterprise, Inc., a federal court held that the single appearance of plaintiff—Native American pow-wow organizer before the local city council seeking the expenditure of public funds constituted merely an example of a matter of general interest to the public as to governmental expenditures—not a preexistent specific or particular controversy plaintiff was seeking to influence.

CONSTITUTIONAL ACTUAL MALICE

In 1989, in Harte-Hanks Communications Inc. v. Connaughton, the analyses of businessmen and businesses as public figures).

28. Warford, 789 S.W.2d at 767-71.
29. Id. at 767. The court distinguished the case of Barry v. Time, 584 F. Supp. 1110 (N.D. Cal. 1984), as involving a head coach hired into a “charged atmosphere” for the particular purpose of cleaning up a program tainted by recruiting violations. Warford, 789 S.W.2d at 768-69. On sports figures as public figures see ELDER, supra note 2, § 5:11[F][1].
30. Warford, 789 S.W.2d at 769-71. And see the unpublished opinion in Osborne v. Ottaway Newspapers, Inc., 18 MED. L. REP. (BNA) 2395, 2397 (Ky. Ct. App. 1991), cert denied, 505 U.S. 1206 (1992), where the court followed Warford and held that a water district consulting engineer and his company were not limited purpose public figures. These plaintiffs had no access to the media and there was no evidence they “utilized the media to affect any particular result.” Id. For examples of numerous other similar independent contractors with governmental entities likewise correctly held to not be public figures see ELDER, supra note 2, § 5:11[G].
32. 491 U.S. 657, 663-68 (1989). For a lengthy analysis of the doctrine of constitutional actual malice see ELDER, supra note 2, ch. 7. The Court noted for the first time the controversial doctrine of “neutral reportage,” i.e., that a defendant is immune as to publications made with knowing or reckless disregard of falsity if received from a responsible source and neutrally reported. Id. at 660-61 n. 1. The issue of “neutral reportage” had been rejected by the Ohio Court of Appeals on the ground that the source was not a “responsible, prominent organization.” Petitioner had not raised or argued the issue and it was not before the Court.
Court reaffirmed the subjective standard applied to plaintiff's required proof of constitutional actual malice under its leading case of *St. Amant v. Thompson.* However, the Court took pains to emphasize that a public plaintiff or a private person attempting to fulfill the First Amendment requisite for punitive or presumed damages in cases of public interest

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.Id. Justice Blackmun thought this “strategic decision” was unwise as the facts “arguably might fit within it.” *Id.* at 694-95 (Blackmun, J., concurring). Note that Kentucky has unequivocally rejected this doctrine. *See infra* part entitled “The ‘Fair Report’ and ‘Neutral Report’ Privileges.”

33. 390 U.S. 727, 731-32 (1968). In probably the most often discussed passages of any of its decisions, the Court concluded that plaintiff must show “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 731. The Court responded to the criticism that its standard “puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity” by concluding that defendant could not “automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.” *Id.* at 732.

The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive . . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous phone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id.*

34. Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 (1990), and see White v. Manchester Enterprise, Inc., 910 F. Supp. 311, 315, n.4 (E.D. Ky. 1996). The United States Supreme Court has imposed due process requirements on the awarding of punitive damages. For a Kentucky decision on remand from the high court see Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993). Note that the Kentucky legislature tightened up the requirements for punitive damages in 1988, *KY. REV. STAT. ANN.* § 411.184 (Michie/Bobbs-Merrill 1992), providing for punitive damages only in cases of oppression, fraud, or malice and upon proof of clear and convincing evidence. There is obviously no federal constitutional problem with a state imposing additional substantive hurdles to the awarding of punitive damages. *See* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 254-55 n.6 (1974) (implicitly authorizing a common law malice addendum). On the constitutionality of this statute under the Kentucky Constitution see Charles E. Moore, *Punitive Damages in Wrongful Death Actions: Is KRS 411.184 Constitutional?*, KENTUCKY BENCH & BAR 18 (Summer 1990), and the comment of the Kentucky Supreme Court in response to arguments of an insurance company appellant as to the significance of § 411.184: "It suffices to say that this Court could not interpret KRS 411.184 to destroy a cause of action for punitive damages otherwise appropriate without fatally impaling upon jural rights guaranteed by the Kentucky Constitution, Sections 14, 54 and 241." Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993) (dicta). The court further noted in a contemporaneous decision that the issue of the constitutionality of § 411.186, the companion statute, was not before it. *Hanson*, 865 S.W.2d at 310. Later, the court noted that limitations on punitive damages were for the legislature, “provided it can be done consistent with our Constitution.” *Id.* at 311. But note that the Kentucky statute, *KY. REV. STAT. ANN.* § 411.051, requiring a written request for a retraction prior to suit, was recently held to preclude punitive damages where it was not complied with both as to defamation and "false light"
could adduce circumstantial evidence, including evidence of motive, negligence and a deviation from professional standards of investigation, as some probative proof in support of a finding of constitutional actual malice. Moreover, while a failure of investigation was constitutionally insufficient by itself to meet the New York Times standard, defendants' refusal therein to examine a tape in its possession, directly relevant to the credibility of a key witness, was held to have evidenced a "purposeful avoidance" of information that might undermine the credibility of a questionable source, as was defendants' refusal to interview this key witness who could have corroborated or negated the veracity of defendants' source.

In several post-Harte-Hanks Communications, Inc. decisions the Kentucky Supreme Court and the federal courts in Kentucky have correctly interpreted and applied the more plaintiff-oriented interpretation of the constitutional actual malice standard evidenced by the Court therein. In Warford, the court focused on a number of listed factors in finding that the plaintiff had provided a circumstantial evidentiary collage of constitutional actual malice: the minimal attempts to verify the athlete source's credibility; defendant's decision to not contact either the student-athlete-source's parents or other useful sources for corroboration as suggested by plaintiff; defendant's decision to wait until just prior to publication of the story to interview the key witness who could have corroborated or negated the veracity of defendants' source.

private causes of action. White v. Manchester Enterprise, Inc., 871 F. Supp. 934, 937-38 (E.D. Ky. 1994). The question of the constitutionality of the statute under § 14 of the Kentucky Constitution, the "open courts" provision, was later resolved in a companion case. The court found no "open courts" violation, but held the statute invalid under § 59 of the Kentucky Constitution, the "special legislation"-equal protection provision. The court found no "rational basis" for distinguishing newspapers from other elements of the print media, such as magazines, newsletters and "other print publications." 910 F. Supp. 311, 315 (E.D. Ky. 1996).

35. Harte-Hanks Comm., 491 U.S. at 667-68.
36. Id. The Court affirmed its traditional view that evidence of bad motive alone would not suffice for constitutional actual malice. Id. at 666-67. See also Cazalet v. Flanagan, 1995 WL 641977, at *5 n. 7 (Ky. Ct. App. 1995).
38. Id. at 692.
39. Id. at 692-93. The Court found a "remarkable similarity" between the case before it and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), where defendant had published an accurate rendition of an unreliable informant's false depiction of plaintiff football coach's purported "fix" of a college football game. Harte-Hanks Comm., 491 U.S. at 692. Although "there was reason to question the informant's veracity ... the editors did not interview a witness who had the same access to the facts as the informant and did not look at films that revealed what actually happened." Id. at 692-93.
41. Id.
tion to contact plaintiff for comment despite the absence of any time or
deadline pressure; the absence of additional investigation prior to the
reprint complained of despite the denials of plaintiffs and others;
defendant’s awareness of the gravity of the charge of offering money to a
student recruit and its likely effect by sending a copy to all potential
college employers and a hundred leading newspapers; defendant’s
adoption of the “most potentially damning alternative” construction of the
source’s clearly ambiguous statement.

In the same vein, a recent Kentucky federal decision has concluded
that a constitutional malice finding was not precluded in a false light-
privacy claim where co-defendant-reporter’s source denied making the
statement. In another federal decision, the court found “ample evi-
dence” of constitutional actual malice in three instances. The first was the
reporter-author’s failure to verify the facts underlying an article from a
Native-American newsletter relied on as the primary source, even though
the authors did contact the author to confirm accuracy. This strand of
the actual malice finding does not seem particularly weighty, especially in
view of the substantial case law authorizing media defendants to rely on
reputable media publications and absolving them of any duty of investi-
gation and verification of the underlying facts thereof. The second
and much weightier factor was the co-defendant-author’s admission that
his partially fabricated adoption of the phrase “a trail of bad checks,”

42. Id. ("From the foregoing, a jury could reasonably believe that appellees were commi-
ted to running the story without regard to its truth or falsity" Id.). The court also reaffirmed
the traditional rule that truth could not be proved by showing other specific bad acts of plain-
tiff. Id. at 773-74.

43. Id. at 772.

44. Id. ("This knowledge of potential harm should have heightened appellees’ investiga-
tive efforts. The fact that it did not may be considered as evidence of malice"). This aspect of the
St. Amant criteria has not been discussed in detail in the case law. See ELDER, supra note 2,
§ 7:22. Warford is a significant development in the jurisprudence on point. Id.

45. Warford, 789 S.W.2d at 772-73. On such exaggerations see ELDER, supra note 2,
§ 7:12[A]. See also J. & C. Inc., 14 MED. L. REP. (BNA) 2162, 2166 (Evidence of substan-
tial discrepancies between what sources told defendant’s reporter and the article’s conclusion
that plaintiffs were “facing charges” presented an issue as to constitutional actual malice), cert.

46. O’Brien v. Williamson Daily News, 735 F. Supp 218, 224 (E.D. Ky. 1990), aff’d,
931 F.2d 893 (6th Cir. 1991). For an analysis of the cases on this issue, see ELDER, supra
note 2, § 7:14. Note that under the conservative position of the Kentucky Supreme Court
“false light” private plaintiffs are subject to the constitutional actual malice requirement, not the
negligence standard. See infra text, pp. 44-46.


48. Id.

49. See ELDER, supra note 2, § 7:2.
where the source cited listed only a single instance, was "mere writer's license" possibly prompted by the "trail of tears" horror known to Native-Americans. Third, the court held that where all three of the newspaper employees who were mentioned as contacts for a printed defamatory statement denied having talked to the quoted source, there was evidence of constitutional actual malice.

In the most important Kentucky case on constitutional actual malice, Ball v. E.W. Scripps Co., the Kentucky Supreme Court followed Harte-Hanks Communications, Inc. in concluding unanimously that evidence of common law malice or motivation, although insufficient by itself to meet the New York Times standard, "lends credence to other circumstances" which the plaintiff-prosecutor asserted as proof of his claim. Indeed, the court allowed plaintiff to rely, in part, on nonactionable articles and editorials, published both prior to and subsequent to the defamatory statements, as supportive circumstantial evidence on the constitutional actual malice issue. In fulfilling its constitutional appellate review function, the court listed the other circumstances supportive of the jury's plaintiff-verdict: the reporter's grudge against plaintiff and evidence he was out to "get" Ball; the reporter's "good case" notations in his own notes when he found case records in public files supportive of his thesis as to plaintiff's alleged incompetence; the reporter's selective use of interviews of only a few persons hostile to plaintiff; the reporter's use of empirical data concerning plea bargains by different commonwealth attorneys, where he knew that the comparison could not properly be made because of the different ways the prosecutors operat-

50. White, 871 F. Supp. at 939. See generally Elder, supra note 2, § 7:12[A].
53. Id. at 686-87. The court noted that rarely will a publisher concede knowing or reckless disregard of falsity, and that normally plaintiff's case will be based on circumstantial evidence. Id. at 689.
54. Id. at 685-87. As to discovery in a libel case see Ky. Rev. Stat. Ann. § 421.100 (Michie/Bobbs-Merrill 1992)(protecting news media from disclosure of "the source of any information procured or obtained by him, and published in a newspaper, or by a radio or television broadcasting station"). See Lexington Herald-Leader Co. v. Beard, 690 S.W.2d 374, 377-80 (Ky. 1984), where the court rejected a supplemental newsman's privilege based on the First Amendment or the Kentucky Constitution as to information in the defendant's possession at the time of publication where the above statute had been met and the references to the sources had been deleted.
55. Ball, 801 S.W.2d at 687. On common law malice as evidence of constitutional actual malice see Elder, supra note 2, § 7:3.
56. Ball, 801 S.W.2d at 687.
57. Id.
ed; the reporter's reliance on a former narcotics officer-source, despite being told by a judge familiar with his work that he was "a very poor police officer" and "totally unreliable;" the defendants' refusal to look at files proffered to them to document the latter source's unreliability; the defendants' failure to retract.

In fulfilling its constitutionally-imposed function of appellate review of the constitutional actual malice determination, the court in Ball adopted the posture of Justice Scalia's concurrence in Harte-Hanks Communications, Inc., deferring to the jury's determination on issues of "so called underlying, subsidiary or historical facts." It refused to "claim . . . superior ability to divine the truth by reason of judicial office, and . . . question[ed] the good judgment of any judge who thinks he has such special powers." In other words, the Kentucky Supreme Court confronted the issue left ambiguous by the Court and applied the traditionally deferential clearly erroneous standard to all such jury findings in fulfilling its appellate review of the evidence of constitutional actual malice. The court also sharply rejected exceptionally lengthy and intricate interrogatories and jury instructions in favor of the Kentucky "bare bones" approach with the concomitant right of counsel to "flesh out" such instructions during argument.

58. Id.
59. Id. See generally ELDER, supra note 2, § 7:2. See Osborne v. Ottway Newspapers, Inc., 18 MED. L. REP. 2395, 2397 (Ky. Ct. App. 1991), cert. denied 505 U.S. 1206 (1992), where the court found evidence of constitutional actual malice in defendant's reliance on a "former disgruntled employee" of plaintiff and an "unhappy consumer" of the water district's services, both of which were "obviously hostile" to plaintiffs. Id.
60. Ball, 801 S.W.2d at 687.
61. Id. at 690. See generally ELDER, supra note 2, § 7:17.
62. Ball, 801 S.W.2d at 689 (following Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657, 696-700 (1989) (Scalia, J., concurring)). In adopting the view of the Sixth Circuit, Justice Scalia concluded that the courts should do "what common-law courts have always done, and there is ultimately no alternative to it," by "making our independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it reasonably could have made." Id. at 700. The majority selected three jury responses to special interrogatories and deferred to them, finding this a "less speculative ground" than deference to all the subsidiary facts. Id. at 689-90.
63. Ball, 801 S.W.2d at 688.
64. Id.
66. Ball, 801 S.W.2d at 691.
The Kentucky decisions have repeatedly reaffirmed the Kentucky Supreme Court's post-\textit{Gertz} adoption of a "simple negligence" standard established in the leading case of \textit{McCall v. Courier-Journal \\& Louisville Times}. In that case, the court relied on the reputation-protective provision in the Kentucky Constitution imposing liability on any person who "abuse(s)" the right of free expression and impinges on the "fundamental right" of reputation in refusing to adopt a more protective Kentucky rule for free expression than that mandated by \textit{Gertz}. Two important federal decisions have interpreted the \textit{McCall} standard. In one appellate decision, the court found evidence of negligence where defendant had failed to use the requisite "extreme care and caution" required under the circumstances in verifying that plaintiff had indeed consented to use of her nude photograph in a "hard core sex magazine" article which also imputed to her lewd fantasies. In another case, the court applied the important "wire service defense" to co-defendants who relied on a reputable wire service story, refusing to impose the "onerous burden" of investigating the merits of such a story merely because it imputed sexual misconduct with a student to a high school teacher. Such a burden would have been one of "extraordinary care, not ordinary care."

However, the court appropriately rejected the "wire service defense" as to both the initiating wire service and as to a co-defendant newspaper which pub-


\footnote{69. \textit{McCall}, 623 S.W.2d at 886 (discussing KY. CON. art. 1, § 8).}

\footnote{70. \textit{Id.}}

\footnote{71. Ashby v. Hustler Mag., Inc., 802 F.2d 856, 858-59 (6th Cir. 1986).}

\footnote{72. \textit{Id.}}

\footnote{73. \textit{See generally Elder}, supra note 2, § 6:8.}

lished additional information pursuant to its own investigation. 

The "Pure" v. "Mixed" Opinion Rule

In two modern decisions, the Kentucky Supreme Court rejected the almost open-ended four-factor-based "pure" opinion rule of Olmman v. Evans in favor of the more restrictive rule adopted by the Restatement(Second) of Torts. Under the latter, "pure" opinion based on stated or assumed non-defamatory facts was not actionable. However, opinion based on facts neither assumed nor stated was treated as "mixed" and plaintiff could bring an action as to the defamatory facts implied but not stated by defendant. Under the Restatement(Second) of Torts approach, a Kentucky plaintiff-prosecutor was held to have a viable cause of action as to a statement, attributed to a police narcotics officer, that the prosecutor's tactics allowed criminals to "commit crime after crime" and that they "couldn't have a better friend." Also, a Kentucky plaintiff had a cause of action as to a statement by a newspaper source, plaintiff's neighbor, that plaintiff was a "smooth talker," "a con artist," and "I would never lend him money." Such actionable opinionative statements gave rise to the reasonable inference that they were supported and justified by unknown, undisclosed defamatory facts. In the latter example, the court found a defamatory implication that plaintiff obtained money by false pretenses, a form of theft by deception or fraud.

The United States Supreme Court repudiated, as First Amendment doctrine, the separate "pure" opinion doctrine, in Milkovich v. Lorain

76. 750 F.2d 970, 979-83 (D.C. Cir. 1984) (the common usage or meaning of the specific language used, the statement’s capability of objective characterization as true or false, the full context of the allegedly defamatory statement, the broader context or setting in which the statement was made), cert. denied, 471 U.S. 1127 (1985). For a lengthy analysis of the important Olmman decision see Elder, supra note 2, § 8:3.
77. Restatement(Second) of Torts § 566 & cmts. b, c (1977).
78. Id.
80. Ball, 801 S.W.2d at 690.
81. Yancey, 786 S.W.2d at 856-58.
82. Id. at 857-58; Ball, 801 S.W.2d at 690.
83. Yancey, 786 S.W.2d at 858.
shortly after the issuance of the Kentucky Supreme Court's two decisions above. The Court held that its prior jurisprudence and the panoply of protections provided for defendants thereunder in cases of public interest eliminated any justification under the First Amendment for a separate pure opinion doctrine. More particularly, the Court's prior decision in Philadelphia Newspapers, Inc. v. Hepps, imposing on all plaintiffs the burden of proving material falsity, was interpreted as necessarily imposing on plaintiff the burden of demonstrating that the matter was provable as factually false in cases involving matters of public concern. The Court specifically held that a statement in the sports section of the newspaper that a high school teacher-coach and the superintendent of schools had lied under oath implied an imputation of perjury, which imputation was provable as factually false.

The two Kentucky decisions aforesaid are consistent with the Milkovich analysis. One of the types of false defamatory implications referenced by the Court was the scenario where the defendant makes the statement: "In my opinion John Jones is a liar." This statement "implie[s] a knowledge of facts which lead[s] to the conclusion that Jones told an untruth." This hypothetical situation parallels the statements made in Ball and Yancey. The Court also found such a potentially actionable implication where the facts thereunder were disclosed but were "incorrect," "incomplete," or where they were fully discussed but defendants' "assessment of them" was "erroneous." A third opinion issued recently by a

84. 497 U.S. 1, 17-23 (1990).
85. Id. at 15-18.
86. Id.
88. Milkovich, 497 U.S. at 16, 19-20. Although Philadelphia Newspapers and Milkovich held that the truth defense, with the burden on the defendant, did not suffice to meet the higher First Amendment requirements as to plaintiffs' burden of proof in matters of public interest, this does not preclude reliance on the "substantial truth" defense as a common law absolute defense, see Cazalet v. Flanagan, 1995 WL 641977, at *2 n.4, *3-4, *5 n.11 (Ky. Ct. App. 1995), or as a First Amendment absolute defense. See ELDER, supra note 2, § 2:2 [B][1].
89. Milkovich, 497 U.S. at 19-23.
90. Id. at 21-23. Such a determination could be made "on a core of objective evidence," by comparison of the prior evidence before the state administrative board and a trial court or by a perjury action. Id. at 21. Such an approach "holds the balance true" in accommodating the interests in free expression as to public issues and the protection of individual reputation. Id. at 22-23.
92. Id. at 18.
93. Id. at 18-19. See Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097 (1991), where the Court, interpreting Milkovich, concluded that "a defamatory assessment of facts can
Kentucky court of appeals is likewise consistent with *Milkovich*, although the latter surprisingly was not cited. In that case a “figurative phrase” about a county judge executive stating that he had “washed his hands” of the county budget was held to be protected freedom of expression.94

One earlier modern Kentucky appellate decision is not consistent with *Milkovich*. In *Rich v. Kentucky Country Day, Inc.*,95 the court of appeals held nonactionable the defendant- private school’s imputations that plaintiff was “lazy” and “irresponsible.”96 Although consistent with the Restatement(Second)of Torts approach,97 the latter’s extension of the then opinion doctrine to the *purely private* arena constituted an overly broad interpretation of *Gertz*,98 which has since been repudiated by *Milkovich*, which limited its constitutional requirement of provability as factually false to matters of public interest.99 Under this correct interpretation, whatever residuum of the opinion rule remains post *Milkovich* should not and does not apply to the *purely private* arena, e.g., to intra-employer defamation or to defamation by an employer to a new or prospective employer,100 or to, as in *Rich*, communications to plaintiff’s parents or to the parents of a girl with whom plaintiff had been allegedly misbehaving.101 In such situations the common law rule allowing the imposition
of defamation liability based on opinionative statements\textsuperscript{102} should remain untouched by First Amendment requirements.

**THE “FAIR REPORT” AND “NEUTRAL REPORTAGE” PRIVILEGES**

In an important Kentucky decision, *Pearce v. Courier-Journal*,\textsuperscript{103} the doctrine of “fair report” was applied to immunize substantially accurate reports of judicial proceedings: a search warrant and return thereon, personal injury litigation, and quasi-judicial administrative proceedings of the state board of medical licensure.\textsuperscript{104} However, an informal statement made by the assistant secretary of the medical licensure board was not shown to have been made “in the performance of a duty imposed upon him by law” and, thus, was not covered by “fair report.”\textsuperscript{105}

Following accepted doctrine, the court held that such substantially accurate reports\textsuperscript{106} were privileged whether or not the defamatory conclusions contained therein were in fact false.\textsuperscript{107} In other words, facial

\textsuperscript{102} Restatement(Second) of Torts § 566 cmt. a (1977).

\textsuperscript{103} 683 S.W.2d 633 (Ky. Ct. App. 1985). See generally Elder, supra note 2, ch. 3. In one Kentucky case, the court noted cryptically in denying “fair report” that the reporter was not present at the public meeting in question. O’Brien v. Williamson Daily News, 735 F. Supp. 218, 226 (E.D. Ky. 1990), aff’d, 931 F.2d 893 (6th Cir. 1991). However, presence is not and should not always be required in cases of “indirect” or “secondary” source reliance. See Elder, supra note 2, § 3:2; David A. Elder, The Fair Report Privilege § 1.18 (1988).

\textsuperscript{104} Pearce, 683 S.W.2d at 636. See Marshall v. Courier Journal, 12 Med. L. Rep. (BNA) 2350, 2353 (Ky. Ct. App. 1986) (holding in accordance with Pearce that information taken from an arrest warrant, attached affidavit, or arrest slip was covered by “fair report”). Note that in an unreported recent case, a court of appeals extended “fair report” to publication, in the Real Estate Commission’s newsletter, of a decision issued by the Commission, refusing to distinguish between the Commission itself and third party republishers. Kachler v. Daniels, No. 92-CA-000734-MF, (Ky. Ct. App. Nov. 12, 1993). This is the general rule. See Elder, supra note 104, § 1:19b; Elder, supra note 2, § 3:4[K].

\textsuperscript{105} Pearce, 683 S.W.2d at 637. On what statements of executive officers are held to be authoritative pronouncements subject to “fair report,” see Elder, supra note 2, § 3:4[C]-[F]. One recent decision has noted, but not relied on Restatement(Second) of Torts § 611 cmt. h (1977) (dening “fair report” to informal statements by police and prosecutors). Marshall, 12 Med. L. Rep. (BNA) at 2352.

\textsuperscript{106} Pearce, 683 S.W.2d at 635.

\textsuperscript{107} Id. at 636. Note that Pearce was followed recently in the unreported case of Kachler, supra note 104, where the Kentucky Real Estate Commission republished in its widely disseminated newsletter a decision of the Commission maligning plaintiff, despite the fact that the decision had been reversed on appeal by the circuit court. The court of appeals held that the notation that the case was “ON APPEAL” sufficed to notify the reader that the matter was on appeal and not final, even though no specific reference to the circuit court’s reversing action was given and the Commission had not appealed the circuit court order at the time of publication, although it did so thereafter. Kachler, slip op. at 5. This conclusion seems very questionable. Compare the cases cited in Elder, supra note 104, § 2:4[E].
accuracy, not substratal truth, is the focus of "fair report." The court of appeals specifically held that the article's reference to the drug "Demerol" rather than to the affidavit's correct usage of "controlled substances" was deemed substantially accurate and protected. Whatever inaccuracy existed "could not have appreciably affected their defamatory result . . . ." By contrast, a companion story, portraying plaintiff-physician as having unprofessionally addicted an elderly patient to a "living hell of drugs," was an investigative article by defendant's reporter not covered by "fair report."

The Pearce court likewise held that a story quoting a medical licensure board official as stating that plaintiff-doctor "will be suspended indefinitely" was "an inaccurate reportorial addition." The "fair report" privilege was similarly rejected in a federal decision in response to an argument that defendant's reportage of a public meeting of high school parents was covered. In that case, defendant's reporter had added matter pursuant to her investigation specifically identifying plaintiff by implication as involved in sexual misconduct.

In Pearce, the court of appeals, faced with interpreting the statutory "malice" qualification to "fair report," rejected the suggestion that otherwise accurate reports were defeasible by proof of knowing or reckless disregard of substantial falsity by defendant, i.e., by proof of consti-

108. Pearce, 683 S.W.2d at 635.
109. Id.
110. Id. The court noted that the statutory term "controlled substances" included LSD and opium. Id. See Marshall, 12 MED. L. REP. (BNA) at 2352 (factual inaccuracy as to the value of property seized during execution of a search warrant did not forfeit "fair report"). This is the general rule. See Elder, supra note 2, § 3:1.
111. Pearce, 683 S.W.2d at 636. Summary judgment was later granted against Pearce and sustained on appeal for failure to prove fault. Pearce v. Courier Journal, 22 MED. L. REP. (BNA) 1730, 1733 (Ky. Ct. App. 1993).
112. Pearce, 683 S.W.2d at 637. Note that the Pearce opinion concluded that, although plaintiff's reputation had been "stung . . . badly" by the charges privileged as "fair report," the "reportorial addition" aforesaid was "yet another stinger into . . . [plaintiff's] already wounded reputation." Id. The court's conclusion as a matter of Kentucky law parallels the Supreme Court's rejection as First Amendment doctrine of the "incremental harm" aspect of the "libel proof plaintiff" doctrine. See Masson v. New Yorker Magazine, 501 U.S. 496, 522-23 (1991). (specifically noting that the doctrine could be adopted as a matter of state law even though not mandated by the First Amendment). Id.
114. Under the Restatement(Second) of Torts open public meetings are covered by "fair report." See Restatement(Second) of Torts § 611 cmt. i (1977); Elder, supra note 2, § 3:4[H].
tutional actual malice. Such a contention was held to be inconsistent with the basic common law tenets of "fair report." Instead, the court adopted the 1938 Restatement of Torts definition prevailing contemporaneously with the passage of the Kentucky "fair report" statute, i.e., that "fair report" was forfeited only where defendant acted "solely" for the "purpose" of injuring the plaintiff. The latter test will undoubtedly provide a nearly absolute privilege in most cases, as the separate newsgathering function of the media defendant will provide at least a partial justification for reportage in almost all cases.

The Pearce case also reaffirmed Kentucky's unequivocal rejection of the extremely dubious absolute privilege of "neutral reportage," which some jurisdictions have adopted as to accurate reports of newsworthy matters emanating from responsible sources. As noted earlier, the Supreme Court has never approved "neutral reportage," only acknowledging its existence for the first time in a footnote in Harte-Hanks Communications, Inc.

THE COMMON LAW

A number of the Kentucky decisions of the last decade have followed the broad and expansive definitions of actionable libel reflected tradi-
tionally in Kentucky law.124 Other decisions have delineated other important elements of a plaintiff's prima facie case. In one important federal decision, the court followed the dubious and arbitrary numerical orientation of the group libel rules in the Restatement(Second) of Torts,125 limiting the small group to twenty-five or fewer,126 and held that the all-inclusive defamation and "false light" claims of a group of twenty-nine high school teachers did not give rise to an action by any individual member thereof.127 However, the same decision followed the general rule128 and provided a cause of action for both defamation and "false light" as to one particular member of the class who was particularly identified and implicated by the commingling of unrelated incidents.129

124. See Elder, supra note 1, §§ 1:06-08.
126. This arbitrary rule follows the leading case of Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952).
127. O'Brien v. Williamson Daily News, 735 F. Supp. 218, 220-23 (E.D. Ky. 1990), aff'd 931 F.2d 893 (6th Cir. 1991). The court referenced the minority view adopting a multi-factor "intensity of suspicion" test, which was "gaining favor in some jurisdictions." Id. at 223 n.4. The court noted plaintiffs had not argued the latter's applicability and there was no indication that the Kentucky courts would be receptive to such if properly presented. Id. For a supportive discussion of this minority view see Elder, supra note 2, §§ 1:7[B][2].
129. Id. The court also suggested that the same result would have occurred had a particular sub-class been identified, e.g., "some English teachers" at the high school. Id. at 223.
In two modern loosely-analyzed decisions, the court of appeals confused the separate issue of publication to a third person, an element of plaintiff’s prima facie claim, with the issue of a qualifiedly privileged publication, a matter of affirmative defense. In one case, the court held that separate defamatory communications from a school to a student, to the student’s parents, and to the parents of a girl with whom he was allegedly misbehaving were non actionable on grounds of qualified privilege and absence of publication. As to the dissemination to plaintiff, the absence of publication should have been the sole ground of the decision under the general rule because publication to the plaintiff alone is never sufficient for publication. As to the dissemination to the plaintiff’s parents and the girl’s parents, clearly the publication requisite was met. Consequently, those publications were properly non actionable only on grounds of non abused qualified privilege, the alternate ground of decision.

In the other decision, the court held alternatively that the defendant-employer had not published the defamatory matter to a third person and that intracorporate publication of audit results by defendant’s credit manager regarding plaintiff-branch manager’s operation were necessary intracorporate communications made without malice. The latter is

130. Elder, supra note 2, §§ 1:06[A].
131. Id. § 2:3[I][1].
133. See Elder, supra note 1, at 116.
134. Id. at 116-17.
135. Id. § 1.11[D].
136. Wyant v. SCM Corp., 692 S.W.2d 814, 815-16 (Ky. Ct. App. 1985). The court’s perfunctory analysis is not altogether clear on the “publication” issue. Plaintiff had alleged that the credit manager’s “internal report” that he “ruled” the store by ‘intimidation, sarcasm, and fear’ damaged his managerial reputation within SCM and led to his termination. Id. at 815. The court held that there was no evidence of publication by appellee to a third person (emphases added). Id. at 816. The corporation was apparently treated by the court as an indivisible entity and publication was denied unless the corporation published the matter “to a third person external to it.” Id. It seems undoubted that the audit was disseminated internally within the corporation. Id. This is made clear by the court’s qualified privilege discussion, which described the matter in question as “part of an internal memoranda detailing an audit of appellant’s branch.” Id.
137. Id. See also Stewart v. Pantry, Inc., 715 F. Supp. 1361, 1367-68 (W.D. Ky. 1988) (Non-malicious disseminations to the defendant’s “risk management department” and to plaintiffs’ supervisors were qualifiedly privileged as “necessary to its [the employer’s] proper function.” Id. at 1367.) Note that the required malice for abuse of a qualified privilege, i.e., ill will, wrongful motive, or hatred, is less restrictive than the “sole purpose” test used in abuse-of-“fair report” cases, see supra, part entitled “The ‘Fair Report’ and ‘Neutral Report’ Privileges,” or the test adopted by the Court of Appeals and dissenting justices before the
clearly the only correct ground. The alternative absence-of-publication conclusion is antithetical to the limited Kentucky law on point and the more defensible view of the law generally. If followed, it would effectively accord the defendant corporate employer a de facto absolute privilege to nonconsensually defame at will an employee within the corporate context regardless of the harm done or the justifiability of dissemination. This view is inconsistent with Kentucky's strong protection of the individual's fundamental interest in an unsullied reputation.

As indicated above, the modern Kentucky decisions have applied qualified privilege to communications justified under one of the privileged occasions traditionally protected in Kentucky. Four decisions, one involving the tort of injurious falsehood, have involved an absolute common law privilege. In General Electric Co. v. Sargent & Lundy, the Sixth Circuit applied the Restatement (Second) of Torts rule applicable in defamation to defendant, which had made actionable statements preliminary to the filing of a judicial proceeding against it, in an attempt to shift legal liability for a dysfunctional system of hydrostatic dust precipitators to plaintiff manufacturer. The court adopted the defensible modern majority and progressive rule extending the judicial proceeding privilege to such pre-filing comments by a likely party where litigation was "under serious consideration" and not a "bare possibility."

Kentucky Supreme Court in Compton v. Romans, 869 S.W.2d 24 (Ky. 1993). See the discussion of the latter in the text, infra notes 152-82 and accompanying text.

138. ELDER, supra note 1, at 120.

139. ELDER, supra note 2, § 1:6[B].

140. See generally id.; ELDER, supra note 1, at 120. For instance, a calculated falsehood, one made with knowledge of its falsity or in reckless disregard thereof, by a supervisory employee to a ranking superior for the specific purpose of getting plaintiff fired, and which is successful, would be nonactionable either as to the defaming employee or employer under the non-publication aspect of the opinion. This is assuredly an undesirable result not dictated by any of the public policies justifying the limited areas of absolute privilege recognized in Kentucky. See ELDER, supra note 1, §§ 1:09[A], 1:10.

141. See text, supra, part entitled "Constitutional Standards Applicable to Private Plaintiffs."

142. ELDER, supra note 1, § 1:11.

143. 916 F.2d 1119 (6th Cir. 1990).

144. Restatement(Second) of Torts § 587 cmt. e (1977).

145. General Elec., 916 F.2d at 1126-29.

146. See ELDER, supra note 2, § 2:2[C][5], [7]. Note that an unreported case has retained the Kentucky rule of only a qualified privilege as to statements to police or prosecutors reporting suspected criminality. Centel Cable Television Co. of Kentucky v. Brown, 32 K.L.S. 4, 7-8 (Ky. Ct. App. 1985). This remains the clear majority rule. See ELDER, supra note 2, § 2:2[C][6].

147. General Elec. Co., 916 F.2d at 1126 (quoting Restatement (Second) of Torts § 587
Under the Restatement (Second) of Torts rule adopted, the court held that defensive self-protective statements made by defendant after the injured party had sought and gotten from it a written waiver of the statute of limitations defense constituted absolutely privileged statements.\footnote{148} That defendant was not a disinterested party and was allegedly acting in furtherance of a fraud were held irrelevant to the claim of absolute privilege accorded a party.\footnote{149} In a second decision, the federal court held that plaintiff-employees' express consent to communication of unfavorable polygraph results to their employers and necessarily interested supervisory personnel within the company barred their action.\footnote{150} In another decision a Kentucky appellate court held that a statute mandating reporting requirements as to certified school personnel justified provision of absolute privilege to such reports.\footnote{151}

Lastly, in Compton v. Romans,\footnote{152} the Kentucky Supreme Court held 4-3 that the chairperson of the Kentucky State Racing Commission was absolutely immune for calculatedly false statements made by him in a public press release imputing to plaintiffs violation of racing rules.\footnote{153} Citing the twin policies generally relied on for absolute immunity, prevention of "timid, weak and vacillating performance of public duties" and avoidance of "undesirable utilization of time and energy in the defense of litigation,"\footnote{154} the court held that the Commission was "fully comparable" to a cabinet-level department\footnote{155} and its chair, elected by members solely to preside over meetings, was of "comparable rank" to the head of a department of state government.\footnote{156}

By an expansive reading of Kentucky precedent, which had never insulated a public press release under the panoply of absolute immunity except as to the final result of a quasi-judicial proceeding,\footnote{157} the court

\footnote{148. Id. at 1127-29.}
\footnote{149. Id. at 1128, 1129 & n.4.}
\footnote{150. Stewart v. Pantry, Inc., 715 F. Supp. 1361, 1366-68 (W.D. Ky. 1988). The consent was voluntary although given under a conditional threat of discharge. Id. at 1366-67. See discussion infra p.50.}
\footnote{151. Matthews v. Holland, 912 S.W.2d 459, 461 (Ky. Ct. App. 1995).}
\footnote{152. 869 S.W.2d 24 (Ky. 1993).}
\footnote{153. Id. at 25.}
\footnote{154. Id. at 24.}
\footnote{155. Id. at 27. The court referenced only two factors supporting this conclusion: the commission's status as an independent agency of state government and the governor's appointment of its membership. Id.}
\footnote{156. Id.}
\footnote{157. McAlist er & Co. v. Jenkins, 284 S.W. 88, 90-91 (Ky. 1926); Compton, 869 S.W.2d at 29-30 (Leibson, J., with Combs, J., & Wintersheimer, J., dissenting).}
found in the limited precedent a “public policy which favored courageous and decisive performance” of quasi-judicial functions (and impliedly, those executive in nature), even though such a release was unnecessary to fulfilling the functions of the position, as long as the release was “sufficiently connected” with the “general scope” of the chairperson’s statutory duties and “pertinent to the inquiry under investigation at the time.” In sum, the chairperson of a commission with such plenary authority must have “considerable discretion in the manner of performance of duties imposed by law.”

Justice Leibson, in dissent, would have affirmed the qualified privilege accorded by the trial court and court of appeals, which equated to a constitutional actual malice instruction sans the clear and convincing evidence requirement. Justice Leibson concluded that the majority “greatly expands” the concept of absolute immunity in Kentucky to a “reckless, publicity seeking” individual acting within the scope of his or her discretionary authority “speaking under the pretext of keeping the public informed.” He cited to and emphasized the responsibility-for-abuse provision of the Kentucky Constitution and concluded that Kentucky’s traditional posture (and that of the Restatement(Second) of Torts should be adopted to limit absolute immunity to the Governor and those who speak on his behalf as heads of executive departments.

Justice Leibson cited to and relied on the “substantially identical” case of Lanier v. Higgins, where the court of appeals had previously rejected absolute immunity as to comments by the City of Louisville Chief of Police concerning racism of an inferior officer during a television interview. He also correctly concluded that the case on which the majority relied, McAlister, supported a conclusion opposite to that for which cited by the majority. That case involved the official final report of

158. Compton, 869 S.W.2d at 26-27.
159. Id. at 27.
160. Id. at 28 (quoting McAlister, 284 S.W. at 91).
161. Id. at 28.
162. Id. at 29 (Leibson, with Wintersheimer, J., & Combs, J., dissenting).
163. Id.
164. Id. at 29.
165. Id. at 31.
166. Id. at 29 (citing KY. CON. ART. I, §8). See discussion, supra pp. 18-19.
168. Compton, 869 S.W.2d at 30-31 (Leibson, J., with Combs, J., & Wintersheimer, J., dissenting).
169. Id. at 29.
the Real Estate Commission acting *quasi-judicially,*¹⁷¹ not the preliminary and tentative conclusions of a commission at the initial stage of its proceedings.

The ramifications of *Compton,* particularly in light of the court’s very close alignment, are unclear. Is it limited to the head of a state administrative board, the Kentucky State Racing Commission, with broad authority, and of particular public interest and importance because of the horse industry’s prominence in Kentucky? Or does it apply to the press releases of the chairperson or head of any administrative entity authorized by Kentucky statute having status as an “independent agency” of the state? Or does it also have potentially wide significance at the municipal level as Justice Leibson’s sharp dissent seems to suggest?¹⁷²

In addition to these unanswered questions, two possible implicit conclusions of both opinions in *Compton* have important potential ramifications for Kentucky law. First, even the dissenters assume that defendant had at least a *qualified* privilege to issue the press release, relying on *Lanier.*¹⁷³ The public dissemination aspect of *Lanier,* never directly discussed by the court therein, was itself a significant departure from traditional Kentucky law, which had limited this qualified privilege to limited dissemination to others within government with a reciprocal interest in the defamatory subject matter.¹⁷⁴ However, this implicit aspect of

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¹⁷¹. *Compton,* 869 S.W.2d at 29-30 (Leibson, J., with Combs, J., & Wintersheimer, J., joining, dissenting).

¹⁷². *Id.* at 31. “There is no need to extend this oppressive regime [of *Barr v. Matteo* as to federal officials] to state and local government officials other than the Governor and heads of executive departments who speak for the Governor.” *Id.* (questioning *Barr v. Matteo,* 360 U.S. 569 (1959)). He reasoned that there is “no reason to believe” that the *Barr* rule “produces benefits that merit its use to protect the defamatory statements of less important state and local officials.” *Id.* Compare Chamberlain v. Mathis, 729 P.2d 905, 912-14 (1986), where the court applied only a conditional privilege to the state director of the health services department. The court rejected *Barr’s* underlying rationale as speculative and opined it was contradicted by the post-*Barr* experience with the qualified privilege given high state officials in constitutional tort cases. *Id.* at 914.

¹⁷³. *Lanier,* 623 S.W.2d at 914.

¹⁷⁴. *ELDER,* supra note 1, § 1:11C. *Lanier’s* adoption of a qualified privilege as to the news release is attributable to an erroneous reading of *Ranson v. West,* 101 S.W. 885, 896 (Ky. 1907), i.e., that all executive official communications not absolutely privileged are conditionally or qualifiedly privileged. *Lanier,* 623 S.W.2d at 915. *Ranson* involved a limited communication by a school trustee to the county superintendent, his superior. *Ranson,* 101 S.W. at 886. Nothing in Kentucky law existing at the time of *Lanier* justified extension of the executive privilege to public dissemination. See generally, “Compton v. Romans—Implications For Executive Officers of Government,” 8 MUNICIPAL L. NEWS, Vol. II 4-5 & n.7 (1994). And compare the very thoughtful opinion in Draghetti v. Chmielewski, 626 N.E.2d 862, 867-68 (Mass. 1994), where the court rejected any common law privilege when a police chief was
the holding in *Lanier*, tacitly reaffirmed in *Compton*, is consistent with
the view of a large number of cases from other jurisdictions extending
the qualified privilege to such public disseminations of matter of public
interest.\(^{175}\)

Second, even the dissenters seem to assume that the knowing or reck-
less disregard requirement (by a preponderance of evidence standard) is
the controlling fault-re-falsity standard for abuse of the common law
privileges,\(^{176}\) at least as to executive officials publishing matter of public
interest.\(^{177}\) If this broader construction was intended, it would effective-
ly repudiate preexisting Kentucky common law (without citation to or dis-
cussion thereof), which has found forfeiture of a common law privilege
where defendant lacked a reasonable belief or probable cause to believe
in the truth of the defamatory matter, a type of negligence standard.\(^{178}\)
If intended to so impact upon all qualified privilege, this would be an
exceptionally unfair result. What public policy justification is there for
adoption of a common law forfeiture-of-privilege standard nearly as
demanding as the exceptionally demanding burden imposed on public per-
sions and for punitive damages as to matters of public interest under the
First Amendment?

In all likelihood, the trial court's conclusion reflected or was influ-
enced by the rule of the Restatement (Second) of Torts in section 600\(^{179}\)
adopting said standard. However, the express rationale for so doing, i.e.,
that a negligence standard for forfeiture was subsumed in *Gertz's*
require-
ment of negligence in all cases of defamation, whether libel and slander,
whether a matter of public interest or matter of purely private inter-
est,\(^{180}\) has been subsequently repudiated by the Supreme Court's deci-
sion in *Dun & Bradstreet*, which held that common law standards
under state law applied as to matters of purely private interest, which is the
undoubted realm of most qualifiedly privileged occasions.\(^{181}\)

\(^{175}\) Elder, supra note 2, § 2:3[F].

\(^{176}\) Id.

\(^{177}\) Id.

\(^{178}\) Elder, supra note 1, at 214-18.

\(^{179}\) Restatement (Second) of Torts § 600 (1977).

\(^{180}\) Id. cmt. a, b.

If Compton stands for a Kentucky Supreme Court consensus that at least a forfeiture standard of reckless disregard should be adopted in a qualified privilege such as Compton, there is undoubtedly no compelling argument for applying the same forfeiture ground to both qualifiedly privilege scenarios involving matters of public interest (i.e., Compton)\(^2\) and for other matters in the purely private realm, where protection of reputational interests would presumably be more compelling.

**Privacy**

The modern Kentucky decisions\(^3\) involving media defendants have repeatedly reiterated the conservative view taken in McCall,\(^4\) that a private individual suing in "false light" must comply with the Time, Inc. v. Hill\(^5\) rule. The rule requires that private persons suing as to matters of public interest must meet the New York Times standard, until the United States Supreme Court specifically limits the Time, Inc. v Hill rule to public persons and expressly adopts the Gertz standard as to suits by private persons in such cases.\(^6\) This set of conclusions results in the

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\(^{182}\) Justice Leibson, in adopting the reckless disregard of falsity standard, concluded that such a qualified privilege, as depicted in Lanier, was all that was necessary "to balance public interest and private rights." Compton, 869 S.W.2d at 31 (questioning Lanier v. Higgins, 623 S.W.2d 914 (Ky. Ct. App. 1981)). His opinion should not be interpreted as conceding or supporting the application of the reckless disregard of falsity standard where such a "public interest" does not come into play and where the countervailing fundamental interest in protecting reputation is much stronger.


\(^{185}\) 385 U.S. 374, 388-91 (1967).

\(^{186}\) When and if the United States Supreme Court acts, the court indicated it would adopt a simple negligence standard as in defamation. McCall, 623 S.W.2d at 888. The Restatement(Second) of Torts § 652E Caveat & cmt. d (1977) has adopted the Time, Inc. v. Hill standard, taking no position as to the ambiguous status of the law after Gertz. For an analysis of the decisions for and against applying the Gertz standards in private person-"false light"-public interest cases, see ELDER, supra note 3, § 4:121B. Note that the Supreme Court has equated the interests of the libel and "false light" torts, i.e., protection of reputation, Zacchini v. Scripps Howard Broad. Co., 433 U.S. 562, 572 (1977), while noting that Time, Inc. v. Hill was "hotly contested and decided by a divided Court." Id. at 571. Of course, a prerequi-
anomalous and confusing scenario of differing standards and instructions being applied to defamation and "false light" claims arising from the same actionable matter and litigated in the same case. The recent Kentucky decisions have also reaffirmed the McCall view that a plaintiff may bring both libel and "false light" actions but may get only a single recovery. Consistent with this analysis, a recent federal decision has applied the Kentucky retraction statute to both libel and "false light" claims, refusing to permit a plaintiff to circumvent the statutory limitations by characterizing the action as one for "false light" privacy.

Only a modest amount of litigation has involved the "public disclosure of private facts" subspecie of privacy. A recent federal decision has correctly rejected both "intrusion" and "public disclosure" claims as to an aspect of personal identity voluntarily left open to public view by plaintiff. Moreover, the Pearce decision has correctly reaffirmed the view that true matters of public record which are accurately reported are absolutely privileged, expressly following the holding of the United Supreme Court in Cox Broadcasting Corp. v. Cohn. In another decision, the Kentucky Supreme Court recently held that the "privacy" exemption of the Kentucky Open Records Act did not apply to matters, such as expenditures of substantial sums of money by a state university in responding to NCAA allegations, which would be covered by the "public interest" limitation on the "public disclosure" action.

...
The Supreme Court rightly rejected, however, mandatory disclosure by a state licensing board of the details of psychological records and charges of sexual impropriety made against a psychologist, which resulted in his resignation, as matters falling within the statutory exception providing for nondisclosure of "information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of personal privacy." Recently, a court of appeals has likewise issued a well-reasoned opinion involving press reportage of an identified twelve year old's pregnancy that is likely to get national attention. While rejecting interest-newsworthiness privilege, see generally ELDER, supra note 3, §§ 3:11-14. In one interesting unreported decision a court of appeals rejected arguments that the use of a front page photograph of a dead or dying victim of a massacre at Standard Gravure in Louisville constituted an actionable tort. Barger v. Courier-Journal, 20 MED. L. REP. (BNA) 1189 (Ky. Ct. App. 1991), cert. denied, 503 U.S. 1006 (1992). It held that there was no cause of action under the intentional infliction tort's high threshold, i.e., "conduct utterly intolerable in a civilized community," although the court found the publication and national distribution thereof "in poor taste, insensitive, and indelicate." Id. at 1190-91. The court also rejected the "public disclosure" action primarily on grounds of lack of standing of family members to bring such an action where their own privacy was not violated. Id. at 1191. This is the general rule. See ELDER, supra note 3, § 1:3.

In "the interest of judicial economy" the court also answered appellant's other contentions in dicta. Barger, 20 MED. L. REP. (BNA) at 1191-92. It suggested that the matter published came within the broad "public interest" limitation on the "public disclosure" tort. Id. at 1191-92. It further opined that the "public interest" privilege was not forfeited by the allegedly trespassory manner of acquisition of the information, as no allegation had been made that the photographer's access via tunnels and hallways from defendant's adjacent building was without consent. Id. Lastly, it suggested also that the news media had a customary right of access to such public business premises when "events of great public concern" were involved, id., relying on the well-known but very controversial case of Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977). For a strong critique of this controversial decision see ELDER, supra note 3, § 2:17[A]. Note that the United States Supreme Court has recently rejected any protection under the First Amendment for the media where it breached contractual undertakings of anonymity to sources. Cohen v. Cowles Media, 501 U.S. 663, 668-72 (1991). This decision provides solid constitutional support for the strong majority view that media trespasses or intrusions are not privileged merely because they result in reportage of true matter of public interest. Indeed, under this rule the media defendants can be held liable for the enhanced damages resulting from subsequent use or publication of the illegally or tortiously acquired matter. See ELDER, supra note 3, § 2:17[A]. See infra note 196.

193. Kentucky Bd. of Exam. of Psych. v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324, 328 (Ky. 1992). Noting that this statutory exception acknowledges "that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," the court held that disclosure of such under the act would violate privacy interests of a "very personal nature" of the psychologist's patients, i.e., details of marital and familial relationships, psychological symptoms, clinical impressions and treatment, and sexual behavior of the therapist vis-a-vis patients. Id. Such information "touche[s] upon the most intimate and personal features of private lives." Id.

an "intrusion upon seclusion" claim as to publicization of her name and age, the court of appeals upheld both an intentional infliction claim, based primarily on the reporter's breach of confidentiality, and a "public disclosure of private facts" cause of action founded in the widespread publicity given to the private matter. The court concluded that disclosure of her identity and pregnancy was one that "a reasonable person would find degrading, humiliating and offensive," and that a question of fact existed as to its legitimate newsworthiness, i.e., whether it was of "genuine and sufficient public interest or concern" or "legitimately informative" rather than publicized merely "to satisfy idle curiosity and plant seeds for gossip." Only a couple of modern Kentucky privacy decisions have been issued outside the media defendant setting. One involved allegations of "intrusion upon seclusion" and "false light" precipitated by an employer's use of a polygraph. The court applied the absolute defense of consent to the intrusion claim, rejecting the suggestion that consent given under the coercive threat of loss of employment was other than voluntary. As

195. The court focused on "the type of intrusion intrinsic to the tort" and concluded that there was "no physical or sensory interference with, or prying into [plaintiff's] solitude or seclusion or private affairs." Id. at *5. Compare, however, the analysis in McSurely v. McClellan infra notes 203-09 and accompanying text.

196. Doe, 1995 Ky. App. LEXIS 193, at *12. The court concluded that such a disclosure was "a deviation from all reasonable bounds of decency . . . not tolerable in our society." Id. Moreover, it was not privileged, whatever the level of public interest, where a breach of confidentiality was involved: "To do so would cause not only the offended to suffer, but in the long term the press as well; ultimately, of course, the public becomes the greater victim. No individual would confide in and speak to the press if she were aware that its promise of confidentiality is meaningless." Id. The court's analysis is consistent with the view of the United States Supreme Court in Cohen v. Cowles Media Co. See, supra note 192.


198. Id. at *9-10. The court declined to indicate whether it accepted the "involuntary public figure" illustration in Restatement(Second) of Torts § 652D cmt. f (1976), of a birth to a twelve-year-old, which was taken from Meetze v. Assoc. Press, 95 S.E.2d 606, 610 (S.C. 1956). It distinguished the above illustration as involving, unlike pregnancy, the "medical oddity" of childbirth, Doe, at *10, and concluded that identifying plaintiff specifically added nothing to the value of the article. Id. at *10-11. The court rejected a claim by the co-plaintiff mother, whose name had not been used and as to whom no private matter had been disclosed. Id. at *13.


to the “false light” claim, the court rejected the view that “the mere act of firing,” under circumstances which may result in gossip “in a small town environment,” was sufficient to fulfill the essential element of “publicity” by the defendant. The “publicity” requisite mandated more than the mere fact of a termination of an employee. Any other result would unreasonably circumscribe the time-honored employment at will doctrine in Kentucky.

An important federal decision has interpreted the same “publicity” requirement more liberally in a “public disclosure” case. In *McSurely v. McClellan*, the District of Columbia circuit was required to interpret Kentucky law in the unusual context of a suit against a co-defendant member of a United States Senator’s staff (also an investigator for a Senate subcommittee) who had forced the co-plaintiff/husband to go through previously illegally seized documents individually and in close detail when ostensibly returning the documents. This return procedure was used for the purpose of ensuring that the co-plaintiff/husband read correspondence detailing his wife’s premarital affair with a noted columnist.

The court held that such conduct constituted an actionable intrusion upon both spouses’ right of privacy and also constituted tortious “publicity” of embarrassing private matter as to the co-plaintiff/wife under the “public disclosure” tort. The court interpreted Kentucky law on the latter issue as supporting the liberal minority view on the concept of “publicity,” which focuses on whether the defendant disclosed the private matter to a “particular public” with whom the plaintiff had a “special relationship.” The court correctly held that the spouse constituted “the most significant possible audience” for such purposes and rejected the contention that defendant had either an absolute Speech or Debate Clause immunity or a qualified privilege for such “sadistic and voyeuristic” conduct. More recently, however, a Kentucky appellate

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202. *Id.* at 1370.
204. *McSurely*, 753 F.2d at 112-14.
205. *Id.* For a discussion of the “intrusion upon seclusion” cases involving third party interference with the marital relationship see *ELDER, supra* note 3, § 2:24.
207. *Id.* at 113.
208. *Id.* at 112-13. For a critical discussion of the Restatement’s “publicity” requirement and a supportive analysis of the minority view decisions followed by *McSurely*, see *ELDER, supra* note 3, § 3:3[A].
court, without any reference to McSurely, adopted the much narrower “publicity” definition found in Restatement (Second) of Torts section 652D. 210

The Kentucky legislature has wisely acted to eliminate a major area of controversy in the area of privacy law dealing with the appropriation—“right of publicity” tort, i.e., the descendability and inheritability of the publicity interest after the death of the holder thereof. 211 As the involved multi-state Elvis Presley litigation aptly evidences, 212 the controversy over whether the appropriation—“publicity” interest is personal (and non-descendable) or essentially proprietary in nature (and descendable) has posed considerable difficulty for the courts. 213 The Kentucky legislature has attempted to forestall such a situation under Kentucky law, reaffirming that an individual has a property interest, 214 protected against “commercial exploitation,” 215 which survives the death of the individual asserting said property right for a period of fifty years in the case of a public figure. 216 The recent legislation is ambiguous, however, as to the impact of death upon a “right of publicity” claim as to a person who would not be deemed a “public figure” under the law. 217

211. See generally Elder, supra note 3, § 6:7.
212. Id.
213. Id.
215. Id.
216. Id. § 391.170(2).
217. Although § 391.170(1) is prefaced by descriptive language suggesting that the entire section applies only for the benefit of “public figures,” the text of subsection (1), “Commercial rights to use of names and likenesses of public figures,” refers to the “property right” of “a person” (emphases added) in his name and likeness and then states that such a right does not terminate upon the death of said person. Id. § 391.170(1). Clearly, however, a provision for protection of a person’s property interest in his or her name or likeness is not limited to those of celebrity status. See infra notes 218-227 and accompanying text. And see, Elder, supra note 3, § 6.1. Consequently, the statute leaves open the possibility of a noteworthy gap in protection as to non-public figures whose names or likenesses have commercial value or viability but who die without having attained the status of “public figure.” Furthermore, defining who is a “public figure” is often a difficult matter. One exasperated court has opined that trying to define “public figure” in the defamation context is akin to endeavoring to “nail a jellyfish to a wall.” Rosanova v. Playboy Enter. Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976), aff’d, 580 F.2d 859, 861 (5th Cir. 1978) (The court applied Justice Stewart’s “I know it when I see it” definition of obscenity to the definition of public figure status). Moreover, while treating “celebrities” as “public figures” may be relatively uncomplicated, the courts may not necessarily find the volume of “public figure” precedent in defamation particularly helpful in a privacy context where the privacy violation in question involves true matter or true depictions. In fact, there is very little precedent delving into who is and who is not a “public figure” for appro-
More recently, a federal decision, *Cheatham v. Paisano Publications, Inc.*\(^{218}\) upheld an appropriation—"publicity" claim based on allegations that the defendants commercially appropriated plaintiff/designer's "unique" style, i.e., cut-off jeans displaying plaintiff's posterior through fishnet fabric, by using a sketch of her posterior on T-shirts.\(^{219}\) The court held that use of the photo by the media defendant as part of a "photo essay" of a bikers' convention was protected by a First Amendment based "newsworthiness" privilege.\(^{220}\) However, it upheld a claim founded on the same media co-defendant's supplying of the photo to the co-defendant manufacturer and participation in the profits of sale therefrom.\(^{221}\)

The court properly rejected any *per se* rule limiting the appropriation—"publicity" tort to celebrities,\(^{222}\) concluding that the cause of action was available to those "whose identity has commercial value."\(^{223}\) Although
there is loose language in the opinion, suggesting the plaintiff "must have a notoriety strong enough to have commercial value within an identifiable group" and that the court had "grave doubts" that the plaintiff could demonstrate "a sufficiently wide notoriety" for the case to proceed further, it is clear from the context that this "notoriety" requirement was directed at a fundamental problem with plaintiff's claim, i.e., the iffiness of "identification" of plaintiff in defendant's commercial use. In other words, there could be no actionable appropriation of plaintiff's identity unless "her image was distinctive enough" that customers and friends "recognized the replica drawing" (which only showed her fishnetted bottom from waist to thighs) and "identified" it as "her 'image.'" Apart from the identification problem, there would appear to be no justifiable "notoriety" requirement as to a person of non-public stature whose identity is utilized commercially without authorization.

CONCLUSION

As the above extended analysis has indicated, Kentucky courts (state and federal) and the Kentucky legislature have been active in the defamation-privacy realm, a phenomena paralleling that of the nation as a whole. The burgeoning amount of precedent emanating from the courts, locally and nationally, mandates that a practitioner contemplating defamation or privacy litigation, or trying to advise his or her client preventatively, be conversant both with the common law in Kentucky and the law's evolution nationally and with the great volume of jurisprudence delineating the limitations imposed by the First Amendment. While the modern Kentucky decisions undoubtedly collectively evidence Kentucky's firm protection of reputational and privacy interests, the intricacy of the law nonetheless remains a veritable minefield for the unwary attorney.
I. INTRODUCTION

The educational system in the United States today has been the subject of many debates and much courtroom litigation. With the rapid occurrence of dynamic worldwide change, this country's concern for the welfare of its people has shifted drastically to the welfare concerns of its youth and the uncertainty of their future. One of these major concerns is that of the educational system in our country today. This growing concern has prompted many states, voluntarily or involuntarily, to overhaul their system of schools in order to keep pace with the rapid change that is constantly progressing day after day. Kentucky is one such state that has been forced to reorganize its entire system of schools by judicial decree.

In 1989 the Kentucky Supreme Court, in *Rose v. Council for Better Education, Inc.*, declared the entire school system for the Commonwealth of Kentucky to be unconstitutional. The ruling in *Rose* provided the impetus for the reorganization of the public schools in Kentucky. In this unprecedented and landmark decision, the Kentucky Supreme Court, relying upon the Kentucky Constitution section 183, set a standard requiring the Kentucky General Assembly to provide for the establishment and maintenance of an efficient system of common schools for the state.

As a result of the decision in *Rose*, the Kentucky General Assembly responded by enacting the Kentucky Education Reform Act of 1990 pursuant to the mandate of the Kentucky Supreme Court. One of the most...
dramatic changes in the Kentucky Education Reform Act is the process by which a local board of education terminates the contract of a tenured teacher. The process for terminating a tenured teacher in Kentucky is set forth in section 161.790 of the Kentucky Revised Statutes. 7 This governing statute provides for the contract of a teacher to be terminated for insubordination, immoral character or conduct unbecoming a teacher, physical or mental disability, inefficiency, incompetency or neglect of duty. 8 The local boards of education have a primary interest in providing a quality education by competent and moral teachers. The students’ rights to receive a quality education must be protected.

Under this statute, the teacher is notified by the superintendent that his or her contract is terminated. Such notification is to be accompanied by a written statement specifying in detail the charges being levied against the teacher. 9 The teacher may, within ten days of the receipt of this charge, notify the chief state school officer of his or her intention to answer the charges. 10 Upon the notice of the teacher’s intention to answer the charges, the chief state school officer arranges and schedules an impartial hearing to determine whether to sustain the teacher’s termination. 11 In addition to Kentucky Revised Statutes section 161.790, the impartial hearing is also supported by Kentucky Administrative Regulation chapter 701, 5:090, 12 which deals specifically with the teacher disciplinary hearing process. This hearing process, by which tenured teachers in Kentucky are terminated, raises a number of questions as to whether the teacher and the local board of education are afforded adequate procedural guarantees of due process with respect to the governing statutory procedures.

II. CONSTITUTIONAL RIGHT OF DUE PROCESS

One of the fundamental principles of American jurisprudence is the constitutionally guaranteed right to due process. Pursuant to the Fourteenth Amendment to the United States Constitution, 13 no state shall deprive any person of life, liberty or property without due process of law. This guarantee applies with equal force to processes established in the system of public schools. In Kentucky, the public school system is an

8. Id. § 161.790(1)(a)-(d).
9. Id. § 161.790(3).
10. Id.
11. Id. § 161.790(4).
13. U.S. CONST. amend. XIV.
extension of the state, and is established and funded by the General Assembly.\textsuperscript{14}

It has long been held that tenured employees of a public school system are entitled to fundamental procedural due process. A teacher’s contract, whether continuing or limited, is a property right entitled to due process protection of proper notice and an opportunity to be heard pursuant to the Fourteenth Amendment of the United States Constitution. Due process is especially important where the teacher is a tenured employee and his or her employment is one of an expected and continuing nature. This is the precise approach which has been taken by the United States Supreme Court in the opinions of \textit{Board of Regents v. Roth}\textsuperscript{15} and \textit{Perry v. Sindermann}.\textsuperscript{16} Similarly, the Kentucky Supreme Court, in \textit{Osborne v. Bullitt County Board of Education},\textsuperscript{17} has expressly afforded due process protection to a teacher’s contract.

Faced with the necessity of providing the tenured teacher with due process when determining the future of continued employment, the General Assembly drafted Kentucky Revised Statutes section 161.790 with provisions that grant the vital elements of notice and hearing. The notice requirement is embodied in Kentucky Revised Statutes section 161.790(3),\textsuperscript{18} which requires that the teacher be notified in writing by the superintendent of the charges being brought against him or her. The hearing requirement is subsequently embodied in Kentucky Revised Statutes section 161.790(4).\textsuperscript{19} This provision requires that a hearing be provided for a teacher if it is the desire of the teacher to challenge the charges being levied against him or her. More importantly, this hearing is to take place no less than twenty days nor more than thirty days after the teacher receives the statement of charges from the superintendent.\textsuperscript{20} This additional element of expediency with regard to the hearing goes straight to the heart of fundamental due process.

The courts and the Kentucky General Assembly have provided for rudimentary due process guarantees with respect to a tenured teacher and his or her expected continuation of employment. This governing statute, at least minimally, gives the facial appearance of an indicia of due process by granting the tenured teacher notice and an opportunity to be

\begin{thebibliography}{9}
\bibitem{rose} Rose, 790 S.W.2d at 200 n.1.
\bibitem{roth} 408 U.S. 564 (1972).
\bibitem{sindermann} 408 U.S. 593 (1972).
\bibitem{osborne} 415 S.W.2d 607, 612 (Ky. 1967).
\bibitem{kyrev} Ky. REV. STAT. ANN. § 161.790(3) (Michie/Bobbs-Merrill 1994).
\bibitem{kyrev1} \textit{Id.} § 161.790(4).
\bibitem{kyrev2} \textit{Id.}.
\end{thebibliography}
heard.

III. THE TRIBUNAL AND IMPARTIALITY

The right to a trial by jury is long standing in our system of jurisprudence. Typically, such right is interpreted to mean a trial by fair, unbiased, and impartial fact finders. These are important attributes to insure that jurors, as the finders of fact, will weigh all of the evidence properly, listen to all of the testimony presented, and make a determination based solely upon the facts presented. In many instances, one's right to a trial by jury is conducted through an administrative proceeding overseen by an appointed panel. Even though one's right to a trial by jury is carried out via an administrative, trial-type hearing, the constitutionally guaranteed right of due process to an impartial hearing is still adequately protected.

A. APPOINTMENT OF THE TRIBUNAL UNDER K.R.S. § 161.790(4)

The appointment of the three member tribunal is conducted by the chief state school officer, who is the Commissioner of Public Education. The tribunal consists of one teacher, one administrator and one lay person. None of the appointed members of the tribunal reside in the district where the impartial hearing is to take place. This type of procedure has been held to have met the rudimentary requirement of due process by putting in place an apparatus which avoids even the appearance of lack of impartiality on the part of the hearing body. The Kentucky Court of Appeal's decision in *Burkett v. Board of Education of Pulaski County* held that the appointment process had the indicia of due process requirements. These decisions expressly support the process which is in place today, and it is this process that protects the teacher's right of due process.

B. BIAS CONCERNS REGARDING THE TRIBUNAL

One of the major concerns with the hearing process is with the actual functions of the tribunal during impartial hearings. Kentucky Revised

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21. *Id.*
24. *Id.*
Termination of the Tenured Teacher

Statutes section 161.790(4) provides in relevant part that the "chief state school officer shall appoint a three member tribunal... to conduct an impartial hearing...". An inference can be made from the term "impartial hearing" that the finder of fact, in this instance the tribunal, shall fairly weigh the evidence presented, listen to witness testimony and make a finding in accordance therewith, not unlike the responsibilities of jurors. It is, therefore, axiomatic that an impartial hearing cannot be conducted by partial finders of fact.

It can be argued that the teacher will be precluded from receiving a statutorily guaranteed "impartial hearing" because the tribunal acts as both judge and jury. The United States Supreme Court, in Withrow v. Larkin, held that it is fundamental to both court and administrative adjudications that a fair trial in a fair tribunal is a basic requirement of due process. However, in an administrative proceeding such as this, it is necessary for the tribunal to act as both judge and jury. In Rouse v. Scottsdale Unified School District No. 48, the Arizona Supreme Court aptly held that due process does not prohibit a tribunal from joining adjudicative and investigatory functions in the performance of its duties. This precise issue has also been addressed at the federal level. In Breitling v. Solenberger, the Fourth Circuit upheld a ruling that due process has never demanded a pristine separation of adjudicative and investigatory functions.

Even though the teacher is not denied the guaranteed right of due process by the tribunal combining adjudication and investigation with respect to the hearing process, the risk of prejudice could possibly exist as a result of the tribunal receiving relevant information in advance of the hearing. However, the appointed tribunal for this type of administrative hearing must undertake some preliminary fact finding, prior to commencement of the proceedings, in order to be familiar with the relevant facts relating to the termination hearing in order to render an accurate decision. This notion was supported by the United States Supreme Court in Hortonville by stating, "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decision maker." This position has also been

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27. KY. REV. STAT. ANN. § 161.790(4) (Michie/Bobbs-Merrill (1994)).
29. 752 F.2d 22, 27 (Ariz. 1987).
32. Id. at 493.
taken by the Kentucky Court of Appeals in *Kelly v. Board of Education.*

Another contention is that the appointment of a tribunal by the Commissioner of Public Education denies the teacher the opportunity for an impartial hearing because of a potential adversarial interest in the termination hearing by the Commissioner, since it is his job to oversee the state’s public schools. However, this is not the case. The authority of the Commissioner to appoint the tribunal is expressly granted in Kentucky Revised Statutes section 161.790. This authority is stated plainly and with no express provisions for the creation of a substitute tribunal. Under Kentucky Administrative Regulations chapter 701, 5:090, the tribunal appointment procedure, pursuant to Kentucky Revised Statutes section 161.790, is deemed to be a necessary function. This function establishes necessary administrative and hearing procedures with respect to the tribunal process.

The Kentucky Court of Appeals, in *Carter v. Craig,* ruled that necessity requires that the appointed panel members sit even though they all may be biased and have predetermined ideas or notions regarding the termination hearing. Teachers who are proven to be unfit for employment cannot enjoy immunity from termination of their employment solely because the only removing authority, a three-member tribunal appointed by the Commissioner of Public Education, is disqualified as being biased against them. Furthermore, the Tenth Circuit has stated in *Stanton v. Mayes* that “out of necessity, disqualification will be permitted to destroy the only power to act.”

In order to prevent any predispositions or ideas that might be so prejudicial as to deny the teacher the right to an impartial hearing, the teacher, pursuant to Kentucky Administrative Regulations chapter 701, 5:090 section 6, may, along with the local board of education, at the termination hearing, conduct voir dire of the tribunal prior to the commencement of the hearing. In *Blackburn v. Board of Education,* the Kentucky Court of Appeals held that a claim by a tenured teacher that he was denied due process of law because the charges against him were not tried by an impartial panel was cured by the fact that a voir dire was conduct-

33. 566 S.W.2d 165, 168 (Ky. Ct. App. 1977).
34. 574 S.W.2d 352 (Ky. Ct. App. 1978).
35. *id. at 355.*
37. *id. at 913.*
ed prior to the termination hearing. It is this opportunity to conduct voir dire of the tribunal which safeguards the teacher’s constitutionally guaranteed right of due process with respect to the hearing procedure.

One final caveat to the potential for bias on the part of the tribunal is whether an argument can be made for the proposition that the tribunal would innately favor the teacher when rendering its decision. This is an allegation which has never been litigated before the courts and is purely theoretical. Since two-thirds of the tribunal consist of individuals employed by the public school system, that being a teacher and an administrator, an argument could be made that these two members of the tribunal would be innately predisposed to protect one of their own. Even though purely speculative, this is an argument that might support potential litigation in the future.

IV. IS THE TRIBUNAL AN AGENT OF THE SCHOOL BOARD?

The process by which the Commissioner of Public Education appoints the tribunal could lead one to speculate that the tribunal is no more than an extension of the local board of education and acts as an agent to carry out the desired termination on behalf of the school board and its superintendent. However, this argument is not supported by the tribunal’s governing statute and is contrary to the law of Kentucky.

In Grant v. Bill Walker Pontiac-GMC, Inc., the court held that under Kentucky law the right to control is the most critical element in determining whether an agency relationship exists. The framework of Kentucky Revised Statutes section 161.790(4) is constructed so as to remove all control from the local board of education when passing upon the recommendation of the Superintendent to terminate a tenured teacher. This governing statute clearly expresses that the composition and control of the tribunal is vested in the chief state school officer, who solely appoints the members, none of whom reside in the district where the hearing is to take place. The obvious purpose of this statutory provision is to construct an adjudicative tribunal with no connection to the local board of education. This is accomplished by providing for the appointment of the tribunal to be made by an officer of the state. The time, place, and manner is controlled solely by the Commissioner of Public Education with no regard for the local board of education. The local

39. Id. at 37.
40. 523 F.2d 1301 (6th Cir. 1975).
41. Id.
board of education exercises absolutely no control over the tribunal or the hearing process. As such, the tribunal cannot be deemed an agent of the local board of education.

V. THE RIGHT TO APPEAL THE TRIBUNAL'S DECISION

The process for terminating a tenured teacher set forth in Kentucky Revised Statutes section 161.790 allows for a review of the tribunal’s decision to the circuit court having jurisdiction in the county where the school district is located. However, the statute, in sub section (8), expressly grants the teacher the right to appeal the decision of the tribunal and is completely silent regarding the local board of education’s right to appeal. This silence is peculiar in light of the otherwise strong mechanism to protect the teacher’s due process rights, while the due process rights of the local board of education are ignored. The local board of education must have the ability to protect the quality of education provided to its students by having an avenue through which to obtain judicial review of the decision of a tribunal, of which two-thirds are teachers, to retain an incompetent, immoral or insubordinate teacher.

A. ADMINISTRATIVE APPEALS REQUIRE STRICT STATUTORY COMPLIANCE

The issue of an administrative appeal in Kentucky has been faced by the courts a number of times. The Kentucky Supreme Court in Board of Adjustments v. Flood, along with more recent decisions by the Kentucky Court of Appeals in Rosary Catholic Parrish v. Whitfield and Our Lady of the Woods, Inc. v. Commonwealth, have ruled that when a statutory appeal is provided, strict statutory compliance is necessary for an appeal of an administrative decision. This would seem to indicate that since the teacher is the only party expressly granted the right to appeal, the local board of education is unable to appeal, since strict compliance with the governing statute is mandatory.

This line of authority, however, is only applicable when the statute in question expressly provides for an independent review, and a party is attempting to obtain judicial review of an administrative decision without previously exhausting all available remedies. As such, this authority only applies where the appeal is granted, and the terms of such a grant must be followed to the letter. Since Kentucky Revised Statutes section

42. 581 S.W.2d 1 (Ky. 1978).
43. 729 S.W.2d 27 (Ky. Ct. App. 1987).
44. 655 S.W.2d 14 (Ky. Ct. App. 1982).
161.790(8) is completely silent regarding the local board of education’s right to appeal, this authority bears no persuasiveness to the board’s right of appeal.

B. ABSENCE OF STATUTORY GRANT IMPLICITLY ALLOWS RIGHT OF APPEAL

The dilemma faced by the local board by not being expressly granted or denied the right to appeal, wherein the teacher is expressly granted such right, is easily resolved. This issue was squarely faced by the Kentucky Court of Appeals in City of Covington v. Tranter. The Court of Appeals in City of Covington, upon the reliance of Kentucky Constitution section 14 aptly stated,

Where the legislature has provided for a procedure for appealing an administrative case to the circuit court, we have no difficulty in upholding its use. In the absence of that [express] statutory grant, the right of the appellee Tranter to resort to the courts is implicit in Section 14 of the Kentucky Constitution.

The Kentucky Court of Appeals, in City of Covington, also cited Kendall v. Beiling, holding “It is the inherent power of the courts to scrutinize the acts of such administrative tribunals . . . and no special provision of the statute is necessary to confer authority already possessed by them under the constitution.” In addition, the Kentucky Supreme Court, in Foster v. Goodpaster, ruled that where a statute is silent as to the method of appealing an administrative decision, review may be obtained on the ground that the administrative body acted arbitrarily. Under this authority, it seems clearly evident that the silence of Kentucky Revised Statutes section 161.790 regarding a local board of education’s right to appeal does not deprive the board from obtaining their constitutionally guaranteed right to judicial review of an adverse decision by the tribunal. Even absent this line of authority, one could infer that the local board of education has the right to appeal since that right is not expressly prohibited, and where that right is in turn expressly granted to the teacher.

45. 673 S.W.2d 744 (Ky. Ct. App. 1984).
46. KY. CONST. § 14.
47. City of Covington, 673 S.W.2d at 747.
48. 175 S.W.2d 489 (Ky. 1943).
49. City of Covington, 673 S.W.2d at 747.
50. 161 S.W.2d 626 (Ky. 1942).
51. Id. at 627.
C. VIOLATION OF CONSTITUTIONAL RIGHT NOT NEEDED TO APPEAL

It is well settled that a teacher has a constitutionally protected property interest in continued employment which is subject to review by the courts.\(^52\) The parallel question to this right is whether the local board of education, in the absence of a violation of a constitutional right, is entitled to an appeal of the tribunal's decision. The Kentucky Court of Appeals in *Taxpayers' Action Group v. Madison County Board of Elections*\(^53\) held that there is no inherent right to appeal from an administrative decision absent any allegation of violation of constitutional rights.\(^54\) This ruling is inconsistent with the well settled law in Kentucky that an aggrieved party has an inherent right to seek judicial review of arbitrary administrative decisions. This was the exact ruling by the Kentucky Supreme Court in *American Beauty Homes Corp. v. Louisville Planning & Zoning Commission*,\(^55\) which is further supported by Kentucky Constitution section 2, wherein absolute and arbitrary power by administrative agencies is prohibited.\(^56\)

Whether an administrative body acted arbitrarily is a question of law, which is always subject to review by a court.\(^57\) Constitutional courts are not subservient to statutory boards of administration, and under Kentucky Constitution section 14, the courts have the inherent power to scrutinize the acts of such administrative tribunals, and no special statutory provision is necessary.\(^58\) The Kentucky Court of Appeals, in *Epsilon Trading Co. v. Revenue Cabinet*,\(^59\) ruled that where an administrative body has misapplied the legal effect of the facts, or where the decision or action of the administrative board is unreasonable and capricious, for the reason that it is not based on substantial evidence, courts are not bound to accept such legal conclusions of the administrative body.\(^60\)

Based upon this authority, it is not necessary for the local board of education to allege a violation of constitutional rights. It is only necessary that the board allege that the tribunal acted arbitrarily and that its decision is not supported by substantial evidence in order to obtain judicial

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52. Roth, 408 U.S. at 564.
54. Id.
55. 379 S.W.2d 450 (Ky. 1964).
56. KY. CONST. § 2.
57. *American Beauty Homes*, 379 S.W.2d at 456.
58. Kendall v. Beiling, 175 S.W.2d 489, 491 (Ky. 1943).
59. 775 S.W.2d 937 (Ky. Ct. App. 1989).
60. Id. at 940.
review of such decision.

D. CURRENT STATE OF BOARD OF EDUCATIONS’ RIGHT TO APPEAL

This precise issue of the right of the local board of education to appeal the tribunal’s decision to the circuit court was recently ruled upon by the Kentucky Court of Appeals in *Campbell County Board of Education v. Lawrence Reis*\(^6\) wherein the court of appeals, by reversing the decision of the Campbell Circuit Court, correctly held that the tribunal is not an agent of the local board of education, that the board of education has an inherent right to appeal the tribunal’s decision absent express statutory authority and that the board of education need only show that the tribunal acted arbitrarily in reaching its decision. This decision is directly in line with the Kentucky Constitution and the cases previously cited herein.

This ruling, however, is currently pending on appeal by way of a motion for discretionary review to the Kentucky Supreme Court.\(^6\) Based on the strength of the authority previously mentioned, one would presume that the Campbell County Board of Education’s right to appeal the tribunal’s decision will remain intact. However, trying to interpret how a court will eventually rule is, unfortunately, purely speculative. The future will reveal if the constitutionally guaranteed rights of local boards of education will be protected.

VI. CONCLUSION

The process for the termination of the tenured teacher is riddled with a number of due process concerns; not all have been ruled on by the courts. The most prominent due process concern is that with regard to the local board of education’s right to an appeal of the tribunal’s decision. For the most part, Kentucky Revised Statutes section 161.790 is constitutionally sound, even though facially deficient when granting due process to the local board of education. Only time will tell whether the local board, which represents the interests of its students, will be afforded the same constitutionally guaranteed protection as that of the tenured teacher.

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KENTUCKY'S APPROACH TO THE DISCOVERABILITY OF PEER REVIEW

by Donna M. Bloemer

I. INTRODUCTION

In view of the increasing frequency of medical malpractice actions and of actions against hospitals based on respondeat superior or on corporate negligence, together with current trends toward liberal use of discovery, questions as to the discoverability of hospital records are of frequent occurrence. Information in hospital records concerning the qualifications of an individual physician, or evaluations of an individual physician by his peers, is normally discoverable, except where covered by a special privilege created to protect the functions of hospital staff committees. Such a privilege is created by statute in Kentucky. Kentucky Revised Statutes section 311.377(2) provides:

At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions and recommendations of any committee, board, commission, medical staff, professional standards review organization, or other entity. . . . shall be confidential and privileges and shall not be subject to discovery, subpoena or introduction into evidence, in any civil action in any court.

This statute or similar statutes have been the subject of litigation on at least four occasions since 1977: McGuffey v. Hall, Sweasy v. King's Daughters Memorial Hospital, Appalachian Regional

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3. Laurent B. Frantz, Annotation, Discovery of Hospital's Internal Records or Communication as to Qualifications or Evaluations of Individual Physician, 81 A.L.R.3d 944, 946 (1977).


5. On March 17, 1995, Leanhart v. Humana, No. 94-SC-506-MR (Ky argued Mar. 17, 1995) was orally argued before the Kentucky Supreme Court. A decision has yet to be rendered.

6. 557 S.W.2d 401 (Ky. 1977).

7. 771 S.W.2d 812 (Ky. 1989).

II. BACKGROUND ON CONFIDENTIALITY OF PEER REVIEW MATERIAL

Peer review deals with cases involving the discoverability of a public or private hospital’s internal records or communications as to qualifications of an individual physician, evaluations of him by his colleagues, disciplinary proceedings against him, or internal hospital proceedings dealing with his admission to the hospital staff or his continuance as a member thereof.

“Hospital peer review committees have been used to review staff physician quality since the early 1900’s.” Confidentiality of the resulting minutes and memoranda from peer review sessions has been traditionally recognized as a necessary corollary to the effectiveness of these committees. Though the hospital’s governing board retains the ultimate responsibility for the quality of care provided, that responsibility is normally delegated to the hospital staff and discharged in practice by medical staff review committees. Concern that the candor necessary to the effective functioning of these committees would be destroyed if their proceedings were discoverable has led to the adoption of statutes in a number of states conferring a privilege from discovery upon the proceedings of such committees. Currently, all fifty states have statutes giving varying degrees of protection to certain medical peer reviewers. A grant of qualified immunity for defamation suits is expressly offered by a majority of the statutes, while others provide absolute immunity from all civil actions. Those statutes which grant absolute immunity also have additional requirements in order for the immunity to
apply, which renders their privileges qualified. 17

The peer review privilege is premised on the belief that, absent the privilege, physicians would be reluctant to serve on peer review committees and engage in frank evaluations of their colleagues. 18

Doctors seem to be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect and friends, possible retaliations, vulnerability to torts, and fear of medical malpractice actions in which the records of the peer review proceedings might be used. It is this ambivalence that lawmakers seek to avert and eliminate by shifting peer review deliberations from legal attacks. 19

III. KENTUCKY CASES DEALING WITH PEER REVIEW

The precursor to the modern cases dealing with peer review was Nazareth Literary & Benevolent Institution v. Stephenson. 20 This case predates any Kentucky statute dealing with peer review. In this medical malpractice case, the controversy concerned the discoverability of several written statements received by the hospital from physician members of its staff in which reports are made about the professional activities of one of the defendant physicians. 21 The hospital’s contention that the requested material was not discoverable was based on two propositions. First, the written reports constituted the same situation as is presented by the work product of a lawyer. Second, the material sought should be regarded as privileged matter which should remain confidential because of considerations of public policy. 22

The court had no problem rejecting the argument that the reports constituted the work product of a lawyer. 23 However, the court grappled with the public policy argument. It was argued that an exception to the procedural rules for discovery should be made because reports such as these must remain confidential because their revelation would impede the

17. Id.
20. 503 S.W.2d 177 (Ky. 1973).
21. Id.
22. Id. at 178.
23. Id.
freedom of communication between physicians and hospital authorities concerning proper methods of treatment and the corrections of mistakes. To this, the court responded:

Although this might be regarded as an initially appealing argument, on reflection, one might well debate wherein the public interest lies. Claims of privilege are carefully scrutinized, and impediments to the discovery of truth are afforded validity in relatively few instances in the common law. In any event, we find no applicable privilege expressed in either the general law of evidence existing in this state or in the statutes of this state expressing any protection of confidentiality in the situation presented.

In 1973, the highest court in Kentucky denied the hospital’s petition for a permanent order of prohibition. The court was faced with a different dilemma in 1977, however. By that time, there was a state statute expressing “protection of confidentiality in the situation presented.”

A. McGUFFEY V. HALL

The first Kentucky court case to examine the forerunner of today’s statute was McGuffey v. Hall. Two separate declaratory actions were brought challenging the constitutional validity of KRS section 311.377 and were eventually consolidated. The act, passed at the regular session of the 1976 General Assembly, was entitled “AN ACT relating to health care malpractice insurance and claims.”

In a decision in which all the justices concurred, the court held that section 9 of the 1976 Act was in violation of the subject title requirement in Section 51 of the Kentucky Constitution because the subject matter of Section 9 of the Act was not sufficiently related to malpractice claims or insurance. The rationale of the court was that the section of the Act pertaining to liability arising out of peer review board proceedings and

24. Id.
25. Id. at 179.
26. Id.
27. Id.
28. 557 S.W.2d 401 (Ky. 1977).
29. Id.
30. Id.
31. Ky. CONST. § 51 provides:
No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions therefore extended or conferred by reference to its title only, but so much therefore as it revised, amended, extended, or conferred, shall be re-enacted and published at length.
32. McGuffey, 557 S.W.2d at 407.
evidentiary limits on use of such proceedings was not germane to the subject of the Act.\textsuperscript{33} The court stated:

Although conduct that results in a malpractice claim may also eventuate in a peer review proceeding, the relationship between the two is purely coincidental. A peer review is not designed to serve any purpose of a malpractice claim, and to the extent that the confidentiality conferred upon it serves to protect those who participate in the proceedings, it is a protection against suits for defamation, not malpractice.\textsuperscript{34}

\textbf{B. Sweasy v. King's Daughters Memorial Hospital}

The problem of the Kentucky peer review statute was revisited in \textit{Sweasy v. King's Daughters Memorial Hospital}.\textsuperscript{35} The General Assembly passed the Act with a different title, but the Kentucky Supreme Court found it was once again constitutionally infirm.

In this medical negligence case a hospital sought a writ prohibiting enforcement of order compelling discovery of documents relating to the peer review process.\textsuperscript{36} In a four to three decision,\textsuperscript{37} \textit{Sweasy} held that the 1980 version of KRS section 311.377 was unconstitutional because it once again violated section 51 of the Kentucky Constitution requiring that "[n]o law . . . shall relate to more than one subject and that subject shall be expressed in the title."\textsuperscript{38}

This case was the third time that the court was confronted with the question of whether hospitals and physicians can claim a privilege against discovery of records related to peer review procedures. The court pointed out that the parameters of this term are somewhat difficult to define because some of the records internally generated are not just the opinions of committees involved in peer review, but records and reports also utilized in treating patients and otherwise involved in the everyday operation of the hospital.\textsuperscript{39}

In prior cases, hospitals have claimed both a common law and statutory privilege from discovery.\textsuperscript{40} In this case, as in previous ones, the hos-

\begin{thebibliography}{99}
\footnotesize
\bibitem{33} Id.
\bibitem{34} Id.
\bibitem{35} 771 S.W.2d 812 (Ky. 1989).
\bibitem{36} Id. at 813.
\bibitem{37} Leibson, J. wrote the majority opinion with which Combs, Lambert, Wintersheimer, JJ. concurred. Stephens, C.J. dissented by separate opinion. Vance, J. also dissented by separate opinion in which Gant, J. joined.
\bibitem{38} \textit{Sweasy}, 771 S.W.2d at 815 (citing \textit{KY. CONST.} § 51).
\bibitem{39} \textit{Id.} at 814.
\bibitem{40} \textit{See} Nazareth Literary & Benevolent Inst. v. Stephenson, 503 S.W.2d 177 (Ky. 1973);
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pital argued that "such reports as are sought here must remain confidential because their revelation would impede the freedom of communication between physicians and hospital authorities concerning proper methods of treatment and the corrections of mistakes."  

Citing Stevenson, the court responded that "on reflection, one might well debate wherein the public interest lies. Claims of privilege are carefully scrutinized, and impediments to the discovery of truth are afforded validity in relatively few instances in the common law."  

The court later interpreted the holding of Sweasy in Appalachian Regional Health Care v. Johnson, stating that:

Sweasy held that the statutory privilege of confidentiality provided under KRS 311.377 was limited to suits against peer review entities. More specifically, it held that the statute did not provide a privilege against discovery of documents generated through the peer review process in a medical negligence action brought by a patient against a doctor and his hospital.

Chief Justice Stephens criticized the holding because he claimed that the cases interpreting section 51 of the Kentucky Constitution have placed a less onerous burden on the General Assembly as it writes titles to legislative acts. Justice Vance dissented:

On four separate occasions the General Assembly of Kentucky has enacted legislation which clearly and in unmistakable terms has provided that proceedings and records of hospital peer review committees and other similar committees shall not be subject to discovery nor admitted into evidence in civil actions. This court has managed to frustrate and circumvent every effort of the General Assembly to protect the confidentiality of such records.

The court declared that the 1976 and 1980 enactments by the General Assembly were unconstitutional. In 1988, the General Assembly passed two more acts to protect the confidentiality of peer review committee records from discovery or admission into evidence. Justice Vance criticized the majority for making "an end run around the two

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McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977).
41. Sweasy, 771 S.W.2d at 814.
42. Stephenson, 503 S.W.2d 177 (Ky. 1973).
43. Sweasy, 771 S.W.2d at 814.
44. 862 S.W.2d 868 (Ky. 1993).
45. Id. at 870.
46. Sweasy, 771 S.W.2d at 817.
47. Id. at 818.
48. Id.
49. Id.
DISCOVERABILITY OF PEER REVIEW

1988 enactments on the ground that neither of them was in effect when this case was before the Court of Appeals or were otherwise involved in the decision to grant the writ of prohibition."

C. Appalachian Regional Health Care v. Johnson

The Kentucky Supreme Court next examined KRS section 311.377, the version of the statute that is currently in effect in Appalachian Region-

50. Id. at 819.
51. The statute presently reads:
Waiver of claim for damages by applicant for or grantee of staff privileges-Records confidential-Exceptions-Federal immunity provisions.

(1) Any person who applies for, or is granted staff privileges after June 17, 1978, by any health services organization subject to licensing under the certificate of need and licensure provisions of KRS Chapter 216B, shall be deemed to have waived as a condition of such application or grant, any claim for damages for any good faith action taken by any person who is a member, participant in or employee of or who furnishes information, professional counsel, or services to any committee, board, commission, or other entity which is duly constituted by any licensed hospital, licensed hospice, licensed home health agency, health insurer, health maintenance organization, health services corporation, organized medical staff, medical society, or association affiliated with the American Medical Association, American Podiatry Association, American Dental Association, American Osteopathic Association, or the American Hospital Association, or a medical care foundation affiliated with such a medical society or association, or governmental or quasi-governmental agency when such entity is performing the designated function of review of credentials or retrospective review and evaluation of the competency of professional acts or conduct of other health care personnel. This subsection shall have equal application to, and the waiver be effective for, those persons who, subsequent to June 17, 1978, continue to exercise staff privileges previously granted by any such health services organization.

(2) At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions, and recommendations of any committee, board, commission, medical staff, professional standards review organization, or other entity, as referred to in subsection (1) of this section shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action in any court or in any administrative proceeding before any board, body, or committee, whether federal, state, county, or city, except as specifically provided with regard to the board in KRS 311.605(2). This subsection shall not apply to any proceedings or matters governed exclusively by federal law or federal regulation.

(3) Nothing in subsection (2) of this section shall be construed to restrict or limit the right to discover or use in any civil action or other administrative proceeding any evidence, document, or record which is subject to discovery independently of the proceedings of the entity to which subsection (1) of this section refers.

(4) No person who presents or offers evidence in proceedings described in subsection (2) of this section or who is a member of any entity before which such evidence is presented or offered may refuse to testify in discovery or upon a trial of any civil action as to any evidence, document, or record described in subsection (3) of this section or as to any information within his own knowledge, except as provided in subsection (5) of this section.
In this medical malpractice suit, the defendant's doctor and a hospital petitioned for a writ of prohibition asking that the trial court be prohibited from ordering discovery of peer review records.\textsuperscript{53} The Supreme Court held, in a unanimous decision,\textsuperscript{54} that the defendants failed to demonstrate that they would suffer irreparable harm from discovery of documents relating to peer review of the surgeon in question or that their remedy of appeal was inadequate; thus, they were not entitled to a writ of prohibition.\textsuperscript{55}

The court emphasized that KRS section 311.377 was enacted to allow individuals who sit on medical review boards the privilege to be free from lawsuits filed against them by disgruntled practitioners, dissatisfied with the reviewer's findings.\textsuperscript{56}

\textbf{D. ADVENTIST HEALTH SYSTEMS/SUNBELT HEALTH CARE CORP. V. TRUDE}

\textit{Adventist Health Systems/Sunbelt Health Care Corp. v. Trude,}\textsuperscript{57} was the Kentucky Supreme Court's next foray into the realm of discoverability of peer review. In this case, a physician brought an action against a hospital seeking to rescind his resignation and to obtain reinstatement to the hospital staff.\textsuperscript{58} In a five to two decision,\textsuperscript{59} the supreme
court held that KRS section 311.377, providing that medical peer review records are confidential and privileged, prohibited discovery of such records in a physician's action, but the hospital was not entitled to summary judgment on the basis of qualified immunity. 60

The court stated that the language of KRS section 311.377(2) clearly extends privilege and confidentiality of peer review proceedings, records, opinions, conclusions and recommendations to "any civil action in any court." 61 Therefore, the court ruled that the statute applied to any civil action, including the present case. 62

Special Justice Weinberg dissented, arguing that the majority opinion prematurely decided the scope of KRS section 311.377. 63 He contended that KRS section 311.377 specifically limits the waiver discussed therein to "good faith" actions and that the thrust of the doctor's action in this case is that the hospital did not act in good faith. 64 Kentucky Revised Statutes section 311.377(2) specifically refers to KRS section 311.377(1) and therefore incorporates the good faith exception to the waiver discussed in the statute into the peer review confidentiality subsection as well. 65 Consequently, Special Justice Weinberg concluded that the doctor would seem entitled to conduct rudimentary discovery aimed at showing a basis for his bad faith allegations. 66

The dissent also pointed out that even if a privilege existed, Ott v. St. Luke Hospital. 67 held that the privilege would not be recognized if the injury that would occur by the disclosure of the communication is not greater than the benefit granted by disclosure in assisting the correct disposition of the litigation. And in this case, the hospital's request for

Spain, Reynolds, Wintersheimer, JJ. joined. Special Justice Weinberg filed an opinion concurring in part and dissenting in part in which Leibson, J. joined. Lambert and Stumbo, JJ. did not sit.

60. Adventist, 880 S.W.2d at 542.
61. Id.
63. Adventist, 880 S.W.2d at 543.
64. Id.
65. Id.
66. Id.

In Ott, a doctor brought a civil rights suit challenging denial of his application for staff privileges. Judge Bertelsman held that there was no real showing that a peer review committee's function would be substantially impaired by denial of the hospital's assertion of common-law privilege for deliberations of hospital peer review committees. Therefore, the hospital was not permitted to assert the privilege. Id.
extraordinary relief did not pass that portion of the test.68

IV. CONCLUSION

The history of KRS section 311.377 is a long and arduous one, and the evolution of the statute continues. There are still challenges being made to both the substance and the form of the statute. At the present time, KRS section 311.377 remains in effect. It has been reviewed in the context of medical malpractice actions by a patient and by a doctor in a wrongful termination suit.

68. Adventist, 880 S.W.2d at 539.
BOOK REVIEW

NOT A TRIVIAL PURSUIT: SALMON P. CHASE AND AMERICAN CONSTITUTIONAL LAW

reviewed by James A. Thomson*

SALMON P. CHASE: A BIOGRAPHY
by John Niven**

THE SALMON P. CHASE PAPERS, VOL. I: JOURNALS, 1829-1872
Edited by John Niven, et al.

Edited by John Niven, et al.

I. INTRODUCTION

Chasing the United States Constitution is an enduring enterprise. Even outside the judicial pantheon,¹ splendid examples abound: Washington,²

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Jefferson, Madison, Lincoln, Johnson and Webster. Should Salmon Portland Chase be included? If longevity in this pursuit of and influence on a chameleon Constitution are important criteria, an affirmative response may be easily supported, advanced and maintained. Resurrecting and recognizing Chase as a major political figure during great American epochs—the antebellum years (1820-1861), Civil


8. "Chase owed his pompous name (which he disliked intensely) to one of his uncles, also a Salmon, who had been the foremost lawyer in Portland, Maine." JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 5 (1995) (citing a letter from Chase to John T. Towbridge on Dec. 27 1863).

9. This "middle name . . . was given [to Chase] by his parents to commemorate the death of his uncle Salmon at Portland." [JACOB] W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 3 n.1 (1874 rep. 1970). Indeed, "Chase . . . vetoed [his daughter's] suggestion that [his first grandson] be named after him. One Salmon Portland was enough." NIVEN, supra note 8, at 394.

10. For Chase's genealogy see, e.g. NIVEN supra note 8, at 5-6; SCHUCKERS, supra note 9, at 2-4; FREDERICK BLUE, SALMON P. CHASE: A LIFE IN POLITICS 1-2 (1987).


12. See infra parts III-IV.

War (1861-1865), and Reconstruction (1865-1877)—requires recourse to three, apparently distinct, historiographic phases. First, contemporary assessments and initial biographies generally tended to be laudatory. Second, an interregnum, when, despite a “revolution in Civil War and Reconstruction historiography [starting] in the 1950s,” no major Chase biography was published and a retrogressive “change in Chase’s reputation” became discernible. Third is an emerging,


16. For overlapping and blurring see infra text accompanying notes 229-35.


18. See, e.g., ALBERT B. HART, SALMON P. CHASE (1899 rep. 1980); SCHUCKERS, supra note 9; ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICE OF SALMON PORTLAND CHASE (1874). President Lincoln stated: “Chase is about one and a half times bigger than any other man that I ever knew.” HART, supra at 435. See also SCHUCKERS, supra note 7, at 488 (similar). Justice Holmes thought that “Chase [was]... good...” Holmes’ letter of June 6, 1926 to Laski, in 2 HOLME-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD L. LASKI 1916-1935, at 848 (Mark DeWolfe Howe ed., 1953). “[B]y all [contemporary] accounts [Chase was] one of the formidable legal and political figures of the antebellum, Civil War, and Reconstruction Years...”. White, supra note 17, at 41. See also infra text accompanying note 86 (similar). See also Frederick Blue, Kate’s Paper Chase: The Race to Publish the First Biography of Salmon P. Chase, 8 THE OLD NW. 353 (1983).

19. For the suggestion that this period was “between the 1930s and 1987” see White, supra note 17, at 42. The 1987 date marks the publication of BLUE, supra note 10.


22. White, supra note 17, at 42.

23. Id. at 42 (referring to FAIRMAN, supra note 21). For an assessment of why Fairman
though, as yet, incomplete, movement towards a nuanced and balanced assessment of Chase: a synthesis and evaluation of Chase's weaknesses, strengths, failures and accomplishments. Into this arena strides Professor John Niven with *Salmon P. Chase: A Biography* and the first two volumes *Journals, 1829-1872* and *Correspondence, 1823-1857*,

may have instigated or strengthened such a “retrogressive” view of Chase see Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995). See also supra note 17 (derogatory remarks).

24. Suggestions for further work on Chase continue. See, e.g., Louis S. Gerteis, *The Slave Power and Its Enemies*, 16 REV. AM. HIST. 390, 395 (1988) (“The significance of Chase’s challenge to Lincoln on Reconstruction requires further exploration . . .”); Benedict, supra note 20, at 136 (“hardly any scholarly discussion of [Chase’s] post-war career, as politician or as jurist”), 146 n.50 (“Little has been written about Chase’s part in the early development of Liberal Republicanism”). For some discussion of these issues see Niven, supra note 8, at 315-21, 328, 369 (Reconstruction), 447 (“Liberal Republican movement”), 376-451 (post-Civil War career).


of a project to publish The Salmon P. Chase Papers. 30

But, what about Chase as a major constitutionalist? Has there been too much, almost exclusive, concentration on Chase the politician with consequential neglect or diminution of Chase as a constitutional law theorist, advocate and jurist? 31 Prior to Niven's Chase it was suggested:

The only biography of [Chase] prepared since the revolution in Civil War and Reconstruction historiography began in the 1950s . . . is limited to [Chase's] career as a politician. Scholarly attention to [Chase's] post-Civil War career has been especially skimpy. Chase plays a major role in anti-slavery and Civil War politics, but there has been hardly any scholarly discussion of his post-War career, as politician or as jurist. Professor White exaggerates a bit when he suggests that conventional accounts charge Chase with allowing his political ambitions to determine his actions on the bench. There has not been enough scholarship to define a "conventional account." Professor Blue provides an overview . . . but . . .


31. This raises questions concerning the "'antebellum' universe of constitutional theory that entertained 'antebellum' conceptions of the role of the Supreme Court as a constitutional interpreter." White, supra note 17, at 48. One premise was "that no sharp separation existed, in constitutional discourse, between morality, constitutional politics and law. A sharp distinction was made between 'constitutional politics' and partisanship . . . ." Id. at 50 (emphasis in original). As to the role of judicial review see infra notes 71, 185, 206-46 and accompanying text.
does not go into much detail . . . and does not relate Chase's judicial activities to his politics. Charles Fairman['s] scattered descriptions of Chase's political and judicial activities . . . do not amount to a coherent whole. And while [the Chase Symposium] does begin to remedy the lack of attention to Chase's judicial career, its connection to his post-war political career has been left out [of the Symposium] as well.32

Is such a paucity thesis correct? Quantitatively and qualitatively, is there scholarship concerning Chase's contribution to and effect on American constitutional law in the antebellum, Civil War and Reconstruction years? Even before Salmon P. Chase: A Biography, a positive answer might have been proffered. Particularly during the antebellum era, Chase's constitutional law theories and advocacy have been documented and discussed.33 Suggestions, solutions and reasons articulated by Chase to deal with Civil War constitutional law conundrums, for example, involving emancipation, "greenbacks," and initial forays into reconstruction, have also engendered scholarly analysis.34 Perhaps, Chase's contribution as Chief Justice, whether on the U.S. Supreme Court or Fourth Circuit or in the Senate impeachment proceedings against President Andrew Johnson, has received most attention.35

32. Benedict, supra note 20, at 135-36 (footnotes omitted) (discussing BLUE, supra note 10; FAIRMAN, supra note 21; David F. Hughes, Salmon P. Chase: Chief Justice (1963) (unpublished Ph.D. dissertation, Princeton University)). See also Benedict, supra note 20, at 33 ("paucity of modern research"). But see infra notes 33-35.
With such a plethora of information and analysis, are *Salmon P. Chase: A Biography* and *The Salmon P. Chase Papers* project superfluous? Of course, easily accessible, clearly readable and well-edited publications of primary documents should be welcomed, not repudiated. However,

Chase . . . left mountainous manuscripts. The empire of paper [Chase] created includes his famous diaries, plus letters, legal briefs while he lawyered, and draft decisions and opinions during his chief justiceship . . . [Chase's] handwriting [is] awful. Many Chase manuscripts have obstructed even diligent researchers' attempts at deciphering, with the result that some of [Chase's] cryptic scribblings retain their meanings virginaly intact.36

Already *The Salmon P. Chase Papers* project has copied “more than twenty-eight thousand documents related to Chase’s career.”37 In addition to the *Journals, 1829-1872* and *Correspondence, 1823-1857*, some Chase papers have previously been published38 and there is a microfilm

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edition of *The Salmon P. Chase Papers.* Indeed, the publication project "is highly selective" and will "reproduce . . . only a fraction of Chase's papers." For constitutional lawyers and historians there may already be disappointments. Prominent examples include failure to publish "lengthy documents [such] as Chase's argument in the Van Zandt case" and "Chase's draft beginning of an opinion" for *Ex parte Milligan.* Also tantalizing, from a constitutional law and history perspective, are Professor Niven's observations: "Following [Chase's] appointment to the bench he began to record again a relatively full and consistent account of his daily life in his journal." Those entries have been published. However, referring to the journals as "the diaries," Professor Niven also suggests that "[u]nfortunately the diaries do not reflect in any depth Chase's judicial career. But his correspondence is quite full and illuminating on certain important cases, on his interaction with his colleagues on the court, and on his approach to Reconstruction." Unless original documents or microfilms are examined, lawyers and legal historians must await publication "in chronological order" of further volumes and hope that, despite selectivity, all relevant "correspondence" is included. Exclusion of Chase, from the increasing availability and publication of Justices' papers, letters, diaries and


40. *Chase Papers II,* *supra* note 29, at xxi.

41. *Id.* Referring to Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847) and Salmon P. Chase, Reclamation of Fugitives from Service: An Argument for the Defendant, Submitted to the Supreme Court of the United States at the December Term, 1846, In the Case of Jones v. Van Zandt. *See also infra* note 111. Also omitted is the Appeal of the Independent Democrats in Congress to the People of the United States. *See Chase Papers II,* *supra* note 29, at xxi. *See also infra* note 82.

42. *Chase Papers I,* *supra* note 28, at lxvii.

43. 71 U.S. (4 Wall.) 2 (1866). *See infra* note 207.

44. *Chase Papers I,* *supra* note 28, at xliii. *See, e.g., id.* at 517 (noting in Journal that he declined to join Justice Clifford's dissent in Lowber v. Bangs, 69 U.S. (2 Wall.) 728 (1865) despite Chase's agreement with Clifford because "except in very important causes dissent [was] unexpedient"). *See Niven, supra* note 8, at 376.


48. *See supra* text accompanying notes 40-43.
unpublished opinions,\(^49\) would be unfortunate.

Of course, *Salmon P. Chase: A Biography* utilizes much more than published Chase papers. Manuscript sources\(^50\) are frequently relied upon and quoted. Again, the dominant themes, dichotomies, conflicts and puzzles of Chase biographies emerge: personal ambition and political expediency; moral commitment and altruistic principles; self-interest and pragmatism; ideological conviction and sincerity of purpose.\(^51\) Inevitably, in Chase, these characteristics could be inconsistent. Which prevailed, when and with what effect can be debated, for example, in the context of a single question: Was Chase committed to Chase?\(^52\) Pursuit or attainment of one objective may have detracted from or been detrimental to another. However, two questions are more important. First, to what, if any, extent did that occur? Second, despite a superficial antagonistic appearance, was there a congruence a mutual reinforcement and advancement between Chase's consuming and relentless desire for personal prestige and promotion and his commitment to larger humanitarian crusades, such as anti-slavery? Ultimately, despite his contribution to slavery's abolition, Professor Niven is committed to the conventional, not


\(^{50}\) For the location of the Chase manuscripts see, e.g., *CHASE PAPERS I, supra* note 28, at li (“over eighty” locations with most at the “Library of Congress” and “Historical Society of Pennsylvania”); STEPHENSON, *supra* note 35, at 189; WIGDOR, *supra* note 49, at 76-79.


\(^{52}\) Stites, *supra* note 27, at 543 (suggesting that NIVEN, *supra* note 8 answers affirmatively).
contemporary, conclusion: Chase’s “insidious ambition,” particularly for the presidency, is the predominant and prevailing factor. “In the end . . . Chase remains a tragic figure . . . . The ambitions of his restless nature were never fully satisfied. [Chase] died a frustrated, lonely individual . . . .”

For Chase enthusiasts, is all lost? Is “[t]his . . . the last word on Chase”? Even through such a pessimistic prism, can *Salmon P. Chase: A Biography* enliven Chase’s reputation? In an “age of rights,” does Chase have anything to contribute to American constitutional law? Within this context, Professor Niven’s *Chase* appears to be an orthodox biography: politics, not law, is crucial. Failure to consummate presidential ambitions fatally diminishes, perhaps destroys, Chase’s reputation and overwhelms his achievements. However, “presidential fever” does not inevitably have such a “negative effect” on reputations. At least one explanation—“recent trends [elevating the Supreme Court’s and Congress’ reputation] in the historiography of the [Reconstruction] years in which Chase served [1864-1873] as chief justice . . . did not result in a corresponding elevation of Chase’s reputation”—has been advanced as to why “presidential fever” has and continues to affect Chase. Thus, to rescue Chase only a slight re-orientation may be required. Indeed, *Salmon P. Chase: A Biography* provides the relevant materials. That is, interwoven within the interstices of the “political” Chase is a successful constitutional law theorist, advocate and judge. Devoting more attention to these latter dimensions, without neglecting the former, may encourage

53. Niven, supra note 8, at 450-51. See also text accompanying supra note 82 (“driving ambition”).

54. Stites, supra note 27, at 543. But see supra note 24 (suggestions for further work).


57. White, supra note 17, at 43-44. “The diminution of Chase’s reputation, then, turns out to be a complex historiographic phenomenon.” Id. at 45.

58. That is, despite losing fugitive slave cases (see infra note 113), Chase deeply influenced constitutional jurisprudence.

59. See infra Part III-IV. See also infra text accompanying note 86 (revival in “political” reputation).

60. Compare, for example, Professor Niven’s treatment of Chase as Chief Justice (Niven, supra note 8, at 375-451) which does not deal with issues and themes in *Symposium, supra* note 35, at 1.
optimism, re-invigorate debates about nineteenth century jurisprudential
theories and processes of judicial review, and expose possibilities inher-
ent in dialogic relationships between the Constitution and politics. Given
Professor Niven's conclusion, at least for the present, Chase's salvation
may be with the Constitution. If so, there will emerge a different,
more sanguine, conclusion: Chase was all of one piece.

II. THE MAN

Salmon Portland Chase (January 13, 1808-May 7, 1873): born in
Cornish, New Hampshire, just under five years after Chief Justice Mar-
shall, in Washington D.C., delivered the Supreme Court's unanimous
opinion in Marbury v Madison. Chase died in New York City twenty-
three days after Justice Miller delivered the "bare majority" opinion in
The Slaughter-House Cases. Within those sixty-five years, Chase lived
under a Constitution bereft of the Thirteenth," Fourteenth,' and Fif-

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61. See supra text accompanying note 53.
62. That is, until scholarship pursues, for example, suggestions for further work. See supra
note 24. But cf. text accompanying note 54 ("last word").
63. For suggestions of continuity in Chase's constitutional thought see, e.g., FONER, FREE
SOIL, supra note 13, at 75 n.7 ("Chase's views on the constitutional relations of slavery re-
mained relatively constant throughout his career"). See also infra notes 139, 142 (continuity in
Chase's linkage of Declaration of Independence and Constitution), 147 ("major assumption"),
160 ("currency"), 198 ("rights") 201 ("continuity" in judicial review). But see Frederick J.
Blue, From Right to Left: The Political Conversion of Salmon P. Chase, 21 N. KY. L. REV.
1, 5 (1993) ("In 1836, Chase's approach and philosophy suddenly changed"), 12 ("dramatically
altered"), 14 ("gradual shift"), 19 ("political conversion experience"). See also NIVEN, supra
note 8, at 210 ("Chase . . . sought [in 1850s] to modify his radical image"). See also infra
text accompanying notes 145-51 (change in view of congressional power).
64. For biographies and other scholarship of Chase see supra notes 8-10, 13, 18, 20, 21,
26-29, 32-35 and infra notes 107, 266.
65. 5 U.S. (1 Cranch) 137 (1803) (opinion delivered Feb. 24, 1803). See infra note 71.
66. CURRIE, supra note 35, at 342. The majority: Justices Miller, Clifford, Nelson, Davis,
and Strong. The minority: Chief Justice Chase and Justices Bradley, Swayne, and Field. See
also infra notes 226, 247-55.
67. 83 U.S. (16 Wall.) 36 (1873) (Louisiana 1869 Act establishing a corporation with an
exclusive privilege to conduct the business of slaughtering animals for human consumption
constitutional despite Fourteenth Amendment challenge) (opinion delivered April 14, 1873). See
infra note 226 (references). See also Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (deni-
al of admission to Illinois bar not contravene Fourteenth Amendment's privileges and immuni-
ties clause) (opinion dated April 15, 1873). See infra note 227 (references).
68. Ratified on Dec. 18, 1865. See generally FAIRMAN, supra note 21, at 1117-59;
GEORGE H. HOEMAN, WHAT GOD HATH WROUGHT: THE EMBODIMENT OF FREEDOM IN THE
THIRTEENTH AMENDMENT (1987); RANDALL & DONALD, supra note 14, 396-97; Douglas
Colbert, Liberating the Thirteenth Amendment 30 HARV. C.R.-C.L. L. REV. 1 (1995); Lauren
Kares, The Unlucky Thirteenth Amendment: A Constitutional Amendment in Search of a Doc-
trine, 80 CORNELL L. REV. 372 (1995); Lea Velde, The Labor Vision of the Thirteenth

teenth Amendments and Supreme Court invalidation of congressional legislation. Consequently, Chase grappled with a significantly different Constitution, text, and exercise of judicial review powers. What also changed, but slowly and, perhaps, not until after Chase’s Supreme Court tenure (1864-1873), was the “foundational premises of antebellum constitutional thought.”


70. Ratified on March 30, 1870. See generally WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965); HYMAN, supra note 14, at 522-24; RANDALL & DONALD, supra note 14, at 642-43. See also NIVEN, supra note 8, at 446 (Chase “brought pressure on Ohio Democrats through the remnants of his organization to help carry the Fifteenth Amendment through the legislature”) (footnote omitted). See also DANIEL A. FARBer & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 275-338 (1990) (partially reproducing congressional debates on Thirteenth, Fourteenth, and Fifteenth Amendments).

71. Until Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) (congressional “greenbacks” legal tender legislation unconstitutional), the U.S. Supreme Court had only held congressional legislation to be unconstitutional in two cases: Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). See generally ROBERT L. CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989); DON E. FEHRENBRACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978). For the debate over how many congressional Acts the Chase court held unconstitutional see, e.g., CHASE PAPERS I, supra note 28, at xlvi (“[T]he Chase court in the space of eight years took a very positive stand . . . in eight cases it invalidated acts of Congress. Previously, since . . . 1789, only two acts of Congress had been overthrown by judicial review. This was no craven court.”) (referring to FAIRMAN, supra note 21, at 1426-36); Hughes, supra note 35, at 596-97 (11 cases); HYMAN & WIECECK, supra note 13, at 484-85 (listing cases and concluding that “Chase bequeathed to [Chief Justice] Waite the largest tally of federal laws or policies to be held [unconstitutional] since the nation’s start”).

72. For the suggestion that “reconsideration of [the foundationalist premises of antebellum jurisprudence] had just begun to surface during Chase’s tenure” see White, supra note 17, at 58-59.

73. Id. at 50. The premises were: First, “no sharp separation existed, in constitutional discourse, between morality, constitutional politics, and law.” Id. at 50. Second, “[j]udges were free to employ a variety of extratextual sources, including abstract principles of justice and morality, in interpreting the Constitution’s text.” Id. at 51. Third, “no pervasive conflict existed, outside the narrow ambit of constitutionally protected rights, between state sovereignty and the protection of individuals.” Id. at 58. See also id. at 47-48 (judicial review as a means of using the Constitution to protect and enforce individual rights against governments is a “twentieth-century conception” which “was alien to the [antebellum and] Reconstruction period”).
Chase’s . . . jurisprudence was “antebellum” . . . [His] constitutional jurisprudence started from the premises of antebellum constitutional theory . . . . [However, two qualifications emerge. First,] certain antebellum political convictions of Chase appeared to harmonize with a more expansive, “modern” role for Supreme Court justices, that of substantive doctrinal scrutinizers of both state and federal legislation in the service of protection for textually derived constitutional rights. . . . [Second,] Chase had his own distinctive perspective . . . . Chase . . . often took positions because he believed they were intrinsically right . . . . At the core of Chase’s ideological perspective was a set of convictions that he took to be guiding principles for his conduct, and in which he had a moral investment . . . . When . . . issues [where those convictions were implicated] emerged as having constitutional dimensions, and thus required attention to legal authorities and doctrines . . . . [Chase again] shared his antebellum contemporaries’ belief that constitutional interpretation was an exercise which included recourse to moral and political principles as well as to legal doctrines. 74

Entangled75 in Chase’s personal resume were the following occurrences: the death of his father, Ithamar Chase, in August 1817 when Chase was nine years old; education at schools in Keene, New Hampshire; Windsor, Vermont; Worthington, Ohio; Cincinnati College; and Dartmouth College (1824-1826); work as a school teacher and legal apprenticeship (1827-1829) to the United States Attorney-General William Wirt;76 admission to the Washington, D.C. (December 14, 1829) and Ohio (March 13, 1830) Bars; the death of his mother, Janette Ralston Chase, on April 8, 1832; three marriages and deaths of his wives;77 an

74. Id. at 48, 60-61. Those “strongly held convictions” were: First, unalterable opposition “to slavery . . . and to the proposition that the Constitution associated the national government with the perpetuation of slavery.” Id. at 61. Second, deep committal “to the idea of ‘freedom’ . . . . ” Id. Third, a “belief in ‘sound money,’ or the use, where possible, of gold and silver coin as currency.” Id. at 63. A fourth has been suggested. See Herman Belz, Deep-Conviction Jurisprudence and Texas v. White: A Comment on G. Edward White’s Historicist Interpretation of Chief Justice Chase, 21 N. KY. L. REV. 117, 123-131 (1993) (“fundamental ideas about the nature of the Union . . . [by which] Chase synthesized conflicting elements of antebellum jurisprudence into a theory of dual federalist nationalism”).

75. White, supra note 17, at 60 (“within that structure of [foundational] premises, Chase had his own distinctive perspective . . . which flowed from a combination of temperament and ideology”).


77. Catherine Garniss (married March 4, 1834-died Dec., 1835); Eliza Ann Smith (married
election in 1840 and defeat for re-election in 1841 to the Cincinnati city council; U.S. Senator (1849-1855, 1860-1861); Governor of Ohio (1856-1860); Delegate to the Peace Convention of Notables (March 1861); Secretary of the Treasury (March 5, 1861-June 30, 1864); and Chief Justice of the U.S. Supreme Court (December 15, 1864-May 7, 1873). 

Supplementing that chronology, *Salmon P. Chase: A Biography* provides a comprehensive political context which considers Chase's affiliations with virtually all political parties including Whig, Democratic, Independent Democrat, Liberty, Free Soil and Republican; Chase's pivotal role in organizing the latter into a national party, thus, creating the potential for antislavery sentiments to be embodied in executive and legislative mandates; and Chase's continual quest to secure the Republican presidential nomination in 1856, 1860, 1864, 1868 and 1872.  

For Professor Niven, that scenario places Chase in the second historiographic phase. Not only Niven's conclusion, but also other facets of *Salmon P. Chase*, reinforce that impression. For example, as early as 1856 Professor Niven discerns and condemns Chase's pattern. Unfortunately the means [Chase] would employ to attain the lofty goals [of eradicating servitude and racial discrimination and ensuing equality irrespective of color, economic condition or place of origin] were of small concern to this inordinately ambitious man. Ever since [Chase's 1854] "Appeal of the Independent Democrats [in Congress to the People of the United States]" Kansas was fertile ground to be exploited, for his personal advancement and for the cause, always the cause. Chase's driving ambition to achieve his goal at any cost more than countered his many good and strong qualities. This character trait that reflected the darker side of his personality [Chase] was never able to control and was all too evident in his moves to gain the [1860] presidential nomination . . . .”

Sept. 1839-died Sept. 29, 1845); Sarah Belle Dunlop Ludlow (married Nov. 6, 1846-died Jan. 13, 1852). See Niven, supra note 8, at 42-43, 71, 76, 96, 144.

78. He also sought the 1868 Democratic Nomination. See, e.g., Benedict, supra note 20, at 134 ("serious contender"); Niven, supra note 8, at 426-32. As to Chase's 1872 Liberal Republicanism see Benedict, supra note 20, at 146 n.50; Niven, supra note 8, at 447-48.

79. See supra text accompanying notes 19-23.

80. See supra text accompanying note 53.

81. Perhaps even earlier-1837-as indicated by Chase's conduct in the *Matilda* case. See Niven, supra note 8, at 50-56 (Chase’s “twofold” motives). On *Matilda* see infra note 108.

82. Niven, supra note 8, at 190. On the “Appeal” see id. at 149-52 (“one of [Chase’s] greatest achievements . . . [a]nd . . . important . . . in precipitating the constitutional crisis that would come six years later.”); Foner, Free Soil, supra note 13, at 94 (“one of the most effective pieces of political propaganda in [American] history”); Hyman & Wieck, supra note 13, at 168 (“masterpiece of political propaganda . . . [which] hastened the formation of the Republican party”). For a substantial reprint of the Appeal see 1 HENRY COMMAGER,
However, other revisionist scholars are returning not only the "constitutionalist" but also the "political" Chase to the first historiographic phase.

Chase was a dominant figure in the history of the Civil War era. It is not enough to say that he was one of the most important leaders of the Republican party. He was a preeminent leader, a figure of immense proportions.

Chase's ambition for the presidency was legend among contemporaries and among historians of the civil war era. But no one doubted that he was worthy of the ambition, except for those who scrupled at his inability to mask his aspiration.

As treasury secretary, Chase fashioned policies that revolutionized the American financial system—funding a great national debt, establishing a paper currency, framing a national banking system, and shifting the tax base from the tariff to excises and the nation's first income tax.

"[T]he cause," however, was antislavery. At least since 1827, while in Washington D.C. observing slave markets and drafting "a petition to Congress for the abolition of [slavery] in the District of Columbia," Chase had acquired antislavery views. Additional factors which shaped, strengthened and developed Chase's antislavery opinions included: a New England heritage, friendship with and influence of William Wirt, an association with James G. Birney, violent and destructive anti-abolitionist meetings, and litigation associated with fugitive slaves.

III. THE LAWYER

At this juncture, parallels with Bostonian Oliver Wendell Holmes, Jr. begin to emerge. Both were lawyers appointed to the U.S. Su-
Supreme Court. Chase found “the law [to be] but a barren field” in his first years of legal practice. For Holmes, the law was “a thick fog of details-in a black and frozen night, in which were no flowers, no spring, no easy joys.” Extensive reading, hard work and publications (for example, Chase’s introduction and “comprehensive new edition of the Ohio Reports” and Holmes’ four volumes of the twelfth edition of Chancellor James Kent’s *Commentaries on American Law*) constitute other similarities. Apparently, on January 24, 1861 in Boston’s Tremont Temple, Holmes attended the Massachusetts Anti-Slavery Society annual meeting possibly as a bodyguard to protect Holmes’ radical abolitionist cousin, Wendell Phillips, who was to address the meeting. That event has echoes of Chase’s action on July 31, 1835, when he confronted a mob and prevented their entrance to the Franklin House hotel to protect the antislavery advocate James Birney. Chase’s and Holmes’ relationships with women, outside the marital context, have also engendered similar speculation. More enduring and influential are the rhetorical flashes—the striking slogans and phrases—which flowed from their pens. Holmes has a brilliant cache. Though less in quantity, Chase’s aphorisms are equally effective and memorable. Examples include: “Free Soil, Free Labor and Free Men,” “Inauguration first-adjustment

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92. Did Holmes stay at Chase’s Washington, D.C. home? For an affirmative response see NIVEN, supra note 8, at 269 (Holmes recovering from a wound in 1861 was “brought . . . home” by Chase) (citing Chase letter of July 28, 1865 to Kate Chase). See also supra note 18 (Holmes’ view of Chase).

93. NIVEN, supra note 8, at 38 (citing Chase letter of May 9, 1831 to Hamilton Smith).


95. NIVEN, supra note 8, at 36.

96. Thomson, Playing with a Mirage, supra note 49, at 140.

97. Id. at 132-35 (discussing this event and its implications for Holmes’ career).

98. NIVEN, supra note 8, at 48. See also Blue, supra note 63, at 7-8, 19 (describing Chase’s “confrontation” with a “mob”).


100. See generally JUSTICE HOLMES EX CATHEDRA (Edward J. Bander comp., 1966); THE ESSENTIAL HOLMES, supra note 49.

101. NIVEN, supra note 8, at 110 (phrase, written by Chase, of resolution adopted Aug. 10, 1848 by the Free Soil Party Convention). See generally id. at 107-10.
afterwards,"102 "Universal Amnesty and Universal Suffrage,"103 "Freedom national" and "divorce,"104 "one great slave pen,"105 and "an indestructible Union, composed of indestructible States."106

An armoury of constitutional arguments, theories and principles stood behind, ready to justify, such rhetoric. Fugitive slave cases,107 including Matilda,108 Birney,109 Mary Towns,110 John Van Zandt,111 Hoppess,112 and Parrish,113 provided the cauldron in which Chase114

102. Id. at 233.
103. Id. at 409.
104. FONER, FREE SOIL, supra note 13, at 79 ("the absolute and unconditional divorce of the Government from slavery"); HYMAN & WIECEK, supra note 13, at 170.
105. CHASE PAPERS I, supra note 28, at xxx; BLUE, supra note 10, at 116 (Chase's accusation against "the Supreme Court and the Buchanan administration").
106. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869). See also id. ("What can be indissoluble if a perpetual Union, made more perfect, is not?"). See also NIVEN, supra note 8, at 446 (Chase's "customary felicity of style").
108. The Case of Matilda (1837) (unreported) (Matilda returned to her captors under the Fugitive Slave Act 1793). See generally Salmon P. Chase, Speech of Salmon P. Chase, In the Case of the Coloured Woman, Matilda, Who Was Brought Before the Court of Common Pleas of Hamilton County, Ohio by Writ of Habeas Corpus, March 11, 1837; FINKELMAN, SLAVERY, supra note 107, at 29-32; HYMAN & WIECEK, supra note 13, at 106-07; NIVEN, supra note 8, at 50-55; Blue, supra note 63, at 9-11.
110. NIVEN, supra note 8, at 62.
112. Ohio v. Hoppess (Samuel Watson returned to, not freed from, slavery). See NIVEN,
developed, refined and articulated an antislavery constitutionalism. Of course, in turning to the Constitution, Chase was not alone. A spectrum of possibilities and multiple positions about the Constitution, its nature and effect, congressional and state powers; and how they should be exercised were extolled. For example, it has been suggested that

Five constitutional alternatives [were] open to the nation in 1848-Wilmot Proviso (Free Soil), territorial sovereignty, extension of the Missouri compromise line, Calhounite slavery-ubiquity, and the Clayton compromise-[and the Missouri compromise and territorial sovereignty] lay dead or dying in 1854.

If the period 1820s-1870s represents a ferment of the Constitution, a veritable and prolonged constitutional crisis, then Chase was a leading protagonist.

Jostling among competing arguments over the nature of the Constitu-

supra note 8, at 84-86.

113. Francis D. Parrish case. See NIVEN, supra note 8, at 103-04 (Parish convicted for breaching the Fugitive Slave Law). See also HART, supra note 18, at 81 ("Chase . . . defeated in everyone of the slave cases in which he appeared for the defense"); FONER, FREE SOIL, supra note 13, at 83 ("no federal court adopted Chase's constitutional interpretation in the ante-bellum years"); Stephen Middleton, Salmon P. Chase: Reluctant Antislavery Reformer; Comment on Frederick Blue's From Left to Right, 21 N. KY. L. REV. 23, 32 (1993) (Chase’s efforts to nullify the Federal Fugitive Slave Law failed”). See also NIVEN, supra note 8, at 183-88 (Margaret Garner case while Chase was Governor of Ohio), 185 ("another fugitive slave case").

114. But see FONER, supra note 13, at 74-75 (James G. Birney (supra note 89) assisted or partnered Chase in developing antislavery interpretation of the Constitution). See also infra note 122 (Chase’s Role).

115. Slavery and involuntary servitude were not to exist in territories. See generally HYMAN & WIECEK, supra note 13, at 127-30; CHAPLAIN W. MORRISON, DEMOCRATIC POLITCS AND SECTIONALISM: THE WILMOT PROVISO CONTROVERSY (1967); NIVEN, supra note 8, at 95.

116. The people determine whether slavery would exist in a territory. HYMAN & WIECEK, supra note 13, at 132-35.

117. Id. at 130-31.

118. Id. at 135-36 (rejecting “constitutionality of the Wilmot Proviso’s central assumption that Congress had authority to exclude slavery from a territory” and developing a “proslavery [position] to ensure all territories were open to slavery”).

119. Id. at 131 (“all questions involving slavery [in California and New Mexico to be re- solved by the territorial supreme court, whose decisions . . . would be directly appealable to the United States Supreme Court”).

120. Id. at 166.

121. See generally HYMAN & WIECEK, supra note 13; HYMAN, supra note 14; POTTER, supra note 13. See also PALUDAN, supra note 46, at ix ("constitutional crisis,” “constitutional ideas and perceptions,” “legal-constitutional history of America”).

122. Indeed, “contemporaries recognized [Chase] as the architect of mainstream antislavery constitutional argument.” Benedict, supra note 20, at 135. But see supra note 114 (Birney’s role). See generally supra notes 13, 33.
tion and its relationship to slavery were three principal "abolitionist" positions. First, radicals considered the Constitution's true character to be antislavery. Consequently, slavery violated various federal and state constitutional provisions and the federal government possessed constitutional power to abolish slavery in the states and territories. Second, for Garrisonian abolitionists (and southern Democrats) the Constitution recognized and supported slavery. It was a pro-slavery document and, therefore, a "covenant with death." A third, more moderate view, between those extremes, was advanced by Chase. Despite textual difficulties, "Chase insisted that the Constitution was not a proslavery document." Even the fugitive slave clause was not, when interpreted as "subject to state power," an insurmountable impediment, and the Fifth Amendment, for example, could be read

123. HYMAN & WIECEK, supra note 13, at 92-93 (discussing "radical, moderate, and Garrisonian abolitionists"). See also CHASE PAPERS I, supra note 28, at xxiv n.29 ("differences between Chase's antislavery and other forms of abolitionism").


125. FONER, FREE SOIL, supra note 13, at 74 ("the Garrisonian group-accepted the southern contention that the Constitution recognized and protected slavery").

126. "[T]he compact which exists between the North and the South is 'a covenant with death, and an agreement with hell' . . . ." MERRILL, supra note 124, at 205 (resolution adopted at 11th meeting of the Massachusetts Anti-Slavery Society, Jan. 1843). See also Isaiah 28:18.

127. See, e.g., HYMAN & WIECEK, supra note 13, at 89-90 (listing eight "slavery clauses of the Constitution"); 118-19 (discussing "the three-fifths clause").

128. NIVEN, supra note 8, at 89. See also id. at 68 (1842 Liberty Party resolution that "the federal Constitution [was] an antislavery document").

129. U.S. CONST. Art. IV, § 2, cl. 3. See generally FINKELMAN, SLAVERY, supra note 107; Finkelman, Story Telling, supra note 107.

130. NIVEN, supra note 8, at 89.

131. Chase had a "restrictive definition" of the fugitive slave clause. For Chase the clause established only the principle of comity between the states. It was for the states themselves to decide how they would handle fugitives, whether they be white apprentices or black slaves. The [Fugitive Slave] Act of 1793 was unconstitutional because nowhere in the enumerated powers of Congress was there a fugitive slave provision. [The fugitive slave clause] 'conferred no powers . . . upon the [federal] government . . . .'

NIVEN, supra note 8, at 80-81 (quoting from Chase's Van Zandt argument supra note 111). See also HYMAN & WIECEK, supra note 13, at 150-51 (similar). But see supra notes 113
and enforced as a guarantee of "judicial procedural rights [for] all persons, which included blacks."\(^\text{132}\) Turning from text to framers' intentions,\(^\text{133}\) Chase continued to extol the Constitution's potential. The founding fathers intended slavery, albeit not too slowly, to wither and be replaced by the natural and preferable status of freedom and equality.\(^\text{134}\) Others interpret the Framers' intent as much more cautious and conservative, for example, on emancipation and racial equality.\(^\text{135}\) However, regardless of the existence and merits of such a debate,\(^\text{136}\) the immediate practical outcome was a success for Chase. "Thousands of northerners" were "convinced" that the founders intended antislavery to prevail.\(^\text{137}\) From that perspective, and particularly through Jefferson,\(^\text{138}\) Chase linked three great documents: the Declaration of Independence, 1776,\(^\text{139}\) Northwest Ordinance, 1787,\(^\text{140}\) and the Constitution. Again,

\(^{132}\) NIVEN, supra note 8, at 89. See also id. at 84 ("Fifth Amendment procedural rights for [the slave Samuel] Watson as a person"); 188 (Chase "struck [in 1856] by . . . the due process language of the Fifth Amendment . . . [which to Chase] meant that no slavery could exist in any territory [but which] Calhoun . . . used to justify slaves as property wherever the power of the national government extended, [the] doctrine Taney would espouse in . . . Dred Scott").


\(^{134}\) See generally CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN...
that was not unusual, though Chase may have done it earliest and, apart from Lincoln, best.

Congressional power and its exercise was another great constitutional battleground. Recourse to Salmon P. Chase: A Biography exposes the intensity, variety and inconsistencies involved. First, "[s]outhern extremists such as Calhoun . . . insisted that the national government must protect slavery wherever American slavery extended." Second was the view that, even in the territories, congressional legislation "was inherently unconstitutional despite the territorial clause in the Constitution." Third, was the Chase position that slavery could be abolished "in those areas where the Constitution conferred plenary powers on Congress—the District of Columbia, the territories, the internal slave trade, and the high seas." For example, Congress could stipulate

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There shall be neither slavery nor involuntary servitude in the [Northwest] territory . . .

[provided . . . that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming [their] labor or service. . . .

U.S. CODE, Vol. 1 at LI, LIII (1787).

142. See, e.g., WILLS, supra note 5, at 99-120; Harold Hyman, Lincoln and Other Anti-slavery Lawyers: The Thirteenth and Fourteenth Amendments and Republicans' Political Agendas, in A CRISIS, supra note 26, at 94, 96 ("democratizing continuum"); Phillip Paludan, Lincoln and the Rhetoric of Politics, in id. at 75, 77 ("Fundamental to [Lincoln's constitutional] thought . . . was his understanding of the conversation between the Declaration and the Constitution"). See also Robert J. Kaczesowski, The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism, 21 N. KY. L. REV. 151, 184 n.146 (1993) (suggesting Justice Field linked 1776 Declaration of Independence and 1868 Fourteenth Amendment in his dissenting opinion (which Chief Justice Chase joined) in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 105 (1873)).

143. NIVEN, supra note 8, at 105.

144. Id. at 108 (footnote omitted).

145. Id. at 60. Similarly see HYMAN & WIECEK, supra note 13, at 141; FONER, FREE SOIL, supra note 13, at 79-80. But see supra note 132 and infra note 151 (Congress no power).
freedom or slavery in the territories and stipulate either as a condition of admission to statehood. At least for territories, did Chase change? Professor Niven's response appears to be no. Congress possessed "clear constitutional power to legislate whatever governance or . . . conditions it chose to impose on the territories. [F]or Chase this meant legislating free soil." However, a transformation seems to have occurred. By 1856, on the basis of the Fifth Amendment, the Republican platform declared establishment of slavery in territories beyond congressional constitutional competence. This complemented the second aspect of Chase's view of Congress' competence, that such federal power could not establish, interfere with or abolish slavery in the states. Here, Chase's moderate, perhaps, federal or states' rights constitutionalism was crucial. What remained was state legislative power. Unless it was exercised, states remained "free."

146. NIVEN, supra note 8, at 52, 60, 70, 105.
147. Compare supra note 63. Also note Belz, supra note 74, at 117 ("major assumption: on matters of ultimate conviction, Chase was . . . largely consistent").
148. NIVEN, supra note 8, at 148 (also suggesting that this 1853 Chase position was "diametrically opposite" Calhoun's slavery stance). But compare Chase's 1860 position that the Fifth Amendment precluded slavery in the Territories. See supra note 132.
149. HYMAN & WIECEK, supra note 13, at 169. Similarly on this lack of federal power see id. at 92-93 (moderate abolitionists), 142 (Free Soil Party Platform 1848); FONER, FREE SOIL, supra note 13, at 87 (quoting 1850 Chase letter to Charles Sumner).
150. See, e.g., HYMAN & WIECEK, supra note 13, at 92-93, 141; NIVEN, supra note 8, at 68.
151. For example, Chase considered that "[n]othing short of positive law can sustain [slavery]." NIVEN, supra note 8, at 192 (quoting Chase's Jan. 5, 1857 message to the Ohio legislature). Indeed,

[Chase] had fought a defensive battle to keep the northern states and the . . . territories free of slavery. He had not aspired to enlist the federal government in the protection of human rights but only to deny it the constitutional power to promote slavery. The federal government, bound to obey the Fifth Amendment's injunction . . . could have nothing to do with slavery, which could be established and sustained only by the positive law of the individual states.

Benedict, supra note 20, at 148 (citing FONER, FREE SOIL, supra note 8, at 73-102; Earl M. Maltz, Slavery, Federalism, and the Structures of the Constitution, 36 AM. J. LEG. HIST. 466 (1992)). Thus, "Republican ideology was grounded on two fundamental constitutional principles. . . . First . . . that slavery existed only where established by positive law. . . . [S]econd . . . only states . . . had] any substantive power over slavery . . . to abolish, establish or regulate it." HYMAN & WIECEK, supra note 13, at 169-70. Compare the post-Civil War period when "most Republicans had moved to new ground, making the federal government responsible for protecting rights . . . [but the] more conservative Republicans lagged behind. Chase plainly was torn . . . . He articulated [in 1869] his commitment to traditional ideas of federalism . . . in Texas v. White, [74 U.S. (7 Wall.)] 700 (1869)] . . . Yet in 1873, Chase . . . join[ed] Justice Stephen J. Field's dissent in The Slaughter-House Cases [83 U.S. (16 Wall.)] 36, 83 (1873)] . . . [which would have] empowered the judges to protect a
Executive power to deal with slavery also confronted Chase. Without realizing the potential or exploring this issue, *Salmon P. Chase: A Biography* provides some examples including the use of gubernatorial pardons and of state executive power to prevent state prisoners being transferred to federal custody under the Fugitive Slave Act of 1850. Invocation of presidential power to issue the Emancipation Proclamation was also a matter in which Chase participated. Even if symbolically, rather than practically, important, this involved significant constitutional law conundrums which, presumably, were of more than merely passing interest to a lawyer such as Chase. Indeed, somewhat incessantly, Chase pressed Lincoln to again exercise, but now on an even wider range of fundamental rights [and] would have meant a revolution in federalism." Benedict, *supra* note 20, at 148-49 (footnotes omitted). For the suggestion that Chase would have reconciled these positions by expanding federal judicial power and limiting (even under the Fourteenth Amendment’s section 5 enforcement power) Congress' authority see *id.* at 149. See also *Niven, supra* note 8, at 399 (quoted *infra* note 163). See also *Hyman & Wieck, supra* note 13, at 249 (suggesting that by 1863 “[m]any Republicans were coming to see the Bill of Rights as a grant of positive power to the nation”). *But see infra* note 189 (congressional legislation required for *AMEND. XIV, § 3*). *See also infra* note 198 (“rights”).

152. *Niven, supra* note 8, at 191-92 (Governor Chase seeking pardons for Ohio citizens in Kansas prisons).

153. *Id.* at 183-85 (fugitive slave Margaret Garner). For Chase’s involvement in the exercise of presidential power see *infra* notes 154-59. As Secretary of the Treasury, Chase exercised federal executive power. *See supra* note 34 (references).


155. *See generally Niven, supra* note 8, at 302-07; *Chase Papers I, supra* note 28 at 393-95; *Foner, Free Soil, supra* note 13, at 79 (“It was Chase who added the final clauses to Lincoln’s Emancipation Proclamation, asking the blessing of God for the great enterprise”) (footnote omitted).

156. The Emancipation Proclamation (which took effect on Jan. 1, 1863) only applied “in those states and parts of states still in rebellion. [It did not apply] to loyal slave states and . . . areas where the Union army was in control.” *Niven, supra* note 8, at 306. Indeed, despite Chase’s agitation, Lincoln did not, for political and constitutional reasons, broaden its application. *Id.* at 321.

157. *See e.g. Randall, supra* note 5, at 342-404; *Niven, supra* note 8, at 321 (Lincoln “doubted his constitutional power to [broaden the Proclamation’s area of application]”).

158. For example, on the Monday, Sept. 22, 1862 Cabinet meeting, when Lincoln read the proposed Preliminary Emancipation Proclamation, Chase remarked that "it was [Lincoln’s] right, and under [the President’s] oath of office [his] duty, to do." *Chase Papers I, supra* note 28, at 395. Professor Niven suggests that the Proclamation was “[h]ased on military necessity as expressed in the Second [1862] Confiscation Act and on [Lincoln’s] position as Commander-in-Chief” and notes that Chase agitated for Lincoln to broaden the Proclamation’s application by rescinding its exceptions. *Niven, supra* note 8, at 306, 320. But what, if any, constitutional arguments did Chase utilize to endeavor to overcome Lincoln’s doubts?
wider basis, that presidential power.\textsuperscript{159}

Confining Chase’s confrontation with the Constitution to the parameters cannot, however, suffice. Other facets of that document and non-slavery constitutional law issues interested and involved Chase. Hints particularly involving his tenure as Secretary of the Treasury are provided by \textit{Salmon P. Chase: A Biography}. The Legal Tender Acts\textsuperscript{160} and national banking legislation\textsuperscript{161} are the prominent examples.\textsuperscript{162} To assess the full dimensions of Chase’s constitutional jurisprudence, more information and analysis are required. What other issues required his attention and resolution? Were the same or, at least, consistent doctrinal and interpretative methodologies applied? How and with what effect were Chase’s basic impulses-Jeffersonian\textsuperscript{163} and Jacksonian\textsuperscript{164}-influential?

Unresolved and interesting complexities regarding Chase as a constitutional lawyer, therefore, remain. Consequently, judgments on his reputation ought not merely to rest on a stark dichotomy of results as an unsuccessful litigation attorney,\textsuperscript{165} but a proficient advocate in converting his ideals and ideas into party political platforms.\textsuperscript{166} When a more comprehensive portrait emerges, another adventure, comparing Chase with great American lawyers who were his predecessors,\textsuperscript{167} contemporar-
ies, and successors, can be undertaken.

IV. THE JUDGE

Not ranked among the greats, in modern comparisons of U.S. Supreme Court judges, what is and should be Chief Justice Chase’s reputation? Again, historiographic trends are evident. Initially, Chase and the Supreme Court over which he presided were perceived by contemporaries as “important,” “formidable,” and of such influence to be compared with the Marshall Court era. Second, coinciding with “an older [‘tragic’] view of reconstruction,” was a period (from the 1930s to 1960s) where Chase and the Supreme Court were “thought of as an ineffectual, insignificant force” while “congressional activism,” for example on reconstruction measures, number of justices, and the Court’s jurisdiction, was supreme. Third, since the 1960s, an elevation in the Chase Court’s, but not Chase’s reputation, has been occur-

168. For example, Wendell Phillips (see supra note 124).
171. See supra text accompanying notes 16-25, 79-86.
173. See, e.g., White, supra note 17, at 41-42.
174. Id. at 44 (“a fanatical band of Republicans in Congress overrode the moderate accommodationist policies envisaged by Lincoln and endorsed by Andrew Johnson to impose their vindictive will upon the defeated South”). See supra note 20 (Reconstruction historiography).
175. Act of July 23, 1866, 14 Stat. 209 (providing for a reduction from nine to seven Justices as vacancies occurred). See NIVEN, supra note 8, at 410-11; FAIRMAN, supra note 21, at 168-69. Justice Wayne’s death, on July 7, 1867, left eight Justices and Justice Grier’s resignation, effective Feb. 1, 1870, reduced the Court to seven Justices. For subsequent developments (including increasing the Justices to nine by the Act of April 10, 1869, 16 Stat. 44) see id. at 487-88, 559-60, 730-38; NIVEN, supra note 8, at 438.
176. See infra note 208 (Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869)).
177. White, supra note 17, at 44. See also supra note 23 (Fairman’s responsibility).
ring.178 Slowly, however, that “diminution of Chase's reputation”179 is being addressed and, perhaps, redressed.180 Although Salmon P. Chase: A Biography rushes through Chase's judicial career,181 scholars ought to move more slowly in this terrain. Given the plethora of available information,182 to be supplemented by further volumes of The Salmon P. Chase Papers,183 this turn to Chief Justice Chase should continue.

A. Circuit Judge

One aspect of judicial work Chase enjoyed184 was the position of circuit judge for the Fourth Circuit. Professor Niven provides the context.

Chase . . . decided a range of political, economic, and social cases while on circuit duty that brought legal stability to investment, to financial transactions, and to property ownership that existed before and during the [Civil] war. Though associated with the district court judges, most of the business that came before the circuit [Chase] as the senior [judge] . . . handled himself and in so doing established the framework for crucial aspects of Reconstruction. During the less than four years that Chase presided over his circuit which extended from Delaware to North Carolina, he heard and wrote opinions on 47 cases. Free from the distraction of debating with other critical minds

178. White, supra note 17, at 44 (“historiographic shift . . . did not result in a corresponding elevation of Chase’s reputation”). Compare, Kaczorowski, supra note 142 at 151. (denigrating Chase Court as “annul[ing] a revolution in American constitutionalism”). However, the extent of such a “revolution” and whether the Chase Court “annulled” it are disputed. See Benedict, supra note 20, at 138 (framers’ intentions); Lowell Schechter, A Comment on the Chase Court and Fundamental Rights, 21 N. KY. L. REV. 203 (1993) (Court’s performance).

179. White, supra note 17, at 45.

180. See, e.g., Symposium, supra note 35, at 41-214.

181. NIVEN, supra note 8, at 375-451.


183. For a glimpse of what may come, see supra text accompanying notes 40-49.

184. Compare Supreme Court work which Chase “found . . . unfamiliar and tedious [and a] ‘painful monotony’” with NIVEN, supra note 8, at 376 (quoting Chase letter of March 1865).
and presiding over divisions of opinions on the Supreme Court, Chase found circuit duties more to his taste. For there he was very much his own man and most of his decisions had immediate, direct impact. [Chase summarized his approach:] "It is only as a Circuit Judge that the Chief Justice or any other Justice of the Supreme Court, has, individually, any considerable power." 185

Even so, "Chase . . . consistently refused to hold circuit court in Virginia [and other] lately rebel states until all possibility of [a] claim that the judicial is subordinate to the military power" was eliminated. 186 That stance removed at least one important case—the trial of Jefferson Davis 187—from Chase's purview. Others remained 188 including the Caesar Griffin Case, 189 Shortridge v. Macon, 190 United States v. Morrison, 191 and, perhaps the most famous, In re Turner. 192 What, if any-
thing, do they reveal about Chase's constitutional jurisprudence and the unfulfilled possibilities of a "too-brief Chief Justiceship" and "sadly truncated judicial career"? 93

More work, than Salmon P. Chase and others have done, 94 is still required. For example, assume Macon 95 and, indeed, Chase's even earlier "wrest[ing] with the theoretical problem of secession" 96 illustrate, together with Texas v. White, 97 Chase's continuity of thought and decision making. 98 Would the same have been true for In re Turner, 99 the unwritten Chase opinions in The Slaughter-House Cases 200 and Bradwell v. Illinois, 201 and into the future? In re Turner opened the vista of a revolution vastly expanding federal judicial review and supervision of federal constitutional rights against the states. That had implications for the nature of American federalism and for a change to judicial enforcement of rights. 202 Does this also provide an intimation of how

521-25 (strictly military acts done for the Confederate Government were immune from prosecution). See, e.g., Benedict, supra note 20, at 147.

192. 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14, 247), in JOHNSON, supra note 182, at 157-61 (habeas corpus writ granted releasing Elizabeth Turner, a former slave from apprenticeship agreement with former master because of Thirteenth Amendment and Civil Rights Act of 1866). See, e.g., FAIRMAN, supra note 21, at 1309, 1351; HYMAN & WEIECK, supra note 13, at 433-34; Hyman, supra note 25, at 197-201; Kaczorowski, supra note 142, at 157-60; White, supra note 17, at 72, 74-78, 113.


194. See Niven, supra note 8, at 380, 409, 427, 433; White, supra note 17, at 72, 74-78, 113; Benedict, supra note 20, at 143-44, 146-48; Kaczorowski, supra note 142, at 157-59; Hyman, supra note 25, at 197-99; Hyman & Hyman, supra note 185.

195. 22 F. Cas. 20. See supra note 190.

196. NIVEN, supra note 8, at 436.

197. 74 U.S. (7 Wall.) 700 (1869).

198. See supra note 63. See also White, supra note 17, at 113 (Chase "prepared to depart from his previously expressed views that individual rights of person and property were best defined and restricted by states and localities").

199. 24 F. Cas. 337. See supra note 192.

200. 83 U.S. (16 Wall.) 36 (1873). "[P]robably because of his illness, [Chase] was the only dissenter in the Slaughter-House Cases not to write a dissenting opinion"). Schechter, supra note 178, at 207. "Chief Justice Chase said nothing beyond joining in [Justice] Field's dissent." FAIRMAN, supra note 21, at 1363. See also infra note 248 (tantalizing comment).

201. 83 U.S. (16 Wall.) 130 (1873). Only Chase dissented in Bradwell and did so without writing an opinion. See infra text accompanying notes 256-61. Perhaps, there is a Turner-Crandall-Slaughter-House-Bradwell continuity suggesting that Chase anticipated modern judicial review of constitutional rights. See also Belz, supra note 74, at 119 (similar); White, supra note 17, at 78-82 (discussing Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868)), 115-16 (conventional and emerging views of Chase Court).

202. White, supra note 17, at 58. But note id. at 57 ("in areas such as the Contracts Clause and admiralty jurisdiction, the [antebellum] Court continued to assume that it had broad supervisory powers"). See also supra note 151 (judicial protection of rights).
Chase would, in Supreme Court opinions, have resolved his dilemma? Which commitment, Chase's traditional federalism and concern for the states (illustrated by his original constitutional views on slavery, Macon, and Texas v. White) or Chase's emergent position of federal responsibility, especially on the judiciary, for protecting and enforcing constitutional rights (illustrated by In re Turner, The Slaughter-House Cases, and Bradwell), would have prevailed?

B. United States Supreme Court

Among the vast and increasing commentary on Supreme Court opinions rendered during Chase's tenure, two commendable tendencies are clearly evident: Explorations of such questions is occurring and, consequently, theories and explanations-divergent, conflicting, and debatable-are beginning to emerge about Chase's constitutionalism. In this context, "commonly anthologized Chase Court constitutional decisions" include: Ex parte Milligan, Ex parte McCardle, United States v. Klein, Ex parte Yerger, The Test Oath Cases, Mississippi v. Johnson, Georgia v. Stanton, Texas v. White, White v.  

203. See supra text accompanying notes 101-59. 
204. See supra note 151 (Chase relying on judicial review, not congressional legislation under U.S. CONST. amend. XIV, § 5, to protect federal constitutional rights). 
205. See supra note 182. 
206. White, supra note 17, at 70. For a plethora of scholarship, see supra note 182 and especially CURRIE, supra note 35 and FAIRMAN, supra note 21. Only extra fragments are cited in infra notes 207-27. 
209. 80 U.S. (13 Wall.) 128 (1872) (congressional legislation that presidential pardons were proof of aiding the rebellion and, with such proof, suits to recover property from the government to be dismissed for want of prosecution unconstitutional). See, e.g., Gordon G. Young, Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited, 1981 WIS. L. REV. 1189. 
210. 75 U.S. (8 Wall.) 85 (1869) (Supreme Court had appellate jurisdiction to habeas corpus under Judiciary Act 1789). 
211. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) and Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867) (Missouri and congressional legislation requiring oath that a person had never aided the rebellion to be taken before carrying on specified occupations unconstitutional). 
212. 71 U.S. (4 Wall.) 475 (1867) (no jurisdiction in Supreme Court to enjoin the President from performing presidential duties of enforcing Reconstruction legislation). 
213. 73 U.S. (6 Wall.) 50 (1868) (Supreme Court not entertain a suit to enjoin the Secre-

Tory of War and two generals from enforcing Reconstruction legislation).
214. 74 U.S. (7 Wall.) 700 (1869) (partly reconstructed state of Texas could bring an action in Supreme Court to recover federal bonds sold after rebel Texas legislature purported to repeal earlier Texas law because secession was unconstitutional).
215. 80 U.S. (13 Wall.) 646 (1872) (Georgia had never left the Union and, therefore, despite the attempted secession, could not, because of the Contracts Clause, impair contractual obligations).
216. 74 U.S. (7 Wall.) 71 (1869) (state law that county officers pay state taxes "in gold and silver coin" upheld and Congress, in Legal Tender Acts, had not attempted to intrude).
218. 75 U.S. (8 Wall.) 603 (1870) (congressional "greenback" legislation unconstitutional).
220. 70 U.S. (3 Wall.) 713 (1866) (Pennsylvania statute authorizing construction of a bridge over the navigable Schuykill River upheld against wharf owners challenge that this would prevent boats reaching wharf).
221. 73 U.S. (6 Wall.) 31 (1867) (Louisiana Act imposing five dollar tax on boats entering New Orleans port unconstitutional).
222. 73 U.S. (6 Wall.) 35 (1868) (state tax on passengers leaving state unconstitutional). See, e.g., White, supra note 17, at 78-82 (suggesting Chase’s commerce clause position in Crandall was to disassociate himself from Justice Miller’s narrow conception of freedom and to foreshadow a larger role for judicial review and constitutional rights).
223. 75 U.S. (8 Wall.) 123 (1869) (Alabama tax on goods sold at auction constitutionally applied to goods from other states sold in original packaging).
224. 80 U.S. (13 Wall.) 581 (1872) (section 3 of Civil Rights Act of 1866 did not give federal courts jurisdiction over criminal trials of white defendants for crimes against black victims where black witnesses' testimony was inadmissible under state law). See, e.g., Robert D. Goldstein, Blyew: Variations on a Jurisdictional Theme, 41 STAN. L. REV. 469 (1989).
225. 80 U.S. (13 Wall.) 251 (1872) (dismissal for want of jurisdiction of case raising question: under the 1870 Civil Rights Act, did the federal court in South Carolina have jurisdiction to try defendants for murder?).
Two aspects are obvious, including the range and, in many instances, the novelty of the subject matters involved in this litigation, and the rampant judicial statistics.

One conspicuous feature of the Chase period [is] . . . the enormous increase in the Justices' workload. In [its] first seventy five years . . . the Court had produced sixty-eight volumes of decisions; in Chase's nine terms it produced fifteen. The increase in constitutional litigation was [even] more striking . . . [I]n less than nine years under Chase, the Court resolved as many constitutional cases as it had in the preceding twenty-eight years." 228

Some sense of this judicial revolution is becoming apparent in the emerging explanations and theories-the new jurisprudence-of the Chase Court. Most prominent and prevalent is endorsement of a revisionist conclusion that "the [Supreme] Court in [the post-Civil War decade] was characterized by forcefulness and not timidity, by judicious and self-imposed restraint rather than retreat, by boldness and defiance, instead of cowardice and impotence, and by a creative and determinative role with no abdication of its rightful powers." 229

To that global assessment, Salmon P. Chase: A Biography signals a partial retreat to previous ineffectual characterizations. "[I]t must be said that the period between 1868 and 1870 while the Chase Court boldly asserted its appellate jurisdiction . . . it did so when it was less risky than earlier when congressional Reconstruction was at full tide . . . " 230 Even if modified, that "historiographic shift" 231 is beginning to rehabilitate Chase's reputation as Chief Justice. Where Chase exhibited reticent


228. CURRIE, supra note 35, at 286 (footnote omitted). See also supra note 71 (debate over number of congressional Acts invalidated by Chase Court).

229. KUTLER, supra note 35, at 6.


231. White, supra note 17, at 44.
and reluctant in exercising judicial power, including "readmission" of confederate states to the Union, status of personal property rights in such states, and congressional confiscation and loyalty oath legislation are possible examples, can be commended as a careful and prudent stance. Sensitivity to and, perhaps, practical realism about congressional and presidential powers may have been the cause. In response to The Test Oath Cases and Milligan, Professor Niven suggests that

Chase's antennae were vibrating as he judged the temper of Congress and the activities of [President] Johnson. His sense . . . was to preserve the [Court's] independence . . . and if possible enhance it and his own prestige. His overall approach was the promotion of harmony between Congress and the President. In this effort he aligned himself with the moderates among the Republicans in the Congress. That he would vote against treasured concepts embedded in the Constitution such as . . . First Amendment rights shows a wavering of principle in the interests of expediency. This stand and the decision in . . . Milligan . . . clearly brings out [Chase's] motive of steering clear of any collision with the legislative branch.

Chase was largely responsible for helping to keep the Court clear of potentially embarrassing political matters.

Chase's reputation is invigorated by the refutation, in Salmon P. Chase: A Biography, of the suggestion "that Chase led a conservative Court away from a direct confrontation with Congress on Reconstruction." Rather, Professor Niven considers that, "working informally with Congress and formally with his colleagues on the court, Chase sought always to uphold his interpretation of a federal system of government. He would not needlessly antagonise Congress or the President. But when [Chase] thought one or the other branch was out of line, he did not give way." But, when did Chase "not give way"? Possibilities include Chase's deep and abiding convictions such as opposition to slavery, freedom of labor and economic opportunity, hard currency, and the nature of the American union. This, of course,

232. Id. at 112-13.
233. NIVEN, supra note 8, at 407, 413 (footnote omitted and italic added).
234. Id. at 413 n.63 (referring to Hughes, supra note 35, at 584-88).
235. NIVEN, supra note 8, at 413 n.63 (referring to Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 and Chase's May 5, 1868 letter to John Van Buren). See also NIVEN, supra note 8, at 434-35 (similar interpretation of Chase's position in Ex parte McCord, 74 U.S. (7 Wall.) 506 and Ex parte Yerger, 75 U.S. (8 Wall. 785)). See supra notes 208, 210, 212.
236. White, supra note 17, at 61.
237. Id. at 61-62.
238. Id. at 63-70.
239. Belz, supra note 74, at 123-31. See generally supra note 74 (Chase's four deep con-
raises questions about the nature of judicial decision-making and, in the Chase context, whether he was a "political" judge and the nature of his jurisprudence. At least two models have been postulated. First, especially in those cases where Chase did "not give way" or temporize through prudential responses measured against the political situation and possible consequences, Chase is aligned with a neutral, legal expertise model of adjudication. Second, a more overtly political model where it is recognized that politics, principles and passion as well as reason, deliberation and craftsmanship inform and infuse constitutionalism without inevitably leading to partisanship, ideological zeal, and, eventually, denigration of judicial office. Do Chase's "convictions" slide into the latter? Are there "transcendent, universal principles or ideas" or were these "convictions" merely "time-bound and contingent" even for Chase, "a pretext for the pursuit of partisan and ideological ends"? Can Chase's reputation be rescued or restored by his, perhaps numerically small, deep conviction decisions? Upon the answers depends the hope of reclaiming Chief Justice Chase's contribution to constitutional jurisprudence and adjudication. Within that context, to what extent did Chase recognize, confront, take advantage of and endeavour to render acceptable "a potentially vast expansion" of the scope and depth of judicial review? From one perspective, the justices . . . faced the new jurisprudential world that was potential in the Civil War Amendments. Those Amendments were on their face a repudiation of ante-bellum jurisprudence. They radically extended the

victions). Were there several judicial continuities? For example, Turner-Crandall-Slaughter-House-Bradwell and Veazie Bank-Hepburn-Legal Tender. 240 Compare White, supra note 17 (non-political deep-conviction decisionmaking) with Belz, supra note 74 (politically motivated prudential decisionmaking). 241 Belz, supra note 74, at 119-20, 123. However, Professor White does suggest that Chase's "freedom" and "currency" convictions may have been time-bound. White, supra note 17, at 62, 63. 242 Id. at 115. 243 However, there are others. For example, the quagmire of framers' (and ratifiers') intentions concerning the Thirteenth and Fourteenth Amendments (see supra notes 68-70) and the role and purpose of section 5 of the Fourteenth Amendment. On the latter see, e.g., Tushnet, supra note 169, at 182-83 (discussion during Supreme Court oral argument in Brown v. Board of Education, 347 U.S. 483 (1954)); Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U.L. REV. 437 (1994); Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 CARDOZO L. REV. 357 (1994); Scott C. Idleman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 TEX. L. REV. 247 (1994); Peggy S. McClard, The Freedom of Choice Act: Will the Constitution Allow It?, 30 HOUS. L. REV. 2041, 2069-81 (1994).
Court's jurisdiction over rights. . . . And the justices stood at the threshold
of this radical extension of federal court jurisdiction with a constitutional
jurisprudence that permitted virtually unconstrained [judicial] decision
making.244

Assume, as a matter of text and framers' intent, that such an opportu-
nity existed.245 Did the Chase Court or at least some justices "annul[] a
revolution in American constitutionalism"?246 Addressed through The
Slaughter-House Cases differing answers have emerged.247 But, what of
Chase? He dissented without writing an opinion in The Slaughter-House
Cases248 and Bradwell. From that juncture, unresolved mysteries
abound. First, why did Justice William Strong249 change his mind and
vote on the meaning of the Civil War Amendments between United States
v. Given250 and The Slaughter-House Cases? Given Chief Justice
Chase's ability to persuade and, perhaps, dominate some justices,251 and
if he had not been "[w]eakened in body and mind,"252 could Chase have
held Strong to the Given position and, therefore, transformed the four
dissenters into a majority of five?253 Will The Salmon P. Chase Papers
or those of other justices reveal whether even an attempt to do so was

244. Benedict, supra note 20, at 137-38.
245. But see supra notes 68-70.
246. Kaczorowski, supra note 142, at 151 (footnote omitted).
247. See supra note 178 ("framers' intentions" and "Court's performance").
248. 83 U.S. (16 Wall.) 36. However, Professor Niven throws out a tantalizing comment:
Weakened in body and mind Chase nevertheless saw in the argument [for the butchers]
of former Associate Justice John A. Campbell a means of strengthening the protection
the Fourteenth Amendment afforded to the civil rights of blacks.
NIVEN, supra note 8, at 447 (footnote omitted). Campbell a "states rights Southerner essentially
adopted the Republican party's theory of constitutionalism . . . that the Constitution . . .
secured the fundamental rights of all citizens and conferred plenary authority on the national
government to enforce and protect these rights." Kaczorowski, supra note 142, at 177 (footnote
omitted) (citing Brief for Appellants, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)).
249. See generally Burnett Anderson, William Strong, in THE SUPREME COURT JUSTICES:
ILLUSTRATED BIOGRAPHIES, 1789-1993, at 196-200 (Clare Cushman ed., 1993); Michael
Dougan, Strong, William, in OXFORD COMPANION, supra note 35, at 845-46; Stanley Kuter,
William Strong, in 2 THE JUSTICES, supra note 35, at 1153-80; Stanley Kuter, Strong, Wil-
liam, in ENCYCLOPEDIA, supra note 35 at 1791-93; Lou Williams, William Strong, in THE
SUPREME COURT JUSTICES, supra note 35, at 445-47.
250. 25 F. Cas. 1324 (C.C.D.O. Del. 1873) (No. 15, 210). "Just weeks before the [Su-
preme] Court announced its decision in Slaughter-House, Justice William Strong issued an opinion . . .
that the Reconstruction amendments affirmatively secured the fundamental rights of
citizens." Kaczorowski, supra note 142, at 191 (footnote omitted).
251. See infra Part E (Inside the Supreme Court).
252. NIVEN, supra note 8, at 447. See also White, supra note 17, at 81 ("Chase was ill . . .
and had to be content with joining Justice Stephen Field's dissent").
253. Schechter, supra note 178, at 204.
made? If Chase could have obtained such a fifth vote, would American constitutional law and history have been significantly different? However, a negative response does not preclude another question: Would a broader interpretation of the Privileges and Immunities Clause in *The Slaughter-House Cases*... have provided... a more solid basis than the Due Process Clause for protecting individual rights...?"  

*Salmon P. Chase: A Biography* does not discuss or assist with a second conundrum: Why did Chief Justice Chase dissent in *Bradwell*? Perhaps, because Myra Bradwell and Chase were relatives. Perhaps, because Chase “always favored the enlargement of the sphere of women’s work and the payment of just compensation for it.” Perhaps, because Chase considered a *Bradwell* dissent to be consistent with his dissent in *The Slaughter-House Cases*. Perhaps, it is “impossible” to ascertain and no-one will ever “fully know” Chase’s reasons. Of course, one hope remains: the forthcoming volumes of *The Salmon P. Chase Papers*.  

A third example is provided by Chase’s vote, without opinion, in *Crandall v. Nevada*. Why did Chief Justice Chase decline to join or endorse Justice Miller’s opinion erecting a federal constitutional right to travel interstate? 

One might have anticipated that Chase might have been an enthusiastic supporter of Miller’s opinion. For Chase, the ability of American citizens to move from place to place was an essential component of Chase’s commitment to “freedom national.” Miller’s list of “correlative rights"... 

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254. *Id.*  
255. *Id.* at 204.  
256. But see *Niven*, *supra* note 8, at 40 (Chase’s view in 1830s of women), 203-04, 441-42 (relationships with women), 448 n.64 (“Chase’s approach to women’s suffrage was not [as] enlightened [as his support for the Fifteenth Amendment]. Though not opposed to it in principle, [Chase] thought Susan B. Anthony was ‘a little too fast’ in her demands to eliminate sex as a standard for voting”) (quoting Feb. 13, 1873 Chase letter to Gerrit Smith). See *supra* note 70 (Chase’s support for the Fifteenth Amendment).  
257. Friedman, *Myra Bradwell*, *supra* note 227, at 1297 (distant cousins); Sanger, *supra* note 227, at 1258 (Bradwell’s “father’s mother was a descendant of [Chief Justice] Chase”), 1259 (“Bradwell’s distant relative”).  
259. 83 U.S. (16 Wall.) 36. See also *supra* notes 201, 239 (Turner-Crandall-Slaughter-House-Bradwell continuity).  
260. CURRIE, *supra* 35, at 351 (suggesting that Chase “did not have the courtesy” to disclose his reasons).  
262. See *supra* text accompanying note 46.  
263. 73 U.S. (6 Wall.) 35. See also *supra* note 222. For discussions see FAIRMAN, *supra* note 21, at 1125, 1302-06; White, *supra* note 17, at 78-81.
closely paralleled Chase's own comments about the restrictive effects of slavery. ... Just why Chase acted as he did in *Crandall* is unclear, but his eventual position in *The Slaughter-House Cases* provides a possible explanation. ... Could [Chase] have felt that Miller's articulation of the "correlative rights"... was too meager a definition of "freedom national?" One cannot answer that question with much confidence, because Chase was ill by the time *The Slaughter-House Cases* came down. ... Relevant revelations in future volumes of *The Salmon P. Chase Papers* would assist in analyzing Chase's constitutional jurisprudence and decision-making process and satisfy historical curiosity.

### C. Impeachment

Other important and interesting facets of Chief Justice Chase are also addressed in *Salmon P. Chase: A Biography*. Already an array of scholarship evaluates the Senate impeachment proceedings involving President Andrew Johnson.265 Professor Niven adds an account focusing upon Chase's role266 particularly in relation to the Constitution's command: "When the President of the United States is tried, the Chief Justice shall preside. ... "267 From a constitutional law perspective, four significant matters emerge. First, based on that fourteen word command, Chase analogized the Senate proceedings to those of a court. Examples included his power to rule on the competency of witnesses, the evidence and points of order and to cast a tie-breaking vote. Second, was Chase's assessment of the Constitution's criteria—"Treason, Bribery, or other high

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264. White, *supra* note 17, at 81 (footnote omitted). Compare the suggestion that Crandall's "basic principle was old, although the language rang with the assurance derived from the recent triumph of the Union." *Fairman*, *supra* note 21, at 1125.


Crimes and Misdemeanours” and conclusion that President Johnson had not committed an impeachable offense. Third, was Chase’s “trump card”: [Chase] could refuse to preside. There was no way the Senate could compel him to serve . . . . [U]nless the Senate chose to make a direct violation of the Constitution and proceed without the Chief Justice presiding, no [presidential impeachment] trial could be held.

Finally, there were even larger structural issues at stake. Chase “deplored the impeachment process, and while he was opposed to Johnson’s policies on Reconstruction, [Chase] looked to the long-term impact of the trial on the structure of the national government.” But, from a “long-term” perspective what has been that impact? Has it, like Justice Samuel Chase’s acquittal, rendered presidential impeachment a blunt ineffectual congressional instrument unable to thwart an imperial presidency? At least after the Nixon impeachment process, a negative response might be incorrect.

D. Advisory Opinions

Proclivity for extra-judicial activities is, for Chase, a well-known phenomenon. Indeed, they give credence to “the conventional view of [Chase] primarily being interested in ‘semi-political’ matters while chief justice.” Condemnation under “modern separation of powers theory” would, however, be inappropriate. Whether that view should also prevail in regard to Chief Justice Chase’s advisory opinions requires, especially in the context of information about other Justices, further

268. *Id.* at art. II, § 4.
269. *Niven, supra* note 8, at 419.
270. *Id.* at 420.
271. *Id.* But, would this have constituted grounds for the Chief Justice’s removal if impeached by the House of Representatives and convicted by the Senate?
272. *Id.* at 419. *See also id.* at 4 (Chase “deplored the unprecedented action of Congress to remove a President”).
275. *White, supra* note 17, at 112.
276. *Id.*
evaluation. Professor Niven provides some details: Chase's drafting a presidential proclamation,278 congressional Bill and "minor amendments" introduced in the Senate.279 In addition, Chase "privately informed . . . wavering senators of his belief that the articles [of impeachment] did not warrant conviction" of President Johnson.280 Not mentioned in Salmon P. Chase: A Biography is a more egregious example.

The most striking precedent for the giving of advisory opinions occurred in 1872 during Salmon P. Chase's chief justiceship . . . . Asked for an opinion by Secretary of State Hamilton Fish about the constitutionality of certain provisions of a proposed treaty, Chief Justice Chase replied that there was no impropriety in Fish's request or in [Chase's] own response. He told Fish that he had consulted his two senior colleagues and they all thought one provision was unconstitutional but were divided on the constitutionality of another. Chase, however, cautioned Fish, "These impressions may, of course, be changed upon argument and full consideration should questions involving them ever be brought before us for judicial decision."281

Knowledge of such advisory opinions is important. The need is not to praise or condemn Chase by standards and doctrines which may not have prevailed when he was Chief Justice (1864-1873). Rather, it will enhance increasing awareness about the extent to which, despite professed reticence, U.S. Supreme Court Justices have rendered advisory opinions.282 An additional benefit may also ensue: Chase's views on a wider and, possibly, different range of constitutional issues will be exposed.

E. Inside the Supreme Court

Peering behind the U.S. Supreme Court's public facade into the sanctum sanctorum no longer constitutes voyeurism.283 Even the Chase

278. NIVEN, supra note 8, at 410.
279. CHASE PAPERS I, supra note 28, at 597 n.44. See also NIVEN, supra note 8, at 410 ("amendment to . . . Senate Bill); FAIRMAN, supra note 21, at 168 ("Chief Justice's draft").
280. BENEDICT, IMPEACHMENT, supra note 265, at 136-37.
282. See supra note 277.
Court has not been immune.\textsuperscript{284} \textit{Salmon P. Chase} and \textit{The Salmon P. Chase Papers} add further hints.\textsuperscript{285} More have been promised.\textsuperscript{286} That, of course, assists endeavours to ascertain the actual course and processes of the Supreme Court's constitutional decision-making. Realism is added to theories.\textsuperscript{287}

Such material is also useful to assess Chase's influence as Chief Justice. In addition to enhancing the existing understanding of how Chase dealt with administrative responsibilities,\textsuperscript{288} his relationship with judicial colleagues might also be elucidated. Already diversions, at least of emphasis, have emerged. On the fourth Circuit, was Chase "frankly bullying"\textsuperscript{289} or merely persuasive?\textsuperscript{290} Within the Supreme Court, \textit{Salmon P. Chase} offers some tentative and, possibly, conflicting observations:

Accustomed to deference for years [Chase] quickly found that he could not impose his will upon his colleagues.

. . . .

His years of political experience and his devotion to natural rights and individual standing before the law had . . . made an impression on his colleagues, leading them in many instances to avoid fruitless collisions with Congress and with public opinion.\textsuperscript{291}

Other possibilities, perhaps alluding to the \textit{Hepburn v. Griswold-Legal Tender Cases} imbroglio,\textsuperscript{292} are also advanced. "[Justice] Miller was undoubtedly correct in his observation that Chase tried to use the powers of his office to bend the will of his colleagues in the direction of his own views, and that this sparked controversy and resistance."\textsuperscript{293} Indeed, Chase, even as Chief Justice, is an intriguing and complex character.

\textsuperscript{284} See, e.g., \textsc{Fairman}, \textit{supra} note 21.

\textsuperscript{285} \textsc{Niven}, \textit{supra} note 8, at 376, 439-40; \textit{CHASE PAPERS I}, \textit{supra} note 28, at 517. \textit{See also} White, \textit{supra} note 17, at 105-06 ("extraordinary series of events . . . within the Court").

\textsuperscript{286} \textit{See supra} text accompanying note 46.

\textsuperscript{287} \textit{See, e.g.,} \textsc{Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking: Cases and Materials} (3rd ed., 1992).

\textsuperscript{288} White, \textit{supra} note 17, at 112 ("composition, circuit duties and salaries of" Justices), 113 (examples were "Chase was not loath to act strategically on matters involving his discretionary powers as chief justice").

\textsuperscript{289} Hughes, \textit{supra} note 32, at 278-81 (quoted by Benedict, \textit{supra} note 20, at 147).

\textsuperscript{290} \textsc{Niven}, \textit{supra} note 8, at 434 ("persuade"). \textit{See also} supra text accompanying note 185.

\textsuperscript{291} \textsc{Niven}, \textit{supra} note 8, at 376, 427.

\textsuperscript{292} \textit{See supra} notes 218, 219. \textit{See generally} \textsc{Fairman}, \textit{supra} note 21, at 677-775.

\textsuperscript{293} White, \textit{supra} note 17, at 113 (referring to Justice Miller's remarks quoted \textit{id.} at 43). \textit{But compare} instances where Chase joined a majority opinion even though he disagreed. \textit{See, e.g.,} \textsc{Niven}, \textit{supra} note 8, at 376, 517; \textit{CHASE PAPERS I}, \textit{supra} note 28, at 517; \textsc{Currie}, \textit{supra} note 35, at 302.
V. CONCLUSION

Salmon P. Chase stimulates the desire to know more. At this juncture, continuing assistance from The Salmon P. Chase Papers project can be expected. However, that ought to constitute merely a beginning, not an end. Chasing Chase must continue to be a scholarly adventure. Especially for constitutional lawyers and historians, that promises to be an enticing and exciting quest.

STUDENT ARTICLE

CRASHWORTHINESS IN THE COMMONWEALTH: AN ANALYSIS OF THE DEFECTIVENESS OF TRACTORS WITHOUT ROPS,

by Rebecca K. Phillips

I. INTRODUCTION

In 1994, twenty-eight Kentucky farmers lost their lives in tractor-related accidents.1 Twenty-three of those deaths were the result of the tractor rolling over on the operator.2 Although roll-over protective structures (ROPS)3 were designed specifically to reduce such fatalities by providing "an envelope of protection for the driver in the event a tractor overturns,"4 manufacturers were not required to equip their products with this safety feature until 1985.5

According to a 1992 survey, over 145,000 of the 163,560 tractors in use on Kentucky farms were manufactured before 1988.6 Further studies conducted in 1994 by the Kentucky Farm Bureau indicated that the average age of tractors in the state is twenty-eight years old.7 Thus, it can be reasonably inferred from these statistics that unless independent action has been taken to purchase and install ROPS, the majority of Kentucky farmers are operating tractors which are designed in a manner that furnishes no protection in a roll-over. To those familiar with the law of products liability, such a design emphatically raises the question of defectiveness or, more specifically, whether or not the manufacturer of a tractor without ROPS can be held liable for selling a product "in a defective condition unreasonably dangerous."8

1. Death on the Farm, LEXINGTON HERALD-LEADER, August 7, 1995, at A10 (reprinting an editorial originally appearing in THE INDEPENDENT (Ashland)).
2. Id.
3. The term "ROPS" is also defined within the industry as a roll-over protective system which consists of a roll bar and a seat belt combination. Turney v. Ford Motor Co., 418 N.E.2d 1079, 1082 (Ill. App. Ct. 1981).
4. Id.
5. Death on the Farm, supra note 1, at A10.
7. Death on the Farm, supra note 1, at A10.

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As both state and federal courts throughout the nation have addressed the matter, the idea of litigating this particular issue of defectiveness cannot be characterized as novel. However, quite ironically, it appears that the defectiveness of a tractor manufactured without ROPS has not been given comparable consideration in those courts applying the law of the Commonwealth even though Kentucky is among the national leaders in tractor-related deaths. Therefore, an analysis of the viability of a plaintiff’s cause of action under Kentucky law is both appropriate and necessary.

II. DEFINING THE THEORY OF DEFECTIVENESS

As a preliminary matter, a clear understanding of the defective nature of the design is needed. Although plaintiffs in prior litigated cases have phrased their assertion of defectiveness in a rather broad and generic manner by stating simply that the tractor was unreasonably dangerous because it was manufactured without ROPS, a more precise allegation of defectiveness has been made by those plaintiffs who framed their cause of action around the doctrine of crashworthiness. Unfortunately, as will be discussed in section III, the fields of Kentucky law are virtually barren of any explanation of this doctrine; thus, a basic understanding of


10. Although the possibility exists that cases addressing this issue of liability may have been initiated in the lower courts, they appear to have been disposed of without reported opinions.

11. In fact, Kentucky led the nation in tractor-related deaths in 1994 (with most fatalities ensuing as a result of roll-overs). Death on the Farm, supra note 1, at A10.

12. This article is an attempt at such an analysis, yet it in no way purports to be exhaustive. Rather, the intention is to provide a general overview of various issues likely to confront a plaintiff pursuing a cause of action in Kentucky courts. Although the central focus of the analysis will be the law of Kentucky, the law of other jurisdictions will also be consulted on those matters not yet fully developed in the Commonwealth. Where necessary to facilitate discussion and to elucidate certain points, especially in sections IV and V, hypothetical factual situations will be provided.

13. See, e.g., Hammond, 691 F.2d at 649; Ford, 406 So. 2d at 855.

crashworthiness must be acquired by looking to other jurisdictions.

A. The Origins of the Crashworthiness Doctrine

Cases founded upon the concept of crashworthiness, which focuses on the protection afforded to passengers by a vehicle in the event of an accident, were not originally embraced as meritorious in the courts. Chief among the skeptics was the Seventh Circuit. In rejecting the theory as presented in *Evans v. General Motors Corp.*, the Seventh Circuit distinguished a line of cases relied upon by the plaintiff from the action before the court by emphasizing that the products in the former cases "were unfit for their intended use and in precisely that respect were the cause of accidental injuries." By contrast, the court stated that "[t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." Clearly, by refusing to categorize collisions as among the intended purposes of a vehicle (thus negating the duty of a manufacturer to design his product with such a purpose in mind), the Seventh Circuit delivered a sound blow to the underpinnings of the crashworthiness doctrine. However, despite such initial rejection, the theory continued to be asserted.

Two years after the opinion in *Evans* was rendered, the Eighth Circuit addressed the issue in what would become the seminal crashworthiness case, *Larsen v. General Motors Corp.* After reviewing a string of prior decisions, including *Evans*, the Eighth Circuit concluded that although a manufacturer is under no duty to design an accident-proof or fool-proof vehicle, a "manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." Repudiating the previously employed distinction which was based upon the intended use of the product, the court stated:

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15. Although some commentators make a distinction between the two, the terms "crashworthiness" and "second collision" tend to be used interchangeably. Caiazzo v. Volkswagenwerk A.G., 647 F.2d 241, 243 n.2 (2d Cir. 1981). "The term 'second collision' usually refers to the collision between a passenger and an interior part of the vehicle following an impact or collision. The term has also been applied to ejection cases . . . in which the second collision is between an occupant of the car and the ground." *Id.*

16. 359 F.2d 822 (7th Cir. 1966).
17. *Id.* at 825.
18. *Id.*
19. 391 F.2d 495 (8th Cir. 1968).
20. *Id.* at 502.
The manufacturer should not be heard to say that it does not intend its product to be involved in any accident when it can easily foresee and when it knows that the probability over the life of its product is high, that it will be involved in some type of injury-producing accident.\textsuperscript{21}

As the realities of the intended and the actual use of a vehicle are well known to both the manufacturer and the public, the court found “no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents.”\textsuperscript{22} While Larsen is credited with validating the theory of crashworthiness, other cases have been responsible for expanding the theory in regard to the more subtle issues it raises.

\textbf{B. The Burden of Proof Dispute}

Crashworthiness or “second impact” cases present no unique proof problems in reference to the actual defect because the plaintiff has “the same burden as in other products cases as to whether the product was in a defective condition that was unreasonably dangerous as defined by ordinary consumer expectations when it left the control of the manufacturer.”\textsuperscript{23} However, such cases do approach the causation burden from a different perspective. As the liability of the manufacturer is viewed in terms of the “enhancement” or the “aggravation” of injuries, damages are assessed against the defendant “only if the plaintiff can prove that he suffered injuries as a result of the latent defect or ‘second impact’ in addition to those suffered as a result of the accident or ‘first impact.’”\textsuperscript{24} Therefore, unless the injuries caused by the design defect are clearly distinguishable from those caused by the initial collision, “the evidence will necessarily include a determination of what injuries might have happened in the collision absent the defect.”\textsuperscript{25} It is the assessment of this evidence which has precipitated a definitive division among the cases addressing second collisions.

One group of decisions, which includes \textit{Huddell v. Levin},\textsuperscript{26} “requires the plaintiff to precisely and exactly prove those injuries that are attribut-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 503.
\item Lee \textit{v. Volkswagen of America, Inc.}, 688 P.2d 1283, 1286 (Okla. 1984).
\item \textit{Id.}
\item \textit{Id.} at 1287.
\item 537 F.2d 726 (3d Cir. 1976).
\end{enumerate}
\end{footnotesize}
able to the accident and those that are attributable to the alleged design defect." An alternative standard is suggested by another cluster of cases, such as Lahocki v. Contee Sand & Gravel Co., which hold that the plaintiff need not prove the nature of the injuries as he must only produce some evidence of enhancement. However, in Lee v. Volkswagen of America, Inc., the Supreme Court of Oklahoma declined to adopt either of these approaches. Reasoning that the standard in second impact cases should be no different than that utilized in first impact cases, the court in Lee framed the burden of proof in the following way:

[T]he plaintiff must prove by a preponderance of the evidence that the product was in a defective condition that was unreasonably dangerous as defined by the ordinary consumer expectations when it left the control of the manufacturer and must prove after the original impact such defect caused or enhanced his injuries.

Additionally, the plaintiff should be required to prove by a preponderance of the evidence the extent of the enhanced injuries which are a result of the defect itself, with the manufacturer being liable only for those injuries which were caused or enhanced by the defect.

However, as the court in Lee acknowledged, the aforementioned principles are applicable only in those situations where separate and divisible injuries are sustained. In analyzing the standard to be applied to single indivisible injuries, the court once again rejected the "repressive" rule of Huddell which requires a plaintiff "to prove with specificity that the single injury was caused by the specific defects in the product in or-

27. Lee, 688 P.2d at 1287. The Huddell court described the plaintiff's burden as a three step process: (1) the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances; (2) the plaintiff must offer proof of what injuries, if any, would have resulted with the alternative design; and (3) the plaintiff must offer some method for establishing the extent of the enhanced injuries attributable to the defective design. Huddell, 537 F.2d at 737-38.

30. Stating that "the goal of limiting a manufacturer's liability to a manageable burden can be accomplished without mandating an almost rigid level of proof," the court expressly rejected the Huddell standard. Id. at 1288. Furthermore, the court expressed reservations regarding the Lahocki standard by declaring that while the stricter standard of proof had been rejected, there was no intention "to travel to the other extreme." Id.
31. Id.
32. Id.
33. Specifically, the court stated, "What we have heretofore said applies to 'second impact' cases where the injuries sustained are separate and divisible. . . . But a different rule applies where the principal injury complained of is single and indivisible (such as death or, as here, quadriplegia) and therefore are incapable of apportionment." Id.
der to make a submissible case.” Alternatively, the court adopted the principles set forth in the Restatement and slightly modified the approach followed in other jurisdictions by holding that the “plaintiff has the burden of presenting sufficient evidence to prove to the jury that each defendant’s act was a contributing (not substantial) factor in producing the plaintiff’s injuries.” Upon the presentation of such evidence, the burden will then shift to the defendant.

Obviously, the question of proof of causation in enhanced injury cases is one that inspires a myriad of responses. “A majority of recent cases have treated the issue as being analogous to the problem of apportioning damages among joint tortfeasors,” placing the burden of proof of apportionment on the defendant. A smaller number of courts follow the standard presented in Huddell, placing the burden of proof on the plaintiff.

III. VALIDATING THE THEORY IN KENTUCKY LAW

Though it may appear that a seemingly inordinate amount of the preceding material has been devoted to a survey of the law of other jurisdictions, an examination of how other courts treat the intricacies of crashworthiness is necessitated by the absence of any detailed discussion of the doctrine in Kentucky law. In the lone disposition addressing crashworthiness, O’Bryan v. Volkswagen of America, which is unpublished, the Sixth Circuit recognized the prior void by stating, “Larsen has been widely followed in other jurisdictions but has not been applied by either the Sixth Circuit or the Kentucky courts.” Although the plaintiff

34. Id.
37. DAVID A. FISCHER & WILLIAM POWERS, JR., PRODUCTS LIABILITY CASES & MATERIALS 476-77 (2d ed. 1994).
38. Id. at 477.
39. Nos. 93-5292, 93-5314, 1994 WL 599450 (6th Cir. Nov. 1, 1994). O’Bryan is an unpublished disposition which is referenced in a “Table of Decisions Without Reported Opinions” contained in the Federal Reporter at 39 F.3d 1182. It must be noted that the citation of unpublished dispositions is disfavored by the Sixth Circuit except for establishing res judicata, estoppel, or the law of the case, and service of copies of cited unpublished dispositions of the Sixth Circuit is required. See 6TH CIR. R. 24(c).
40. O’Bryan, 1994 WL 599450, at *4. Even though no opinions addressing crashworthiness have been rendered by the Sixth Circuit or the Kentucky courts, such opinions have been issued by a court under the appellate jurisdiction of the Sixth Circuit and by another circuit attempting to apply Kentucky law. See Higgs v. General Motors Corp., 655 F. Supp. 22 (E.D. Tenn. 1985), aff’d without opinion, 815 F.2d 80 (6th Cir. 1987); Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (applying Kentucky law and assuming that the crashworthiness
in *O'Bryan* did not specifically frame his cause of action in the terms of the crashworthiness doctrine, the court labeled the claim as one sounding in crashworthiness since the plaintiff did not maintain that any defect caused his accident, but rather that he would have suffered fewer or no injuries absent the alleged defect. Thus, the court essentially utilized *O'Bryan* as an opportunity to examine how the crashworthiness doctrine is to be reconciled with Kentucky law.

**A. The O'Bryan Standard of Proof**

Summarizing the issue of proof, the court stated that "[i]n crashworthiness cases, courts deny recovery unless the plaintiff establishes, by competent expert testimony, that the defect was responsible to some degree for enhancement of injury to the plaintiff. The plaintiff’s proof in such cases must include competent evidence of some practicable, feasible, safer, alternative design." Defining the standard against which the plaintiff’s evidence must be measured, the court reiterated the principles espoused in *Hersch v. United States* and *Calhoun v. Honda Motor Co.*

Under Kentucky law, the burden is on the plaintiff “to show that the circumstances surrounding the accident were such as to justify a reasonable inference of probability rather than a mere possibility that the [alleged design defects] were responsible.” Simply establishing that the defect is a possible cause of an accident amidst a series of possible causes is not enough to establish liability. Naturally, the plaintiff will try to meet his burden through the presentation of expert witnesses. However, although it is within the province of the jury to determine which expert to believe, unless the expert testimony is supported by more than conjecture and supposition, it is not entitled to be credited by the jury.

Applying these standards to the crashworthiness aspect of the case, the court in *O'Bryan* concluded that the plaintiff not only failed to propose an alternative design for a more crashworthy door lock, but also failed to
prove causation. The plaintiff urged that if the door had not opened, he would have remained in the car and would have escaped injury. Although one of the plaintiff’s experts testified that the plaintiff would not have been injured had he not been ejected from the car, the court found that he stated no basis for his opinion and that given the circumstances surrounding the accident, the assertion appeared to have no factual basis. Further bolstering the defendant’s case was expert testimony based upon the circumstances of the wreck and the ultimate condition of the car which indicated that had he remained in the car, the plaintiff would have sustained fatal head, brain, neck, and chest injuries. Therefore, in view of the evidence (which failed to prove enhancement), the court reversed the district court’s judgment and entered judgment in favor of the defendant. In rendering this decision, the court provided an initial example of the analysis Kentucky courts should employ when faced with a crashworthiness claim.

B. The Relationship of the Theory to Existing Law

Perhaps the greatest attribute of the O'Bryan opinion is that it furnishes support for the utilization of the crashworthiness theory by plaintiffs in subsequent cases. As stated previously, the plaintiff in O'Bryan did not pursue an action founded upon crashworthiness. In fact, when arguing that the case was strictly a products liability case and not a crashworthiness case, the plaintiff maintained that the latter would be contrary to the principles of existing Kentucky law. It is this contention by the plaintiff which opened the door for the court to further validate the theory by examining its relationship to existing law.

Specifically, the plaintiff criticized the concept of enhanced injuries employed in a crashworthiness analysis on the basis that where the injuries are indivisible, it would be impossible to decide what injuries would have occurred absent the alleged defect. The court, however, rejected

49. Id.
50. Id.
51. Id.
52. Id.
53. Interestingly, when the trial court instructed the jury that recovery could be denied unless it was established that the defect was responsible to some degree for enhancing the plaintiff’s injuries, the plaintiff did not object. Id. at *5 n.6.
54. Id.
55. Id.
this argument as unpersuasive, emphasizing that the same allocative process is necessitated by Kentucky’s adoption of comparative fault via section 411.182 of the Kentucky Revised Statutes (KRS). Stating that “[p]rinciples of comparative negligence apply to products liability actions under Kentucky law,” the court concluded that the use of a crashworthiness analysis does not conflict with existing Kentucky law. Although the O’Bryan court did not refer to the opinion, the decision in Murphy v. Taxicabs of Louisville further supports the compatibility of the theory with the law of the Commonwealth even in cases of indivisible injury.

After rejecting the lower court’s assessment of the claim and characterizing the plaintiff’s injury as single and indivisible, the court in Murphy explained the standards applicable in such a case as follows:

[T]he burden of proof is on a plaintiff to establish by sufficient evidence the material facts which constitute his alleged cause of action. Specifically it is incumbent on him to prove that the defendants by concerted action were guilty of the wrongful act or acts charged, and that such act or acts were the proximate cause of the injury received or the damage sustained by him. The law imposes on each of the several tort-feasors the burden of proving his own innocence or his own limited liability, as the case may be.

Even though this statement regarding the allocative burden in instances of indivisible injury was not made in the context of crashworthiness, by analogy, it appears to be quite applicable to an argument for the application of the principles of Lee v. Volkswagen of America, Inc. (which does specifically address indivisible injury in the context of crashworthiness) to Kentucky cases. Therefore, as the suggested theory of defectiveness itself (that a tractor without ROPS is a defective product because it is not designed in a crashworthy manner) can be properly

56. Id.
57. Although the court confidently stated that comparative fault applies to products liability actions in Kentucky, an authoritative basis for this statement did not exist at the time the statement was actually made. The relationship between KRS section 411.182, which adopts comparative fault in all tort actions, and KRS section 411.320, which applies the principles of contributory negligence to products liability actions, has been one of much contention. See Ky. Rev. Stat. Ann. §§ 411.182, .320 (Michie/Bobbs-Merrill 1992). Section VI of this article will discuss the controversy in greater detail.
59. 330 S.W.2d 395 (Ky. 1959).
60. Id. at 397.
61. Id. at 399.
IV. ESTABLISHING DEFECTIVENESS UNDER KENTUCKY LAW

The modern era of products liability in Kentucky began in 1965 when strict liability, as enunciated in section 402A of the Restatement, was adopted in *Dealers Transport Co. v. Battery Distributing Co.* Subsequent to the decision in *Dealers Transport*, the case law began flourishing. However, in 1978, the legislature statutorily addressed the subject of products liability by enacting KRS sections 411.300 through 411.340, known as the "Product Liability Act of Kentucky." Any analysis of defectiveness under Kentucky law must therefore necessarily begin within the confines of these statutes. Especially germane to this facet of the discussion are the presumptions contained in KRS section 411.310.

A. The Statutory Presumptions

According to KRS section 411.310, it shall be presumed, until rebutted by a preponderance of evidence to the contrary, that the product is not defective if either of the following two conditions are met: (1) “the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture” or (2) “the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or state of the art in existence at the time the design was prepared, and the product was manufactured.” Remarking on the presumption contained in KRS section 411.310(1), Professor Ronald W. Eades stated, “It is difficult to tell whether the legislation was intended to create an affirmative defense or merely state where the burden of proving defect would lie.” Eades concluded that the statutory language appears to allow the defendant to plead and prove the time period in the nature of an affirmative defense, yet the plaintiff’s burden of proving defectiveness by a preponderance of the evidence remains unchanged. Drawing similar conclusions in regard to KRS section 411.310(2), Eades stated that “although the statute seeks to create a presumption, its practical effect is

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63. 402 S.W.2d 441 (Ky. 1965).
65. Id. § 411.310.
66. Id. § 411.310(1).
67. Id. § 411.310(2).
68. RONALD W. EADES, KENTUCKY PRODUCTS LIABILITY LAW § 8-4 (1994).
69. Id.
not radically different from prior law." A "[d]efendant’s proof of conformity with the state of the art may operate to dictate the standards for the product. The plaintiff is always allowed, however, to prove a defective product by a preponderance of the evidence." In Ingersoll-Rand Co. v. Rice, the Kentucky Court of Appeals appeared to agree with the views espoused by Eades, stating that the statutory presumptions do nothing more than "codify what the law has always been." Nevertheless, the existence or non-existence of either or both of these presumptions must be the initial consideration in the analysis of the defectiveness of a tractor without ROPS. Clearly, the basis for establishing the first presumption, contained in KRS section 411.310(1), can be attained through a simple mathematical calculation. However, the second presumption, contained in KRS section 411.310(2), seems to be more difficult for a defendant to establish.

Upon a closer examination of the subsection, it appears that two criteria are set forth by which the design, the methods of manufacture, and the testing are to be judged: (1) the generally recognized and prevailing standards or (2) the state of the art. Although Kentucky may not have taken the initiative to require ROPS on all tractors sold in the state prior to the national mandate, other states did. Consequently, the standard to which the manufacturers had to conform differed from state to state; therefore, it can be argued that no conclusively "recognized and prevailing standards" can be established which would support the exclusion of ROPS as standard equipment. Furthermore, no possible argument can be fathomed to support a defendant manufacturer’s compliance with the state of the art at the time of manufacture if ROPS were being made available to the public as an option. Optional offerings provide irrefutable proof that not only was an alternative, safer tractor design feasible at the time of manufacture, but also that such a design was actually being produced and marketed.

These considerations would seem to negate the ability of a defendant to

70. Id. § 8-3.
71. Id.
72. 775 S.W.2d 924 (Ky. Ct. App. 1989).
73. Id. at 928.
74. As is evidenced by several state regulations, California required ROPS on all tractors manufactured after July 7, 1972. See CALIFORNIA GENERAL INDUSTRY SAFETY ORDERS art. 25, §§ 3651-3652; CALIFORNIA CONSTRUCTION SAFETY ORDERS art. 10, § 1596; CALIFORNIA LOGGING & SAWMILL SAFETY ORDERS art. 8, § 6297. In addition, Oregon also required ROPS as standard equipment prior to the establishment of the national regulations. See OREGON SAFETY CODE FOR LOGGING § 7.
establish the presumption of KRS section 411.310(2), yet, as stated previously, the presumption of KRS section 411.310(1) can be established with little argument. Therefore, in order to submit the question of defectiveness to the jury, the plaintiff must be able to rebut the presumption against defectiveness. To do this, the plaintiff has the burden of proving, by a preponderance of the evidence, that the product is encompassed within the definition of defectiveness contained in Kentucky case law.

B. The Definition of Defectiveness

Following the adoption of section 402A of the Restatement in Dealer's Transport, the Kentucky courts struggled with the four key words "defective condition unreasonably dangerous." However, the struggle ended fifteen years later with the landmark decision in Nichols v. Union Underwear Co. According to Nichols, in design defect cases, the finder of fact must decide whether the manufacturer that placed the product into the stream of commerce "acted prudently, i.e., was the design a defective condition which was unreasonably dangerous." As for what criteria should be included in the determination, the Supreme Court of Kentucky rejected "patent danger" and "consumer expectations" as absolute defenses to strict liability and stated, "We believe that consumer knowledge... is only one of the factors that should be before the jury in determining whether a product is unreasonably dangerous."

Of special significance is the fact that the court declined the opportunity in Nichols to set out an exclusive list of the factors which should be included in the determination, noting instead that "the facts of the individual case will determine what is relevant to each action." Prior to Nichols, such factors as the deviation from industry standards, the obviousness of the danger, and the presence of a warning had been deemed relevant. In Montgomery Elevator Co. v. McCullough, the court adhered to the Nichols standard, emphasizing that "[c]onsiderations such as feasibility of making a safer product, patenty of the danger,

75. Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 780 (Ky. 1984).
76. 602 S.W.2d 429 (Ky. 1980).
77. Id. at 433.
78. Id.
79. Id.
82. See id.
83. 676 S.W.2d 776 (Ky. 1984).
warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics" are all factors relevant to the primary question rather than separate legal questions.\textsuperscript{84} "In a particular case, as with any question of substantial factor or intervening cause, they may be decisive."\textsuperscript{85}

Although the Kentucky Supreme Court expressly stated in \textit{Nichols} that no exclusive list of factors was to be applied, the Fourth Circuit, while attempting to apply Kentucky law in \textit{Sexton v. Bell Helmets, Inc.},\textsuperscript{86} found this approach unsatisfactory since it failed "to give the standard by which a condition of defectiveness is to be measured."\textsuperscript{87} As a future plaintiff pursuing a cause of action in those courts applying Kentucky law is likely to also be faced with the standard crafted by the Fourth Circuit, it must be mentioned.

According to \textit{Sexton}, a defect can be identified "by measuring the product against a standard articulated expressly by government or industry or established by society in its expectations held about the product at the time of the sale."\textsuperscript{88} The court stated that "[w]hile government and industry standards are readily identifiable for a given product at a given time, the reasonable expectation of purchasers requires a factual examination of what society demanded or expected from a product."\textsuperscript{89} These expectations can be proven from evidence of "actual industry practices, knowledge at the time of other injuries, knowledge of dangers, the existence of published literature, and from direct evidence of what reasonable purchasers considered defective at the time."\textsuperscript{90} In essence, by setting forth a specific test, the Fourth Circuit, in \textit{Sexton}, did what the Kentucky Supreme Court, in \textit{Nichols}, felt should not be done. Furthermore, the \textit{Sexton} methodology tends to give an extreme amount of deference to consumer expectations, while \textit{Nichols} stressed that such expectations were merely to be one factor in the determination. Despite the inconsistencies between \textit{Sexton} and \textit{Nichols}, both tests will be further analyzed.

Even if no standard requiring ROPS existed in Kentucky at the time the allegedly defective tractor was manufactured, this factor is not determinative. As stated in \textit{Jones v. Hutchinson Manufacturing, Inc.},\textsuperscript{91} "[i]f

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\item \textsuperscript{84} Id. at 780-81.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} 926 F.2d 331 (4th Cir. 1991).
\item \textsuperscript{87} Id. at 336.
\item \textsuperscript{88} Id. at 337.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} 502 S.W.2d 66 (Ky. 1973).
\end{itemize}
\end{footnotesize}
the only test is to be that which has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety." 92 "Cases will no doubt be infrequent in which any defendant will be held liable for failing to do what no one in his position has ever done before; but there appears to be no doubt that they can arise." 93 While affirming summary judgment for the defendant in Jones, 94 the court distinguished between those designs "regarded by the industry as the safest possible under the circumstances," and those "where an entire industry or part of it customarily fails to do that which is known and available and practicable." 95 Although the court concluded that the evidence in Jones mandated that the case be treated as being within the first category, the potential evidence which could be presented by a plaintiff pursuing a cause of action against a tractor manufacturer cannot support the same classification.

While in Jones there was no attempt to claim the alternative design suggested by the plaintiff was known or available or that "common knowledge and ordinary judgment would have recognized as unreasonably dangerous the design uniformly adopted by the industry," 96 quite a different situation is currently being analyzed. Long before ROPS were made standard equipment, they were offered by manufacturers as "optional equipment." 97 Despite the "optional" classification, it can be as-

92. Id. at 70.
93. Id. (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 167 (4th ed. 1971)).
94. In the lower court, the defendant's motion for summary judgment was granted in regard to both the negligence and the strict liability claims. Id. at 67. Specifically addressing the latter claim, the trial judge concluded that "the action could not be maintained under the so-called 'strict liability' theory because this state had not extended this doctrine to bystanders who were not consumers of the product that was the alleged cause of harm." Id. Remarkably on this issue, the Court of Appeals of Kentucky (the highest state court at the time) stated, "We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned." Id. at 69-70. Concluding that "[i]n either event the standard required is reasonable care," the court declined to consider whether or not section 402A extends to bystanders, stating instead that "[i]f the manufacturer failed to observe the standard required, it is subject to liability to those whom he should expect to use the product or to be endangered by its probable use under the principles of section 398." Id. at 70.
95. Id.
96. Id. at 71.
97. For example, the operator's manual for the International 674 Series Tractor, manufactured by International Harvester Co., included ROPS among a list of "optional equipment" which included such other items as a heavy duty battery, an electric horn, a foot pedal accelerator, a swinging drawbar, an underslung muffler, and a stabilizer. INTERNATIONAL HARVESTER CO., INTERNATIONAL OPERATOR'S MANUAL (INTERNATIONAL 674 TRACTOR) 97.
sumed that the manufacturers' actual knowledge of the propensity of tractors to roll under certain conditions prompted the development of ROPS. Following this line of reasoning, it can be further assumed that as the manufacturers' research and development efforts increased, the amount of information available detailing the invaluable protection afforded by ROPS also increased.

Obviously, if these contentions can be proven, they distinguish the action being analyzed from Jones and tend to answer the controlling question of Nichols, as to whether or not the ordinarily prudent manufacturer would have placed the product on the market, in the negative. Consequently, it can be argued that prior to the existence of the national standard, tractor manufacturers knew of the danger and knew how to eliminate it, but unless forced to do so via the existence of state mandates, the companies chose not to act. Instead, they varied their standard of "reasonable care" from state to state, affording individuals in one part of the country greater protection than that received by individuals in other parts of the country. Proving that a manufacturer was aware of the danger of roll-overs as well as the means of eliminating the danger will remove the corporate conduct from the realm of that considered to be "reasonable care." Therefore, even without the benefit of imputation of knowledge, a plaintiff can submit evidence sufficient to meet the Nichols standard, thus rebutting the presumption of KRS section 411.310.

Turning to the test formulated in Sexton, it appears that a plaintiff can again establish defectiveness by a preponderance of the evidence, thus rebutting any applicable presumption. Sexton proclaimed that "a product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale." As previously stated, although no "standard" requiring ROPS may have been in existence in Kentucky at the time of manufacture, if such standards were in existence in other states, neither an applicable state standard nor a uniform national standard would exist for use in the Sexton analysis. With regard to industry standards, the Fourth Circuit measured the product in Sexton against actual, promulgated industry standards which were of equal applicability throughout

98. In actual litigation, these assumptions can be confirmed or disproved through discovery whereby the defendant's own research, testing, and internal communication will reveal the amount of knowledge actually possessed.


100. See id. at 333 (referring to the American National Standards Institute Specifications for Protective Headgear for Vehicular Users, the Federal Motor Vehicle Safety Standards and Reg-
the nation. No comparable standards within the tractor industry were in existence so as to require mandatory installation of ROPS prior to 1985.\textsuperscript{101} Granted, one could argue that the absence of a promulgated standard requiring an act is itself a standard allowing for the non-performance of the act. However, even if the \textit{Sexton} court contemplated such an argument, the language of \textit{Jones} sufficiently curtails it.\textsuperscript{102}

The second consideration of the \textit{Sexton} test, reasonable consumer expectations, derives from an examination of what society demanded or expected from a product. "This may be proved from evidence of actual industry practices, knowledge at the time of other injuries, knowledge of dangers, the existence of published literature, and from direct evidence of what reasonable purchasers considered defective at the time."\textsuperscript{103} As those factors requiring knowledge are personal to each defendant, the specific information obtained through discovery will be decisive. Therefore, no general discussion of these factors will be undertaken. However, with regard to the existence of published literature, an examination of other cases is beneficial since the literary evidence presented in prior litigation is of equal application to subsequent litigation.

The court in \textit{Sexton}, referring to the standards surrounding the product in question, a helmet, stated that "[n]o literature was presented to indicate that anyone—industry, government, or consumers—recognized a need for greater protection."\textsuperscript{104} By contrast, the need for greater protection in the design of farm tractors was well-recognized, especially within the industry itself, prior to the time in which the inclusion of ROPS as standard equipment become mandatory. In \textit{Turney v. Ford Motor Co.},\textsuperscript{105} the evidence produced at trial indicated that in January of 1967, the Farm Conference of the National Safety Council "recommended that tractors be equipped with protective frames and crush resistant cabs so that fatalities occurring from tractor turnovers would be reduced."\textsuperscript{106} The Farm and Industrial Equipment Institute Engineering Committee

\begin{footnotes}
\item[101] Death on the Farm, supra note 1, at A10.
\item[102] Jones established that the mere fact that an entire industry has adopted careless methods is not an absolute defense as a manufacturer may be held liable for failing to do what no one in its position has ever done before. Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973).
\item[103] Sexton, 926 F.2d at 337.
\item[104] Id.
\item[106] Id. at 1082.
\end{footnotes}
(Committee) adopted the same resolution in March of that year.\textsuperscript{107} Additionally, the American Society of Agricultural Engineers adopted the Committee's recommendation that "tractors be equipped with a protective frame or roll bar and a seat belt attached to the seat" in order to protect drivers in roll-overs.\textsuperscript{108} Thus, this evidence presented in \textit{Turney} illustrates that literature (if only in the form of resolutions and recommendations) was in existence while tractor after tractor continued to roll off of the assembly line without ROPS.

Finally, the evidence of what reasonable purchasers considered defective at the time must be examined. Of the factors enunciated in \textit{Sexton}, this is the least persuasive for "[i]n many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made."\textsuperscript{109} This principle is especially true with items such as machinery, the dynamics of which the average user may not understand. Indeed, a farmer may know that a tractor will roll-over in certain situations, but if that same farmer does not know and understand that the danger associated with a roll-over could be eliminated by the installation of ROPS, he would never categorize the tractor as defective. The \textit{Sexton} court stated that it is significant that a reasonable purchaser "does not demand or expect that the product incorporate a particular aspect of design."\textsuperscript{110} However, these demands or expectations should be given consideration only if it is established that they were expressed by fully informed individuals possessing knowledge of and appreciating the value of the particular safety feature. To be given credence, consumer expectations must be based upon relatively the same information as that available to the manufacturers themselves. Otherwise, the plaintiff is furnished with the argument that if a consumer knew what the manufacturer knew, then reasonable consumer expectations would require all tractors to be equipped with ROPS.

Nevertheless, the question as to what the reasonable consumer expected is one for determination by the trier of fact. Even if the defendant could produce evidence regarding the average farmer's aversion to ROPS, the issue still must be resolved by the jury. Therefore, reflecting upon the application of the foregoing factors, it appears that a plaintiff

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\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Nichols v. Union Underwear Co., 602 S.W.2d 429, 432 (Ky. 1980) (quoting Dean Wade, \textit{On the Nature of Strict Tort Liability for Products}, 44 Miss L.J. 825 (1973)).
\end{flushright}
can once again rebut the presumption of KRS section 411.310 and can reach a jury on the issue of defectiveness according to the Sexton standard.

C. The Effect of Additional Considerations

Despite the numerous factors which point toward defectiveness, a defendant manufacturer will still attempt to negate the effect of the evidence by alleging that the danger was precipitated by the owner's failure to purchase and install ROPS since the manufacturer's duty was met by merely offering ROPS as an option. However, the majority view of the case law rejects this theory, indicating that the mere offering of a necessary safety device as an option does not insulate a manufacturer from liability. For example, in Bexiga v. Havir Manufacturing Corp., the Supreme Court of New Jersey stated that if a manufacturer places a product into the stream of commerce which should be provided with safety devices "because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him." The court further remarked, "The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser." In order to be certain that safety devices are installed where needed, the duty must rest upon the manufacturer. Therefore, a jury "may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purposes." A majority of courts are in accord with Bexiga.

It can be inferred from the opinion in Pike v. Benchmaster that the Sixth Circuit also follows this reasoning. In Pike, a punch press was sold without a safety feature known as "palm buttons." Although the safety feature was "well known in the technology of the industry," it was not

112. Id. at 285.
113. Id.
114. Id.
115. Id.
116. FISCHER & POWERS, supra note 37, at 322.
117. 696 F.2d 38 (6th Cir. 1982) (applying Kentucky law).
118. Id. at 41.
a standard component of the punch press but was offered by Benchmaster as an option. The trial court obviously found this offering to be of little significance as it concluded that the product was in a defective condition unreasonably dangerous and awarded the plaintiff $93,800.

Although the trial judge granted Benchmaster’s motion for judgment non obstante veredicto, the Sixth Circuit reversed and remanded for entry of judgment on the jury verdict. Thus, even though a discussion of the manufacturer’s duty to do more than just provide a necessary safety device as an option was omitted from the decision, such a duty can be inferred from the result reached in the case.

In Deere & Co. v. Grose, the Supreme Court of Alabama specifically addressed the issue of optional equipment in the context of ROPS and held that the question of whether or not a tractor sold without ROPS was defective was one to be submitted to and decided by the jury; thus, the manufacturer was not absolved simply by providing the equipment as an option. Prior to the decision in Grose, the Alabama court had rendered an opinion in Caterpillar Tractor Co. v. Ford, the holding of which is of particular importance. In Ford, the court rejected Caterpillar’s argument that it was “unjust to hold it responsible for not installing the ROPS when they were offered as optional equipment.” Supporting the decision, the court stated, “If the tractor was defective in the condition in which it was sold, liability for resulting injury cannot be escaped by showing that the customer could have but did not buy an item which would have removed the defect.”

Despite these decisions, the tractor manufacturer will no doubt argue that due to the multi-functional nature of the product, offering ROPS as optional equipment was the only viable alternative. More precisely, the manufacturer may assert the difficulty or the impossibility of working in orchards, barnyards, and other areas of low clearance as well as the problems with using various farm implements with tractors equipped with ROPS. Thus, the manufacturer will attempt to use the multi-functional use of the tractor as a shield against liability by claiming that ROPS was

119. Id.
120. Id. at 38.
121. Id.
122. Id. at 42.
123. 586 So. 2d 196 (Ala. 1991).
124. See id. at 199-200.
126. Id. at 857.
127. Id.
not compatible with all of the appropriate uses of the product. Although some courts may favor the manufacturer in this respect and find that no duty exists to provide a safety device if the device is not suitable for all uses of the product, not all courts would be so sympathetic. Specifically rejecting this defensive theory, the Second Circuit, in *Jiminez v. Dreis & Krump Manufacturing Co.*, held that loss of utility due to the provision of safety devices “is only one of many factors that may be presented to the jury to consider when it performs the balancing analysis.”

In *Wagner v. International Harvester Co.*, the defendant argued that it had satisfied its duty of reasonable care by offering roll-over protection, in the form of a canopy, as an option. Supporting this contention, the defendant relied upon the theory that “the purchaser of multi-use equipment knows best the dangers associated with its particular use, and so it should determine the degree of safety provided.” Although the Eighth Circuit acknowledged that the argument was basically sound, it refused to apply it to the facts of the case, deeming it unrealistic for the average purchaser to know the degree of protection incorporated into the optional safety device. A comparable reason also exists for not applying the argument to the situation under analysis. If the average farmer does not fully know and appreciate the danger of roll-overs, as well as the purpose and the benefits of ROPS, he will not take the purchase of such equipment under consideration. A manufacturer cannot simply assume that all farmers possess the level of understanding needed to make the proper choice of protection. This point was emphasized in *Gann v. International Harvester Co.* by the testimony of a safety engineer who concluded that offering ROPS as optional equipment was insufficient

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129. 736 F.2d 51 (2d Cir. 1984).

130. Id. at 54.

131. 611 F.2d 224 (8th Cir. 1979).

132. Id. at 231.

133. Id. The optional item, an ESCO canopy, was neither tested nor marketed to provide roll-over protection even though it would apparently survive a roll-over. Id. Since the advertisements for the canopy portrayed it only as a device to provide overhead protection in the timber industry, the court believed that it would be unrealistic to expect a purchaser to know that both overhead and roll-over protection were incorporated into the design; thus, imposing liability on the purchaser would have been inappropriate. Id.

134. As will be discussed in the next section, the acquisition of such knowledge and appreciation may not be possible without adequate warnings provided by the manufacturer.

135. 712 S.W.2d 100 (Tenn. 1986).
since, in effect, the average consumer did not recognize the hazard.\textsuperscript{136}

Furthermore, the Supreme Court of Minnesota limited the applicability of the Wagner rule in \textit{Bilotta v. Kelley Co.},\textsuperscript{137} stating, "The rule cited in Wagner... can be justified only where multi-use equipment is involved and the optional device would impair the equipment’s utility in the uses for which the device is unnecessary."\textsuperscript{138} Under this rationale, application of the Wagner rule to the situation of tractors manufactured without ROPS cannot be justified. In those areas where ROPS is unnecessary, the device can be removed; thus, the utility of the tractor would not be reduced in the least.\textsuperscript{139} In place of the Wagner rule, the Bilotta court substituted what it regarded as "the better rule," concluding that "a manufacturer may not delegate its duty to design a reasonably safe product."\textsuperscript{140} Recognizing that the newly adopted rule was grounded in the policy of Bexiga, the court reiterated the fact that the "manufacturer should not ‘leave safety [sic] to the haphazard conduct of the ultimate purchaser’ and that the only way to ensure use of a needed safety device is to place the duty to install that device upon the manufacturer."\textsuperscript{141} Thus, the weight of authority suggests that an optional offering of ROPS does not automatically prevent a finding of liability against the manufacturer and a determination that a tractor without ROPS is a defective product. Rather, as the court in \textit{Turney v. Ford Motor Co.}\textsuperscript{142} found, "[e]vidence of the multifunctional nature of a product is admissible and is a factor for the trier of fact to consider in determining whether a product is unreasonably dangerous."\textsuperscript{143}

\textbf{V. ANALYZING THE NECESSITY OF A WARNING}

From the foregoing, it appears that a plaintiff can present a solid case alleging the defectiveness of a tractor manufactured without ROPS. How-

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\item \textsuperscript{136} \textit{Id.} at 103.
\item \textsuperscript{137} 346 N.W.2d 616 (Minn. 1984).
\item \textsuperscript{138} \textit{Id.} at 624.
\item \textsuperscript{139} The concept of removing ROPS in those instances where the intended use necessitates such removal is embodied in the Occupational Safety and Health Administration (OSHA) standards pertaining to ROPS for tractors used in agricultural operations. See 29 C.F.R. § 1928.51(b)(5)-(6) (1994) (listing those uses which are exempt from the requirement of ROPS and mandating the remounting of ROPS).
\item \textsuperscript{140} \textit{Bilotta}, 346 N.W.2d at 624.
\item \textsuperscript{141} \textit{Id.} (quoting Bexiga v. Havir Mfg. Corp., 290 A.2d 281 (N.J. 1972)).
\item \textsuperscript{142} 418 N.E.2d 1079 (Ill. App. Ct. 1981).
\item \textsuperscript{143} \textit{Id.} at 1083.
\end{itemize}
\end{footnotesize}
ever, one area remains to be explored: the warning regarding the danger. “In products liability law, the duty to warn may arise in either of two contexts, which frequently overlap in particular cases.” 144 The first is related to the concept of design defect while the second arises out of general negligence principles. 145 As the purpose of this analysis is to determine whether or not a tractor without ROPS is defective, the discussion will be confined to the former context.

“A product may be unreasonably dangerous in design, unless accompanied by a warning that it should not be put to a certain use . . . . Thus, it might be said that the manufacturer [is] under a ‘duty to warn’ of the risk.” 146 Such a duty to warn may be considered as part of the strict liability doctrine of design defect, with the lack of an adequate warning being used to prove that a product is defective. 147 In other words, “the fundamental duty is to market a product that is reasonably safe. Because the warning can make the product reasonably safe without in any way changing it, it may be said that there is a duty to provide a warning as part of a reasonably safe design.” 148 However, as the Sixth Circuit recognized in Hutt v. Gibson Fiber Glass Products, 149 “there is no duty to warn the user of a product when the user is aware of the product’s danger.” 150 In Montgomery Elevator Co. v. McCullough, 151 the Supreme Court of Kentucky concurred, stating “We agree that the manufacturer has a duty to warn the ultimate user of any dangers in its product (other than those that are open or obvious).” 152

Although a manufacturer will likely try to utilize this escape device and argue that no warning is mandated because farmers are aware of the propensity of a tractor to roll, the danger of a roll-over is not the issue at hand. If the alleged defect was the unbalanced nature of the tractor which causes it to roll in certain situations, and if, as the manufacturer would argue, such a propensity was a matter of common knowledge in the farming community, indeed, the duty to warn may be alleviated. However, a quite different scenario is presently being analyzed. The alleged defect is

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145. Id.
146. Id.
147. Id.
148. Id.
149. 914 F.2d 790 (6th Cir. 1990) (applying Kentucky law).
150. Id. at 793.
151. 676 S.W.2d 776 (Ky. 1984).
152. Id. at 782 (quoting with approval Minert v. HarSCO Corp., 614 P.2d 686 (Wash. 1980)).
not the instability of the farm tractor. Rather, it is the absence of ROPS, a necessary safety device, on the tractor.

It must be stressed that the distinction between being aware of the propensity of a tractor to roll and being aware of and appreciating the function of ROPS is fundamental. The two components of knowledge do not necessarily exist coextensively, and it is the absence or the presence of the latter which is decisive to the cause of action being analyzed. For example, in *Orfield v. International Harvester Co.*, the directed verdict in favor of the defendant was affirmed as the plaintiff's own testimony indicated that not only was he aware that "windrowing trees and brush with a bulldozer not [equipped with a canopy guard] was a dangerous operation," but also that he "appreciated" the safety provided by such canopy guards. Accordingly, as it cannot be said that the true safety provided by ROPS is a matter which is obvious, warnings need to be given which reflect the purpose and the necessity of ROPS as well as the dangers inherent in operating a tractor without ROPS. In *Post v. American Cleaning Equipment Corp.*, the distinction between providing adequate directions for use and providing adequate warnings was noted as "'[i]t is clear from the better-reasoned cases that directions for use, which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn.'" *Post* also addressed the content of a sufficient warning in the following manner:

'The misuse or failure to follow directions may be foreseeable. And even if there is some word of caution, some mention of misuse in the directions, the question still remains whether this constituted an adequate warning. The issue is whether the totality of directions or cautionary language constituted an adequate warning in the light of the foreseeable use and user of the product.'

Therefore, the duty of a manufacturer to warn is not diminished even if the manner of use which precipitated the tractor roll-over can be charac-

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153. If a plaintiff does possess both facets of knowledge and the product can otherwise be proven defective, his conduct in using the product with this knowledge will be considered in assessing the percentage of liability attributable to each party. The apportionment of liability will be discussed in section VI.


155. *Id.* at 960.

156. 437 S.W.2d 516 (Ky. 1968).

157. *Id.* at 521 (quoting LOUIS R. FURMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 8.05 (1960)).

158. *Id.*
terized as misuse, so long as it is foreseeable. Without question, tractor manufacturers could foresee conduct by operators which would result in roll-overs. In fact, when warnings were provided by manufacturers, the content of those warnings usually revolved around those actions which trigger roll-overs. Despite such warnings denoting dangerous conduct, mention must also be made of the fact that ROPS should be utilized in order to decrease the harm incumbent in a roll-over. Merely supplying a warning does not, therefore, absolve the manufacturer of liability if the warning given is found to be inadequate.

Encompassed within the manufacturer's burden is the necessity of expressing the magnitude of the physical injury a farmer may encounter in the event of a roll-over if he is operating a tractor without ROPS. In Deere & Co. v. Grose, the owner's manual provided by the defendant contained the statement, "Do not operate without a roll guard." However, the jury verdict in favor of the plaintiff indicated that as a matter of fact, the warning was inadequate. Furthermore, the Alabama Supreme Court's affirmation of the submission of the question to the jury indicated that as a matter of law, the danger was not obviated by the warning. Certainly such a warning does not "bring home" to the user the danger of disobeying the warning, and it is that failure which renders the warning inadequate. Illustrative of this point is the manner of scrutiny given the warning provided in Post. Addressing the warning given, "Only Use on 115 Volts AC or DC," the court stated, "There is grave question . . . whether such specifications were sufficient to bring home to any user of the product the gravity of the danger in violating the voltage directions."

The question upon which the analysis of the content of the warning should turn can thus be stated as follows: "[W]as the degree of warning commensurately proportionate to the potential danger of which the manufacturer was aware, or in the exercise of reasonable care, should have been aware?" The court in Post simplified the matter by stating:

159. See, e.g., INTERNATIONAL HARVESTER CO., supra note 96, at 7-8 (advising the operator to reduce tipping by spreading wheels as far as work permits and to keep the tractor in gear when going down steep hills).
161. Id. at 199.
162. Id.
163. Id.
165. Id. at 520.
166. Id. at 520-21 (quoting Williams v. Caterpillar Tractor Co., 149 So. 2d 898 (Fla. Dist. Ct. App. 1963)).
[I]t may be doubted that a sign warning, 'Keep off the Grass,' could be deemed sufficient to apprise a reasonable person that the grass was infested with deadly snakes. In some circumstances a reasonable man might well risk the penalty of not keeping off the grass although he would hardly be so daring if he knew the real consequences of his failing to observe the warning sign. Or, a warning to 'Keep in a Cool Place' might not be sufficient if the result of nonobservance was a lethal explosion of the container. 167

Applying this standard, the court in Byrd v. Proctor & Gamble Manufacturing Co. 168 found that even the inclusion of detailed instructions regarding the product (a home permanent) was insufficient "where the result of non-observance was more or less immediate baldness." 169

Although the content of the warning has been stressed, the location of the warning is of equal importance. Warnings must be placed so that in the ordinary course of events they will reach and will be understood by the person who should be expected to use or to be exposed to the product. 170 Therefore, warnings contained only in the owner's manual, without any comparable counterpart located on the tractor itself, will not necessarily reach the ultimate user of the product. Consequently, such warnings, even if adequate in content, may not absolve a manufacturer of liability. For example, in Post, the court held that additional warnings about the product contained in the instruction booklet delivered to the purchaser, who was the plaintiff's employer, did not affect the manufacturer's liability to the ultimate user, the employee. 171 "[A]dequate warning may terminate liability as to those who get the warning. But it has no effect on those who do not get the warning except in extraordinary circumstances . . . ." 172

To illustrate these points, consider the following warnings: (1) wear a seat belt if ROPS is on the tractor; (2) install seat belts if ROPS is installed on the tractor; and (3) keep the tractor in low gear when going down hills. Although the first and second warnings do at least mention ROPS, they are insufficient. The prior existence of ROPS and the subsequent installation of ROPS are treated in a conditional manner, with any mention of the necessity of such installation being omitted. Furthermore,

167. Id. at 520.
169. Id. at 606.
171. Post, 437 S.W.2d at 519.
172. Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 782 (Ky. 1984).
the gravity of the danger inherent in operating a tractor without ROPS is not alluded to in any way. Indeed, the third warning does provide an example of what actions are likely to result in a roll-over, yet it does not reflect the value of ROPS in minimizing the effect of the hazard if a roll-over does in fact occur. Thus, regardless of whether these warnings were placed on the tractor itself or in the owner’s manual, they are insufficient when measured against the Post standard. A warning informing the operator that the tractor should be equipped with ROPS did not even exist; therefore, it is impossible to even assert that the danger of disregarding the (non-existent) warning was “brought home” to the user.

VI. EVALUATING THE SIGNIFICANCE OF THE PLAINTIFF’S ACTIONS

Obviously, the preceding discussion has been devoted to establishing that a tractor without ROPS, because it is not designed in a crashworthy manner, is a defective product unreasonably dangerous. However, a finding of defectiveness does not automatically equate with a recovery by the plaintiff. Regardless of whether or not a plaintiff can meet his burden of proof, his recovery might be eliminated or reduced because of his own conduct. Yet, as the following discussion illustrates, the standard against which the plaintiff’s actions must be evaluated has been somewhat ambiguous.173

A. The Search for the Applicable Standard

Extremely relevant to the evaluation of the plaintiff’s conduct are the provisions of KRS section 411.320.174 Essentially, KRS section 411.320 divides the plaintiff’s relevant conduct into two categories: (1) actions which alter or modify the product and (2) actions which constitute the failure to exercise ordinary care.175 “The first two provisions of KRS 411.320 specifically protect manufacturers from liability in cases where the product was altered or modified by any person or entity, and specifically by a plaintiff.”176 Subsection (3) of the statute “codified contribu-

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173. Although an intensive analysis of the evolution of the law on this issue is well beyond the scope of the current discussion, a general overview of the matter shall be provided.


175. See id.


(1) In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used
tory negligence in the product liability context, by providing that a plaintiff's negligence, when it constitutes a substantial cause of his injury, completely bars his product liability claim." Viewing these provisions in an isolated manner, they appear to be self-explanatory and easily applied. However, since the enactment of the Product Liability Act of Kentucky in 1978, the state of the law has evolved so as to make the provisions of KRS section 411.320 inconsistent with the prevailing legal standards. To fully understand the breadth of this disorder, it is necessary to have some background information regarding the path Kentucky law has taken in relation to evaluating the significance of the plaintiff's conduct.

In 1967, the Court of Appeals of Kentucky abolished assumption of risk as a separate defense and affirmed the application of the principles of contributory negligence to actions within the state. As stated previously, in 1978, the legislature subsequently codified the application of contributory negligence to products liability actions by enacting KRS section 411.320(3). The uncertainty surrounding the authority of this statute first began surfacing in 1984 when the Supreme Court of Kentucky abolished contributory negligence and adopted the comparative fault approach in Hilen v. Hays. Explaining the change, the court stated:

[Where contributory negligence has previously been a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce the total in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.

(2) In any product liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.


177. Smith, 894 F. Supp. at 1089. Specifically, subsection (3) states:

[If the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.


179. Prior to 1976, the highest state court was the "Court of Appeals."

180. Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967).

181. 673 S.W.2d 713 (Ky. 1984).
amount of the award in the proportion that the claimant's contributory negligence bears to the total negligence that caused the damages. Of special significance, however, is the fact that the *Hilen* court emphasized that whether or not contributory negligence could be construed as an absolute defense to a products liability action was a question which remained for a case on point.

Based upon the holding in *Hilen*, it was argued in *Reda Pump Co. v. Finck* that KRS section 411.320(3) was unconstitutional "because it establishes[d] a different standard for recovery in products liability cases from that which is used in negligence cases generally." Responding to this argument, the court stated:

This contention resolves itself into an argument that because we held by judicial fiat in *Hilen* . . . that in ordinary civil actions contributory negligence shall have a different effect from that which the General Assembly has plainly ascribed to it in products liability actions, we must now declare the policy clearly established by the General Assembly to be unconstitutional because it conflicts with the policy created by this court.

To so hold would constitute the ultimate arrogation of power unto ourselves. We adhere to the principle that the establishment of public policy is the prerogative of the General Assembly. If there is any present conflict or confusion in the law applicable to products liability actions it is of our own making. We resolve the issue now by holding that KRS 411.320(3) absolutely bars recovery in products liability actions where the plaintiff is contributorily negligent and his negligence is a substantial cause of the occurrence which caused the injury, and by further holding that KRS 411.320(3) is not unconstitutional.

In 1988, the General Assembly exercised this power over public policy described in *Reda Pump Co.* and further muddied the waters by enacting KRS section 411.182 which codified the comparative fault standard in all

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182. Id. at 720.
183. Id. at 715.
185. *Reda Pump Co.*, 713 S.W.2d at 820. This contention was based upon the holdings of *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984) and *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986). Id. The *Tabler* decision specifically addressed § 59 of the Kentucky Constitution "which seeks to protect the people from legislation creating arbitrary classifications 'not based upon a natural, real or substantial distinction inherent in the subject matter.'" Id. at 823 (citing *City of Louisville v. Klusmeyer*, 324 S.W.2d 831 (Ky. 1959)).
186. Id. at 821.
tort actions, including products liability actions. Although KRS section 411.182 was in direct conflict with those statutes which codified contributory negligence, such as KRS section 411.320, "[t]he legislature ... did not repeal or otherwise comment on the existing statutes." Addressing the effect of this new legislation in *Ingersoll-Rand v. Rice*, the Kentucky Court of Appeals stated that KRS section 411.182 "adopts comparative negligence in products liability cases, thus overruling KRS 411.320(3)" and statutorily overruling *Reda Pump Co.* Although the statement made in *Ingersoll-Rand* appeared to clarify the issue of which standard applies to products liability actions, its authoritative value was uncertain.

**B. The Answer According to Smith**

Prior to the certification of the law by the Supreme Court of Kentucky, the most accurate depiction of the relationship between the statutes was contained in the opinion rendered in *Smith v. Louis Berkman Co.* In tracing the history of the issue, the federal district court in *Smith* gave a great deal of credence to the statement made by the court of appeals in *Ingersoll-Rand* by stating that although the "Kentucky courts have not had occasion to address whether KRS 411.182 also supersedes KRS 411.320(1) and (2)," the Kentucky Court of Appeals did clear up one uncertainty, concluding that KRS section 411.182 supersedes KRS section 411.320(3). Attempting to discern a standard for resolving the dilemma, the court reiterated the following principle: "If the statutes are irreconcilable or repugnant to each other or if the subsequent statute covers the whole subject matter of the former statute and is manifestly intended as a substitute, the court may deem the former statute repealed by implication." Applying this standard to the relationship between KRS section 411.182 and KRS section 411.320, the court stated:

189. 775 S.W.2d 924 (Ky. Ct. App. 1988).
190. *Id.* at 930.
191. *See Caterpillar, Inc. v. Brock*, No. 95-SC-426-CL, 1996 WL 83171 (Ky. Feb. 22, 1996) (holding that KRS section 411.182(1) has repealed KRS section 411.320(1)); discussion *infra* section VI(C). It must be noted that as of the time of publication, the opinion in *Brock* was not final.
193. *Id.* at 1090.
194. *Id.* (citing *Dreidel v. City of Louisville*, 105 S.W.2d 807 (Ky. 1937)).
KRS 411.182 expressly covers 'all tort actions, including products liability actions, involving fault of more than one party to the action.' Therefore, the legislature intended that the statute cover the whole subject matter of the former statute, KRS 411.320, which governs only product liability actions. Moreover, 411.182 sets forth the comparative fault standard, a different method of determining tort liability than that expressed in the prior statute.\footnote{195}

Further elaborating on the effect one statute is to be given to another, the court proclaimed that "'[a] statute accomplishing the purpose intended to be accomplished by the previously enacted statute, but by obviously different methods and in a different manner, supersedes and repeals the earlier statute.'\footnote{196} Concluding that the General Assembly "manifested in the statute its intention to substitute KRS 411.182 for 411.320," the court deemed the earlier statute repealed by implication\footnote{197} and found both subsections (1) and (2) to be irreconcilable with current law.\footnote{198}

C. Certification of the Law

Following the Sixth Circuit's request for certification of the law, the Supreme Court of Kentucky, in Caterpillar, Inc. v. Brock,\footnote{199} eliminated much speculation by holding that KRS section 411.182(1) negated KRS section 411.320(1).\footnote{200} Noting that "[r]epeal by implication finds no favor within the courts," the court stated that "[t]he proposed apportionment statute is adverse to the purpose of the products liability statute to such an extent that the apportionment statute negates the products liability statute enunciated in KRS 411.320(1)."\footnote{201} Further analyzing the conflict between the two statutes, the court stated:

The language of the comparative fault statute, KRS 411.182, is straightforward and admits, with ease, to only one construction: that in all tort actions, including products liability actions, fault is to be apportioned among all parties to each claim. The chosen language of the legislature is plain and direct rather than circumferential. The date of enactment and the legislative history intone negation of KRS 411.320(1).\footnote{202}
Therefore, the court concluded that, by implication, KRS section 411.182(1) has repealed KRS section 411.320(1).\textsuperscript{203} Even though the other subsections of KRS section 411.320 were not specifically isolated and treated, the court's statement that "in all tort actions, including products liability actions, fault is to be apportioned among all parties to each claim,"\textsuperscript{204} appears to be sufficiently sweeping so as to end the search for the applicable standard.

D. The Bottom Line

Thus, if the reasoning of \textit{Ingersoll-Rand, Smith}, and \textit{Brock} continue to prevail, the plaintiff's conduct will not be a bar to recovery, but rather will be assessed according to the scheme of comparative negligence. "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."\textsuperscript{205} Practically speaking, even if the trier of fact finds that the tractor was operated in a negligent manner or under conditions which are likely to cause a roll-over, under comparative negligence principles, the plaintiff's recovery is not automatically eliminated. Furthermore, even if a plaintiff operates a tractor with knowledge of both the propensity of a tractor to roll and the value of the protection provided by ROPS, such conduct does not constitute a bar to recovery as a matter of law. Whether or not such conduct should reduce or eliminate the recovery received by the plaintiff is a question that is to be decided by the trier of fact.

VII. CONCLUSION

Although the outcome of each case indisputably turns upon the facts involved, the end result of the foregoing analysis is a resoundingly affirmative answer to the question of whether or not a plaintiff can establish a cause of action in Kentucky against the manufacturer of a tractor without ROPS. In fact, the attributes of strict liability, such as the imputation of knowledge, are arguably not even essential to the formation of a claim. It can be maintained that at least some, if not all, manufacturers possessed \textit{actual} knowledge of the danger incumbent in selling their tractors without ROPS, yet despite the fact that they had the capabilities to eliminate or to

\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{KY. REV. STAT. ANN.} § 411.182(2) (Michie/Bobbs-Merrill 1992).
greatly reduce this danger, the manufacturers deliberately chose not to act.

To the corporate giants of the tractor industry, these decisions of long ago may seem inconsequential, but to the thousands of Kentucky farmers who operate tractors manufactured and sold without ROPS, these decisions may prove to have deadly consequences. As the preceding discussion has illustrated, the principles of the law of products liability indisputably support a cause of action. Perhaps of equal importance, however, is the fact that the policies underlying the law of products liability also amply support such action. Certainly it can be said that the primary objectives of the field (compensation and deterrence) are fulfilled by providing a cause of action to those individuals whose safety was left up to chance simply because the exclusion of ROPS as standard equipment made good business sense.
NOTES

RESTORATION OF THE COLLATERAL SOURCE RULE IN KENTUCKY: A REVIEW OF O’BRYAN V. HEDGESPETH

by Craig L. Farrish

I. INTRODUCTION

During the mid-1980’s, in response to what was deemed a liability insurance crisis, state legislatures throughout the nation enacted a variety of tort reform measures designed to address the perceived crisis. In 1988, in response to the perceived crisis, the Kentucky General Assembly passed House Bill 551, An Act Relating to Civil Actions (Act). This legislation consisted of twenty-six sections addressing a wide range of legal issues including apportionment of damages, municipal corporation immunity, punitive damages, personal liability of corporate officers and directors, and the collateral source rule.

Section four of the Act, which was codified as KRS section 411.188, abrogated the collateral source rule. The collateral source rule is a common law rule which provides that if an injured person receives compensation for his injuries from a third party independent of the tort-feasor, the amount of that compensation should not be deducted from any award obtained from the tort-feasor.

The primary issue raised on appeal in O’Bryan v. Hedgespeth was the constitutionality of the General Assembly’s action in abrogating the collateral source rule. A secondary issue addressed by O’Bryan was whether a denied motion in limine preserves the right to appeal without offering a second objection during trial.


2. AN ACT relating to civil actions, ch. 224, 1988 KY. ACTS 557.

3. Sparks, supra note 1, at 474.

4. AN ACT relating to civil actions, ch. 224, 1988 KY. ACTS 557.


7. Id. at 574.
This note first discusses the legislative and judicial background affecting the court's decision in O'Bryan. Also, the note provides a brief overview of the collateral source rule. Following the background material, this note reviews the court's reasoning in O'Bryan and then concludes with a discussion of O'Bryan's impact on Kentucky law.

II. BACKGROUND

A. Overview of the Liability Insurance Crisis

During the early 1980's, the insurance industry was faced with mounting financial losses. In response, the industry raised premiums, canceled or refused to renew existing policies, and refused to issue certain high-risk policies. Companies unable to obtain liability insurance were forced to limit services or to drop business lines. For example, the Coney Island Cyclone ride was closed temporarily, municipal parks closed playgrounds, motels removed diving boards from their swimming pools, the private aircraft industry in the United States virtually shut down altogether, almost all pharmaceutical manufacturers abandoned the production of vaccines, and U.S. contraceptive research came to a halt. This inability of businesses and municipalities to obtain reasonably priced insurance is what became commonly known as the liability insurance crisis.

An illustration of the evidence cited to support the claim of a liability insurance crisis was the level of insurance premiums firms paid for liability insurance coverage. For example, general liability insurance premiums increased nearly 300 percent from a national aggregate of $6.5 billion in 1984, to $19.4 billion in 1986. Indeed, much of the impetus for the tort liability reform efforts came from a perception that the insurance markets were in a state of crisis during this period. During the 1980's, a concerted and largely successful effort, led by large corporations and the insurance industry, was made to convince the public that the reason for the liability insurance crisis was an out-of-control civil justice system and that legal reforms were required.

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9. Viscusi & Born, supra note 1, at 1744.
10. Id.
11. Manzer, supra note 8, at 629.
12. Viscusi, supra note 1, at 1744.
13. Id.
14. Id.
15. Lisa Genasci, Product-Liability Suits Dropping; Sexual-Harassment Filings Rise, LOU-
B. Kentucky's Response to the Liability Insurance Crisis

In response to the liability insurance crisis, the Kentucky General Assembly formed the Kentucky Insurance and Liability Task Force (Task Force). The Task Force was composed of a variety of private groups and public officials. It was formed to examine the liability insurance crisis, report on its causes, and to review legislation from other states that had been enacted to address the liability insurance crisis.

The Act was essentially the Kentucky General Assembly's adoption of the Task Force recommendations for reform of the civil justice system. It is interesting to note that the Task Force specifically found no evidence that a litigation explosion was responsible for causing the liability insurance crisis in Kentucky. However, the Task Force justified its proposed reforms by concluding that they were required in order to improve the efficiency, predictability, and cost-effectiveness of the civil justice system.

C. Overview of the Collateral Source Rule

One of the Task Force recommendations which was adopted by the General Assembly was to abrogate the collateral source rule. The collateral source rule (Rule), which originated as early as 1823 in England and was first adopted in this country in 1854, expresses a two fold public policy judgment. First, the Rule encourages citizens to purchase and maintain insurance for personal injuries and for other eventualities. Second, the Rule prevents tort-feasors from being able to avoid liability for the full amount of damages caused by their actions.

The Rule has both an evidentiary and a damage component. As a

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16. Sparks, supra note 1, at 473.
18. Id.
19. Sparks, supra note 1, at 473.
20. COMMISSION, supra note 17, at 15.
21. Sparks, supra note 1, at 474.
23. Id.
24. Id.
25. Schafer, supra note 1, at 589.
rule of evidence, it precludes introduction into evidence of any benefits the plaintiff obtained from collateral sources. The Rule affects the determination of damages by forcing the defendant to pay for the entire loss he caused despite independent recoveries by the plaintiff for the same loss.

The main criticism of the Rule is that it permits double payment of damages to a plaintiff for the same injury. Double payment can occur in cases where a plaintiff has not suffered out-of-pocket expenses as a result of reimbursement received from third party payor sources, such as insurance companies, and liability is imposed on a defendant for the entire amount of costs incurred by the plaintiff, without subtracting compensation received by the plaintiff from third party sources.

The main arguments in support of the Rule are: (i) the damages incurred by the plaintiff are real, even if the cost is borne by a third party; (ii) plaintiff is not always compensated for all of their costs, therefore duplicate recovery of one expense may compensate for other unrecovered costs; (iii) plaintiffs should not be denied the benefit of their foresight in purchasing insurance; and (iv) double compensation of the plaintiff can be avoided by permitting the plaintiff's insurer to have the right of subrogation. Since insurance companies generally provide in their policies for subrogation rights against tort-feasors, the plaintiff does not, in fact, realize a double payment for the same injury.

D. Abrogation of the Collateral Source Rule in Kentucky

1. Legislative Action

As discussed above, the Kentucky General Assembly passed the Act in response to a perceived liability insurance crisis. Section four of the Act, which was codified as KRS section 411.188, abrogates the collateral source rule. The statute abrogates the collateral source rule by requir-

26. Id.
27. Id.
29. Id.
30. Id.
31. Id. at 192. Medicare and Medicaid programs do the same in the public arena.
32. AN ACT relating to civil actions, ch. 224, 1988 KY. ACTS 557.
33. Sparks, supra note 1, at 473.
34. KY. REV. STAT. ANN. § 411.188 (Baldwin 1995). The statute provides in its entirety:
(1) This section shall apply to all actions for damages, whether in contract or tort, com-
ing "collateral source payments . . . [to] be an admissible fact in any civil trial." It further requires that parties holding subrogation rights to any portion of the award the plaintiff seeks to recover be listed and notified. The law requires that the notification to third parties state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff.

2. Judicial Development

The constitutionality of the statute was first addressed in 1992, by the Kentucky Court of Appeals, in Edwards v. Land. The Kentucky Supreme Court denied discretionary review of the Edwards decision.

One possible explanation for denying discretionary review in Edwards and granting it in O'Bryan is the procedural posture of the two cases. Edwards was on appeal from the Boyle County Circuit Court, which granted a motion in limine finding the Act, and consequently KRS section 411.188, unconstitutional. O'Bryan, in contrast, was appealed after a full trial, where the final damages awarded were less than the special damages presented by the plaintiff at trial.

In declaring KRS section 411.188 unconstitutional, the Kentucky Supreme Court specifically overruled the decision in Edwards. In order to place the holding of O'Bryan in proper context, a brief review of the

(2) At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.
(3) Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.
(4) A certified list of the parties notified pursuant to subsection (2) of this section shall also be filed with the clerk of the court at the commencement of the action.

35. Id.
36. Id.
37. Id.
39. 858 S.W.2d 798 (Ky. 1993); see O'Bryan, 892 S.W.2d at 575.
40. Edwards, 851 S.W.2d at 484.
41. O'Bryan, 892 S.W.2d at 573.
42. Id. at 578.
rationale and holding in Edwards is required.

a. Edwards v. Land

The court of appeals reversed the Boyle County Circuit Court’s finding that the Act and KRS section 411.188 were unconstitutional as a matter of law.\(^{43}\) The Boyle County Circuit Court determined that the Act addressed a plurality of subjects, only some of which relate to civil actions,\(^{44}\) in contravention of section 51 of the Kentucky Constitution.\(^{45}\) Section 51 provides, in pertinent part, that “no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title.”\(^{46}\)

The court of appeals noted that the Boyle Circuit Court found KRS section 411.188 “does fit within the title,” but declared that the Act’s violation of section 51 of the Kentucky Constitution rendered the whole act unconstitutional.\(^{47}\) The statute, as one component of the Act, was consequently declared unconstitutional despite the fact that the statute was within the legitimate ambit of the Act’s title.\(^{48}\)

The court of appeals addressed several issues in its decision. However, only three major issues were specifically discussed by the Kentucky Supreme Court in O’Bryan. First, the court of appeals held that the lower court’s determination that the Act violated section 51 of the Kentucky Constitution was incorrect as a matter of law.\(^{49}\) In addition, the court of appeals stated that “[i]t has long been the rule in Kentucky that when a subject foreign to the title of an act is introduced . . . that subject or those subjects may be omitted from the act, and the subjects conforming to the title retained, thereby rendering the act, thus distilled, constitutional.”\(^{50}\) Further, the court noted that Kentucky recognizes the general principle of jurisprudence that a court should refrain from addressing issues not before it.\(^{51}\)

The court of appeals summarized the previous two points by stating that “we have demonstrated an unwillingness to excise sections from acts

\(^{43}\) Edwards, 851 S.W.2d at 484.
\(^{44}\) The title of the Act is “AN ACT relating to civil actions.”
\(^{45}\) Edwards, 851 S.W.2d at 484.
\(^{46}\) KY. CONST. § 51.
\(^{47}\) Edwards, 851 S.W.2d at 486.
\(^{48}\) Id. at 487.
\(^{49}\) Id.
\(^{50}\) Id. (citing Farris v. Shopper’s Village Liquors, Inc., 669 S.W.2d 213, 214 (Ky. 1984)).
\(^{51}\) Id.
which do not appear to conform to the title, when the court is being called upon to adjudge the constitutionality of only a certain section or certain sections within the act."\(^{52}\) Accordingly, the court of appeals specifically held, for the two reasons stated above, that as a matter of law, the trial court erred in determining the Act to be unconstitutional in its entirety and that the trial court erred by not restricting its analysis to the conformity of KRS section 411.188.\(^{53}\) The court of appeals concluded its holding on this issue by noting that the trial court was "clearly correct" in finding KRS section 411.188 to be constitutional with respect to section 51 of the Kentucky Constitution because the statute addressed an issue relating to civil actions.\(^{54}\)

The second major issue discussed by the court of appeals was whether KRS section 411.188 violated section 116 of the Kentucky Constitution.\(^{55}\) Section 116 grants the Kentucky Supreme Court the authority to promulgate rules of practice and procedure in the courts of Kentucky.\(^{56}\) The court of appeals stated that the constitutional grant of power to the judiciary is "by no means an inflexibly exclusive authority."\(^{57}\) The court of appeals quoted the Kentucky Supreme Court's decision in *Commonwealth v. Reneer*, in which the court held that even if a statute constitutes "an encroachment by the General Assembly upon the prerogatives of the judiciary, it is, nevertheless, not an unreasonable encroachment if it can be accepted under the principles of comity."\(^{58}\)

Comity is generally defined as the principle by which courts will give effect to legislative acts, not as a matter of obligation, but out of deference and respect.\(^{59}\) The test employed by the Kentucky Supreme Court

\(^{52}\) *Id.* (citing Owsley v. Commonwealth, S.W.2d 408, 410 (Ky. Ct. App. 1988)).

\(^{53}\) *Id.*

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 488.

\(^{56}\) Ky. Const. § 116.

\(^{57}\) *Edwards*, 851 S.W.2d at 488.

\(^{58}\) *Id.* (citing Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987)) (emphasis added).

\(^{59}\) See generally BLACK'S LAW DICTIONARY 267 (6th ed. 1990). The Kentucky Supreme Court's formulation of comity can be found in *Ex Parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978). The Supreme Court held:

> It is not our disposition to be jealous or hypertechnical over the boundaries that separate our domain from that of the legislature. Where statutes do not interfere or threaten to interfere with the orderly administration of justice, what boots it to quibble over which branch of government has rightful authority? We respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters.

*Id.* at 624.
to determine when the principle of comity may be applied is whether an act constitutes an unreasonable interference with the functioning of the courts. Although the court of appeals conceded that KRS section 411.188 does encroach upon the authority granted to the judiciary, the court ruled that the encroachment was reasonable and, therefore permissible under the principles of comity.

The third major point discussed by the court of appeals was whether KRS section 411.188 violated section 54 of the Kentucky Constitution. Section 54 of the Kentucky Constitution provides that "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." Land, the appellee, argued that by repealing the collateral source rule, the legislature effectively limited the amount a plaintiff could recover. Further, the appellee contended that allowing evidence of collateral source payments would obviously invite a jury to reduce an award of damages.

The court of appeals fundamentally disagreed with the appellee's contention. Justice Leibson stated that "[n]owhere in KRS section 411.188 is any sort of cap set on the recovery available in a civil action for injury or death. The statute makes no mention at all of limiting damages." Although the court of appeals upheld that statute, it acknowledged that "the statute may serve to reduce the level of recovery awarded in some civil actions" but concluded that "no limitation on recovery is to be found in the statute."

b. O'Bryan v. Hedgespeth

Because the Kentucky Supreme Court denied discretionary review of the Edwards decision, Edwards was controlling authority when O'Bryan reached the appellate level. Prior to trial, O'Bryan, the plaintiff, made a motion in limine to exclude evidence of collateral source payments and objecting to any mention of collateral source payments during the course

60. Ex parte Auditor of Public Accounts, 609 S.W.2d 682, 688 (Ky. 1980).
61. Id.
62. Id.
63. KY. CONST. § 54.
65. Id.
66. Id.
67. Id.
68. Id.
69. O'Bryan v. Hedgespeth, 892 S.W.2d 571, 574 (Ky. 1995).
of this trial. The trial judge rejected the motion and stated that “your objection is on the record and I’ll overrule it for the record. We’ll go by the statute.” At trial, O’Bryan introduced evidence of his medical bills, indicating the amount of his out-of-pocket expenses as well as collateral source payments.

Three arguments were presented by O’Bryan in the Kentucky Supreme Court against the trial court’s decision, affirmed by the court of appeals, to reject his motion in limine. First, the abrogation of the collateral source rule by KRS section section 411.188 was unconstitutional. Second, regardless of the constitutionality of the statute, the trial court should have excluded evidence regarding the portion of collateral source payments which constituted payment of no-fault benefits. Finally, failure to award damages for permanent impairment of earning power was inadequate as a matter of law.

The Kentucky Supreme Court granted discretionary review only to consider the question of whether KRS section 411.188 was unconstitutional. Justice Leibson’s rationale was that the constitutionality of KRS section 411.188 was an issue “of institutional importance because the statute impacts the trial of a great many civil actions.” The court did not address the question of the classification of no-fault benefits as collateral source payment because it was not properly raised on appeal. As to the third issue raised, the court held that “we would not second-guess the court of appeals’ decision affirming the jury award of zero dollars for permanent impairment of earning power.”

In its opinion, the O’Bryan court first strongly rejected a threshold challenge by Hedgespeth, the defendant, that O’Bryan’s motion in limine, when denied, failed to preserve his objection to evidence of collateral source payments. The court then discussed four arguments against the constitutionality of KRS section 411.188. The court overruled Edwards

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70. Id. at 573.
71. Id.
72. Id. The evidence presented by the appellant, Richard O’Bryan was his medical bills which totaled $48,068.04. The bills were divided into his out-of-pocket expenses of $18,390.08 and the collateral source payments he had received of $30,000. Id.
73. Id. at 573-74.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
80. Id. at 574-78.
and declared KRS section 411.188 unconstitutional on the grounds that “all evidence of collateral source payment was constitutionally impermissible, and prejudicial to the jury’s consideration of damages.”

III. THE COURT’S REASONING

As discussed in the previous section, the Kentucky Supreme Court’s opinion addressed two main issues: (i) waiver of the right to appeal the introduction of collateral payment evidence at trial and (ii) the constitutionality of KRS section 411.188. This section will first review the court’s analysis of the waiver issue, followed by a discussion of each of the four main points addressed by the court in deciding the constitutionality of KRS 411.188.

A. Waiver

The court flatly rejected Hedgespeth’s claim that O’Bryan’s motion in limine, when denied, failed to preserve the right to object to evidence of collateral source payments. The court took note that O’Bryan elected to go forward with the evidence of collateral source payments once his motion in limine was overruled, rather than leaving it to Hedgespeth to present the evidence. Justice Leibson reasoned that leaving the evidence of collateral source payments to be presented by Hedgespeth, after O’Bryan had concluded his case, would have given the appearance that O’Bryan had attempted to conceal the evidence, which “would have been even more devastating, adding insult to injury.” Hedgespeth’s counter argument, that the court should not assume that the defendant would have presented evidence of collateral source payments, was rejected by the court. The court responded by holding that “[t]he likelihood the defendant would not present this evidence after prevailing against the motion in limine borders on absurdity.”

Justice Leibson then addressed the broader issue of the operation of motions in limine under Kentucky law. In practice, the court noted, the effect of motions in limine on the presentation of evidence and the right to subsequent appeal was “somewhat uncertain” until it was codified in the Kentucky Rules of Evidence section 103(d). The court held that

81. Id. at 574.
82. Id.
83. Id.
84. Id. (emphasis added).
85. KY. R. EVID. 103(d) (Baldwin). Rule 103(d) provides, in pertinent part: “[a] party
"[t]he only reasonable interpretation of KRE 103(d) is that, as a general rule, once a motion in limine to exclude evidence has been overruled, a party may go forward with adverse evidence to avoid the appearance of concealment and still 'preserve error for appellate review.'" In support of its holding, the court concluded that "[t]o construe a motion in limine as waived in present circumstances would defeat the purpose of KRE 103(d) and destroy the value of having such a rule."87

B. Constitutionality of KRS section 411.188

The issue of the constitutionality of KRS section 411.188 was one of first impression for the Kentucky Supreme Court.88 The court noted that the main arguments raised against the constitutionality of KRS section 411.188 are similar to arguments rejected by the court of appeals in Edwards v. Land.89 Edwards was followed by the court in deciding the appeal in this case.90

1. Section 51 Subject/Title

The first point addressed by the court related to section 51 of the Kentucky Constitution, the "subject/title" clause, which provides, in pertinent part, that "[n]o law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."91 The court rejected section 51 as a reason to declare the present statute unconstitutional.92 The court agreed with the Edwards v. Land analysis of section 51 which held that the subject of the section of the Act, which was codified as KRS section 411.188, was within the ambit of the title of the Act and therefore did not violate section 51 of the Kentucky Constitution.93

2. Separation of Powers Doctrine
The next argument, which formed the basis of the court's holding, centers on the separation of powers doctrine. The argument was based on sections 27, 28 and 116 of the Kentucky Constitution. Sections 27 and 28 divide "[t]he powers of the government . . . into three distinct departments, each . . . a separate body of magistracy" and further specify that no persons, "being of one of those departments, shall exercise any power properly belonging to either of the others." Section 116 of the Kentucky Constitution vests exclusive jurisdiction in the Kentucky Supreme Court to prescribe "rules of practice and procedure for the Court of Justice.

The issue of which branch of government is responsible for determining what evidence is relevant is at the heart of the court's holding in O'Bryan. The Kentucky Supreme Court held that the "responsibility for deciding when evidence is relevant to an issue of fact . . . must be judicially determined." Justice Leibson stated that the critical facts in the case were those facts which relate to the expenses incurred by O'Bryan. In addition, the court stated that medical expenses incurred for treatment of personal injuries would fall "squarely within the parameters of 'practice and procedure' assigned to the judicial branch by the separation of powers doctrine and section 116.

Justice Leibson observed that, prior to the enactment of KRS section 411.188, the collateral source rule excluded evidence of payments to the plaintiff from medical or disability insurers as irrelevant. The controlling authority in Kentucky case law held that such payments had no bearing on the issue of damages the plaintiff had incurred and would be entitled to recover from the wrongdoer. Citing its holding in Burke Enterprises, Inc. v. Mitchell, the court stated that "to depart from the collateral source rule would provide the tort-feasor a 'windfall' to the

94. Id.
95. Id.
98. Ky. R. Evid. 401. Rule 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Id.
99. O’Bryan, 892 S.W.2d at 576.
100. Id.
101. Id.
102. Id.
103. See, e.g., Davidson v. Vogler, 507 S.W.2d 160, 164 (Ky. 1974).
104. Burke Enter., Inc. v. Mitchell, 700 S.W.2d 789, 796 (Ky. 1985).
O'BRYAN v. HEDGESPETH

substantial detriment of the injured party."105 In dicta, Justice Leibson stated "[t]here is no legal reason why the tortfeasor or his liability insurance company should receive a 'windfall' for benefits to which the plaintiff may be entitled."106 The opinion also dismissed the principle criticism of the collateral source rule, double recovery by the plaintiff,107 by holding that any damages recovered by the plaintiff are ordinarily subject to subrogation, as a result "there is no 'double recovery' by any stretch of the imagination."108

Justice Leibson noted that collateral source payments should have no bearing on the plaintiff’s right to recover damages from the defendant.109 It was the opinion of the court that KRS section 411.188 encourages juries to disregard the plaintiff’s evidence as to the medical bills incurred and to temper their verdict with the irrelevant consideration of collateral source payments.110

The court cited Akers v. Baldwin, in which the Kentucky Supreme Court declared a statute that transgressed the court’s fact-finding function unconstitutional.111 The O’Bryan court also cited its recent decision in Ward v. Harding,112 which reiterated the separation of powers principle that the legislature must not intrude by statute into the judicial prerogative. Justice Leibson then concluded that, as a rule of practice and procedure, KRS section 411.188 is constitutionally defective under the separation of powers doctrine.113

3. Comity

The O’Bryan opinion then addressed the principle holding in Edwards v. Land, that KRS section 411.188 should be embraced in lieu of the collateral source rule under the principle of comity.114 The court defined comity as the judicial adoption of a statute or rule unconstitutionally enacted by the legislature “not as a matter of obligation, but out of deference and respect.”115 Citing Supreme Court Rules,116 the court de-

105. O’Bryan, 892 S.W.2d at 576.
106. Id.
107. See, e.g., Abraham, supra note 28, at 190. See also Sparks, supra note 1, at 489.
108. O’Bryan, 892 S.W.2d at 576.
109. Id.
110. Id.
111. 736 S.W.2d 294 (Ky. 1987). The statute attempted to define a common term in broad form deeds.
112. 860 S.W.2d 280, 283 (Ky. 1993).
113. O’Bryan, 892 S.W.2d at 577, 578.
114. Id. at 577.
115. Id. (citing BLACK’S LAW DICTIONARY 242 (5th ed. 1979)).
clared that the court of appeals had overstepped its authority by utilizing comity as the basis for upholding KRS section 411.188, holding that the decision to accept an otherwise unconstitutional act under the doctrine of comity is reserved to the Supreme Court. Justice Leibson concluded by stating that “[o]nce having determined the collateral source payment statute violated the separation of powers doctrine, the Court of Appeals should have ruled the statute unconstitutional.”

4. Vagueness

The court also criticized KRS section 411.188 as too vague to be applied fairly. Drawing on the facts of the case, the court provided the following example of the vagaries of KRS section 411.188:

When evidence of collateral source payments totaling $30,000 is admitted at trial, and the verdict reduced accordingly because the jury assumes the plaintiff will get the sum awarded, who gets the award? If the plaintiff gets it, the entities who paid collateral source benefits are cut off from their subrogation rights contrary to the statute. On the other hand, if the subrogees now get the $18,000 awarded, does the plaintiff who is out-of-pocket $18,000 then recover nothing? In this scenario, even if the plaintiff gets nothing and the entities paying collateral source benefits get the $18,000 to which they are subrogated, these entities are still out-of-pocket $12,000, the difference between $30,000 and $18,000.

To further illustrate the point that KRS section 411.188 was vague, the court distinguished KRS section 411.188 from the statute addressed in Commonwealth v. Reneer. Justice Leibson noted that the statute did nothing to enhance the jury’s fact-finding function nor did it provide a framework for the jury to relate the evidence received to the amount of damages the plaintiff was entitled to recover. He concluded that the statute only confused the jury with respect to the amount of damages to be awarded to the plaintiff.

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117. O’Bryan, 892 S.W.2d at 577.
118. Id.
119. Id.
120. Id.
121. 734 S.W.2d 794 (Ky. 1987). This case was cited in Edwards v. Land by the court of appeals as authority to uphold KRS 411.188 under the doctrine of comity. The case dealt with sentencing procedure.
122. O’Bryan, 892 S.W.2d at 577.
123. Id.
Justice Leibson quickly dismissed the remaining argument which centered on equal protection and due process guarantees found in the Kentucky Constitution, sections 2, 59 and 60.\textsuperscript{124} The court held that since the statute violates the separation of powers sections of the Kentucky Constitution, it was unnecessary to address the further argument based on the equal protection and due process clauses of the Kentucky Constitution.\textsuperscript{125}

In summary, the court concluded that KRS section 411.118 was unconstitutional and that \textit{Edwards v. Land} should be overruled.\textsuperscript{126} The court ruled that the statute is a violation of the Kentucky constitutional mandate of the separation of powers in state government.\textsuperscript{127}

IV. ANALYSIS

The two main holdings of \textit{O'Bryan} are: (i) a rejected motion in limine is sufficient to preserve the right to appeal, despite the presentation of adverse evidence at trial, and (ii) KRS section 411.188 was an unconstitutional abrogation of the collateral source rule. Both holdings establish significant precedent in Kentucky law. The first holding, relating to the practice and procedure of motions in limine, resolves a procedural paradox in Kentucky civil practice. The second holding restores the traditional, common law collateral source rule. The significance of each holding is discussed in detail below.

A. Motion In Limine

A motion in limine is made by a party in an effort to exclude prejudicial evidence from being presented at trial.\textsuperscript{128} As recently as fifty years ago, the use of motions in limine was not common.\textsuperscript{129} However, since the 1980's its use has been reinvigorated,\textsuperscript{130} both in civil and criminal cases.\textsuperscript{131}

Currently, jurisdictions on both the state and federal level are split on

\textsuperscript{124} Id. at 578.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Catherine Murr Young, \textit{Should A Motion In Limine Or Similar Preliminary Motion Made In The Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection?}, 79 KY. L.J. 177, 179 (Fall 1990).
\textsuperscript{130} Id.
\textsuperscript{131} Id.
the requirements needed to preserve an appeal from an adverse ruling on a motion in limine.132 The majority of jurisdictions take the position advanced by Hedgespeth in the subject case, that a party’s pre-trial objection to evidence is waived if that party presents the evidence at trial.133

The Kentucky Supreme Court’s decision places Kentucky with a minority of states and federal circuits that have adopted the contrary position.134 The minority position acknowledges the practical dynamics of a jury trial.135 Recognizing the precarious position that denial of the motion in limine creates for the movant, minority jurisdictions hold that the movant’s right to appeal the denial of his motion is not affected when he introduces the evidence that he previously sought to exclude.136

Once a motion in limine is denied, the movant typically wishes to preserve the error for appeal.137 The general belief is that once evidence is heard by the jury during a trial, the damage is done.138 The simple fact being, that it is difficult for a jury to ignore what it has already heard, despite instructions by the court to the contrary.139 In fact, objections to evidence in front of the jury may only tend to focus their attention on it.140

As demonstrated in O’Bryan, pre-trial rulings on the admissibility of evidence can drastically alter a party’s trial strategy. After having a motion in limine denied by the trial court, O’Bryan was faced with the dilemma of having Hedgespeth present evidence of collateral source payments received by O’Bryan or present the potentially prejudicial evidence himself.141 The risk in allowing Hedgespeth to present the evidence, as noted by the court, was that it might appear to the jury that O’Bryan was attempting to hide the payments.142

The Kentucky General Assembly enacted KRE 103(d) and the Ken-

132. See generally John B. Trawick, Motions in Limine Preserving Error on Appeal When a Party Loses a Motion in Limine, 18 AM. J. TRIAL ADVOC. 485, 486 (Fall 1994). See also Colleen R. Courtade, Annotation, Sufficiency in Federal Court of Motion in Limine To Preserve for Appeal Objection to Evidence Absent Contemporary Objection at Trial, 76 A.L.R. FED. 619, 622 (1986).
133. See Courtade, supra note 135, at 623.
134. See generally Courtade, supra note 135, at 623. See also Young, supra note 128, at 180.
136. See Trawick, supra note 135, at 486.
137. Young, supra note 131, at 178.
138. Id. at 179.
139. Id. at 179.
140. Id.
141. O’Bryan v. Hedgespeth, 892 S.W.2d 571, 574 (Ky. 1995).
142. Id.
Kentucky Supreme Court adopted it in 1990 to codify Kentucky's common law. The court's interpretation of KRE 103(d) resolved the trial strategy dilemma discussed above. As the court concluded in O'Bryan, "To construe a motion in limine as waived in present circumstances would defeat the purpose of KRE 103(d) and destroy the value of having such a rule."144

B. Collateral Source Rule

The main point addressed in O'Bryan was the constitutionality of the statutory abrogation of the collateral source rule by KRS section 411.188. The General Assembly's promulgation of KRS section 411.188 was viewed as a "restrained response" to the perceived liability insurance crisis.145 It is interesting to note that the Kentucky Insurance and Liability Task Force, formed by the General Assembly to find solutions to the perceived crisis, specifically found no evidence of a litigation explosion in Kentucky.146 Absent a pressing need to reform the civil justice system in Kentucky, at least for the stated reason, KRS section 411.188 lacked a compelling reason to justify the abrogation of the Rule.

Several aspects of the statute were deemed beneficial or "restrained" in relation to statutes enacted in other states. The primary benefit of KRS section 411.188 was that it only required that collateral source payment evidence be presented to the jury for consideration.147 The statute did not require the jury to automatically reduce an award by the amount of payments received from third party sources.148 However, as demonstrated by O'Bryan, in practice, KRS section 411.188 caused most juries to automatically reduce an award by the amount of collateral benefits received, thereby defeating its purported benefit.

Another perceived benefit of KRS section 411.188 was that it reduced the risk of "double recovery."149 In practice, the risk of double recovery is extremely low. Given that plaintiffs' attorneys typically receive contingent fees equal to one third of the damages awarded, and that

144. O'Bryan, 892 S.W.2d at 575.
145. Sparks, supra note 1, at 490.
146. Id. at 473 (citing LEGISLATIVE RESEARCH COMMISSION, REPORT OF THE KENTUCKY INSURANCE AND LIABILITY TASK FORCE, RESEARCH REPORT 232, at 15 (1988)).
147. Id. at 490.
148. Id.
149. Id.
insurance companies ordinarily have subrogation rights against the amount awarded to the plaintiff, the net position of the typical plaintiff is less than the amount awarded by the jury. Justice Leibson referred to the reduction in liability for a defendant as a “windfall”\footnote{150} and concluded that “there is no ‘double recovery’ by any stretch of the imagination.”\footnote{151}

\textit{O'Bryan} reaffirmed the findings of the court of appeals in both \textit{Edwards} and \textit{O'Bryan},\footnote{152} that KRS section 411.188 violated the separation of powers doctrine expressed in sections 27, 28, and 116 of the Kentucky Constitution.\footnote{153} As discussed above, absent a compelling reason to embrace the legislative intrusion into an area of judicial authority, \textit{O'Bryan} strongly rejected the statute on the grounds of judicial comity.\footnote{154} The court also pre-empted the use of the doctrine of comity by the lower courts when deciding constitutional issues.\footnote{155} Justice Leibson firmly held the following:

The decision whether to give life through comity to a statute otherwise unconstitutional because it violates separation of powers doctrine is one of institutional policy reserved for the Supreme Court level. The responsibility of lower courts, including the Court of Appeals, is to follow the law, which includes constitutional separation of powers doctrine, and to correct error accordingly, even if to do so means declaring a legislative enactment unconstitutional.\footnote{156}

The court’s decision in \textit{O'Bryan} is consistent with a recent trend among the states to reestablish or affirm the Rule.\footnote{157} In the past two

\begin{footnotes}
\footnote{150}{O'Bryan v. Hedgespeth, 892 S.W.2d 571, 576 (Ky. 1995).}
\footnote{151}{Id.}
\footnote{152}{See, e.g., Edwards v. Land, 851 S.W.2d 484, 488 (Ky. Ct. App. 1992), review denied, 858 S.W.2d 698 (Ky. 1993), overruled by O'Bryan v. Hedgespeth, 892 S.W.2d 571 (1995). See also O'Bryan v. Hedgespeth, 892 S.W.2d at 575.}
\footnote{153}{O'Bryan, 892 S.W.2d at 576.}
\footnote{154}{Id. at 577.}
\footnote{155}{Id.}
\footnote{156}{Id.}
\end{footnotes}
years, twenty-six state supreme courts have heard cases which addressed the Rule, and in the overwhelming number of those cases, twenty, the courts have decided in favor of the Rule. Given this strong trend in support of the Rule, it seems very unlikely that the abrogation of the Rule will be included in future attempts of civil litigation reform by the legislature.

V. CONCLUSION

O'Bryan impacts two important aspects of Kentucky civil litigation. First, the decision reestablished the common law collateral source rule. As noted by the court, "[t]he right of every individual in society to access a system of justice to redress wrongs is basic and fundamental to our common law heritage." The rule prevents a defendant from reducing his liability and, thereby, receiving a windfall based on the plaintiff's private contractual relationships. This decision restored a plaintiff's right to recover the entire amount of expenses incurred as a result of a defendant's wrongful actions.

The second important aspect of the decision is that it clarified the use of motions in limine, with respect to preserving an objection for appeal. The result is that a plaintiff's presentation of evidence adverse to itself at trial pre-empts the defense from later raising unflattering inferences as to the plaintiff through its introduction of the same evidence, without waiving the right to appeal the decision of the trial court on a motion in limine to exclude the evidence.

Together, the two holdings in O'Bryan reestablish a level playing field at trial. First, a plaintiff is now able to exclude prejudicial evidence relating to third party payments. Second, trial counsel may use a wider range of tactical options in presenting evidence, secure in the knowledge that they are not waiving a right to appeal the admission of the evidence.


Five states have affirmed or upheld the abrogation of the rule. Senn v. Alabama Gas Corp., 619 So. 2d 1320 (Ala. 1993); Jackson v. Farm Bureau Mut. Ins. Co., 528 N.W.2d 516 (Iowa 1995); Kiss v. Jacob, 650 A.2d 336 (N.J. 1994); Greco v. United States, 893 F.2d 345 (Nev. 1995); and Dewitz v. Emery, 508 N.W.2d 324 (N.D. 1993). One state, Montana, in Knutson v. Barbour, 879 P.2d 696 (Mont. 1994), refused to address the issue because it was not properly before the court, but suggested it would reestablish the rule if properly presented.

158. Id.

159. O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995).
I. INTRODUCTION

Plaintiffs suing government contractors face a formidable affirmative defense: the government contractor defense. For example, a civilian emergency medical technician, injured while on duty when the ambulance she was riding in overturned, was barred from recovery. The nonmilitary manufacturer of the ambulance avoided liability as the court ruled both that the government contractor defense was applicable and that the ambulance met the General Services Administration's specifications. Now, subsequent to the Supreme Court's promulgating the defense, a plaintiff's success against a military government contractor is infrequent.

However, several very recent decisions show that courts are taking a much closer look and deciding not to release government contractors from state tort liability. The decisions address whether a government contractor had provided: 1) adequate warnings to users, as opposed to the government, and 2) sufficient safety features in the product. This term the United States Supreme Court, in its first case involving the government contractor defense subsequent to Boyle v. United Technologies wherein the judicially created government contractor defense elements

2. Id. at 1118.
and justifications were announced, denied recovery for class action settlement costs incurred by military government contractors.\textsuperscript{5}

The 1995 Sixth Circuit \textit{Tate v. Boeing Helicopters}\textsuperscript{6} decision, concerning a Kentucky controversy regarding a failure to warn, insisted that the \textit{Boyle} defense requires separate analyses with distinct elements for concurrent defective design and failure to warn claims, regardless of having successfully defeated the defective design product liability claim.\textsuperscript{7} Before state tort law is displaced, the contractor must essentially satisfy six, rather than just three, elements to avoid liability. The \textit{Tate} decision is particularly noteworthy because the plaintiffs’ claims arose from injuries relative to a helicopter crash, which was also the \textit{Boyle} fact pattern.

Upon remand, Kentucky has an opportunity to consider whether there is some duty to warn users under Kentucky tort law. Although not discussed in \textit{Tate}, the Supreme Court of Washington in November, 1994, decided that a helicopter manufacturer’s use of the government contractor defense did not bar a state tort postmanufacture failure to warn claim where the manufacturer showed only compliance with design specifications.\textsuperscript{8} Likewise, in 1995 the Supreme Court of New Jersey upheld the liability of a government contractor for his lack of safety devices on equipment supplied to the military.\textsuperscript{9} These recent adverse government contractor decisions all concern safety issues.

Quite troublesome is that the government contract defense is a very powerful\textsuperscript{10} judicially created affirmative defense which was articulated in a severely divided Supreme Court opinion, extrapolated from a Congressional act, the Federal Tort Claims Act. This defense presents serious separation of powers problems in that preemption of all state tort law can occur when a significant federal interest exists which is in conflict with state tort law. Congress remains conspicuous in its absence in resolving

\textsuperscript{5} Hercules Inc. \textit{v. United States}, No. 94-818, 1996 WL 88267 (U.S. March 4, 1996) (federal government not liable for Agent Orange defoliant manufacturers class action costs despite furnishing detailed specifications to manufacturers.

\textsuperscript{6} 55 F.3d 1150 (6th Cir. 1995).

\textsuperscript{7} Id.


\textsuperscript{10} See Smith \textit{v. Xerox Corp.}, 866 F.2d 135 (5th Cir. 1989) (dismissal of product liability suit from injuries suffered from an alleged anti-tank weapon simulator misfiring where claims included negligence in design and/or manufacture, strict liability via a weapon unreasonably dangerous for normal use, failure to warn or instruct despite defendant's knowledge of similar misfiring mishaps, breach of warranty of fitness for intended use).
the debate.  

Recently, some state courts have refused state tort law displacement by Congressional enactments. The 1995 Sixth Circuit Tate decision reflects a similar trend emerging with regard to the judicially created government contractor defense, as it likewise refused perfunctory set aside of state products liability tort law as well. The Tate decision is also in harmony with several recent state supreme court decisions. This note will discuss the 1995 Sixth Circuit decision of Tate v. Boeing Helicopters as it is quite a departure from two earlier Sixth Circuit decisions. One case involved a Kentucky controversy plainly instructing that the government contractor defense is available for use far beyond circumstances in which it was created, alleged defective military product design. The other Sixth Circuit decision concerned a Kentucky dispute resulting from a military helicopter crash where the court permitted no recovery for plaintiffs, but recognized the harshness of the result.

The Tate judiciary decided that a military federal interest was of insufficient magnitude to completely displace state product liability tort law. The court insisted on separate analyses for design defect and failure to warn claims. This is a new requirement in the Sixth Circuit for a government contractor defendant, particularly a military contractor, seeking to avoid liability. If the determination is made upon remand that Kentucky tort law would require warnings, Kentucky would be consonant with other states limiting the ease with which the federal government histor-

11. Boyle v. United Technologies Corp., 487 U.S. 500, 515-16 (Brennan, J. dissenting). Congress . . . has remained silent . . . having resisted a sustained campaign by Government contractors to legislate for them some defense. The Court—unelected and accountable to the people—has unabashedly stepped into the breach to legislate a rule denying Lt. Boyle’s family the compensation [$725,000 awarded by a jury] that the state assures them . . . . In my view, this Court lacks both authority and expertise to fashion such a rule, whether to protect the Treasury of the United States or the coffers of industry. Because I would leave that exercise of legislative power to Congress, where our Constitution places it, I would reverse the Court of Appeals and reinstate petitioner’s jury award.

See also, Carley v. Wheeled Coach, 991 F.2d 1117, 1133 n.7 (3d Cir. 1993), cert. denied, 114 S. Ct. 191 (1993).

12. Tebbetts v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), cert. denied, 116 S. Ct. 773 (1996) (holding the Congressional Safety Act only “supplementary of and in addition to common law of negligence and product liability” and that while compliance with statutory standard is evidence of due care, it is not conclusive thus not preempting plaintiff action against Ford). Id. at 348.

13. 55 F.3d 1150 (6th Cir. 1995).

cally has displaced state tort law in product liability actions when the defendant is a military government contractor.

II. BACKGROUND

Prosser & Keeton define three types of product liability defects: (1) design defects, (2) failure to warn defects, and (3) manufacturing defects. Predicting whether courts will protect government contractors from product liability claims has become particularly risky of late. However, denying protection under the government contractor defense seems less controversial with respect to manufacturing defects made by a government contractor, as the contractor has exclusive control over his own manufacturing facilities. A manufacturing defect is an unintended flaw in a product easily identified as it differs from similar products in the line. Past decisions suggest that distinguishing among the types of defects when the government contractor defense was presented really was not important. However, several 1994 and 1995 decisions placed great importance on distinguishing failure-to-warn users claims from design defect claims.


17. Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1317 (11th Cir. 1989) (stating that federal law determines if a specific defect is considered one of manufacture or design), cert. denided, 494 U.S. 1030 (1990), reh'g denied, 495 U.S. 942 (1990). See also Bailey v. McDonnell Douglas Corp., 989 F.2d 794, 801 (concluding that the state law label on the claims sought to be dismissed is irrelevant that all claims are subject to the same Boyle elements), reh'g denied, 995 F.2d 225 (5th Cir. 1993). Contra Tate v. Boeing Helicopters, 55 F.3d 1150 (6th Cir. 1995) (finding that a separate analysis and similar but distinct elements apply to a failure to warn defect than that of a product design defect); Timberline Air Service, Inc. v. Bell Helicopter-Texttron, Inc., 884 F.2d 920 (Wash. 1994) (finding evidence of compliance with government contract design specifications irrelevant to postmanufacture failure to warn claim).
Boyle v. United Technologies Corp.\textsuperscript{18} addressed an alleged design defect in a military procurement context. The Tate v. Boeing Helicopters decision addressed concurrent design defect and failure to warn claims.\textsuperscript{19} Lieutenant David Boyle drowned when he was unable to open the escape hatch to his Marine Corps helicopter after it plunged into the Atlantic Ocean.\textsuperscript{20} By design, the escape hatch opened outward, not inward, which allegedly rendered it inoperative due to severe water pressure.\textsuperscript{21} Access to the escape hatch handle was allegedly hindered by other equipment.\textsuperscript{22} Boyle's father claimed his son's death was caused by helicopter design defects built by the Sikorsky Division of United Technologies Corporation.\textsuperscript{23} Sikorsky personnel described a continuing relationship with the government in the design of the helicopter.\textsuperscript{24} Government personnel reviewed and approved basic designs including a "mock-up" of the cockpit with all instruments and controls, including the escape hatch.\textsuperscript{25} A jury had awarded the plaintiffs $725,000 for the wrongful death of Lt. Boyle.\textsuperscript{26}

The United States Court of Appeals for the Fourth Circuit found that the government had approved sufficiently precise specifications, had received a product that sufficiently conformed to those specifications, and had been warned of inherent dangers.\textsuperscript{27} Thus, Sikorsky was absolved

\begin{thebibliography}{99}
\bibitem{19} Boyle, 487 U.S. at 503.
\bibitem{21} Pilots had been opening crew exits outward in water accidents for years. . . . [C]onclusive evidence [showed] Lt. Boyle never attempted to open his emergency exit. . . . [T]o provide a visual check for inadvertent activation of this [exit hatch] jettison feature, the release handle is secured with a thin safety wire designed to show that the handle is in the locked position until a small amount of force is applied to the handle by the pilot, thereby breaking the safety wire. . . . [T]he safety wire on Lt. Boyle's door was still intact. . . . Dazed and perhaps confused from the impact and the gushing water that was pouring into the cockpit, Lt. Boyle had unstrapped himself and become disoriented inside the large helicopter's fuselage, which is about the size of a Greyhound bus.
\textit{Id.} (citations omitted).
\bibitem{22} Id.
\bibitem{23} Id.
\bibitem{24} Id.
\bibitem{26} Id.
\bibitem{27} Id. at 414-16.
\end{thebibliography}
from liability according to that court's version of the government contractor defense.28 Government contractor immunity had been recognized in some fashion for quite some time, and in that regard Boyle was not controversial.29

The Supreme Court, in an opinion written by Justice Scalia, anchored the Boyle affirmative defense, however, to a distinctly different theoretical base from that which other courts had been using. He preferred use of the discretionary function exception of the Federal Tort Claims Act ("FTCA") rather than using the Feres doctrine, as he expressed concerns for over- and under-inclusiveness.30 This change was not unexpected. Justice Scalia's dissent in Johnson v. United States31 provided him an opportunity to express his dissatisfaction with extending Feres at that time.32

For Justice Scalia, Feres was too broad in that even injuries caused to military personnel by a helicopter purchased from stock or any other standard off-the-shelf item would be unnecessarily protected. "Since Feres prohibits all service-related tort claims against the government, a contractor defense [resting] upon it should prohibit all service-related tort claims against the manufacturer—making inexplicable the three limiting criteria for contractor immunity" that the lower court adopted.33 Likewise, since Feres covers only "service-related injuries and not injuries caused by the military to civilians, it could not be invoked to prevent . . . a civilian's suit against the manufacturer of fighter planes based on a state tort theory," possibly from alleged needlessly high levels of jet engine noise.34 Thus, in Justice Scalia's view, the discretionary function exception to the FTCA was preferable as the theoretical anchor for the government contractor defense.35

The exclusive federal interest in the procurement of equipment by the

28. Id.


31. United States v. Johnson, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting) ("We have not been asked by respondent to overrule Feres, and so need not resolve whether considerations of stare decisis should induce us, despite the plain error of the case, to leave bad enough alone . . . . I would not extend Feres any further.").

32. Id. at 692.


34. Id. at 510-11.

35. Id. at 511.
United States, "merely establishes a necessary, not a sufficient, condition for the displacement of state law."\(^{36}\) Before federal law displaces state tort law in a design defect products liability action, courts must determine that a significant conflict exists between federal interests, via government procurement contracting, and operation of state law. If the conflict exists in an area of particularly unique federal interest, preemption of state law is warranted. Federal preemption of state law in most situations requires a clear statutory prescription or a direct conflict between federal and state law.\(^{37}\) The Court observed that preemption can also arise when an area is committed by the Constitution and laws of the United States to federal control, and federal courts may replace state law with federal law of a content prescribed (absent explicit statutory directive) by the courts—so called federal common law.\(^{38}\) Federal government contracting is such an area.\(^{39}\)

A military contractor fulfilling a procurement contract is similar to a federal official performing governmental duties, whose liability, the court noted, in many contexts is controlled by federal law in that both implicate the same interest in getting the government’s work done.\(^{40}\) The Court noted that civil liabilities arising out of federal performance contracts are a uniquely federal interest and that there should be no difference for federal procurement contracts.\(^{41}\) A federal government interest existed despite the fact that the dispute was between private parties.\(^{42}\) However, such an interest alone was not enough to displace state law. Displacement will only occur where a significant conflict exists between an identifiable federal policy or interest and state law, or where state law application would frustrate specific objectives of federal legislation.\(^{43}\)

State law holding government contractors liable for design defects in military equipment does in some circumstances present a significant conflict with federal policy and must be displaced.\(^{44}\) Contractors may decide not to manufacture at all or may increase prices to the government.\(^{45}\)

36. Id. at 507.
37. Id. at 504.
38. Id.
39. Id.
40. Id. at 505.
41. Id. at 505-06 (citing Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940) (a performance contract)).
42. Id. at 506.
43. Id. at 507.
44. Id.
45. Id.
The Court discussed at length when displacement of state tort law should occur, recognizing that there must be significant conflict and that the discretionary function exception to the FTCA provides an appropriate framework for displacement, rather than Feres. The selection of the appropriate design for military equipment is assuredly within the meaning of the discretionary function exception. The Court explained this is so because "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness" is involved.

The Court ultimately remanded this case, but agreed that the scope of displacement promulgated by an earlier Fourth Circuit decision permitted escape from liability for the contractor when three elements are met: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States. The existence of a sufficient federal interest has on occasion been considered a fourth element of Boyle. Application of the FTCA discretionary function exception involves a two-pronged analysis by a court. A formal FTCA analysis requires that the function must involve an element of choice to determine whether a specific and mandatory regulation, statute, or policy requires a particular course of action. If so, then no discretion is involved and the discretionary function exception does not apply. If the government's conduct is not so controlled, then the court applies the second prong and determines whether the discretion exercised by the government is of a kind that the discretionary function was designed to

46. Id. at 508-13.
47. Id. at 511.
48. Id.
49. Id. at 514.
50. Id. at 512.
52. Black Hills Aviation, Inc. v. United States, 34 F.3d 968, 972-73 (10th Cir. 1994).
53. Id. at 972.
54. Id.
shield. Most courts interpret Boyle as not requiring the FTCA two-step analysis to be met prior to applying the government contractor defense.

The Boyle opinion provided a judicially-created defense extrapolated from a statute enacted by Congress displacing state tort law when a sufficient federal interest conflicts. Although a military products liability procurement decision, Boyle used what is now considered a harbinger performance contract case to illustrate a federal interest. Yearsley was not even remotely a military product liability case, but was a case where the Court rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of ninety-five acres caused by the contractor's work in constructing dikes for the government. If the authority to carry out the project was validly conferred (i.e., if what was done was within the constitutional power of Congress), then there was no liability on the part of the contractor for executing its will.

The ever evolving Boyle government contractor defense generates a wealth of scholarly articles, and 1994 provided its contribution to the genre. The controversy surrounding Boyle is quite justified considering the magnitude of interests at stake. Practically speaking, only a limited number of suppliers exist who can deliver sophisticated military hardware and support systems, perform dangerous environmental cleanup, furnish space shuttles, or run power plants. There is a very strong argument, in particular, for maintaining an exclusively American military manufacturing base. Thus, special protections for American military government contractors seem warranted, and the government contractor defense seems a plausible response, despite being a judicial creation. At the moment, the defense is used far beyond circumstances where a military design defect products liability claim is at issue. The General Services

55. Id. at 973.
Administration, the Departments of Energy and Defense, and the Environmental Protection Agency all have successfully protected their private contractors from state tort liability at one time or another via the government contractor defense.

III. THE FACTS OF TATE V. BOEING HELICOPTERS

The Sixth Circuit has decided that defeating a defective product design claim via use of the government contractor defense does not necessarily defeat a concurrent failure to warn claim without a separate application of newly created Boyle-like defense elements, if a state failure to warn tort law exists.

When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not. As in design defect cases, in order to satisfy the first condition—government "approval"—in failure to warn cases, the government's involvement must transcend rubber stamping.60

This was unexpected in light of an earlier generous stretch for government contractor protection in Lamb v. Martin Marietta Energy Systems, Inc.,61 which was neither a military procurement nor a product liability action.

In Tate, a product liability action was brought against manufacturers of an Army Chinook helicopter and its components, asserting defective product design and failure to warn claims with regard to the helicopter's tandem hook system. The United States District Court for the Western District of Kentucky granted the manufacturers' motion for summary judgment, which are routinely granted2 based on the government contractor defense. The court of appeals held that (1) the evidence established that defendants were entitled to summary judgment as to the design

60. Tate v. Boeing Helicopters, 55 F.3d 1150, 1157 (6th Cir. 1995).
defect claims; (2) such fact did not, standing alone, mean that defense was also established on failure to warn claims; and (3) for the defense to apply to failure to warn claims, it was not necessary to show that the government dictated or prohibited warnings, only that the government exercised its discretion and approved warnings.63

The defendants built and sold to the Army a helicopter that crashed during a training mission in July 1990.64 Three crew members were killed and two others injured.65 One of the survivors and family members of two deceased soldiers brought a diversity action under Kentucky law alleging theories of design defect and failure to warn.66 The district court granted summary judgment for the defendants based on the Boyle government contractor defense, thus dismissing the case.67 The summary judgment on the design defect claim was affirmed, but the court vacated and remanded as to the failure to warn claim.68

The five soldiers were on a training mission aboard a CH-47D Chinook helicopter at Fort Campbell, Kentucky.69 The training mission was to teach the crew, while using night vision goggles, to attach heavy equipment to a hook and sling system on the underbelly of the helicopter, lift the load, fly to a new position, and set the equipment down.70 The load was a concrete block which, as they flew over a hill, became lodged into the hillside, and during attempts to free the load by releasing the hooks, the sling and concrete block did not separate.71 Further attempts were made to try and level the helicopter, but the block served as an anchor, and the helicopter pitched forward crashing into the hillside.72 Plaintiffs pointed to three design features they believed were responsible, at least in part, for the crash, and alleged that defendants failed to provide adequate warnings under Kentucky tort law.73

63. Tate v. Boeing Helicopters, 55 F.3d 1150, 1156-58 (6th Cir. 1995).
64. Id. at 1151.
65. Id.
66. Id.
67. Id. at 1151-52.
68. Id. at 1158.
69. Id. at 1152.
70. Id.
71. Id.
72. Id.
73. Id. at 1152-53.
IV. THE COURT'S ANALYSIS

The court began by citing to the Boyle opinion, noting that Lt. Boyle’s estate alleged, among others, one theory of liability under Virginia tort law (the crash occurred off the Virginia coast) that the helicopter manufacturer defectively designed the escape hatch in such a way as to prevent the hatch from opening when the helicopter was submerged. The court recited the three elements of the government contractor defense wherein liability for design defects in military equipment cannot be imposed, pursuant to state law. The court noted a series of cases distinguishing government approval from merely rubber stamping contractor specifications, emphasizing that the cases showed that the government contractor defense was to protect the FTCA exemption from suits in which the United States exercised discretion in selecting a military equipment design.

Quoting from Harduvel v. General Dynamics Corp., when the government and the contractor engage in a continuous back-and-forth design review process, the first element of Boyle is met. In this case, the court found enough evidence of continuous back and forth development with respect to the three alleged design defects. The second Boyle element was met as the Army inspected and approved the CH-47D that crashed and the plaintiffs pointed to no evidence that the helicopter failed to conform with the designs, production contracts, or specifications. The third Boyle design defect element was met, as the court found that the Army was aware of all the dangers of which the contractors were aware. Boeing had warned that the cargo might not release if it dragged on the ground, and the Army’s own manuals cited dangers and ways to release cargo if an attempt failed.

After a thorough but routine discussion of the facts of the case relative to design defect and the contractor defense, the court affirmed the lower
court's summary judgment grant on the design defect claim.\textsuperscript{82} However, the next part of the opinion is unusual for the Sixth Circuit. The court decided that the defendants' success in meeting the three government contractor defense elements for the design defect claim did not by itself defeat the failure to warn claim.\textsuperscript{83} The court noted that the district court dismissed the entire case without even addressing the failure to warn claim, holding only that the government contractor defense shielded the defendants from liability for the alleged design defects.\textsuperscript{84} The court cited several asbestos product liability decisions from other circuits which applied the government contractor defense against failure to warn claims, pointing out that those cases did not focus on underlying design defects.\textsuperscript{85}

Warning the government of dangers arising from a specific design—the third condition of Boyle—does not encompass or state a failure to warn claim; it simply encourages contractors to provide the government with all the information required to soundly exercise its discretion. "By contrast, tort law duties to warn accomplish an entirely different objective of helping those who use or otherwise come into contact with a product to protect their own safety."\textsuperscript{86} In the government contractor defense context, design defect and failure to warn claims differ practically as well as theoretically. Simply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings, if any, that should accompany the product.\textsuperscript{87}

When the government exercises its discretion and approves designs prepared by private contractors, it does have an interest in insulating its contractors from liability for such design defects.\textsuperscript{88} Likewise, when the government exercises its discretion and approves warnings, it does have an interest in insulating its contractors from state failure to warn tort liability.\textsuperscript{89}

The court held that when state law would otherwise impose liability for

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. (citing \textit{In re} Hawaii Fed. Asbestos Cases, 960 F.2d 806, 812-13 (9th Cir. 1992) (dictum); Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487, 1489 (11th Cir. 1990); \textit{In re} Joint E. & S. Dist. N.Y. Asbestos Litig. v. Eagle-Picher Indus., Inc., 897 F.2d 626, 632-33 (2d Cir. 1990)).
\textsuperscript{87} Tate v. Boeing Helicopters, 55 F.3d 1150, 1156 (6th Cir. 1995).
\textsuperscript{88} Id. at 1157.
\textsuperscript{89} Id.
a failure to warn of dangers in using military equipment, state law is displaced if the contractor can show: "(1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment’s use about which the contractor knew, but the United States did not." 90

As in design defect cases, rubber stamping by government is not sufficient to avoid liability under the first Boyle element. 91 On the other hand, when the government actually determines for itself the warnings to be provided, the first element is surely satisfied. 92 The second element of the failure-to-warn analysis, as in the design defect case, assures that the government’s exercise of discretion is protected. 93 The third element “encourages frank communication to the government of the equipment’s dangers . . . increas[ing] the likelihood that the government will make a well-informed judgment.” 94 Since none of this three-prong failure to warn analysis was performed, the court remanded back to the district court. 95 In providing further guidance, the court emphasized that the FTCA’s discretionary function exemption dictates only discretion is required, not dictation nor prohibition of warnings. 96 This decision differs importantly in that regard from other circuits. 97 At this time, there has been no determination that Kentucky tort law imposes a duty to warn under the facts of this case. Upon remand, the district court may elect to assume, arguendo, that Kentucky law would impose liability under these facts, and proceed to determine the propriety of summary judgment based on the government contractor defense. 98 The parties may also have failed to develop any significant record on the failure-to-warn claim. 99 Summarizing, the court created three new elements for a separate analysis for a failure-to-warn claim, distinct from the design defect ele-

90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
98. Tate, 55 F.3d at 1157-58.
99. Id. at 1158.
ments and analysis, when a defendant argues nonliability under the government contractor defense. This judicial creation is quite a departure from all other decisions to date.

V. ANALYSIS

Kentucky has already shown some reluctance to having state tort law preempted. For example, in a products liability claim based on a design defect no preemption occurred, despite FDA drug approval, which left the patient free to litigate the issue of the drug’s efficacy.\(^{100}\) \textit{Tate} imposes a return to a more traditional framework of dealing with design defects and failure to warn defects separately, even when a government contractor defense is at issue, thus preventing state tort law preemption without a much more extensive analysis. The Sixth Circuit imposes a heavier burden before a military government contractor can avoid liability for injury.

A similar case, in withholding protection to a Kentucky government contractor, is \textit{Smith v. Louis Berkman Co.}^{101} The court allowed a products liability action despite the fact that a state government contractor met the bid specifications set by the state of Kentucky for a salt spreader and a claim of nonliability via the government contractor defense. Protection to the contractor was denied because Kentucky not only determined the bid specifications, but had waived its sovereign immunity to tort suits by statute, section 44.070 of the Kentucky Revised Statutes.\(^{102}\) Thus, no conflict between state tort law and state governmental immunity existed justifying a \textit{Boyle}-type defense and a release from liability.\(^{103}\) This decision in a state government contractor defense action also is strikingly at odds with the earlier \textit{McCabe Powers Body Co. v. Sharp} decision.\(^{104}\)


\(^{101}\) 894 F. Supp. 1084 (W.D. Ky. 1995) (This decision is also notable for a discussion that, in this court’s view, section 411.182 of the Kentucky Revised Statutes covers all tort actions, including products liability actions, involving fault of more than one party to the action and, therefore, was intended by the legislature to supersede section 411.320 (1) & (2) of the Kentucky Revised Statutes, which only governs product liability actions). \textit{Id.} at 1090-91. Also issued, but not yet a final decision at this time, the Supreme Court of Kentucky in \textit{Caterpillar, Inc. v. Brock}, No. 95-SC-426-CL, 1996 WL 83171 (Ky. Feb. 22, 1996) ruled that KRS 411.182(1) negates KRS 411.320(1).

\(^{102}\) \textit{Id.} at 1094.

\(^{103}\) \textit{Id.}

\(^{104}\) 594 S.W.2d 592 (Ky. 1980). (A Kentucky Department of Highways employee, aloft and unconscious after an explosion, fell from a side opening of a bucket attached to an aerial boom while surveying an outage of lights on an interstate exchange. The contractor was protected from liability because the manufacturer manufactured to the exact specifications of the Kentucky Division of Purchases).
When viewed in light of history, both 1995 decisions clip a government contractor's advantage back in a way not often seen.

In many cases there is a very close relationship between product defect because of a failure to warn and product defect because of design.\textsuperscript{105} The separate analysis required by Tate provides the injured plaintiff another, albeit slim, opportunity to prevail against a most formidable government contractor defense: "the warning theory is particularly appealing . . . because it may be easier to persuade a jury that the manufacturer should change his warning than that he should change his design."\textsuperscript{106}

As recently as 1993, decisions addressing Kentucky controversies were much more government contractor friendly. In the 1993 case of\textit{Lamb v. Martin Marietta Energy Systems, Inc.},\textsuperscript{107} the United States District Court for the Western District of Kentucky, while acknowledging that federal courts are split\textsuperscript{108} on whether the government contractor defense applies only to military procurement contracts, nevertheless ruled that the defense should be available to non-military contractors.\textsuperscript{109} The court recognized that the Paducah Gaseous Diffusion Plant ("PGDP") is only one of two plants in the country that produce enriched uranium.\textsuperscript{110} This product is used both in commercial reactors and in weapons production.\textsuperscript{111} A strict liability action was disallowed because the plant plays an integral role in the nation's defense and domestic energy programs.\textsuperscript{112} Thus, the court found that "the plant's activities are carried on in pursuance of a public necessity."\textsuperscript{113} Kentucky law would not recognize a cause of action for strict liability because the rules for strict liability rarely apply to activities carried on in performance of a public duty.\textsuperscript{114}

\textsuperscript{105} DAVID A. FISCHER & WILLIAM POWERS, JR., PRODUCTS LIABILITY CASES AND MATERIALS 361 (2d ed. 1994) (citing Twerski, Weinstein, Donaher, Piehler, \textit{The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age}, 61 CORNELL L. REV. 495, 500-05 (1976)).

\textsuperscript{106} \textit{Id.} at 362.

\textsuperscript{107} 835 F. Supp. 959 (W.D. Ky. 1993).

\textsuperscript{108} \textit{Id.} at 966 (citing Carley v. Wheeled Coach, 991 F.2d 1117, 1119 n.1 (3d Cir. 1993), \textit{cert. denied}, 114 S. Ct. 191 (1993) (listing both pre and post Boyle v. United Technologies Corp. decisions)).


\textsuperscript{110} \textit{Id.} at 971.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} (citing Kentucky Utils. Co. v. Auto Crane Co., 674 S.W.2d 15 (Ky. Ct. App. 1983) (holding rules for strict liability for abnormally dangerous activities do not apply if the
The court did decide that the government contractor defense was available, although it significantly refused the defendant's motion for summary judgment,\textsuperscript{115} which is often the stage in federal courts where most defendants win.\textsuperscript{116} The defendants argued that while they were responsible for the day-to-day operations of the plant, the contractor was required to follow Department of Energy ("DOE") directions and instructions, that nothing was done at the plant without DOE consent or approval, thus all activities would fall within the government's discretionary function immunity.\textsuperscript{117} Interestingly, the court rejected the suggestion that such approval necessarily was a discretionary function,\textsuperscript{118} as conduct is not discretionary unless an element of judgment or choice is involved.\textsuperscript{119} Assuming an element of judgment is involved, a court must determine whether that judgment is of a kind that the discretionary function exception was designed to shield.\textsuperscript{120}

The court believed that the exception was based upon Congress' desire to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of a tort action, and thus the exception protects only decisions based on public policy.\textsuperscript{121} Therefore, the defendants had to show that the government official's approval involved the permissible exercise of policy judgment.\textsuperscript{122} The discretionary function exception does not apply when a federal statute, regulation, or policy prescribes a course of action an employee must follow.\textsuperscript{123}

The facts of Lamb really are quite distant from a military product design defect case, instead a performance contract with a uniquely federal interest. However, Lamb was quickly cited in a 1994 decision where a government contractor successfully defended against an environmental pollution allegation.\textsuperscript{124}

\begin{itemize}
  \item activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier).
  \item Id. at 968.
  \item Cahoon, supra note 21, at 852.
  \item Id.
  \item Id. (citing Berkovitz v. United States, 486 U.S. 531, 536-37 (1988)).
  \item Id.
  \item Id. at 967 (citing Berkovitz, at 537).
  \item Id. at 967.
  \item Id. (citing Berkovitz; cf. Crawford v. Nat'l Lead Co., 784 F. Supp. 439, 446-47 (S.D. Ohio 1989) (finding that where defendants have violated federal environmental laws, there is no significant conflict to preclude state tort law claims for this conduct)).
\end{itemize}
The *Lamb* defendants Union Carbide and Martin Marietta had operated the PGDP continuously from 1951 to 1984. The lawsuit resulted from the discovery in August 1988 that the groundwater outside the PGDP contained a plume of contaminants that had affected several residential drinking water wells. The plume did not reach the plaintiffs' property and may never reach it as remedial efforts commenced. Plaintiffs' complaint sought personal injury and property damages as a result of the defendants' discharges of contaminants into the soil, atmosphere, creeks, and ditches at the PGDP.

The defendants raised a total of three defenses: (1) derivative sovereign immunity; (2) intergovernmental immunity; and (3) the government contractor defense.\(^\text{125}\) The court began by noting that preemption exists only when there is a clear Congressional prescription or a direct conflict between state and federal law.\(^\text{126}\) The court continued by noting that the Supreme Court has also held that a few areas involving uniquely federal interests are so committed to federal control by the Constitution and laws of the United States that state law is preempted and replaced by federal law of a content prescribed by the courts, so called federal common law (absent explicit statutory directive).\(^\text{127}\) Under this theory, federal law preempts state law where (1) the action involves a uniquely federal interest and (2) a significant conflict exists between an identifiable federal policy or interest and operation of state law or the application of state law would frustrate specific objectives of federal legislation.\(^\text{128}\) The court stated:

There can be no real dispute as to whether a suit involving the operations of a nuclear production facility involves a uniquely federal interest. As the Supreme Court pointed out in *Goodyear*, "[w]ith certain limited exceptions, the DOE, as agent of the United States, is the exclusive owner of all nuclear production facilities . . . . This federal control over the production of nuclear material is an important aspect of federal nuclear energy policy." Thus, state tort law is pre-empted if it represents a significant conflict with federal policy.\(^\text{129}\)

The court, citing the Supreme Court's rationale in *Boyle*, found the government contractor defense "equally applicable in non-military as well

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126. *Id.* at 965 (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988)).
127. *Id.*
128. *Id.*
129. *Id.*
as military settings"130 and held the defense applicable in this case. De-
spite denial of defendant's summary judgment motion, this case still
represented quite a significant win for the government contractor.
In fact, in Richland-Lexington Airport District v. Atlas Properties,
Inc.,131 the court relieved a government contractor from liability citing
to Lamb, as well as Boyle and Yearsley, for the proposition that "there is
simply no reason why a nonmilitary contractor should be barred from
enjoying ... immunity simply because he does not contract with the
armed forces."132
The dispute in Richland arose when the Environmental Protection
Agency ("EPA") hired a private contractor to perform environmental
hazardous waste removal, who, during the course of that contract perfor-
ance, allegedly contaminated Richland-Lexington Airport's adjacent
property. Richland-Lexington commenced proceedings against the defen-
dants pursuant to the FTCA and CERCLA.133 The court emphasized:
"The dispositive issue is not one of performance versus procurement, but
whether there is a uniquely federal interest in the subject matter of the
contract."134 Thus, the court ruled that the two-prong test of the discre-
tionary function exception was met, then ruled that the Boyle govern-
ment contractor defense not only applied, but that the three-prong test was also
met.135 Therefore, defendant's summary judgment motion was grant-
ed.136
The significant federal interest coverage provided by the FTCA's
discretionary function exception alone provides powerful protection for
the government, as seen in a 1994 decision in which the court concluded
lawful discretion was exercised.137 In this case, civilians under govern-
ment contract to extinguish missile-caused fires on a missile testing range
died from injuries when their air tanker crashed responding to a govern-
ment call for fire extinguishment services.138 The government chose to
conduct a very abbreviated plane crash investigation despite compelling

130. Id. at 966.
132. Id. at 421.
133. Id. at 405-07.
134. Id. at 422; (citing Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 966
 & n.7 (W.D. Ky. 1993); Crawford v. Nat'l Lead Co., 784 F. Supp. 439, 445-46 n.7 (S.D.
 Ohio 1989)); see also Carley v. Wheeled Coach, 991 F.2d 1117, 1120 (3d Cir. 1993), cert.
denied 114 S. Ct. 191 (1993)).
135. Id. at 423-24.
136. Id.
137. Black Hills Aviation, Inc. v. United States, 34 F.3d 968 (10th Cir. 1994).
138. Id. at 970-71.
evidence that suggested a missile shot the civilian craft down. The court believed that the missile base officers were well within the discretionary function exception for investigatory decisions based on the officers’ balancing of the Army’s use of its limited resources to investigate accidents, lack of expertise to investigate technical aspects of the crash, and the Army’s desire to get on with the missile testing as soon as possible without interference.

In a 1993 Kentucky case much more analogous to the facts of Boyle, it is not surprising that a military contractor avoided liability via use of the government contractor defense. Landgraf v. McDonnell Douglas Helicopter Company, was a wrongful death suit seeking damages under Kentucky law. The court relieved a government contractor of liability reiterating that “[a]lthough the [government contractor] defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense.” Here the court applied the one element of the government contractor defense still in dispute to the facts of the case and released McDonnell Douglas Helicopter Company from liability for injury from an alleged military helicopter design defect. It affirmed a lower court summary judgment finding that the Army had been aware of the danger, but had exercised its discretion in the design selection by allowing the continued manufacture and certification of the helicopters without change.

Unlike in Tate, no separate failure to warn claim was made in this case. Therefore, a plaintiff’s attorney should consider pleading separate design defect and failure to warn claims separately, if state tort law permits, as two distinct opportunities now exist in the Sixth Circuit to recover from a government contractor. Likewise, the defendant should recog-

139. Id. at 971-72.
140. Id. at 976.
141. 993 F.2d 558 (6th Cir. 1993) (agreeing with the Boyle interpretation appearing in Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989) (judgment against defendant General Dynamics reversed on appeal), cert. denied, 494 U.S. 1030 (1990), reh’g denied, 495 U.S. 942 (1990) and Kleemann v. McDonnell Douglas Corp., 890 F.2d 698 (4th Cir. 1989), (summary judgment for defendant McDonnell Douglas), cert. denied, 495 U.S. 953 (1990) and concluding that: "Boyle makes clear that the government contractor defense is intended to protect military contractors from state tort liability when they produce equipment conforming to design specifications adopted by government agencies in exercise of this discretion. This is such a case.") Landgraf, Id. at 564.
142. Id. at 560.
143. Id.
144. Id. at 564.
nize that satisfying the defective design analysis of Boyle will not necessarily protect from failure-to-warn tort liability.

The 1995 Tate v. Boeing Helicopter decision requires a separate failure-to-warn Boyle type analysis before a government contractor is released from liability. This does not seem so alarming when viewed in the light of traditional product liability tort law. The Tate case was remanded for an examination of whether Kentucky law would require product warnings. No past fact pattern in Kentucky is sufficiently analogous to a military helicopter crash to predict with confidence that warnings should have been given to the users.

However, Kentucky case law does suggest that there is a duty to warn in some circumstances, and that a lack of warning can even be a factor in deciding if a product is unreasonably dangerous. Clearly, the duty to warn is non-delegable.

As a general rule the purchaser's failure to remedy a defect in the product is no defense for the manufacturer where the claim is based on the defective condition of the product at the time of manufacture and is made on behalf of an ultimate user or bystander who has not been adequately warned of the danger. This particular decision also noted:

We agree that the manufacturer has a duty to warn the ultimate user of any dangers in its product (other than those that are open or obvious.) This duty is non-delegable.... If the injury was the result of the manufacturer's breach, the liability for the injury will lie with the manufacturer. Clearly, the duty to warn is non-delegable.

"The sole question in a products liability question is whether the product is defective as defined in Nichols v. Union Underwear," wherein the manufacturer is presumed to know the qualities and characteristics, and the actual condition, of his product at the time he sells it. "The question is whether the product creates 'such a risk' of an accident of the general nature of the one in question 'that an ordinarily prudent company engaged in the manufacture' of such a product 'would not have put it on the market.'" Like patent defects, adequate warnings may terminate.

146. Id. at 782.
147. Id. (quoting Minert v. Harsco Corp., 614 P.2d 686, 691 (Wash. 1980)).
148. Id.
149. Id. at 780 (citing Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429 (Ky. 1980)).
150. Id. (quoting Nichols at 433).
liability as to those who get the warning, but has no effect on those who do not get the warning, except in extraordinary circumstances.  

"The purchaser who has notice of the dangerous condition may be concurrently liable to the ultimate user for failure to provide adequate warning . . . but the purchaser's failure to act is not an intervening cause except in extraordinary circumstances."  

Kentucky case law also suggests that if a warning is in order, then the adequacy of that warning must be addressed. "[I]t may be doubted that a sign warning 'Keep Off the Grass,' could be deemed sufficient to apprise a reasonable person that the grass was infested with deadly snakes." Additional warnings about a product contained in an instruction booklet delivered to a purchaser, who was a plaintiff's employer, did not affect the manufacturer's liability to the ultimate user, the employee. Detailed instructions are not a substitute for adequate warnings.  

In Kentucky, an adequate warning is one calculated to adequately guard against the inherent danger which was known and which a defendant could reasonably foresee might occur in the expected usage of the equipment. The Kentucky Supreme Court has ruled that "[t]he manufacturer is under a duty . . . to provide such warning as would be reasonably sufficient to bring the danger to an expectable user's attention and be understood by him." Possibly, in Kentucky the government contractor may find upon remand that he has to satisfy the three new failure to warn elements dictated in the Tate decision. Regardless of what legal theory is used, any failure to give proper warning will render a product defective.  

Although not a Kentucky case, but concerning a military helicopter converted to civilian use which was involved in a crash, the Supreme Court of Washington in November, 1994, announced its decision that compliance with government dictated helicopter design specifications was no absolute defense to a postmanufacture failure-to-warn claim under either state statute or the federal common law government contractor's  

151. Id. at 782.  
152. Id. (citing Nichols, 602 S.W.2d 429 (Ky. 1980); but see Sturm, Ruger & Co., Inc. v. Boyd, 586 S.W.2d 19 (Ky. 1979) which this court finds as an exception limited to unusual circumstances).  
154. Id.  
155. Id. at 521.  
156. Id. at 520.  
defense.\textsuperscript{159} Claims arose from a helicopter crash during a logging operation.\textsuperscript{160} The helicopter was manufactured by Bell in 1969, used by the military for 17 years, then transferred to an Oregon corporation in 1986 that sold it to Timberline.\textsuperscript{161} The crash resulted from the failure of a gear in the gearbox.\textsuperscript{162}

The defendant Bell claimed that the injury was really a design defect, but since it was manufactured to specifications, it was entitled to protection via the government contractor defense.\textsuperscript{163} The plaintiff, in contrast, argued that the gear was not defective as originally designed for the government, but constituted instead a failure to warn of a danger of which Bell learned after manufacture, i.e., that repetitive heavy lift operations could stress the gear causing its failure.\textsuperscript{164}

The court presented its analysis of \textit{Boyle}\textsuperscript{165} and ultimately concluded that the federal common law government contractor’s defense does not preclude a legitimate postmanufacture failure-to-warn claim where the only compliance was with government design specifications.\textsuperscript{166} The defendant’s showing only that it complied with design specifications was deemed largely irrelevant to any postmanufacture failure-to-warn claim.\textsuperscript{167} Oregon had a specific state statute addressing the postmanufacture duty to warn, as well as a state version of the government contractor defense.\textsuperscript{168}

The court agreed with \textit{In re Joint Eastern and Southern District New York Asbestos Litigation v. Eagle-Picher Industries, Inc.}\textsuperscript{169} that government contracts “may focus on product content and design while leaving other safety related decisions, such as the method of product manufacture or the nature of product warnings to the contractor’s sole discretion.”\textsuperscript{170} Thus state law design requirements may be displaced, but not necessarily

\begin{itemize}
\item \textsuperscript{159} Timberline Air Service, Inc. v. Bell Helicopter- Textron, Inc., 884 P.2d 920 (Wash. 1994).
\item \textsuperscript{160} \textit{Id.} at 922.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.} at 927-28.
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 928-30.
\item \textsuperscript{166} \textit{Id.} at 930.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.} at 923.
\item \textsuperscript{169} 897 F.2d 626 (2d Cir. 1990).
\item \textsuperscript{170} Timberline, 884 P.2d at 930 (quoting \textit{In re Joint E. & S. Dist. N.Y. Asbestos Litig. v. Eagle-Picher Indus., Inc.}, 897 F.2d 626 (2d Cir. 1990)).
\end{itemize}
state law warning requirements.\textsuperscript{171} This court believed that state tort law duties to warn have the objective of helping those who use or come into contact with the product to protect for their own safety.\textsuperscript{172} Consequently, the third leg of Boyle, warning the government, and the state tort law duty to warn are in no way to be considered similar duties.\textsuperscript{173} This view is in harmony with the Sixth Circuit's 1995 Tate decision.\textsuperscript{174} Warnings to the government, the third element of Boyle, are not to be confused or considered the same as warnings to the user.

Courts, other than the Supreme Court of Washington, have permitted a distinct failure-to-warn users claim to proceed despite a defendant's raising the government contractor defense and satisfying the third element of Boyle.\textsuperscript{175} Although not a warning dispute, New Jersey's Supreme Court in 1995 announced its decision to hold a government contractor liable for the lack of safety devices on a piece of equipment, despite the contractor's assertion of manufacturing to government specifications.\textsuperscript{176} The unhappy dissenters commented in this 3-3 decision that the decision "stands Boyle on its head."\textsuperscript{177}

This decision merits some discussion, as Kentucky courts may find the

\textsuperscript{171} Id.
\textsuperscript{172} Id. at 932.
\textsuperscript{173} Id.
\textsuperscript{174} Tate v. Boeing Helicopters, 55 F.3d 1150, 1156 (6th Cir. 1995).
\textsuperscript{175} See, e.g., Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487, 1489 (11th Cir. 1990) (finding the government contractor defense inapplicable as no conflict between a state law duty to warn and compliance with government specifications); Garner v. Santoro, 865 F.2d 629, 635-36 (5th Cir. 1989) (recognizing the difficulty that a defendant will have under Boyle in establishing an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between federal policy and state law operation); In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 812-13 (9th Cir. 1992) (finding no conflict between defendants state law duty to provide adequate warnings and agreements with the government); Glassco v. Miller Equip. Co., Inc., 966 F.2d 641, 643-44 (11th Cir. 1992) (holding the defense no shield to manufacturer who failed to warn government and end users of limited useful life as no significant conflict between government specifications and state-imposed duty to warn); In re Joint E. & S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 633 (2d Cir. 1990) (determining that where military specifications said practically nothing about warnings, manufacturer could have complied with both specifications and duty to provide adequate warnings on packages without frustrating any identifiable federal interest); Jackson v. Deft, Inc., 273 Cal. Rptr. 214, 221 (1990) (holding certain warnings required by the military specifications but did not place limits on additional information from the manufacturers to users of their products); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1457 (9th Cir. 1990) (denying summary judgment for defendants who "never pointed to any mandatory specification . . . that describes warnings . . . or that precludes the inclusion of additional warnings.")
\textsuperscript{177} Id. at 806 (Pollock, J., dissenting).
reasoning persuasive. In this case the government contractor defense was not applicable as a bar to contractor liability. Plaintiff was a civilian employee of the United States Navy working as a steward aboard a Navy tanker used for transporting fuel and supplies to vessels at sea.\textsuperscript{178} He suffered partial amputation of one hand in an accident involving a ram tensioner when a fuel-replenishment operation was underway.\textsuperscript{179} Plaintiff’s complaint alleged that the ram tensioner had been negligently and defectively designed. The defendant denied liability under \textit{Boyle v. United Technologies Corp.} as the product was in accordance with government specifications.\textsuperscript{180} The trial court granted defendant’s summary judgment motion, and the appellate division reversed, ruling that the defense was not available because defendant was not prohibited, by the terms of its contract specifications, from including safety devices on the lower sheave assembly of the ram tensioner, which inflicted the actual injury.\textsuperscript{181} The New Jersey Supreme Court affirmed in a split three to three decision:

We hold that the government specifications, according to which the ram tensioner was designed, manufactured and supplied, did not impose any requirements that would conflict with the duty of the contractor under state law to provide a product that incorporated a safety feature for the lower sheave assembly of the ram tensioner, and, hence, the government contractor defense is not applicable as a bar to defendant’s liability.\textsuperscript{182}

The court ruled that the “operative standard for determining whether a significant conflict exists to justify preemption of state liability law is that expressed by the three elements of the \textit{Boyle} test.”\textsuperscript{183} Thus, the question to be answered is whether there is a significant conflict between state products liability law applicable to design defects and the federal government’s procurement policy as reflected in the contract specifications, to which the ram tensioner was designed and supplied.\textsuperscript{184} To answer that question one must focus on whether such a conflict, if any, relates to the presence or absence of safety features as an important characteristic in the government-approved design of the ram tensioner.\textsuperscript{185} The court read \textit{Boyle} to mean that no significant conflict would exist if, under

\begin{itemize}
  \item \textsuperscript{178} \textit{Id.} at 797.
  \item \textsuperscript{179} \textit{Id.}
  \item \textsuperscript{180} \textit{Id.} at 797-98.
  \item \textsuperscript{181} \textit{Id.} at 798.
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{Id.} at 800.
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} \textit{Id.}
\end{itemize}
state law, a duty of care to include a certain safety feature was neither contrary nor identical to anything promised the government. Thus the contractor could comply with both its contractual obligations and the state-prescribed duty of care.

The court believed Boyle was a prototypical situation where the helicopter specifications at issue made compliance with both duties impossible. The Boyle defendant had a duty to manufacture and deliver helicopters with an escape hatch mechanism demanded by exact specifications which presented a significant and irreconcilable conflict between federal and state interests. Such a conflict was absent in Anzalone, as the specifications made no mention of any safety features that could have prevented the accident. Literal application of specifications is not the key to whether there is a significant conflict. "[O]mission of a specification does not automatically negate existence of a significant conflict between design defect liability under state tort law and the federal government's procurement policies." It is possible that the design feature in question, in this case omission of a safety feature, had itself been considered by a government officer, and if so would then fall within the area where the policy of the FTCA discretionary function would be frustrated.

The court had to consider, in "assessing the contractual significance of the failure to include any safety features in the specifications for the ram tensioner, whether the government made an affirmative and definite decision to exclude safety features . . . and whether . . . the omission of any such specifications was an exercise of government discretion." The record in this case disclosed that the federal government was not concerned with the safety aspects of the ram tensioner or the need for provisions for safety features in the specifications. Thus, the court agreed with the appellate division, which found nothing in the record to indicate that the government exercised any discretion at all. The court ruled that a safety feature for the ram tensioner may be required as a matter of

186. Id. at 801.
187. Id.
188. Id. at 802.
189. Id.
190. Id.
191. Id.
192. Id.
193. Id. at 804.
194. Id.
195. Id. at 805.
state law without posing a significant conflict with identifiable government interests where:

1. such a safety feature is omitted from the specifications in that it is neither expressly required nor prohibited;
2. the omission of such safety specifications is in the context of detailed and precise specifications, covering all of the important features of the product; the specifications were formulated, reviewed, considered, and approved by the government; and
3. the objectives of the design of the product, reflected in the specifications, were functional efficiency, simplicity in operation, and ease in installment and placement.

Safety in the equipment operation was neither a paramount nor an incidental concern in the design of the product.

It was thus inferable that "a safety feature that would overcome the risk of injury . . . could be incorporated into the product without substantially affecting or modifying any of the features required by the express specifications and without impairing the basic objectives of the design." It appeared to this court that "the contractor could have fulfilled its duty to the government and simultaneously complied with a state law duty to render the product safe without infringing on the discretion exercised by the government." The court stated: "Accordingly, we conclude that there is no significant conflict between federal interests reflected in the government contract specifications and state policies under its products-liability law. Consequently, the government contractor defense is inapplicable, and it may not be interposed to preempt or displace state tort law."

The dissenting opinion remarked that the majority misinterpreted Boyle by admitting that the product was manufactured to very detailed and specific drawings and because the plaintiff did not claim that WesTech failed to warn the Navy of known risks. Yet, because the Navy did not explicitly forbid WesTech from installing a guard on the ram tensioner, WesTech suddenly had a duty to design and provide such a device. This reasoning was what "stands Boyle on its head."

When this 1995 decision is viewed along with the Sixth Circuit Tate v.
Boeing Helicopters, defendants must carefully consider safety features both in design and warnings to users, especially in the absence of any government discussion relative to such features. Automatic displacement of state tort law is much more uncertain in the safety features arena. Clearly, state courts are becoming increasingly skeptical at having state tort law displaced to the benefit of a government contractor without a very careful review.

The just announced Supreme Court 6-2 decision in Hercules, Inc. v. United States also should put military government contractors on notice that the federal government is quite willing to let them absorb costs associated with products allegedly causing injury, despite being manufactured to detailed government specifications. Agent Orange defoliant manufacturers were seeking recovery from the government for class action defense and settlement costs incurred in long lived litigation against presumably Agent Orange injured Vietnam War veterans. The dioxin tainted defoliants were ordered by the government and used to eliminate enemy food supplies and hiding places during the Vietnam War. The Agent Orange litigation began percolating up through the legal system starting as long ago as 1979, with present claims quite different from the usual government contractor defense litigation. The Agent Orange morbidity effects showed up literally years after the product was delivered to the government. It still remains in dispute whether dioxin causes any injury of the kind the veterans claimed

The manufacturers argued that the government required production under threat of civil and criminal fines, provided the detailed specifications, had superior knowledge of the hazards, seized processing facilities to some extent, and limited them to marking the drums containing Agent Orange with no further identification or safety warnings other than a three-inch orange band. Rather than continue already protracted

204. 55 F.3d 1150 (6th Cir. 1995).
206. Id. at *2.
210. Id. at *2.
litigation, all the Agent Orange defendants agreed to create a $180 million settlement fund with each manufacturer contributing on a market share basis.\textsuperscript{211} Hercules and Thompson's shares were $18,772,568 and $3,096,597, respectively.\textsuperscript{212} Considering the strong public policy to reach settlements rather than to continue litigation, particularly in a tort arena where jury awards can be so very costly\textsuperscript{213} and that the government contractor defense had not proved entirely successful for the defendant manufacturers during the years of litigation, the government's position in refusing any reimbursement seems harsh. After noting that the petitioners’ acknowledged that they had no express warranty or indemnification clauses in their government contracts, the Supreme Court rejected petitioners’ attempt to extend a warranty-of-specifications to cover third-party tort claims against them.\textsuperscript{214} The Supreme Court also found no conditions giving rise to implied-in-fact contractual-indemnification agreements.\textsuperscript{215} Hercules instructs that when military government contractors choose to settle litigation involving injury to third parties from a product manufactured to government specifications they do so at severe risk to themselves, in the absence of express indemnification contract language.

With regard to the Agent Orange litigation, the lower courts paid a great deal of attention only to warnings to the government within the context of addressing the third element of Boyle, not in the context of any contractor liability for failure to warn users.\textsuperscript{216} The more recent Tate, Timberline, and Anzalone decisions suggest that when military government contractors fail to consider failure-to-warn users issues, they do so at their peril.

State courts are already taking a hard look and denying effect to Congressional legislation they view as attempting to bypass state tort law.\textsuperscript{217}

\textsuperscript{211} Id. at *3.
\textsuperscript{212} Id.
\textsuperscript{213} Mason v. Texaco, Inc., 741 F. Supp. 1472 (D. Kan. 1990) (manufacturer's inadequate warning resulted in jury award to Coast Guard instructor for benzene-related leukemia of $4,000,000 for worker's personal injuries, $5,025,000 for his survivor's wrongful death claim, and $25,000,000 in punitive damages with amounts to be paid allocated among several defendants, including the Coast Guard), aff'd, 948 F.2d 1546 (10th Cir. 1991) ($25 million punitive damage award reduction to $12.5 million), cert. denied, 504 U.S. 910 (1992).
\textsuperscript{214} Hercules, No. 94-818, 1996 WL 88267 at *5.
\textsuperscript{215} Id. at *5-6.
State courts have begun to fine tune application of the government contractor defense for user warnings and safety features as well. After the Supreme Court decision in *Hercules*, businessmen will likely insist on very tough contract indemnification clauses rather than depend exclusively on the government contractor defense.

VI. CONCLUSION

In 1988, military helicopter defective design litigation gave birth to the current form of the government contractor defense. Yet, in 1995 military defective product litigation continues with the possibility of quite different outcomes for government contractors. Failure to warn users of product defects and lack of safety features potentially expose military contractors to significant liability. Something is deeply amiss. The 1995 *Tate v. Boeing Helicopter* decision has specifically announced that a military defective design product liability challenge, defeated by a government contractor defense, does not defeat a failure-to-warn defect without performing a separate analysis with newly minted elements.

In contrast, the *Boyle* decision cited *McKay v. Rockwell Int'l Corp.* with approval. Yet, this decision suggests warnings may be superfluous, at least, for military personnel. This court believed it was incorrect to even assume that pilots, ignorant of the dangerous character of a chattel, would not fly if they discovered the dangerous character of the chattel. Military personnel, specifically Naval pilots, “[a]re required to fly as ordered.”

Military personnel frequently have been sent to their deaths by the incompetence of others. Hardly a page of history lacks an example or two. We do not suggest that is the case here. However, should it be so those who serve the United States in an active military capacity are assured their survivors will receive some compensation. We merely hold that it is not for this court to increase that compensation in the manner plaintiffs-appellants suggest.

The 1995 Sixth Circuit *Tate* decision concerning military personnel injuries from a helicopter crash, the 1995 New Jersey *Anzalone* decision concerning civilian injuries from equipment supplied to the military, the

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220. Id.
221. Id.
1994 Timberline decision concerning injuries from a military helicopter converted to civilian use, and the 1994 Nevada Allison decision concerning vaccine injuries all suggest that there is a requirement for meaningful user safety warnings, even safety features, in order to avoid liability. This is so despite the fact that the government may have furnished a product’s specifications and the contractor has met all specifications.

Undoubtedly, the state courts have noticed with interest, as all who have watched the Agent Orange litigation progress over the years, that the federal government was amenable to having government contractors pick up the settlement tab. If denying protection to government contractors even in the traditional military product arena is a continuing trend, then the time is well overdue for Congress or the Supreme Court to seriously revisit the government contractor defense. In light of the volume of government contractor litigation and commentary to date, it is anomalous that in 1995 the Nevada Supreme Court stated that “this defense is very ill-defined.” In the failure-to-warn users and safety features arenas, more state courts may decide to join Washington, New Jersey, and Nevada in denying the defense’s protection to government contractors when given a comparable opportunity. The Sixth Circuit has now presented Kentucky with its opportunity.


223. Id. at 959.
HOKE v. CULLINAN

RECKLESSNESS AS THE STANDARD FOR RECREATIONAL SPORTS INJURIES

by Brendon D. Miller

I. INTRODUCTION

It is a more than familiar scene in the Commonwealth of Kentucky: a group of men or women, young and old, gathered and engaged in a traditional game of pickup or recreational league basketball. From the coal fields of Eastern Kentucky to the Jackson Purchase of Western Kentucky, the Commonwealth can be fairly termed a sports-intensive society. That sporting enthusiasm is best exemplified by the rabid following of the basketball programs at both the universities of Kentucky and Louisville. During the 1994-95 basketball season, Kentucky ranked second in NCAA Division I basketball attendance, drawing 23,806 for each game in Rupp Arena, while Louisville was sixth drawing 18,657 per game to Freedom Hall.¹ No other state can boast such voluminous fan support for two separate basketball programs.²

The love of sports for many fans does not simply take the form of watching or attending events, but also includes playing the games they adore. Participation in recreational sports in the United States is an increasingly popular leisure time activity.³ Yearly, participation in recre-
ational football, basketball, softball, volleyball, tennis, and golf leagues continues to escalate. 4

Sadly, however, participation in sports does carry special risks 5 as injuries are natural occurrences. 5 A glance at any daily sports page injury report for a given sport illustrates the severity of this point. Many of the “weekend warriors” and devoted perennials who take part in recreational sporting contests never stop to think about the very real probability of injury, or the standard of liability that would be applied to an injury precipitated by the actions of another participant during play. For example, would there be liability for a broken jaw suffered from a flagrant flying elbow during a rebound, a broken bone or severe injury resulting from a player being pulled down from behind in the course of a break away layup, or a concussion suffered while taking a charge during a recreational basketball game? Would the liability be the same if the league sponsoring the game, or the competing parties, had created a rule to strictly prohibiting such actions because of recent increase in injuries?

The question to be answered in such cases is what standard for liability is needed to effectively balance the competing interests of the parties involved. The opposite interests of the parties include a need to provide the injured party a source of recovery for injuries suffered and the need for all participants to be free to compete vigorously without fear of liability in the sports which they love so much. Would an ordinary negligence cause of action accomplish the dual goals, or should sports participants be held to a lower standard of care due to the competitive nature of sports and the prevalence of injuries in many sports?

Until recently, the two-century old Kentucky common law was void of a decisive solution as to an applicable standard for sport injuries. The

4. See generally Gerjo Kok & Lex M. Bouter, On the Importance of Planned Health Education: Prevention of Ski Injury As an Example, 18 AM. J. SPORTS MED. 600 (1990) (recognizing the importance of planned health education since injuries tend to arise in the course of recreational sports); David Winzelberg, Sports Medicine: A Growing Field, N.Y. TIMES, Nov. 30, 1986, § 11 of LI, at 22 (finding that the physical fitness boom of the 1980s increased participation in recreational sports); Betty Cuniberti, Leisure Time Measured in New Survey; Americans Fall Short, Sociologist Finds, L.A. TIMES, Jan. 13, 1986, at E1 (analyzing a study which found Americans claimed that participating in recreational sports was among one of the most prevalent ways they spent their leisure time).


Kentucky Supreme Court has now resolved the issue in its November 22, 1995 *Hoke v. Cullinan* decision.

II. BACKGROUND

Depending upon the circumstances, injuries arising during the participation in sporting activities have been recognized by commentators as giving rise to at least three principle causes of action. An injury that is precipitated by a defendant who engages in intentional, unprivileged, or offensive conduct gives rise to a cause of action under the theory of intentional tort, usually in the form of an assault or battery. A cause of action is also possible if one's actions involve reckless conduct. In this instance, a defendant's actions must rise to the level of reckless disregard which requires an intentional act that a reasonable prudent person would recognize as creating an unreasonable risk of harm to another person. The third cause of action is based upon an allegation of ordinary negligence in which a person is liable for deviation from the duty owed by a reasonable person. In such situations, there is not an intention to commit the act or cause the harm, but liability may result if the defendant is found to be acting outside of the societal norm for that activity. Recovery under either the recklessness or negligence standard may be altered by the jurisdiction depending upon the current applicable status of the doctrine of assumption of risk.


8. 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES; COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS § 6.10, at 398-99 (2nd ed. 1993); Yasser, supra note 5, at 254-255.


11. RESTATEMENT (SECOND) OF TORTS § 500 (1965). The Restatement fully defines reckless disregard as:

   The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. *Id.*

12. BERRY & WONG, supra note 8, § 6.12-1, at 404.

13. *Id.* § 6.12, at 403-04. See generally KEETON ET AL., supra note 9, § 33.
A. Intentional Tort

A person is liable for a battery if he intentionally acts to harm a third party or places that party in imminent apprehension of harmful contact and that contact directly or indirectly results. Sporting activities are replete with actions that may be termed as assaults and batteries, making the requirement of proving intent in a sports case very difficult in many circumstances. When intent can be proven, the key question becomes whether the action is privileged due to participation in the sport. Privileges are generally categorized as either consensual or non-consensual, with consent having the larger impact in sporting situations.

The consent privilege acts to bar recovery by a plaintiff who voluntarily yields to contact by participating in a sporting activity. The most noted test to determine consent is the “rules of the game test” derived from section 50 of the Restatement (Second) of Torts which provides:

Taking Part in a Game.
Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better

14. RESTATEMENT (SECOND) OF TORTS § 13 (1965). The Restatement defines battery as:
An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact and (b) a harmful contact with their person of the other directly or indirectly results. Id.

15. See Griggas v. Clausen, 128 N.E.2d 363 (Ill. App. Ct. 1955) (holding a basketball player punched by an opponent was able to maintain an action for wanton and unprovoked battery); Gibeine v. Smith, 80 S.W. 961 (Mo. Ct. App. 1904) (holding an adult who voluntarily engaged in play consented to bodily contacts inherent in game); Averill v. Luttrell, 311 S.W.2d 812 (Tenn. Ct. App. 1957) (holding a batter punched by the opposing team's catcher was able to maintain an action for battery); Hogenson v. Williams, 542 S.W.2d 456 (Tex. Civ. App. 1976)(finding the striking of a player's helmet by an irate coach to be battery if unreasonable). Each court struggled in evaluating intent to injure in the actions reviewed.


17. RESTATEMENT (SECOND) OF TORTS § 10 (1965). The Restatement defines privilege as:
(1) The word “privilege” is used . . . to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability.

(2) A privilege may be based upon (a) the consent of the other affected by the actor’s conduct, or (b) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise. Id.

Under this test, participants are held to consent to the contact which is inherent in the game itself but not to contact which is beyond the rules of the game and not within the expectations of the parties. Further, the privilege will attach even though the player knows that his opponents are consistent violators of the rules and he still participates. A defendant is only liable for any actions outside the bounds of the consent privilege. Therefore, recovery for injuries suffered as a result of an intentional tort within the rules of the game is virtually non-existent, and such actions are rarely litigated.

Perhaps one of the more significant cases involving an intentional tort in a sports setting occurred in Tomjanovich v. California Sports, Inc. During a 1977 NBA game between the Houston Rockets and the Los Angeles Lakers, a fight broke out among the Rocket and Laker players. Rocket player Rudy Tomjanovich, who was acting as a peacemaker and not a participant in the fight, was punched in the face by Kermit Washington of the Lakers. The altercation caused a concussion; nose, jaw, and skull fractures; facial lacerations, loss of large amounts of blood; and leakage of spinal fluid from his brain cavity. In allowing a settlement between the parties from the complaint which claimed injury on the basis of intentional tort, the court recognized that no privilege existed for Washington as Tomjanovich's injuries were certainly non-consensual, completely unexpected on his part, and precipitated by conduct clearly outside of NBA rules. This example vividly depicts the limited type of injuries that may be compensable under the theory of

20. KEETON ET AL., supra note 9, § 18, at 112-14.
21. Id. In other words, as long as the action is within the bounds of the rules of the sport or is foreseeable (within the expectations of the participant) the privilege of consent attaches.
23. Burnstein, supra note 5, at 997.
25. Id.
26. Id.
27. Id. The holding is probably best summarized in Ordway v. Superior Court, 243 Cal. Rptr. 536 (Cal. Ct. App. 1988). The court in Ordway stated:
A verdict for Tomjanovich was clearly proper. He did assume the risk of being hit in the face by a flying elbow in the course of defending against an opponent's jump shot, suffering a painful insult to his instep by a size-16 foot descending with a rebound, or even being knocked to the court by the sheer momentum of a seven-footer driving home a slam dunk. But the scope of his consent did not extend to an intentional blow considerably beyond the expected risks inherent in basketball. Id. at 543.
intentional tort.

B. Recklessness

The difficulty of proving intent in a sports injury makes an action based upon reckless disregard of the safety of another athlete a more viable theory of recovery than intentional tort. Reckless disregard is conduct which maintains a more severe risk than mere negligence but less than an intentional tort. Professor Keeton holds that one has conducted himself with reckless disregard when he has acted with "the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." The recklessness standard is based upon section 500 of the Restatement (Second) of Torts which defines reckless behavior. A majority of jurisdictions adopt the recklessness standard of liability, but the standard is applied in differing degrees from jurisdiction to jurisdiction depending upon the classification of the sport as either a contact or non-contact sport and the classification of the level of play as either recreational (unorganized), amateur (organized), or professional.

1. State Case Law

Illinois is distinguished as the first jurisdiction to adopt the theory of recklessness in Nabozny v. Barnhill. The setting of the case was a high

29. KEETON ET AL., supra note 9, § 34, at 211-15.
30. Id. at 214.
32. See Daniel E. Lazaroff, Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 195-98 (1990) (stating that "[t]he emerging legal standard requires either recklessness or specific intent to injure by defendant," and that "[m]ost modern courts raise the threshold for tort liability and require proof of reckless behavior."); Mel Narol, Sports Participation with Limited Litigation: The Emerging Reckless Disregard Standard, 1 SETON HALL J. SPORT L. 29, 29-30 (1991) ("A trend has emerged. Courts and legislatures have espoused the view that torts which might be actionable in other arenas if negligence is shown, should . . . be actionable in the sports arena [only] if the aggrieved person demonstrates gross negligence or reckless disregard by the defendant.").
33. Narol, supra note 32, at 29-30. The commentator observes the trend of decisions to provide recovery only when a defendant demonstrates reckless disregard. Id. Also discussed are the states who have passed statutes requiring reckless disregard to obtain recovery. Id. at 38.
school soccer match, an acknowledged contact sport. Nabozny, as goalkeeper, knelt down to receive a pass and was kicked in the side of the head by defendant Barnhill. The blow resulted in permanent brain and skull damage. Barnhill's actions were a direct violation of the Federation Internationale de Football Association rules prohibiting contact with a goalkeeper while in possession of the ball in the penalty area. Nabozny advanced a claim for recovery based upon negligence which was rejected by the Illinois Court of Appeals as insufficient to state a cause of action. In supporting the standard of recklessness, the court ruled that because the two teams were organized, coached by knowledgeable instructors, and governed by recognized rules of play, a duty to follow such rules should be imposed, and failure to follow would be recklessness sufficient to state a cause of action in tort. The court further noted that the imposition of this standard by the legal system would not impose unreasonable restrictions on the fervor and spirit with which individuals participate in athletics; however, it would allow some of the typical restraints of society to accompany each athlete onto the playing field. Thus, the court felt that the standard would accomplish the dual goals of allowing the injured party to maintain an action for egregious conduct and preserving the competitive integrity of the sport, resulting in a benefit for both sides. As a result of the Nabozny decision, an action under the recklessness standard was only maintainable in Illinois for injuries arising from participation in an amateur contact sport.

In the years following the Nabozny decision, the Illinois Court of Appeals has strengthened its adherence to a strict contact versus non-contact sport dichotomy. However, the court has extended the recklessness standard to lower levels of participation by applying the standard to an injury to a player who was kicked in violation of the standing rules during a required, supervised basketball game in a high school gym class; to a child injured while playing a supervised game of "bombard-

35. Id.
36. Id.
37. F.I.F.A. (the Federation Internationale de Football Association) is the sport of soccer's international governing body which promulgates the basic rules under which the game is played.
39. Id.
40. Id. at 261.
41. Id. at 260.
42. Oswald v. Township High School Dist. No. 214, 406 N.E.2d 157 (Ill. App. Ct. 1980). The court noted that basketball, like soccer, is a contact sport, and held that because rule infractions, either deliberate or unintentional, are virtually inevitable in contact sports, the
ment” in a city summer recreational program, to a player injured in a game of floor hockey which was unorganized, unsupervised, and not played under a set group of rules, and to a player injured by a baserunner while attempting to field a groundball during an unorganized recreational softball game. The opposite result has been reached in allowing a negligence claim to be pursued by participants in non-contact sports such as skiing.

In deciding what is and is not a contact sport, the Illinois courts have ruled that the test is objective, finding unpersuasive the argument that whether a sport is a “contact sport” should be based upon the subjective expectations of the party. As a result, in Illinois, for the recklessness standard to be applied to a sports injury, it must stem from participation in a contact sport, whether recreational or amateur, with the categorization of the activity to be determined by an objective analysis.

In the years following the Nabozny decision, other jurisdictions have adopted the basic reasoning of the case and applied it to differing sports at differing levels of organization. The jurisdictions who presently apply the recklessness standard are: Louisiana, New Mexico, Missouri, imposition of the higher standard of conduct is justified. Id. at 159.

43. Ramos v. City of Countryside, 485 N.E.2d 418 (III. App. Ct. 1985). The court specifically found that the game of bombardment was a sporting event and a contact sport due to the expectant contact of being hit by a ball, finding, “[W]e do not believe there is a legal distinction between ‘bombardment’ and basketball or soccer.” Id. at 420.

44. Keller v. Mols, 509 N.E.2d 584 (Ill. App. Ct. 1987). The court dismissed the claim based upon negligence, holding that the relevant test was whether the sport was a contact sport (which floor hockey is) and not whether the activity was organized or coached. Id. at 586.


46. Novak v. Virene, 586 N.E.2d 578 (Ill. App. Ct. 1991). An injury suffered in an ordinary skiing accident does not give rise to the recklessness standard because a skier does not voluntarily consent to contact with other skiers, and as such contact is avoidable, skiing is not a contact sport and a standard of negligence is appropriate. Id. at 578.

47. Landrum v. Gonzalez, 629 N.E.2d 710 (Ill. App. Ct. 1994). The court held that softball is a contact sport, noting that it is commonplace for runners to be tagged, fielders inevitably collide, players are struck with errantly thrown balls, and fielders and runners in the course of a game collide with great frequency during the course of a normal softball game. Id. at 717.

48. Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976) (holding recklessness applies to an injury during an informal softball game precipitated by a runner trying to break up a double play in flagrant disobedience of a rule prohibiting such). The court concluded that the defendant’s conduct was a breach of his duty to play the game in a sportsmanlike manner, and that while assumption of risk would bar a recovery for foreseeable risks, it was not foreseeable that the defendant would not act in a sportsmanlike manner with a reckless lack of concern for Bourque. Id. at 42. See Yasser, supra note 5, at 255 (stating that while some commentators hold the case endorses a negligence standard, the true meaning of the case is that a participant in a sporting event assumes the risks created by a co-participant’s negligence but not by his
Massachusetts, Nebraska, California, Texas, Ohio, and New

recklessness). See also Picou v. Hartford Ins. Co., 558 So. 2d 787 (La. Ct. App. 1990) (affirming that recklessness applies to informal softball games in that participants have the duty to play the game in a reasonable manner, refraining from acts which are unexpected, unforeseeable, or which evidence reckless disregard for other players).

49. Kabella v. Bouschelle, 672 P.2d 290 (N.M. Ct. App. 1983) (ruling that in order for a player suffering injuries in an unorganized, informal game of tackle football, he/she must prove that the opponent acted with reckless disregard for his/her safety). The court held that one who voluntarily participates in athletics impliedly consents to the normal risks accompanying bodily contact permitted by the rules of the sports as such eventualities are foreseeable and inherent in the playing of the game, but the consent does not include contact of a type prohibited by rules of the sport enacted for the safety of the participants. Id. at 292. The court specifically limited the recklessness standard to informal games by stating that "[t]he players in informal sandlot or neighborhood games do not, in most instances, have the benefit of written rules, coaches, referees or instant replay to supervise or re-evaluate a player's actions." Id. at 294.

50. Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982) (applying recklessness standard to injuries arising from church picnic softball game). In adopting the recklessness standard, the court overruled Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976) which had adopted a negligence standard, citing the need for the standard in balancing the interests of the public in creating awareness that restrictions still arise on the athletic field while not curtailing the vigorous competition the game demands. Id. at 14.

51. Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989) (applying recklessness to an injury in an intercollegiate hockey game). Gauvin was hospitalized and his spleen removed after Clark pushed the butt-end of his stick into his abdomen, an act firmly outside the rules of hockey resulting in disqualification. Id. at 96. The court noted that recklessness is the correct standard of liability in a contact sport such as hockey, reasoning that:

Allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games... [p]recluding the imposition of liability in cases of negligence, without reckless misconduct furthers the policy that "vigorous and active participation in sporting events should not be chilled by threats of litigation." Id. at 97.

52. Dotzler v. Tuttle 449 N.W.2d 774 (Neb. 1990) (applying willful or reckless disregard as the standard for an injury arising in a pickup basketball game). In explicitly ruling out negligence as a cause of action, the court stated, "[A] participant in a game involving a contact sport such as basketball is liable for injuries... only if his or her conduct is such that it is either willful or with a reckless disregard for the safety of the other player, but is not liable for ordinary negligence." Id. at 779.

53. Knight v. Jewett, 834 P.2d 696 (Cal. 1992) (applying recklessness to an injury in a neighborhood game of touch football). The court held that the nature of the sport of football made the careless conduct of players is an "inherent risk" of the sport and as such, a participant in an active sport breaches a legal duty of care to other participants "only if the participant intentionally injures another player or engages in conduct that is [so reckless as to be] totally outside the range of the ordinary activity involved in the sport." Id. at 711.

54. Connell v. Payne, 814 S.W.2d 486 (Tex. Ct. App. 1991) (applying the recklessness standard to an injury in a recreational polo match). The court, in recognizing that polo was an extremely dangerous sport involving much contact, id. at 487, stated, "The risk involved in competing in contact sports is the basis for the historical reluctance of courts to allow players to recover damages for injuries received while participating in a competitive contact sport unless one participant deliberately injures another." Id. at 488.

55. Marchetti v. Kalish, 559 N.E.2d 699 (Ohio 1990) (applying the recklessness standard
Ohio and Texas have gone beyond the contact versus non-contact dichotomy and have applied the recklessness standard to injuries arising from participation in non-contact sports. In *Thompson v. McNeil*, the Ohio Supreme Court held that the recklessness standard may be applied to an injury received while playing a round of golf. The defendant in the matter, Thompson, inadvertently shanked a tee shot in the direction of McNeil who was playing in Thompson's foursome. Despite alleged efforts of Thompson to warn McNeil by yelling "fore," she was struck in the eye and suffered severe damage. The court felt that the danger of such an occurrence was inherent in the game of golf and therefore held that only injuries that are intentional or reckless and are not foreseeable in the course of the sport, even if the sport does not involve contact between the parties, may give rise to a cause of action.

The Texas Court of Appeals likewise held the recklessness standard applied to a golfing accident in *Hathaway v. Tascosa Country Club, Inc.* Though Texas and Ohio are currently the only two jurisdictions that have applied recklessness to non-contact sports, many of the jurisdictions which have formally adopted the recklessness standard have yet to address a case to a minor injured by playing the recreational game of "kick the can"). The Ohio Supreme Court reasoned that regardless of whether the plaintiff player is injured in an unorganized or organized athletic activity, vigorous competition should be encouraged. By adopting the recklessness standard, the court sought to "strike a balance between encouraging . . . free participation in recreational or sports activities, while ensuring the safety" of the participants.

The heightened standard will more likely result in affixing liability for conduct that is clearly unreasonable and unacceptable from the perspective of those engaged in the sport, yet leaving free from the supervision of the law the risk-laden conduct that is inherent in sports and more often than not assumed to be 'part of the game.'

The court further held that a player who injures another through conduct which is foreseeable, customary part of the game cannot be held liable for negligence because no duty is owed to protect the victim from that conduct.

The court held that "shanking the ball is a foreseeable and not uncommon occurrence" and the shot was not hooked intentionally or recklessly, therefore recovery was not proper against the individual golfer. However, a negligence claim against the country club was held to be appropriate.
similar to *Thompson* or *Hathaway* and could easily extend their rule based upon the reasoning in those cases.

2. Federal Case Law

The federal courts first adopted recklessness standard for recovery for sporting injuries in the infamous case of *Hackbart v. Cincinnati Bengals, Inc.*\(^{62}\) The injury giving birth to the case was precipitated during a professional football game by Charles "Booby" Clark, a player for the Cincinnati Bengals, who struck Dale Hackbart, a defensive back for the Denver Broncos, out of frustration following an interception by the Broncos.\(^{63}\) Hackbart first attempted to block Clark and then fell to his knees, where Clark, acting out of anger and frustration, struck Hackbart with this forearm in the back of the head.\(^{64}\) The trial court held that Hackbart could not recover because professional football was an inherently violent sport, and sufficient sanctions were available from the rules of the game imposing monetary fines and expulsion from the game, and those who participate must accept the risks that are involved with participation.\(^{65}\)

On appeal to the Tenth Circuit, the decision was reversed, and Hackbart was allowed a cause of action as the court found the definition of recklessness contained in section 500 of the Restatement (Second) of Torts controlling.\(^{66}\) The Tenth Circuit found that "there are no principles of law which allow a court to rule out certain tortious conduct"\(^{67}\) on the ground that the conduct occurred during the course of an inherently rough game. The court refused to give football players a "safe harbor" defense, solely due to the nature of the game, to injure others outside the rules of the game or the expectations of the participants.\(^{68}\)

The federal courts also seem to have adopted the contact versus non-contact sport dichotomy prevalent in the Illinois-style jurisdictions. In *Levine v. Clear Creek Skiing Corp.*,\(^{69}\) the Tenth Circuit applied the standard of negligence to an injury in the non-contact sport of skiing. The

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62. 601 F.2d 516 (10th Cir. 1979).
63. Id. at 518.
64. Id. at 518-19. The trial court found that Clark simply acted out of frustration and not with a specific intent to injure. Id. This exacerbates the point that the proof of intent, sufficient sustain a cause of action in intentional tort, is a tough task when the injury arises from a sporting activity.
65. Id. at 519.
66. Id. at 526. See supra note 11 for the language of § 500.
67. *Hackbart*, 601 F.2d at 520.
68. Id. at 521.
69. 557 F.2d 730 (10th Cir. 1977).
holdings in the two cases reveal that injuries resulting from participation in professional contact sports will be judged by the recklessness standard in the federal courts with non-contact sport injuries adjudged by a standard of simple negligence.

C. Negligence

In direct contrast to the standards of intentional acts and recklessness, the standard of ordinary negligence could offer a more significant chance of recovery for a participant injured as the result of participation in a sporting event. A basic cause of action in negligence in most jurisdictions consists of the elements of duty, breach, causation, and damages. Liability may be imposed if a person is proven to have failed to act reasonably under the circumstances.

While no court in the country has held that an action for a sports injury may not be maintained for intentional or reckless conduct, many courts have stated that a claim in negligence is insufficient to state a cause of action. Though the jurisdictions of Ohio and Texas have chosen to apply the recklessness standard to injuries resulting from both contact and non-contact sports, other jurisdictions choose to distinguish between contact and non-contact sports, finding it appropriate to heighten the duty owed in non-contact situations. Such jurisdictions hold that a negligence standard is sufficient to state a cause of action in non-contact sports such as skiing and golf.

At least one jurisdiction has chosen to apply a simple negligence standard to an injury arising from a recreational contact sport. The Wisconsin Supreme Court adopted the negligence standard in *Lestina v. West Bend Mutual Insurance Co.*, a case very similar on its facts to *Nabozny v. Barnhill*. Lestina suffered a severe knee injury when he was "slide tackled" by the defendant, Jerger, in violation of a well-established

70. Keeton et al., supra note 9, § 30, at 164-65.
71. Id.
72. See supra notes 34-69 and accompanying text.
73. See supra notes 57-61 and accompanying text.
76. 501 N.W.2d 28 (Wis. 1993).
78. A player "slide tackles" an opposing player by sliding on his or her knee, with the opposite foot extended forward, contacting the foot of another player in an effort to steal the
“no-sliding” rule in place in the Waukesha County Old-Timers Soccer League in which the two were participating.\textsuperscript{79}

In adopting a negligence standard, the court held that the basis of such a claim rests on the consideration of six factors.\textsuperscript{80} In determining the existence of a duty to exercise care and a breach of that duty a court must address: 1) the specific game involved; 2) the rules and regulations governing the sport; 3) the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); 4) the risks inherent in the game and those that are outside the realm of reasonable anticipation; 5) the presence of protective equipment or uniforms; and 6) the facts and circumstances of the particular case, such as the age, skill, and status of the participants and their knowledge of the rules.\textsuperscript{81} The court, in rationalizing the acceptance of the negligence standard, reasoned:

Because [the negligence standard] requires only that a person exercise ordinary care under the circumstances, [it] is adaptable to a wide range of situations. . . . Thus the negligence standard, properly understood and applied, is suitable for cases involving recreational team contact sports . . . and is sufficiently flexible to permit the vigorous competition that the defendant urges.\textsuperscript{82}

The fundamental aim and result of the negligence standard is to hold the participants in a sporting event to the same basic standard of a reasonable person during the activity as must be followed during everyday, off-the-field activities.

\textbf{D. The Role of Assumption of Risk}

The doctrine of assumption of risk plays an integral part in recovery actions for a sports injury presenting the paramount defense to the injury. The doctrine is a traditional barrier precluding recovery in situations giving rise to liability under a standard of negligence, and has also been held to preclude recovery under the recklessness standard.\textsuperscript{83} Assumption

\textsuperscript{79} Id.

\textsuperscript{80} The six factors were first utilized in Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976), involving a softball injury. The Missouri Supreme Court overruled Niemczyk in favor of the recklessness standard in Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982).

\textsuperscript{81} Lestina, 501 N.W.2d at 33.

\textsuperscript{82} Id.

\textsuperscript{83} See Kuehner v. Green, 436 So. 2d 78 (Fla. 1983) (barring recovery for injury sus-
of risk provides a privilege to tortious conduct in that a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm. Much the same as the privilege of consent in the context of intentional tort, any person who voluntarily participates in a sporting activity assumes the risk of injuries arising from foreseeable conduct on the part of another participant. The viability of the privilege is now uncertain in many jurisdictions in light of alteration by the adoption of the concepts of contributory and comparative negligence.

E. Relevant Kentucky Case Law

The number of cases addressing sports injuries in the common law of Kentucky "is hardly legion." In fact, the majority opinion in Hoke v. Cullinan addressed the matter as an issue of first impression in Kentucky. One case that may have some applicability, however, is Lexington Country Club v. Stevenson. The plaintiff, Stevenson, was struck by a golf ball while riding in an automobile being driven on the private driveway of the country club. The private drive to the club crossed the seventh fairway, and it was at this point that Stevenson was struck by an approach shot to the seventh green. The main issue of the opinion was the negligence claim against the country club for the danger-

84. RESTATEMENT (SECOND) OF TORTS § 496A (1965).
86. Id. at 205-12, 216-17.
88. No. 95-SC-042-DG, 1995 WL 692937, at *4 (Ky. Nov. 22, 1995). In deciding that this was a matter of first impression, the majority perceived as not controlling Meyer v. Smith, 428 S.W.2d 612 (Ky. 1968), which applied a negligence standard to a child injured by another child who was swinging a golf club. The court differentiated the case on its facts in that the court felt that the child swinging the club did not constitute a sporting activity. Hoke, 1995 WL 692937 at *4 n.2.
89. 390 S.W.2d 137 (Ky. 1965).
90. Id. at 139.
91. Id.

See also Tavernier v. Maes, 51 Cal. Rptr. 575 (Cal. Ct. App. 1966) (holding claim for injury during softball game by opponent sliding was barred); Ordway v. Superior Court, 234 Cal. Rptr. 536 (Cal. Ct. App. 1988) (holding claim by jockey injured when thrown from mount due to being cutoff by an opposing jockey was barred); Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986) (holding claim by jockey injured when thrown from mount due to being cutoff by an opposing jockey was barred).
ous layout of the course, but the court also mentioned that the claim of negligence against Newman, the defendant golfer, culminated in his favor at the trial court level. This precedent could be read to stand for the proposition that a standard of negligence would apply to an injury in a non-contact sport.

III. HOKE v. CULLINAN

A. Facts and Procedural History

The facts giving rise to this action came about on February 25, 1992, as the two parties to the action, William Hoke and Keith Cullinan, were playing a doubles tennis match at the Louisville Indoor Racquet Club. The match was not part of an organized league, but was an informal match involving the parties. At the time of the injury, Cullinan and Hoke were playing on opposing teams at opposite ends of the court. At the conclusion of a point during the match with Cullinan’s partner to serve the next point, Hoke returned an unused ball to the server. While Cullinan stood at the net, Hoke, standing at his own baseline, struck the ball with his racket in the direction of the server; however, instead of reaching the server, the ball struck Cullinan near the left eye. The two parties disputed the facts surrounding any warning given by Hoke as to the approach of the ball; Hoke claimed to have yelled “ball” as warning when he realized it may hit Cullinan, Cullinan claimed to have heard no such warning. Cullinan claimed to have sustained personal injury as a result of being struck by the ball.

Mr. Cullinan filed his complaint in the Jefferson Circuit Court alleging that Hoke “negligently and carelessly drove a tennis ball into plaintiff’s face and injured his left eye and other parts of his body.” The complaint also alleged “that at the time and place described, the tennis play had stopped and plaintiff was in a protected state and location.”

92. Id. at 141.
94. Id.
96. Id.
97. Id.
98. Brief for Movant at 2, Hoke (No. 95-SC-042-DG).
99. Brief for Appellee at 1, Hoke (No. 95-SC-042-DG).
101. Id.
102. Id.
moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Kentucky Rule of Civil Procedure [hereinafter CR] 12.03, arguing that the pleading failed to allege recklessness, the theory upon which Hoke felt liability for sports injuries should be based. Cullinan answered that at the time of the injury-producing accident, play was not in progress; therefore, recklessness did not apply, and a claim of simple negligence was sufficient for recovery. The trial court held that the fact that the ball was not actually in play at the time of the injury to Cullinan was not significant as the parties both agreed that the game was not over at the time of the injury and effectively the action was part of the game. The trial court, having found that the injury was part of the game, held that recklessness was therefore the appropriate standard of liability and granted the motion to dismiss.

On appeal, the Kentucky Court of Appeals reversed the trial court and ruled that in Kentucky, a pleading that alleges negligence in general is sufficient to encompass reckless conduct. The court reasoned that in Kentucky, conduct is classified as negligent, grossly negligent, or intentional, and concluded that conduct that evidences a reckless disregard for the safety of other persons is gross negligence. Further, the court held that an averment of negligence is sufficient to permit proof of gross negligence or recklessness, and it was not necessary for Cullinan to allege that Hoke acted recklessly or in a grossly negligent manner in order to resist a CR 12.03 motion to dismiss.

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103. Ky. R. Civ. P. 12.03 provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in CR 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.


105. Id.

106. Id. at *2.

107. Id.

108. Id. at *3.


B. The Majority Opinion

Writing for the majority, Justice Lambert quickly noted that the analysis of the court of appeals concerning procedural issues was of minimal importance to the issue at hand and moved on the issue of the applicable standard. Justice Lambert observed that Cullinan had admitted that recklessness was the correct standard for recovery for sports related injuries. However, in Justice Lambert's opinion, the true issue was Cullinan's position that the recklessness rule does not apply during the time between points in a tennis match, but only to that time in which the point is being contested. As Cullinan's injury occurred between points, negligence was the controlling standard.

In addressing the appropriateness of the recklessness standard, Justice Lambert first noted that this issue was one of first impression for the court, and as such, uncovered a substantial number of persuasive authority adopting recklessness as the prevailing minimum standard for civil liability. In review of the body of authority, Justice Lambert found that section 500 of the Restatement (Second) of Torts provides the controlling standard of proof to be applied to damage claims sounding in tort between players in a sports activity. Justice Lambert then recognized that the standard enunciated in that section promotes sound public policy by allowing redress in extraordinary circumstances without permitting fear of litigation to alter the nature of the game. Courts have recognized that in the heat of an athletic contest, normal energetic conduct may include accidentally careless behavior.

To back this conclusion, the court quoted the California case of Knight v. Jewett stating:

In reaching the conclusion that a coparticipant's duty of care should be limited in this fashion, the cases have explained that, in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. The courts have

111. Id.
112. Id. at *4.
113. Id.
114. Id. See supra note 88.
118. Id.
119. 834 P.2d 696 (Cal. 1992) (holding the recklessness standard appropriate for an injury during an informal game of touch football).
concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of her or her ordinary careless conduct. The cases have recognized that, in such a sport, even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule. 120

Relying upon this basis, the court recognized that as a matter of general concession, it would be "unwise to hold an athletic contest participant liable to a co-participant for ordinarily careless conduct." 121 Therefore, the court held that a participant's conduct must reach a level of recklessness before civil liability may attach. 122

As to Cullinan's contention that Hoke's return of the ball between points was not during play so as not to trigger the recklessness standard, the court plainly disagreed. Justice Lambert felt that any such categorization removing the inclusion of precatory actions from the scope of the activity would be too constrictive in defining what was actually part of the game. 124 The court, in analogizing the return of the tennis ball to the server between points to other sports, stated:

In most sports some precatory acts are required. In baseball and softball, it is necessary for the catcher to return an unstruck ball to the pitcher prior to continuation of the game. In basketball, after a goal is scored or a violation called, the offensive team must take the ball out of bounds prior to resumption of play. In volleyball, after play of a point in completed, the ball must be returned to the server on the offensive team prior to play of the next point. 125

In each of the examples given, Justice Lambert pointed out that the interruption of play was an integral part of the ongoing contest. 126 As each of the interruptions in the examples given were parts of the respective contest, so was the return of the ball by Hoke as the action was "an anticipated and routine part of the game," regardless of the momentary

120. Id. at 710.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.
In so finding the actions of Hoke were part of actual participation in the game, the court applied the recklessness standard to Cullinan's claim and affirmed the trial court's dismissal on the basis of CR 12.03.

C. The Dissenting Opinion

Writing for the dissent, Special Justice Levin argued that a claim of negligence is a sufficient standard in a sports setting. Basing his reasoning upon Lexington Country Club v. Stevenson, Special Justice Levin argued that since foreseeability and assumption of the risk issues are involved, a negligence standard is appropriate and should be determined in light of the circumstances of each fact situation.

IV. ANALYSIS

A. The Choice of the Appropriate Standard

Kentucky Supreme Court's decision to follow the recklessness standard is consistent with the very concepts of participation in sport: competitiveness, intensity, and enjoyment. The common thread that runs through the cases that have adopted the recklessness standard is the unwillingness of the court to subject the vigorous and active participation in sporting events to the scrutiny of legal analysis. The court found this basis to be controlling. The court correctly realized that the participation in athletic activities necessarily includes accidentally careless conduct due to the intensity of energetic competition, and liability for such would likely

127. Id.
128. Id. at *4-5.
129. Id. at *6.
130. 390 S.W.2d 137 (Ky. 1965). See supra notes 89-92 and accompanying text for facts and discussion of case.
chill vigorous competition. The court’s reasoning is well taken. No intensely competitive person can compete in a sporting activity while contemplating litigation. The recklessness standard fully accomplishes the dual goals compensating the recklessly injured and allowing inspired and intense participation. This standard benefits all involved in the sporting activity.

The recklessness standard, in accomplishing the dual goals, does restrict legal remedies, but it does not inhibit compensation for conduct which is truly tortious. Conduct does not give rise to liability under the recklessness standard simply because it is outside the rules of the particular sport. The court rightly recognized that compensation for conduct outside the rules of a sport may well alter the nature of the sport by deterring participants from fervently attempting conduct that is close to, but is not, a rule violation.

The key analysis in this situation would seem to be whether the conduct causing the injury is conduct that is not foreseeable or within the expectations of the participants. The distinction between conduct which is truly reckless and that which is not is best exhibited by the holdings in Tomjanovich v. California, Sports, Inc., Hackbart v. Cincinnati Bengals, Inc., and Ross v. Clouser. In both Tomjanovich and Hackbart the actions which precipitated injuries were not foreseeable or expected in the course of the game; however, the “butt-ending” in Ross is an action which is fairly foreseeable and within the expectations of a hockey player. Though there is physical contact in both basketball and football, taking a punch to the face or a forearm to the back of the head is not an action that is foreseeable from any of the actions which occur in either of the sports. In contrast, with the heavy checking that goes on in a hockey game and the extensive use by the players of their sticks while checking, there certainly is a foreseeable chance that a participant will get butt-ended by a stick and will suffer injuries. The holdings in the cases make more sense when analogized to a football running back. The run-

134. Id. (quoting Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992)).
135. Gauvin v. Clark, 537 N.E.2d 94, 97 (Mass. 1989) (holding that conduct which simply violates a safety rule is not actionable, the defendant must have acted willfully, wantonly, or recklessly in disregard for the plaintiff’s safety); Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992) (holding that even when a participant’s conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport, the imposition of legal liability rests upon the proof of recklessness).
138. 601 F.2d 516 (10th Cir. 1979).
ning back is repeatedly tackled during a football game. At times, he may have his facemask pulled, or he may be speared by another player leading and hitting with his helmet while being tackled. Such actions are outside the rules of the game, but will not give rise to liability in that such acts are foreseeable and common occurrences during a game. While those actions may be foreseeable and expected, a running back certainly does not expect to be punched or kicked during a game, and such actions would give rise to liability as they may be fairly termed as having a reckless disregard for the safety of the opposing player.

The recklessness standard also furthers fervent competition in that the presence of the standard lessens the need for participants to seek retaliation during the game or future games. The recklessness standard acts to preclude retaliation in that it gives an injured participant an avenue of redress beyond the provisions of the governing rules of the sport. With the recklessness standard in place, an injured participant knows that recovery is possible if the injuring conduct is proven to be truly egregious and in reckless disregard for his/her safety; anything short would be an acceptable part of the game. The opportunity to redress such conduct by legal action does quiet the need for and the amount of retaliation.

The commentators and jurisdictions which are proponents of the negligence standard feel that the flexibility of either the normal four prong negligence test or the six factor test of Lestina are able to address the needs of the parties in all situations. It is argued that the recklessness standard condones unethical means to win games and fosters a lack of concern for safety that mars the sport, making the spirit of fair play and sportsmanship lost values. However, the negligence standard allows a single judge or a jury to recount and impose personal judgments on a person in a sporting situation which the judge or jury neither actually participated in nor observed. This reviewability of an injury stemming from actions committed in the zeal and intensity of athletic competition could do nothing but dampen the competitiveness that makes each specific sport special to its participants and as a result, end participation is the sport. This is not the place of the courts. A very specific example of the effect that the availability of a negligence cause of action would have on

141. See supra notes 80-81 accompanying text.
142. See generally Miura, supra note 10; Lazaroff, supra note 32; Yasser, supra note 5; Burnstein, supra note 3.
143. Yasser, supra note 5, at 271-72.
athletic competition is the controversy during the 1995-96 National Football League season concerning fines assessed to defensive players for injuries to quarterbacks from so-called flagrant hits. 144 During the season, both Greg Lloyd, a linebacker for the Pittsburgh Steelers, and Vinson Smith, a linebacker for the Chicago Bears, were fined by the league for hits on opposing quarterbacks that were deemed unusually violent. 145 The fines of two men were significant, 146 but what would be the effect on those players and all others in similar positions if those quarterbacks could bring legal actions for any loss of income because of a failure to achieve incentives due to lost playing time or medical expenses from the injuries? The result would likely be tremendous. No single player would ever want to step on the field and perform for fear of liability in the courts. Defensive players would be constantly thinking about pulling up before hitting quarterbacks and simultaneously opening themselves to injury by other players performing at full speed. 147 If such actions were able to be argued, even if unsuccessful on whatever negligence factors adopted, the fear would still influence the playing of the game, and subsequently, the enjoyment for all involved.

One might well conclude that something is terribly wrong with a society in which the most commonly accepted aspects of play give rise to litigation. The lower standard of care and the heightened burden of proof that are part and parcel of the recklessness standard recognize a common sense distinction between excessively harmful conduct and the more compulsory rough contact of sports that occur freely on the playing fields and should not be second-guessed in the courtrooms of the land.

144. Peter King, Knock It Off!: While Quarterbacks Drop Like Flies, Angry Defenders Take Big Hits to the Wallet From the NFL Office, SPORTS ILLUSTRATED, Oct. 16, 1995, at 76.
145. Id. at 77-78, 81.
146. Smith was fined $12,000 for a hit in which he allegedly forearmed St. Louis Rams quarterback Chris Miller in the head on September 24. Id. at 77. Lloyd was also fined $12,000 for launching himself airborne and hitting Green Bay Packer quarterback Brett Favre after releasing a pass on August 12. Id. at 81.
147. The league imposition of fines, definitely had the effect of chilling competition. After the fine to Lloyd, the Steelers felt the effect, as at mid-season the team was seventh in the league in sacks with the same personnel that led the league in sacks during the 1994-95 season. Id. at 81. Steelers defensive lineman Brentson Buckner on the situation commented, "Now I'm thinking, if I hit him here or hit him there, it's going to be a fine. Second-guessing slows you up." Id.
While the fact that the Kentucky Supreme Court chose to follow the recklessness standard is indeed the most significant attribute of this case, the more subtle holding of when the standard is applicable is very important. The recognition of the court that precatory actions are part of the game and subject to the recklessness standard\textsuperscript{148} is very crucial in the area of sports law. Precatory actions, such as returning a tennis ball to a member of a serving team, are structurally and logically part of the sporting activity and, in fact, are an integral part of almost all sports. The court’s holding both affirms the obvious, that precatory actions are actual parts of a given sport, and furthers the idea of uninhibited competition in that a player does not have to constantly worry himself with substantial care while preparing to participate in the relevant portion of the contest.

Perhaps the most interesting and far-reaching aspect of the opinion is that the court chose to apply the recklessness standard to the sport of tennis, which is generally viewed as a non-contact sport.\textsuperscript{149} In so applying the standard, the court did not deal with the contact versus non-contact dichotomy, referring only to tennis as an “athletic contest.”\textsuperscript{150} How should the phrase “athletic contest” as used in the opinion be construed? Does it encompass all contact as well as non-contact sports? This aspect is further complicated by the use of a negligence standard in the traditional non-contact sport of golf in \textit{Lexington Country Club v. Stevenson}.

The court, in adopting recklessness, failed to even address the case. The failure of the court to address the case may be based upon the factual difference from cases such as \textit{Thompson} and \textit{Hathaway},\textsuperscript{152} in that the plaintiff in \textit{Stevenson} was not a participant in the sport, but a simple passer-by.\textsuperscript{153} Also, it must be kept in mind that the decision involved an unorganized, recreational match.\textsuperscript{154} The best reading of the decision, as inferred from the lack of treatment of the issue of a contact sport, the failure to even mention the factual difference of the \textit{Stevenson} case, and the usage of broad wide-ranging language by the court, is that the recklessness standard would apply to all sporting contests, contact and

\textsuperscript{149} Lazaroff, \textit{supra} note 32, at 214.
\textsuperscript{150} Hoke, 1995 WL 692937, at *3.
\textsuperscript{151} 390 S.W.2d 137 (Ky. 1965). \textit{See supra} notes 89-92 and accompanying text.
\textsuperscript{152} \textit{See supra} notes 57-61 and accompanying text for facts and discussion of the cases.
\textsuperscript{153} Stevenson was a passenger in a car passing through the golf course, not a participant playing a round of golf at the time of the injury. \textit{Stevenson}, 390 S.W.2d at 139.
\textsuperscript{154} Hoke, 1995 WL 692937, at *1.
non-contact, recreational and other levels, much the same as the standard that Ohio and Texas have adopted.

C. The Impact of Assumption of Risk and Comparative Negligence

Though the court was not called upon in the case to address the effect of any defenses to recovery under the recklessness standard, other states have experienced difficulty in this area. As discussed earlier, the doctrine of assumption of risk plays an integral part in the context of a sporting injury.\textsuperscript{155} Many states have altered the doctrine of assumption of risk by the institution of the principles of contributory and comparative negligence, but have not totally abolished the defense.\textsuperscript{156} The Commonwealth of Kentucky, on the other hand, has totally abolished assumption of risk as a complete bar to a claim in tort,\textsuperscript{157} and uniquely did so before the adoption of the current doctrine of comparative negligence.\textsuperscript{158} By abolishing assumption of risk as a defense well before the adoption of comparative negligence, no issue arises as to the effect of comparative negligence on the use of assumption of risk as an independent defense.\textsuperscript{159} Therefore, Kentucky will not face the struggles other jurisdictions in deciding to what extent assumption of risk has survived.\textsuperscript{160} The absence of the doctrine of assumption of risk in Kentucky makes the application of comparative fault principles to a sporting injury case clear. The traditional rule has been to preclude application of the defense of contributory negligence where the defendant's conduct is found to have been willful, wanton, or reckless.\textsuperscript{161} This view may be appropriate de-

\textsuperscript{155} See supra notes 83-86 and accompanying text.

\textsuperscript{156} See generally VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE (3d ed. 1994); HENRY WOODS, COMPARATIVE FAULT (2d ed. 1987).

\textsuperscript{157} Parker v. Readden, 421 S.W.2d 586 (Ky. 1967). In deciding to abolish the doctrine, the court stated: "We have reached the point in this discussion where we must say what we are going to do about assumption of risk. The answer is that we are going to abolish it." Id. at 592. The court, in applying contributory negligence which was the law of Kentucky at that time, felt that minor adjustments in the application of contributory negligence would fully cover all issues that would be involved. Id.

\textsuperscript{158} The Kentucky Supreme Court adopted the doctrine of comparative negligence by judicial decision in Hilen v. Hays, 673 S.W.2d 713 (1984). After reviewing the attributes of the doctrine, the court adopted "pure" comparative negligence. Id. at 719. Under "pure" comparative negligence a claimant's recovery is reduced by the amount of fault attributable to him, but he may recover regardless of whether his fault is equal to or greater than that of the defendants. WILLIAM S. HAYNES, KENTUCKY JURISPRUDENCE, TORTS § 30-4(g), at 394 (1988).

\textsuperscript{159} Id., § 30-10(b), at 500.

\textsuperscript{160} See Larazoff, supra note 32, at 205-12, 216-17 for a full analysis of the effect comparative negligence has had on cases involving sports injuries.

\textsuperscript{161} KEETON ET AL., supra note 9, § 67, at 477-78.
dependent upon the actions and culpability of the injured party. The key question seems to be whether the injured party was negligent or reckless himself in the actions that precipitated the injury. A participant in a sporting activity who does not engage in negligent or reckless behavior precipitating the injury that is caused by the intentional or reckless conduct of a defendant, does not generally assume the risk of or consent to such actions as they are neither foreseeable or expected.\textsuperscript{162} Therefore, when one does not engage in negligence the apportionment of fault under comparative negligence is mute and the doctrine is inapplicable. However, when the injuring party engages in conduct which is fairly labeled as intentional, willful, wanton, or reckless, and the other party only engages in ordinary negligence, then the rule should be that an apportionment of liability between the parties due to the comparative negligence doctrine is permitted, assuming, of course, that the plaintiff's negligence was a substantial factor in causing the damages.\textsuperscript{163}

With the abolition of the defense of assumption of risk in Kentucky, the only barrier to full recovery for injuries that are precipitated by reckless behavior is the apportionment of fault and the decrease of recovery due to the fault of the injured party under comparative negligence.

\textit{D. The Practical Effects of the Decision}

As a result of the decision, what is the practical effect for a member of the Kentucky Bar who is visited by a client who has suffered an injury in a sporting event? The basic question is whether or not the activity is indeed a sporting event. If the practitioner does indeed determine that the injury was due to involvement in a sporting event, then by the broad language of the decision, all actions, including precatory actions, are covered by the recklessness standard. But, a practitioner should keep in mind that there are possible exceptions to this rule. Due to the uncertainty of the scope of the \textit{Stevenson} decision, a claim of negligence may succeed for injury in a non-contact sport such as golf, or negligence may be applicable for a higher level of participation other than recreational.

The true lesson to be learned from the case is the value of pleading alternatively. The best avenue to pursue in the pleading of such a claim is to plead all three causes of action depending upon the attendant circumstances. If one standard is inapplicable to the facts, the other is waiting in the wings to provide a legitimate cause of action. With the recklessness


\textsuperscript{163} HAYNES, supra note 158, § 30-10(c), at 502.
standard now fully enunciated and adopted by the court, failure to plead alternatively could result in an action for malpractice if a motion to dismiss is granted on a valid claim. It could also result in a legitimate plaintiff being denied his or her day in court, just like Mr. Cullinan.

V. CONCLUSION

The question as to which standard is the most appropriate to address the needs of the sporting public still abounds. Commentators and jurisdictions on both sides of the recklessness or negligence argument feel they have the right solution to the puzzle, but it still remains for each to adopt the more appropriate of the standards in their discretion. For the benefit of the sports society as a whole and the participants therein, the correct standard is that of the generally accepted intentional tort cause of action and recklessness toward the safety of others. Many times the general public has the perception that rules of law are not based upon usefulness to the public, but the recklessness standard is plainly useful and logical in its application. Even the most unlearned person in the law can comprehend that egregious acts which are blatantly outside the rules of a sport and beyond the expectations of the participants may give rise to legal liability, while actions that are outside of the rules but customarily accepted as purely incidental to the game may give rise to penalties inside the structure of the sport but not to legal liability. The standard realizes that injuries are part and parcel of any sporting activity in which contact between the participants or the necessary equipment used in the sport is prevalent or incidental. While normal injuries from contact in the course of the game are not compensable, recovery may be sought for actions which can be proven to be truly reckless or intentional.

Fortunately, the Kentucky Supreme Court has properly chosen to follow the recklessness standard, instead of following the lead of the Wisconsin Supreme Court and choosing the negligence standard. The decision allows a participant in a recreational sporting activity to perform with the utmost intensity to prevail in the contest without the apprehension that any wrong move could spawn liability, quelling competitive juices and enjoyment along the way. This decision by the Kentucky Supreme Court is greatly appreciated by recreational sports enthusiasts and will doubtlessly benefit all of sporting society in the Commonwealth of Kentucky. As a result of this decision, the regular sight of a neighborhood football game or an intense game of one-on-one hoops shall remain hotly contested and enjoyable for all.
NELSON STEEL CORP. v. MCDANIEL

DISCRIMINATION AGAINST EMPLOYEES WHO HAVE FILED WORKERS' COMPENSATION CLAIMS AGAINST PREVIOUS EMPLOYERS

by Jeffrey K. Neiheisel

I. INTRODUCTION

Employment represents one thing that many Americans have in common. For most of us, our jobs are where we spend much of our time and expend most of our energy. Unfortunately, work is also one of the major causes of personal injury in this country. In the early part of this century, the state legislatures responded to a cry for assistance from the work force. Workers' compensation was born.

Workers' compensation envisions a series of trade-offs between workers and management. Management limits potential liability for injured workers, while workers receive limited compensation for their injuries without having to prove fault. Further, society benefits because injured workers do not become a burden on society.

Under the current workers' compensation scheme, most employers pay a premium to insure their companies against the liabilities created by the workers' compensation system. This premium is generally based on the amount of past claims and the potential for future claims. This gives employers a financial incentive to provide a safe work environment. However, it also has the potential for abuse. Employers may seek to discourage workers from exercising their rights to file claims or they may retaliate against an employee after a claim has been made.

In the late 1970's and early 1980's, states began to respond to this type of retaliation against workers. Most courts recognized that the sys-

1. GLENN L. SHILLING, WORKERS COMPENSATION IN KENTUCKY 6 (University of Kentucky Continuing Legal Education 1991).
2. Id. at 7.
3. Id. at 6-7.
4. Id. at 6.
5. Id. at 7. Employers must either insure the potential workers' compensation liability through a private insurance carrier or join a self-insured group.
6. See Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983). See also Lozier
tem would only work as intended if employees were truly free to exercise their rights to compensation. Either by statute or judicial decision, many states have recognized a cause of action against an employer who retaliates or discriminates against an employee who has filed a claim for workers’ compensation.

_Nelson Steel Corp. v. McDaniel,_ decided by the Kentucky Supreme Court, is the most recent in a long series of cases dealing with discharge in retaliation for filing a workers’ compensation claim. In _Nelson Steel_, the court had to decide whether it would allow a cause of action for retaliatory discharge when the employee filed the compensation claim against a previous employer.
II. BACKGROUND

The Supreme Court of Kentucky recognized the tort of wrongful discharge in retaliation for pursuing a workers' compensation claim in *Firestone Textile Co. v. Meadows.* In that case, Tom Meadows was employed by Firestone as a maintenance specialist in its Bowling Green, Kentucky plant. He suffered a back injury and filed for workers' compensation benefits. Thereafter, Meadows testified that initially he was assigned light-duty work, but was eventually assigned work that was beyond his physical capacity to perform. He was then terminated and filed suit alleging that this termination was in retaliation for filing the workers' compensation claim.

The court determined that the issue presented in this case was whether "a complaint seeking damages for wrongful discharge because an employee was terminated for pursuing a claim under [Kentucky Revised Statutes] Chapter 342 for workers' compensation state[s] a cause of action?" The court adopted an exception to the common law employment-at-will doctrine for the violations of public policy. During its

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12. 666 S.W.2d at 730.
13. Id. at 731.
14. Id.
15. Id.
16. Id.
17. Id.
18. This doctrine states that "an employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." Id. (citing *Production Oil Co. v. Johnson*, 313 S.W.2d 411 (Ky. 1958) and *Scroghan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977)).
19. Id.
20. 335 N.W.2d 834 (Wis. 1983). *Brockmeyer* involved a former employee of Dunn & Bradstreet who contended that he was terminated in an unlawful manner. Id. at 836. Brockmeyer was a manager of Dunn & Bradstreet's facility in Milwaukee and recently separated from his wife. Id. He became romantically involved with his secretary which eventually prompted the company to discharge her after unsuccessfully trying to have her transferred. Id. The secretary filed a sexual discrimination lawsuit against Dunn & Bradstreet. Id. Dunn & Bradstreet requested that Brockmeyer submit a written report detailing what had occurred between him and the secretary, which he refused to submit. Id. There were also allegations that the company requested him to perjure himself at the sexual harassment trial. Id. at 836, 842-43. Eventually, the company settled the suit with the secretary for $12,000. Id. at 836. Three days later Brockmeyer was discharged and was offered $8,500 if he would sign a release agreeing not to sue the company. Id. The trial court implied a duty of good faith to the employer. Id. at 837. The Wisconsin Supreme Court disagreed with the trial court and determined that the "good faith" approach was too amorphous and employers must know the bounds of the employment-at-will doctrine. Id. at 838. The court adopted the public policy exception to
study of Brockmeyer, the court quoted the following rule of law:

[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law. . . . The public policy must be evidenced by a constitutional or statutory provision. An employee cannot be fired for refusing to violate a statute. Employers will be held liable for those terminations that effectuate an unlawful end. 21

Therefore, the court established three factors to determine whether there is an exception to the employment-at-will doctrine:

1) The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
2) That policy must be evidenced by a constitutional or statutory provision.
3) The decision of whether the public policy asserted meets these criteria is a question of law for the courts to decide, not a question of fact. 22

The court justified this new approach by stating that it had already recognized a cause of action for wrongful discharge based upon a public policy implicit in an act of the legislature in Pari-Mutual Clerks' Union v. Kentucky Jockey Club. 23 The court also based its decision on a statute which provides for a cause of action for the violation of any Kentucky statute. 24 Therefore, the court felt that this change was justified. 25

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21. Firestone, 666 S.W.2d at 731 (quoting Brockmeyer v. Dunn & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983)).
22. Id. See also Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985).
23. 551 S.W.2d 801 (Ky. 1977). This case involved an employee of Latonia Raceway who was allegedly fired because he associated with a union. Id. at 802. The National Labor Relations Board declined to take jurisdiction over the matter. Id. The plaintiff then filed suit in Kentucky circuit court alleging a violation of Kentucky law which allows employees to collectively bargain with their employers without reprisals. KY. REV. STAT. ANN. § 336.130 (Baldwin 1993). The circuit court enjoined further violations of the employee's rights. Pari-Mutual Clerks, 551 S.W.2d at 802. The employer challenged the circuit court's equitable remedy because the statute only authorized the Commissioner of Labor to intervene in labor disputes and not the circuit court. Id. at 803. The Kentucky Supreme Court agreed that the circuit court was without power to enjoin violations but stated, however, that KY. REV. STAT. ANN. § 446.070 (Baldwin 1993) provides for legal damages that result from the violation of KY. REV. STAT. ANN. § 336.130 (Baldwin 1993). Pari-Mutual Clerks, 551 S.W.2d at 803.
24. KY. REV. STAT. ANN. § 446.070 (Baldwin 1993). This section states: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation." KY. REV. STAT. ANN. § 446.070 (Baldwin 1993).
25. The dissenting opinion did not believe that Pari-Mutual could serve as a basis for a public policy exception. Firestone, 666 S.W.2d at 734 (Stephens, J., dissenting). In fact, the opinion stated that "[t]here is absolutely nothing in Pari-Mutual which can be used as authority for the majority opinion." Id. (Stephens, J., dissenting).
The court then examined the policy behind the Kentucky workers' compensation laws. The court stated that "[i]mplicit in [Sections 342.395 and 342.335], and in the Act as a whole, is a public policy that an employee has a right to be free to assert a lawful claim for benefits without suffering retaliatory discharge." The court went on to state that:

In enacting . . . Chapter 342 of the Kentucky Revised Statutes, the legislature set forth a comprehensive scheme for compensating employees injured on the job. It is an important public interest that injured employees shall receive, and employers shall be obligated to pay, for medical expenses, rehabilitative services and a portion of lost wages. Injured employees should not become public charges. If that is the public policy of Kentucky, and it is, then action on the part of an employer which prevents an employee from asserting his statutory right to medical treatment and compensation violates that policy. The only effective way to prevent an employer from interfering with his employees' rights to seek compensation is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law.

The court made it clear that it was not abandoning the common law terminable-at-will doctrine, but was exercising its discretion to alter the common law based on a statutory scheme.

The Firestone decision was handed down on November 3, 1983. On February 1, 1994, Representative Louis Johnson of Owensboro introduced House Bill 508 in the Kentucky House of Representatives. House Bill 508 created a new section of the Kentucky Revised Statutes and stated:

No employee shall be harassed, coerced, transferred, discharged or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under [the Workers' Compensation] chapter.

The word "transferred" was deleted by an amendment offered by the House Labor and Industry Committee. The bill passed the House of Representatives on February 17, 1984 by a vote of seventy-four for

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27. Firestone, 666 S.W.2d at 732.
28. Id. at 733-34.
29. Id. at 732-33.
30. Id. at 730. A motion for rehearing was denied on April 19, 1984. Id.
33. Id. at 361, 561.
passage and four votes against passage. That House bill is currently codified in Kentucky Revised Statutes section 342.197. The law now reads:

(1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.

(3) Any individual injured by any act in violation of the provisions of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record.

The next major case in this area decided by the Kentucky Supreme Court was Grzyb v. Evans. In that case, the plaintiff, William Evans, alleged that he was terminated from his position with King's Daughters Hospital because he fraternized with a female employee. Evans based this public policy exception on the Kentucky's Civil Rights statute prohibiting discrimination based on sex. The court found that because the statute not only prohibited certain actions, but also provided for their exclusive remedy through the Kentucky Commission on Human Rights, the statute preempted the field of its application. Thus, the statute could not serve as the basis for a public policy exception.

The court also expressed its discontent with Brown v. Physicians Mutual Insurance Co., another recent court of appeals case. The court

34. Id. at 679.
35. KY. REV. STAT. ANN. § 342.197 (Baldwin 1993).
36. Id.
37. 700 S.W.2d 399 (Ky. 1985).
38. Id. at 400.
40. Grzyb, 700 S.W.2d at 401.
41. Id.
42. Id.
43. 679 S.W.2d 836 (Ky. Ct. App. 1984). This case involved a former employee of Physicians Mutual Insurance Company who contended that she was fired after she attempted to report procedural irregularities and improper conduct on the part of a salesman to the Insurance Commissioner. Id. at 838. The court of appeals based the public policy on KY. REV. STAT. ANN. § 304.2-230(4) (Baldwin 1987), which requires employees of insurance companies to cooperate with an investigation by the Department of Insurance. Id. The court of appeals remanded the case back to the trial court. Id. The judgment of the court of appeals was not appealed to the Kentucky Supreme Court. Grzyb, 700 S.W.2d at 400.
44. Id.
stated that, because there was a "misunderstanding" of the holding in
Firestone, the court would adopt the position of the Michigan Supreme
Court in Suchodolski v. Michigan Consolidated Gas Co.\(^{45}\) The Michigan

only two situations exist "where grounds for discharging an employee are
so contrary to public policy as to be actionable" absent "explicit legislative
statements prohibiting the discharge." First, "where the alleged reason for
the discharge of the employee was the failure or refusal to violate a law in
the course of employment." Second, "when the reason for a discharge was
the employee's exercise of a right conferred by well-established legislative
enactment."\(^{46}\)

This language represents a significant limitation of the public policy
exception in Kentucky.

The Kentucky Supreme Court seems to have expanded somewhat the
scope of the workers' compensation wrongful discharge doctrine in First
Property Management Corporation v. Zarebidaki.\(^{47}\) Before this case
there was some confusion regarding whether the workers' compensation
claim had to be the only reason the employee was discharged or whether
it merely had to be one of the reasons that the employee was dis-
charged.\(^{48}\) The court eliminated this confusion by stating that the issue
should be framed in terms of whether the "workers' compensation claim
was a substantial and motivating factor but for which the employee would
not have been discharged."\(^{49}\)

\(^{45}\) 316 N.W.2d 710 (Mich. 1982). Suchodolski involved a former employee of Michigan
Consolidated Gas who alleged that he was terminated for reporting questionable accounting
practices, such as shifting losses in the appliance sales to the rate payers and selling office
equipment and automobiles to employees at very low prices. Id. at 711. Suchodolski attempted
to base the public policy argument on the Code of Ethics of the Institute of Internal Auditors
and Michigan Public Service Laws (Mich. Comp. Laws § 483.113 (West 1987)). Id. at 712.
The Michigan Supreme Court determined:

[T]his case involve[d] only a corporate management dispute and lack[ed] the kind of
violation of a clearly mandated public policy that would support an action for retaliatory
discharge. The code of ethics of a private association does not establish public policy.
Nor is the regulation of public utilities sufficient to sustain the plaintiff's action. The
regulation of the accounting systems of utilities is not, as is the workers' compensation
statute, directed at conferring rights on the employees.

Id. at 696-97.

\(^{46}\) Gryb, 700 S.W.2d at 400-02. (quoting Suchodolski, 316 N.W.2d at 711-12). It must
be noted that the original language from the Michigan Supreme Court was much less forceful.
See Suchodolski, 316 N.W.2d at 711-12. The excerpts that the Kentucky Supreme Court used
to form its holding were scattered throughout the original opinion.

\(^{47}\) 867 S.W.2d 185 (Ky. 1993).

\(^{48}\) Id. at 186-87.

\(^{49}\) Id. at 186.
The court also addressed the question of whether the employee actually had to file for workers' compensation to receive the benefits of Kentucky law. The court looked beyond the literal language of the statute and held that the employee had to only "intend to file and pursue a lawful workers' compensation claim."  

III. FACTS

The plaintiff, Dale McDaniel, filed two workers' compensation claims while working for a previous employer. In the spring of 1991, he began working for Nelson Steel, pursuant to an oral contract. On December 26, 1991, the day after Christmas, he received written notice from Larry Taylor, his supervisor, that Nelson Steel had terminated his employment. The alleged termination letter was enclosed with his last paycheck and read as follows:  

Red,

As you have probably heard our [workers' compensation] insurance rates tripled last month. Since you have two previous injuries to your knee and two claims we will be unable to employ you in the future. I [truly] regret this since I felt you were one of the most [qualified], [energetic] people working on the erection crew but [economics] doesn't permit us to retain you at this time. Please feel free to call on me if there is anything I can do to help.

Larry

McDaniel also produced an affidavit from Jamie Asher, his former immediate supervisor and a foreman at Nelson Steel stating that Asher was told by the owner of Nelson Steel that the company intended to investigate whether any of its employees had pursued a workers' compensation claim

50. Id. at 189.

51. Id. KY. REV. STAT. ANN. § 342.197 (Baldwin 1993) requires that "[n]o employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever FOR FILING AND PURSUING a lawful claim under this chapter." Id. (emphasis added). The court adopted the reasoning of the court of appeals in Overnight Transp. Co. v. Gaddis, 793 S.W.2d 126 (Ky. Ct. App. 1990) where the court read the statute with an "or" instead of the "and" because it would better effectuate the legislature's intent. Id. at 131-32.


54. Id.

55. Nelson Steel, 898 S.W.2d at 66.

in the past. Asher also indicated that his immediate supervisor and operations manager, “advised him that they were going to have to get rid of the employees who had made former workers’ compensation claims.”

McDaniel filed a wrongful discharge action against Nelson Steel in Fayette Circuit Court alleging that the sole reason that he was terminated from Nelson Steel was because he sought and obtained workers’ compensation benefits from his former employer and that Nelson Steel’s actions were in violation of Kentucky Revised Statutes section 342.197. Nelson Steel, on the other hand, contended that McDaniel “was an at-will employee . . . laid off from his employment at Nelson Steel as a result of a reduction in work load and work availability for employees.”

Nelson Steel made a motion for summary judgment which came for an oral hearing on December 18, 1992 and was granted by Judge Paisley. The judge based his decision upon the conclusion that even if Nelson Steel terminated McDaniel as a result of his prior workers’ compensation claims, he did not have a cause of action under section 342.197 because that statute applies only to claims against current employers.

McDaniel appealed this decision to the Kentucky Court of Appeals. The court of appeals recognized that there was no Kentucky case law specifically addressing the prior employer question, but that case law from other jurisdictions would offer some guidance.

The court began by considering the case of Goins v. Ford Motor Co. In that case, the plaintiff had filed for workers’ compensation benefits while working at General Motors Corporation in 1971. He then applied for employment at Ford’s Woodhaven plant. The medical history forms asked: “Have you ever filed a state compensation claim due to industrial accident or disease?” Goins did not disclose that he had applied for benefits because interviewers at other Ford plants had told

57. Id. at 4.
58. Id. (quoting Asher’s affidavit).
59. Id. at 2-3; KY. REV. STAT. ANN. § 342.197 (Baldwin 1993).
60. Nelson Steel, 898 S.W.2d at 67.
62. Id.
63. Id.
64. Id. at 1.
65. Id. at 5.
67. Id. at 187.
68. Id.
69. Id.
him that an affirmative answer may cause Ford to not offer him the job.\(^70\) Ford hired him as a labor relations employee for the Woodhaven plant.\(^71\) Goins and another employee were responsible for developing a computer program which erroneously caused the employees at the plant to be underpaid.\(^72\) Later, Goins was fired because of the computer error and because he falsified his medical history forms.\(^73\) However, his supervisor testified that Goins would not have been fired just because of the computer error.\(^74\)

One of the theories that Goins proceeded under was that he was unlawfully discharged because he had filed a previous workers' compensation claim.\(^75\) The jury awarded Goins $450,000 on the workers' compensation claim.\(^76\) Ford appealed this decision contending, inter alia, that "there exists no cause of action for wrongful discharge of an employee for filing a workers' compensation claim during previous employment."\(^77\)

The Michigan Court of Appeals stated:

We find no reason, as defendant suggests, to limit this rule only to employers who fire employees who file claims against them rather than against previous employers. The public policy extends to situations such as this where the employee argues an unlawful or retaliatory discharge because he or she filed a workers' compensation claim against any employer, including a previous employer.\(^78\)

The Kentucky Court of Appeals also considered the case of Darnell v. Impact Industries, Inc.\(^79\) In that case, the plaintiff, Norma Darnell, had filed for, but not received, workers' compensation benefits while working at Federal-Huber.\(^80\) She was laid off at Federal-Huber and applied for

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\(^70\) Id. Goins had previously applied at three other Ford plants and at Ford's world headquarters. \(\text{id.}\)

\(^71\) Id.

\(^72\) Id.

\(^73\) Id.

\(^74\) Id.

\(^75\) Id. This cause of action was based on Suchodolski v. Michigan Consol. Gas Co., 316 N.W.2d 710 (Mich. 1982), which was the same case that was quoted extensively by the Kentucky Supreme Court in Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985). See supra notes 45-46 and accompanying text.

\(^76\) Goins, 347 N.W.2d at 187.

\(^77\) Id.

\(^78\) Id. at 189. The Kentucky Court of Appeals quoted the same language in its opinion. Nelson Steel, No. 93-CA-0283-MR, slip op. at 6.

\(^79\) 473 N.E.2d 935 (Ill. 1984).

\(^80\) Id. at 936.
The application contained the following questions: "Have you had a serious illness or injury in the past five years?" and "Have you ever received compensation for injuries?" Darnell answered "no" to both questions. After Darnell began her employment at Impact, one of her co-employees informed Janet Spears, the personnel manager, that Darnell had sustained injuries at her previous job. Spears confirmed this information and summoned Darnell to discuss the injuries and the claim. Darnell insisted that her injuries were not serious and that she had not received any compensation benefits. The next day Darnell was fired.

The Illinois Court of Appeals had not discussed the issue of whether there was a cause of action for wrongful discharge of an employee for filing a workers' compensation claim during previous employment. However, the Illinois Supreme Court did address the issue. The defendant argued that the tort of retaliatory discharge contemplates that the filing of the workers' compensation claim and the discharge involve the same employer and employee. Further, the defendant argued that the

81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
89. Darnell v. Impact Indus., Inc., 457 N.E.2d 125, 127 (Ill. App. Ct. 1983), aff'd, 473 N.E.2d 935 (Ill. 1984). However, the dissenting opinion disagreed with the majority's failure to address whether there was a cause of action in the first place. Id. at 128 (Reinhard, J., dissenting). The dissent stated:

I have doubts that "retaliation" is involved here since the workers' compensation claim was filed while plaintiff was an employee of a previous employer and she was not discharged for an activity performed while in the employ of defendant. Nonetheless, I would concede that the right of an employer to terminate an employee under the generally accepted at will employment rule is subject to exception when such termination is in contravention of a clearly mandated public policy. If, for example, an employee could prove that his employer had a fixed policy to terminate any employee who it learned had previously filed a workers' compensation claim and exercised rights under the Workers' Compensation Act, a cause of action for wrongful discharge should lie if such an employee were terminated solely for making a prior claim. Here, I believe, the facts fall far short of that situation, and the trial court correctly granted defendant's motion for a directed verdict.

Id. (Reinhard, J., dissenting). Therefore, the dissenting judge apparently would recognize a cause of action if presented with the facts in Nelson Steel Corp. v. McDaniel, 898 S.W.2d 66 (Ky. 1995).
90. Darnell, 473 N.E.2d at 937.
91. Id.
discharge of an employee because of a claim filed against a previous employer does not violate a "clearly mandated public policy." The plaintiff, on the other hand, argued that "the evil resulting from the discharge of an employee for having filed a workers' compensation claim against a prior employer is as great as if the discharge has been effectuated by the prior employer."

The Illinois Supreme Court agreed with the plaintiff stating:

We perceive no distinction between the situation where an employee is discharged for filing a workers' compensation claim against the defendant employer and one where the employer discharges the employee upon discovering that the employee had filed a claim against another employer. In either situation a retaliatory discharge is equally offensive to the public policy of this State as stated in the Workers' Compensation Act . . . .

To hold that the tort of retaliatory discharge requires that the workers' compensation claim be made against the discharging employer would seriously undermine the comprehensive statutory scheme which provides "for efficient and expeditious remedies for injured employees."

In Nelson Steel, the Kentucky Court of Appeals concluded that:

92. Id. (quoting Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981)).
93. Id.
94. ILL. REV. STAT. ch. 48, par. 138.4(h) (1983). Paragraph 138.4(h) read as follows:
   It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.
   It shall be unlawful for any employer, individually or through any insurance company or service adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

Note that the above language is presently codified in ILL. REV. STAT. ch. 820 par. 305/4(h)(1993).


See also Groark v. Thorleif Larsen & Son, Inc., 596 N.E.2d 78 (Ill. App. Ct. 1992) and Fiasza v. TNT Holland Motor Express, Inc., 159 F.R.D. 672 (N.D. Ill. 1994) (applying the holding of Darnell that an employee can state a valid cause of action for retaliatory discharge against an employer who discharges an employee for filing a workers' compensation claim against a former employer).
In light of the broad and unambiguous language of the statutory proscription, we find no basis for limiting the protection of section 342.197 to claims against current employers. Had the legislature intended to limit the applicability of this proscription to claims against current employers, it could have utilized the simple expedient of language of limitation. We have no authority to read into a legislative enactment limitations that are not apparent from the words selected by the drafters.

Therefore, the court of appeals reversed the judgment of the Fayette Circuit Court and remanded the case.

IV. THE KENTUCKY SUPREME COURT’S REASONING

The majority recognized that the question presented was essentially one of statutory construction. However, the court then abandoned its statutory construction and stated that the Firestone case both established the basis for recovery and the limitations on claims of this nature. Further, the court stated that:

Grzyb v. Evans specified a clear intent on the part of this court to limit employees’ claims for wrongful discharge to those situations where the evidence established the employer was retaliating against the employee for exercising a right conferred by well-established legislative enactment or for refusing to violate the constitution or a statute.

The court concluded that the evidence presented failed to meet these criteria.

The court recognized that the General Assembly has the power to alter the terminable-at-will doctrine. However, the court found that neither

96. KY. REV. STAT. ANN. § 342.197 (Baldwin 1993). See supra text accompanying note 36 for the text of this statute.
98. Id. at 7.
99. The majority opinion was written by Leibson, J. and was joined by Stephens, C.J., Lambert, J., & Reynolds, J. Nelson Steel, 898 S.W.2d at 66, 70. The dissenting opinion was written by Stumbo, J. and was joined by Spain, J. & Wintersheimer. J. Id. at 70.
100. Id. at 67-68. “The narrow issue before us is to decide whether the phrase ‘for filing and pursuing a lawful claim under this chapter’... extends to legitimate claims against previous employers which the present employer perceives as constituting an economic risk in the form of higher premiums for its workers’ compensation insurance coverage.” Id. at 68. (quoting KY. REV. STAT. ANN. § 342.197(1) (Baldwin 1993)).
102. Nelson Steel, 898 S.W.2d at 68.
103. 700 S.W.2d 399 (Ky. 1985). See supra note 37 and accompanying text.
104. Nelson Steel, 898 S.W.2d at 69.
105. Id.
106. Id. See supra note 18.
section 342.197(1)\textsuperscript{107} nor any other workers' compensation law provides a "well-defined public policy" on which a wrongful discharge claim can be based.\textsuperscript{108} The court also stated that the motive for discharging McDaniel in this case was economic rather than retaliatory.\textsuperscript{109}

The court then noted that, because section 342.197(1)\textsuperscript{110} was enacted shortly after the \textit{Firestone} decision, the statute simply intended to codify the \textit{Firestone} holding and not to expand upon it.\textsuperscript{111} Finally, the court noted that other jurisdictions had examined this issue, but stated that the statutory basis underlying the other jurisdictions' decisions is different from Kentucky's.\textsuperscript{112}

The dissenting opinion recognized that section 342.197(1)\textsuperscript{113} is clear and unambiguous and courts are required to give words of a statute their plain meaning.\textsuperscript{114} Further, the majority stated that the legislature obviously intended section 342.197(1)\textsuperscript{115} to cover this situation because it does not contain any limiting language.\textsuperscript{116}

V. ANALYSIS

The majority attempted to keep the wrongful discharge cause of action as narrow as possible. It is clear, from the court's decisions after \textit{Firestone},\textsuperscript{117} that the court is concerned that the exceptions to the employment-at-will doctrine may overtake the rule itself. However, in its rush to avoid expanding the exception, the court made several errors.

First, the court assumed that there must be a well-defined public policy upon which to base this cause of action.\textsuperscript{118} While this was true when the cause of action was judicially defined, now that the cause of action is statutorily mandated, the question should be one of simple statutory construction. It should not matter whether the public policy is well defined. The only consideration should be whether the statute is broad enough to support this factual situation.

\textsuperscript{107} KY. REV. STAT. ANN. § 342.197 (Baldwin 1993).
\textsuperscript{108} Nelson Steel, 898 S.W.2d at 69 (quoting Firestone, 666 S.W.2d at 731).
\textsuperscript{109} Id.
\textsuperscript{110} KY. REV. STAT. ANN. § 342.197 (Baldwin 1993).
\textsuperscript{111} Nelson Steel, 898 S.W.2d at 69.
\textsuperscript{112} Id. at 70.
\textsuperscript{113} KY. REV. STAT. ANN. § 342.197 (Baldwin 1993).
\textsuperscript{114} Nelson Steel, 898 S.W.2d at 70 (Stumbo, J., dissenting).
\textsuperscript{115} KY. REV. STAT. ANN. § 342.197 (Baldwin 1993).
\textsuperscript{116} Nelson Steel, 898 S.W.2d at 70 (Stumbo, J., dissenting).
\textsuperscript{117} See Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985). See also supra note 37 and accompanying text.
\textsuperscript{118} Nelson Steel, 898 S.W.2d at 67.
Section 342.197(1)\textsuperscript{119} is written in very broad and inclusive language. By its very terms, the statute only requires that the discharge and the claim for workers' compensation be related. Further, the language of the Illinois wrongful discharge statute\textsuperscript{120} is at least as broad as the Kentucky statute and the Illinois Supreme Court allowed a cause of action under similar facts.\textsuperscript{121}

Second, the court assumed that the General Assembly simply intended to codify the holding from \textit{Firestone} in section 342.197(1).\textsuperscript{122} This conclusion is only supported by the short time period between the \textit{Firestone} opinion and the approval of the statute.\textsuperscript{123} In fact, there was no floor debate on the statute in the Kentucky House of Representatives.\textsuperscript{124} If the court had other information on this subject, it should have disclosed it; if not, the time period is not conclusive.

Lastly, the court looked to the motive of the employer in terminating the employee.\textsuperscript{125} The court implied that there is a difference between a "retaliatory motive" and an "economic motive."\textsuperscript{126} While it is ostensibly true that Nelson Steel was motivated by economics to terminate McDaniel, the result of this action is to punish McDaniel for simply exercising his rights under the law. The policy behind the tort of wrongful discharge is to allow the employee to be free to accept the benefits of workers' compensation without the fear that he or she will lose a job in the process.

VI. CONCLUSION

The tort of wrongful discharge is designed to give workers the ability to choose to accept workers' compensation benefits without losing their jobs. This policy is equally applicable to claims filed against a current employer or a past employer. To allow an employer to terminate an

\begin{footnotes}
\item [119] KY. REV. STAT. ANN. § 342.197 (Baldwin 1993). This section reads as follows:
(1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.
\item [120] ILL. REV. STAT. ch. 820, par. 305/4(h) (1993). See supra note 94 for the text of this statute.
\item [121] Darnell v. Impact Indus., Inc., 473 N.E.2d 935 (Ill. 1984).
\item [122] Nelson Steel, 898 S.W.2d at 69.
\item [123] See supra notes 30-31 and accompanying text.
\item [124] KENTUCKY HOUSE JOURNAL, at 679-80 (1984). The debates and testimony of the House Labor and Industry Committee, which may contain valuable incite into the legislative intent, are not maintained. Letter from Leslie Cummins, Librarian, Kentucky Legislative Research Commission (February 13, 1996) (on file with author).
\item [125] Nelson Steel, 898 S.W.2d at 69.
\item [126] Id.
\end{footnotes}
employee based on a claim against a previous employer will create a class of workers who are unemployable, not because they lack skills, but because they have filed workers' compensation claims.
GREATHOUSE v. SHREVE and SHIFFLET v. SHIFFLET: MAINTAINING THE STATUS QUO IN CUSTODY DISPUTES BETWEEN PARENTS AND THIRD PARTY CONTESTANTS

by Kathryn B. Hendrickson

"With respect to emotional wellness, every child has a need for the unbroken continuity of an affectionate and stimulating relationship with an adult."

I. INTRODUCTION

Due to divorce, remarriage, cohabitation, and increased out-of-wedlock childbearing, the structure of the family has changed dramatically over the last century. The traditional nuclear family portrayed so lovingly by Norman Rockwell, consisting of father, mother, and children, is merely a romantic fiction. The reality is that one's family may be any number of related or unrelated individuals who have "a continuing relationship of love and care, and an assumption of responsibility for some other person." However, the general legal definition of "family" continues to be based on the biological relationship.

The disintegration of the traditional family has resulted in increased custody disputes, both between parents and between parents and nonparent third parties. While the greatest number of custody disputes are between the biological parents, nonparent third parties are seeking custody in increasing numbers. As a result, the courts have to deal with a greater number of disputes of increasing complexity.

Since the time of Solomon, courts have been making child custody decisions. The courts have made determinations in challenges between

3. Id at 43 (citing In re Adult Anonymous II, 452 N.Y.S.2d 198, 201 (N.Y. App. Div. 1982)).
4. BLACK'S LAW DICTIONARY 604 (6th ed. 1990). Family "[m]ost commonly refers to group of persons consisting of parents and children; father, mother and their children; immediate kindred, constituting fundamental social unit in civilized society." Id.
parents, and between parents and other third parties, such as relatives. Under Kentucky law, each of these types of custody disputes is treated differently, and the applicable rule depends upon who is challenging, requesting, or disputing custody. Nevertheless, once a custody dispute goes to trial, the courts make the final custody determination, regardless of the identity of the parties involved.

In January 1995, the Kentucky Supreme Court reviewed two custody disputes between a natural parent and a third party with physical custody of the child. The court affirmed the general rule that a child’s natural parents have a statutory right to custody. In addition, the court held that this right can be waived by the natural parent. This waiver doctrine expands the court’s previous list of exceptions to the general rule. Upon a showing of clear and convincing evidence that a natural parent has waived this superior right to custody, the court will apply the “best interests of the child” standard. Prior Kentucky decisions held this “best interests” standard generally inapplicable in custody disputes between a parent and a non-parent.

This note examines the significance of the decisions in Greathouse v. Shreve and Shifflet v. Shifflet on third party custody disputes in Kentucky. Part II briefly reviews the historical development of custody law,


8. Boatwright v. Walker, 715 S.W.2d 237, 244 (Ky. Ct. App. 1986) (holding that absent a permanent agreement, the natural parents have a statutorily granted superior right to a child’s care and custody).


The Kentucky Supreme Court established four exceptions to the general rule of the supremacy of parental rights in custody disputes between a parent and a third party. The exceptions were: 1) where the parent is found to be unfit; 2) where the parent is found to be harmful to the child; 3) where the parent had contracted away his parental rights; and 4) where the parent was estopped from claiming custody.

Id. at 263.


12. James, 457 S.W.2d 261.

13. 891 S.W.2d 387 (Ky. 1995).

14. 891 S.W.2d 392 (Ky. 1995).
followed by a more comprehensive review of applicable Kentucky law. Part III examines the Kentucky Supreme Court reasoning in *Shifflet* and *Greathouse*, while Part IV analyzes the impact of these decisions on third party custody disputes. Finally, Part V concludes that Kentucky custody law continues to ignore the rights of a child in enforcing the status quo of the paternal rights doctrine in third party disputes.

II. HISTORICAL DEVELOPMENT OF CUSTODY LAW

A. In General

1) The Patriarchal Approach to Custody

Ancient Roman law gave the father total authority over a child, who was considered to be the father's property. The mother had no legal right to custody, and the state had no power to interfere with the father's authority. The first chink in the armor of total paternal authority appeared in approximately 300 A.D., when the Emperor Constantine outlawed both infanticide and the sale of children into slavery.

English common law, developed from the ancient Romans and a major influence on the development of American custody law, continued this tradition of paternal control and authority over children. However, there were significant changes in English custody law during the 19th century which gave greater authority to the courts to make custody decisions, and granted equal right of child custody to both parents.

Although American common law was grounded in the English tradition, from the onset the state courts played a greater role in custody determinations. Children continued to be viewed as paternal property, and as a significant source of income in the nineteenth century agrarian economy. Nevertheless, the paternal priority in custody could be lost upon a showing that the father was unfit or that such custody was not "in the child's best interest."

In the late nineteenth century, the courts began to "fully embrace[] the state's *parrns patriae* duties," under which the state was acknowledged

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15. ANN M. HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 1.02 (2d ed. 1993).
16. Id.
17. Id.
18. Id. § 1.03.
19. Id.
22. DONALD T. KRAMER, 1 LEGAL RIGHTS OF CHILDREN, § 1.02 (2d ed. 1994).
as the "higher or ultimate parent of all the dependents within its borders."23 Within thirty years, most states had established juvenile court systems under which the courts took responsibility for the care, custody, and control of children when necessary.24

2) The Maternal Preference in Custody

By the early twentieth century, amidst an emerging industrial society, the custody pendulum began to swing in favor of the mother.25 The maternal-child relationship took on a mystique in the eyes of the court, leading to the so-called tender years presumption.26 This presumption was based on the belief that a young child needed a mother's care.27 As a result, absent a showing of lack of maternal fitness, the courts gave preference to the mother in custody of young children.28 In addition, at common law, the unmarried father of an illegitimate child had no parental rights at all.29

The "primary caretaker" presumption is a more recent twentieth century standard developed by the courts, to effectively give preference to the mother in parental custody disputes.30 Under this presumption, the courts examine which parent provides a child's primary care, and custody is granted on that basis.31 West Virginia is the only state still using the primary caretaker presumption in custody determinations.32

Several United States Supreme Court decisions indicate that any presumption used to grant a maternal preference in custody might violate a father's due process and equal protection rights.33 In response to these decisions some states now have created a preference in favor of joint custody.34 In *Stanley v. Illinois*,35 the United States Supreme Court held

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24. KRAMER, supra note 22.
25. Id. § 1.05.
26. Id.
27. RAMOS, supra note 20, at 33-34.
28. HARALAMBIE, supra note 15, § 1.04.
29. Id. § 3.05.
31. Id.
33. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972) (holding an Illinois statute, making the children of unwed fathers wards of the state upon the death of the mother, was a constitutional violation of the rights of these fathers).
34. TAKAS, supra note 30, at 129-30.
35. 405 U.S. 645 (1972).
that, at least in certain circumstances, fathers have the same constitutional right to custody as mothers. 36 Another significant Supreme Court decision held that the evidentiary standard in parental right termination cases brought by the state is clear and convincing evidence of parental unfitness. 37

3) The “best interests of the child”

The “best interest of the child” standard, developed by Justice Cardozo in 1925, 38 is the prevailing standard for parental custody disputes in all state courts. 39 This standard requires judges to make custody determinations based on what is in a child’s best interest. 40 The court must consider specific factors to determine what custody placement is best for the individual child. 41 Typically, these factors focus on external conditions rather than a child’s psychological needs. 42 This standard adjudicates cases between parents, and is used in third party custody disputes in some states. 43 An alternative interpretation of the “best interests” standard, designated the “least detrimental alternative,” has been proposed to better address the need of the child in dispute. 44 This choice requires the court to determine which custody placement is least detrimental to the growth and development of the affected child. 45

4) Third Party Custody

A nonparent may attempt to obtain custody for a variety of reasons, including the death of a parent, where there are incidents of dependency, neglect or abuse, adoption, termination of parental rights, and other independent custody actions. 46 State law is determinative in third party custody disputes. 47 The two primary standards the courts use for determining custody are the parental rights doctrine and the “best interest of

36. Id.
40. Haralambie, supra note 15, § 1.06.
41. Id. § 1.04.
42. Id. § 1.06.
43. Id.
45. Id. at 53.
46. HARALAMBIE, supra note 15, § 10.01.
47. Id.
The parental rights doctrine, granting natural parents a superior right to custody absent a determination of lack of fitness or abandonment, is the traditional and prevailing standard. The other standard looks at the "best interests of the child," as discussed above. Using this standard a court would grant custody to a third party upon a showing that it was in the child's "best interests." However, the United States Supreme Court has recognized a constitutional privilege to "bring up children," supporting the parental rights view. Nevertheless, in third party disputes where a nonparent has physical custody of the child, the court may look at the child's psychological attachment to that third party. The advent of children's rights has had a significant impact on child custody law, replacing the traditional basis of decisions, the child as chattel, with the "best interests of the child" standard. Children's rights are "intertwined with family and parental rights." As a result, even using the "best interests" standard, the courts generally grant preference to the natural parent in custody disputes with third parties. In addition, a number of states actually prohibit the use of the "best interests of the child" standard in third party disputes.

The concept that children have legal rights is a very recent development. Children are treated differently than adults under American law. Until the twentieth century children had, at most, special protection under the law. In re Gault established that the Bill of Rights and the Fourteenth Amendment apply to children as well as adults. This was followed shortly by a declaration that children "are 'persons' under our constitution" and "are possessed of fundamental rights which

48. Id. § 10.03.
49. Id.
50. Id.
51. Id.
53. HARALAMBIE, supra note 15, § 10.03.
54. KRAMER, supra note 22, § 2.01.
55. Id. § 1.05.
56. Id. § 2.04.
57. Id. § 2.04.
58. See id. § 1.
59. Id. § 1.01.
60. Id.
62. Id. (holding that Arizona, under the Arizona Juvenile Justice Code, had violated a 15 year old boy's due process rights of notice and a fair hearing).
the State must respect.”63 These rights are continuing to evolve as action is taken by the federal courts and Congress.64

B. The Development of Custody Law in Kentucky

1) Custody disputes between parents

As early as 1909, a child’s welfare was found to be the controlling factor in custody disputes between parents, or when both parents were dead.65 By the 1950’s, Kentucky courts were using the tender years presumption to give custody preference to the mother, in disputes between parents.66 This presumption could be overcome by a showing that the mother was unfit to have custody, including a showing of a lack of “moral fitness.”67 While the court might refuse custody on the grounds of some specific “lewd and lascivious acts” on the part of a mother, the case law shows a strong preference for maternal custody.68 The Kentucky custody statute, revised in 1992 to include evidence of child abuse as a factor in determining custody, established the “best interest of the child” as the standard for determining custody between parents, with “equal consideration . . . given to each parent.”69 The statute clearly sets out the factors which the court is to consider to determine custody.70

65. Shallcross v. Shallcross, 122 S.W. 223 (Ky. 1909) (holding in a parental custody dispute that the “paramount duty of the court . . . is to look to the child’s welfare.” Id. at 225.)
67. Id.
68. See, e.g., Scott v. Kirkpatrick, 266 S.W. 390 (Ky. 1924) (refusing to find that the mere fact that the mother lived for a period of time in a “house of ill fame” was sufficient to demonstrate that she was of bad moral character); Smith v. Lloyd, 226 S.W.2d 32 (Ky. 1950) (granting custody of a child to the mother on the grounds that an indiscretion with a man she later married was not sufficient evidence of lack of parental fitness); Mays v. Mays, 232 S.W.2d 1009 (Ky. 1950) (stating that a mother’s indiscretions, if any, with a man to whom she later married, were not lewd and lascivious conduct sufficient to render her unfit to care for her children).
70. Id.
2) Custody disputes between parents and third parties

Early twentieth century Kentucky courts determined that the natural parents had a "superior right" to custody over a third party.71 However, this superior right was not absolute, rather it was subject to considerations of the individual child's welfare.72 The early decisions are more inconsistent in third party disputes, than in custody disputes between parents. There are numerous cases of courts denying a parent custody in favor of a third party, where the child had been left with that third party for some period of time, thus focusing on the child's welfare.73

In 1952, the Kentucky legislature codified the superior parental right to custody, stating that "[t]he father and mother shall have the joint custody, nurture, and education of their children."74 However, Higgason v. Henry,75 a 1960 Kentucky Court of Appeals decision, affirmed that "this statutory right may be relinquished."76 The rule for determining custody disputes between a parent and a third party was further clarified in Berry v. Berry.77 The new rule established that "in a contest between a [third party] and a natural parent who has not surrendered custody, the natural parent has the superior right of custody . . . unless the natural parent is not suitable, fit, or capable of making reasonably adequate provisions"

71. E.g., Rallihan v. Motschmann, 200 S.W. 358 (Ky. 1918). "The laws of God, as well as of man, have made the parent the natural protector and guardian of his children, and the natural family relation should be favored in fixing its custody, if the parent is fit for the trust." Id. at 363; Lewis v. Lewis, 174 S.W.2d 294 (Ky. 1943) "Everyone concedes that, both under statutory and divine law, parents have the superior right to the custody and rearing of their offspring . . . ." Id. at 295.

72. E.g., Staggs v. Sparks, 150 S.W.2d 929 (Ky. 1941) (reversing judgment granting custody to child's grandparents on basis of contract). The welfare of a child "should be the controlling factor even to the extent of superseding such agreements [granting custody to another]." Id. at 930; Lewis, 174 S.W. 2d at 295. "[B]ut in obedience to the best interests of society there has been injected into the law another element largely entering into the determination of such [custody] questions, and which is that the welfare and interest of the infant looms largely in the determination of the question." Id.

73. E.g., Wynn v. Wynn, 689 S.W.2d 608 (Ky. Ct. App. 1985) (granting custody of child to maternal grandparents on basis of contract); Bonilla v. Bonilla, 335 S.W.2d 572 (Ky. 1960) (holding that grandparents retained custody of child over the natural father); Horn v. Dreschel, 183 S.W.2d 22 (Ky. 1944) (holding that mother seeking custody of child who is in custody of and nurtured by others for long periods of time, assumes the burden of showing that the change in custody would be in the child's "best interest").


75. 335 S.W.2d 929, 930 (Ky. 1960) (holding that where mother of illegitimate child left child in the hospital, and consented to her adoption, the mother's superior right to custody was relinquished and the child's welfare required that she remain with the adoptive parents).

76. Id.

77. 386 S.W.2d 951 (Ky. 1965).
for the child.\textsuperscript{78}

The court, in the wake of decisions applying the "best interests" standard in these types of disputes, later found this rule to be "indefinite and confusing" and redefined it.\textsuperscript{79} Under the new rule, in custody disputes between a natural parent and one "not a natural parent," the natural parent is entitled to custody unless he is shown to be unfit, to be harmful to the child, to have contracted away his right,\textsuperscript{80} or is clearly estopped to claim custody.\textsuperscript{81} Factors the courts must consider in their determinations of parental fitness, or lack of fitness, include moral fitness and habits, home environment, age, financial stability, relationship with the child, and "any circumstances . . . prejudicial to the best interest of the child."\textsuperscript{82}

Kentucky law indicates that the relative economic positions of the parties in third party disputes is unimportant in custody determinations, so long as the parents are fit to have custody and able to provide a minimal standard of care.\textsuperscript{83} In addition, where the court has awarded custody to a third party, such judgment is not final and may be modified upon a showing that a child's welfare would justify such modification.\textsuperscript{84}

The Supreme Court of Kentucky made its position on parental rights in third party custody disputes abundantly clear in \textit{McNames v. Corum},\textsuperscript{85} holding that "custody of a child by a suitable natural parent and the best interest of the child are one and the same."\textsuperscript{86} However, soon thereafter the appellate court, relying on \textit{McDaniel}, granted custody to a child's grandparents in a dispute with the child's natural mother.\textsuperscript{87} The court of

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78. \textit{Id.} at 952. \\
80. \textit{E.g. Boatwright v. Walker}, 715 S.W.2d 237 (Ky. Ct. App. 1986) (granting custody of child to prospective adoptive parents on the grounds that the natural mother had contractually waived her superior right to custody); \textit{Raddish v. Raddish}, 652 S.W.2d 668 (Ky. Ct. App. 1983) (granting custody of child to stepparent based on a voluntary contract between the natural mother and the stepfather); \textit{Fraze v. Grundy}, 189 S.W.2d 265 (Ky. 1945) (refusing to grant custody to child's parents on grounds that a prior contract, giving up custodial rights to a third party, is not against public policy and can be enforced). \\
81. \textit{James}, 457 S.W.2d at 262. \\
83. \textit{Killen v. Parker}, 464 S.W.2d 815 (Ky. 1971) (requiring great aunt to return custody of a child to his natural parents even though great aunt was in a significantly better financial position than parents). \\
84. \textit{Cox v. Bramblet}, 492 S.W.2d 188 (Ky. 1973) (denying appeal of award of custody to child's father after his acquittal on murder charges). \\
85. 683 S.W.2d 246 (Ky. 1984). \\
86. \textit{Id.} at 247. \\
\end{tabular}
appeals agreed with the trial court that the impact of the child's separation from the grandparents, with whom he had lived for a number of years, was a factor to be considered in determining the mother's parental fitness. 88

Davis v. Collinsworth 89 established the evidence required to prove parental lack of fitness for custody as: 1) physical or emotional harm or abuse; 2) moral delinquency; 3) abandonment; 4) emotional or mental illness; or 5) failure, for reasons other than mere poverty, to provide adequate care for the children. 90 The holding in Davis, that any such evidence must be proved by clear and convincing evidence, 91 was reaffirmed in Fitch v. Burns. 92

Thus, in custody disputes between a natural parent and a third party, Kentucky law grants the natural parent a superior right to custody. 93 However, such superior right can be relinquished by proving the parent is unfit, by a showing that such custody would be harmful to the child, by a contractual relinquishment of this right, or by estoppel, a term not clearly defined in Kentucky custody law. 94

III. FACTUAL BACKGROUND

1) Greathouse v. Shreve 95

Greathouse v. Shreve evolved from a custody dispute over a child named Nathaniel, born May 16, 1984, the natural son of Bobby Dwayne Greathouse and Sookie Jane Shreve. 96 At the time of Nathaniel's birth, the unmarried, natural parents lived together at the home of Sookie's mother, Nancy Ellen Shreve. 97 Greathouse moved out when Nathaniel was two or three months old, and Sookie Shreve departed not long afterward, leaving Nancy Shreve as the child's care giver. 98 Sookie Shreve made only occasional visits after her initial departure, and usually when

88. Id.
89. 771 S.W.2d 329 (Ky. 1989).
90. Id.
91. Id.
92. 782 S.W.2d 618 (Ky. 1989) (concluding that the clear and convincing evidence is the required standard in divesting a natural parent of custody of a child).
94. James v. James, 457 S.W.2d 261, 262 (Ky. 1970).
95. 891 S.W.2d 387 (Ky. 1995).
96. Id. at 388.
97. Id.
98. Id.
she needed her mother’s care. In 1990, Bobby Greathouse filed a paternity action to establish his paternal rights. His paternity was conceded after a conclusive blood test. Following that determination, Nancy Ellen Shreve, Nathaniel’s maternal grandmother, initiated an action to adopt Nathaniel and to terminate the parents’ rights. Sookie Shreve filed a supporting affidavit, voluntarily consenting to termination of her rights. However, the grandmother later dropped her claim for adoption and parental right termination, and asked for exclusive custody of Nathaniel jointly with her daughter Sookie. While Greathouse’s initial contacts with Nathaniel were sporadic and his prior lifestyle was erratic, the trial testimony indicated that he had “turned his life around.” At the time of the trial Sookie Shreve, whose contacts with the child were also minimal, was living in Florida and was admittedly unable to care for her child herself. Clearly, Nancy Shreve was Nathaniel’s primary caretaker. The Warren Circuit Court, applying the best interests standard, placed the child in the joint custody of Nancy and Sookie Shreve, granting primary custodial authority to the grandmother. The natural father was denied custody but was granted visitation rights, and ordered to pay child support. Greathouse appealed this determination, which was affirmed by the court of appeals.

2) *Shifflet v. Shifflet*

This dispute occurred between Ginger Shifflet, the natural mother and Ortha Shifflet, the paternal grandmother, for custody of Robin Shifflet, born November 18, 1981. As the result of a grant of temporary custody to Ortha Shifflet, pursuant to the Shifflet’s divorce decree, Robin lived with her grandmother for most of her life. The child’s father, a habitual criminal with a history of child sexual abuse allegations, was not

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Greathouse*, 891 S.W.2d at 388.
103. *Id.*
104. *Id.* at 389.
105. *Greathouse*, 891 S.W.2d at 389.
106. *Id.*
107. *Id.* at 388-89.
108. *Id.*
109. *Id.* at 389.
110. 891 S.W.2d 392 (Ky. 1995).
111. *Id.*
112. *Id.* at 393.
a party to the dispute.\textsuperscript{113} Ginger spent the intervening time intermittently incarcerated on a variety of theft and receiving stolen property charges.\textsuperscript{114} The facts indicated that since 1989 Ginger had “changed her life” by obtaining gainful employment and establishing a stable home environment.\textsuperscript{115} The facts also suggested that, while Ortha had previously provided adequate care for Robin, the current environment was “less than an ideal situation.”\textsuperscript{116} Significant factors in finding the grandmother’s home less than satisfactory were Ortha’s past history of shoplifting, the presence of Ortha’s daughter, who also has a criminal record, and Robin’s unsupervised visits with her father.\textsuperscript{117}

The trial court awarded custody to the paternal grandmother based on Robin’s “best interests.”\textsuperscript{118} The court of appeals reversed, awarding custody to the mother and holding “that in a custody dispute between a parent and a non-parent, the parent will prevail unless it is shown by clear and convincing evidence that the parent is unfit.”\textsuperscript{119} Ginger Shifflet had not been shown to be “unfit.”\textsuperscript{120}

IV. THE COURT’S REASONING

\hspace{1em}1) \textit{Greathouse v. Shreve}\textsuperscript{121}

In this dispute between the natural father, the natural mother and maternal grandmother, the Kentucky Supreme Court found that the “best interests” standard used by the trial court was inappropriate.\textsuperscript{122} Justice Leibson determined that the joining of the mother and grandmother was nothing more than a “purely technical device . . . for evading the natural father’s superior claim to custody ‘if suited to the trust’ against the grandmother.”\textsuperscript{123} Since this dispute actually was between a parent and a non-parent, the parental rights doctrine was applicable.\textsuperscript{124} The court found that the court of appeals’ decision “finessed the father’s superior

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 395.
\item \textit{Id.}
\item \textit{Id.} at 393.
\item \textit{Id.}
\item \textit{Id.} at 392.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 390.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 387 (Ky. 1995).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
right of custody . . . by utilizing a waiver principle." However, the court concluded that such a waiver principle does exist, and that if a court is "persuaded the evidence is clear and convincing that the natural [parent] waived his superior custodial right, shall custody between the natural [parent] and the [third party] be decided based on what is in the best interests of the child." The court defined waiver of the superior parental right to custody as "an intentional or voluntary relinquishment of a known right to custody." This knowing relinquishment must be clear and convincing. While such a waiver need not be written or formal, the "statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof."

The Kentucky Supreme Court reversed and remanded on the basis that the trial court had failed to address the issue of waiver prior to using the "best interests of the child standard" to determine custody. Only if the trial court could find that the natural father knowingly and voluntarily waived his superior right to custody could the court look at the best interests of the child. Otherwise, as between the grandmother and the natural father, the father’s statutorily granted superior right to custody would prevail.

2) Shifflet v. Shifflet

In this dispute between the natural mother and the paternal grandmother, who had temporary custody, the Kentucky Supreme Court affirmed the court of appeals holding that the trial court erroneously based its custody determination on the statutorily defined "best interests of the child" standard. The trial court’s holding was predicated on the determination that this case involved a modification of a custody decree. The court agreed that this standard applied only to modification of per-
manent custody order and not to a temporary order such as this. In addition, the court found that this standard is used in the modification of permanent custody orders only in specific instances. The bench further acknowledged that the “best interests of the child” standard applies in custodial disputes between parents.

However, while agreeing that the trial court erred in application of the law, the Kentucky Supreme Court reversed and remanded the court of appeals’ decision, which was based on an estoppel theory. It did not agree that the principle at issue was one of estoppel, but rather one of waiver as established in Greathouse.

V. ANALYSIS

The decisions in Greathouse and Shifflet make it exceedingly clear that the parental rights doctrine is the law in Kentucky in custody disputes between natural parents and third parties. The court emphatically rejected the “best interest of the child” standard in such disputes unless the third party proves, by clear and convincing evidence, that a natural parent is unfit, is of harm to the child, has contracted away their parental rights, or has knowingly and voluntarily waived his or her parental rights to the child. Only after such a showing does the “best interests of the child” become important. Therefore, regardless of the strength, quality or length of the relationship a child may have with a third party care giver, the court is to put the natural parent’s right of possession before any rights or interests of the child. While children are no longer considered to be merely parental property, when there is a dispute as to the possession of a child between a natural parent and a third party, the state continues to give the natural parent a property right in that child.

136. Id.
137. Id. (citing KY. REV. STAT. ANN. § 403.340 (applying the “best interests of the child” standard only upon proof that the child’s current environment may endanger the child, or the custodian agrees to the modification, or the custodial parent has agreed to the child’s integration into the petitioner’s family)).
138. Id.
139. Id. at 394.
140. Fitch v. Burns, 782 S.W.2d 618 (Ky. 1989).
141. James v. James, 457 S.W.2d 261 (Ky. 1970).
142. Id.
144. Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995).
145. Id.
1) Conflicting Legislative Intent

"[T]he entire expression of legislative intent contained in the statutes dealing with the custody of children clearly follows a longstanding public policy in Kentucky looking to 'the best interests of the child' as its polestar." These cases do nothing to resolve the serious conflict existing in Kentucky custody law. On one side of the argument, there is a statutory grant of superior parental authority, and an express legislative intent to "safeguard family relationships" and to "strengthen and maintain the biological family unit." On the contrary, there is also an express legislative intent to "determine custody in . . . the best interests of the child" and to direct all efforts "toward providing each child with a safe and nurturing home."

The Kentucky Supreme Court's decisions in Greathouse and Shifflet are predicated on the principle that parents have a fundamental right to custody of their children. Only in custody disputes where there is an equal legal right of possession of the child will the courts look at what is actually best, or least harmful, for that child. In all other cases, possession by a natural parent is presumed to be what is best for the child. The result of these decisions is that a natural parent, who may have been unfit, and for many years left a child in the care of a third party, may return at some distant time and reclaim that child. In the meantime, the child has developed an emotional relationship with this third party which is rent asunder upon return to the natural parent.

2) The Waiver Exception to the Parental Rights Doctrine

Rather than either abolish or strictly uphold the parental rights doctrine in third party custody disputes, the court chose to recognize another exception to the doctrine. The court concluded that "there is a waiver principle which may be involved in a case of this nature." Waiver was distinguished from estoppel in that it requires no proof of a party having been misled, rather it results from the consequences of an

146. *Id.* at 396 (Spain, J. concurring).
148. *Id.* § 600.010 (Michie/Bobbs-Merrill 1990).
150. *Id.* § 600.010 (Michie/Bobbs-Merrill 1990).
152. Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995).
153. *Id.* at 390.
individual’s actions. The problem is that the opinions in both cases fail to establish what factors the court should consider in determining whether there has been a waiver of parental rights, requiring only that it must be “knowing and voluntary.”

Justice Spain’s concurrence in Shifflet outlines five factors which should be considered in determining if there had been a waiver of parental rights. The factors are: 1) length of time the child has been away from the parent; 2) circumstances of separation; 3) age of the parent when care was assumed by the third party; 4) length of time before parent attempted to reclaim the child; and 5) quality and quantity of any parental contacts during the third party custody.

These factors, if used by the court in third party disputes, could significantly improve the odds of maintaining third party custody in cases where there had been an extended period of parental absence from the life of the child. However, the majority merely requires that the court consider the “totality of the circumstances” to determine the existence of a waiver of parental rights. This undoubtedly will lead to considerable confusion, and additional litigation, in future third party custody cases applying this waiver principle.

As a result, the Greathouse and Shifflet decisions do not afford third party custodians much more protection from the loss of a child to the natural parent than was provided under the prior case law. Even where the third party is able to prove waiver by the natural parent, they still must show that it would be in the best interests of the child to remain in the custody of the third party.

3) Determining the “Best Interests of the Child”

It is unclear as to what “best interests” standard the court would apply once waiver has been proven. Shifflet holds that the standards set forth in the modification of custody statute apply only “to modifications of permanent custody awards.” Where the court has granted only temporary custody, or where the natural parent has merely given physical custody of a child to a third party, there has been no permanent award of

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154. Id.
155. Id. at 391.
156. Shifflet v. Shifflet, 891 S.W.2d 392, 396 (Ky. 1995) (Spain, J. concurring).
157. Id.
158. Greathouse, 891 S.W.2d at 391.
160. Shifflet, 891 S.W.2d at 393.
custody. Therefore, the factors used to determine a child’s “best interests” in modification of permanent custody do not apply.

The standard established for custody disputes between parents requires the court to look at “all relevant factors” including: 1) the parents’ wishes as to the child’s custody; 2) the child’s wishes; 3) the child’s relationship with parents, siblings, and “any other person who may significantly affect the child’s best interests”; 4) the child’s adjustment to home, community, and school; 5) the mental and physical health of all parties; and 6) any allegations or evidence of abuse.\textsuperscript{161} It is unclear whether the court would consider the third party as a parent under this custody statute, and apply these factors in the dispute.

Should the court use this standard, it may result in inconsistent determinations because the natural parent is one of the parties involved. In some instances, the court, hearing such a dispute, may give considerable weight to the wishes of the natural parent, a factor to be considered under the statute. However, in other disputes the court may chose to ignore such wishes. It is much too tempting for the court to give weight to factors favoring “attractive” parents while ignoring them for those less appealing. The application of the law would be inconsistent, leading to disparate results in similar custody disputes.

A third standard the court might consider is outlined in the statute providing for the termination of parental rights.\textsuperscript{162} However, this statute only allows the court to terminate parental rights where the court finds that a child has been abused or neglected.\textsuperscript{163} To use this standard would require the third party not only to prove that there had been a waiver of parental rights, but also that there had been abuse and neglect. Since this would require proof in excess of what the court requires once waiver has been shown, this standard is inappropriate.

The standard which the courts should adopt, either in lieu of the parental rights doctrine or as the standard once an exception to the doctrine has been proved, ought to be based on the alternative which is the “least detrimental”\textsuperscript{164} to the child. This alternative relies on the precept that a child develops an emotional relationship with the third party care giver over a period of time.\textsuperscript{165} It also recognizes that these psychological ties

\textsuperscript{161.} KY. REV. STAT. ANN. § 403.270.
\textsuperscript{162.} Id. § 625.090.
\textsuperscript{163.} Id.
\textsuperscript{164.} GOLDSTEIN, supra note 44, at 53-64.
develop independently of any biological relationship. As a result, the third party care giver becomes the child's "psychological parent," that person who provides the child's essential physical and emotional care and stability. The bonds created between a third party care giver and the child can not be disturbed without jeopardizing the child's emotional and physical well-being. While the precise timetable for this psychological development cannot be determined, specific statutory time periods have been suggested after which removal of a child from a third party care giver would be unreasonable.

The suggested statutory periods during which a child has been in the "direct and continuous care of the same adult(s)" are twelve months for a child up to age three at time of placement and twenty four months for a child over age three at time of placement. A special hearing would be provided for children five years of age and older, who at the time of placement, had been in parental care for at least the three previous years and had not been separated from his parents due to abuse. Any third party care giver who wished to take on permanent custody of a child meeting these criteria would be allowed to do so.

VI. CONCLUSION

Custody law has evolved considerably since the Roman patriarchy had total authority over children. In many states this evolution continues into the present, changing the focus of custody dispute from the rights of the parties seeking custody to the rights of the child. Early Kentucky custody decisions properly emphasized the welfare of the child as the significant issue in disputes. Unfortunately, even while creating a new exception to the parental rights doctrine, Greathouse and Shifflet maintain the more recent status quo of protecting the rights of the natural parent over those of the child. The court could have used this opportunity to recognize the rights of any child, involved in any type of custody dispute, to have his welfare be the determinative standard for custody decisions.

The court could have resolved the conflict between the parental right

166. Id.
167. Id.
168. Id.
169. Id. at 46.
170. Id.
171. Id. at 46-48.
172. Id.
173. E.g., Rallihan v. Motschmann, 200 S.W. 358 (Ky. 1918); Lewis v. Lewis, 174 S.W.2d 294 (Ky. 1943).
to custody and the child's right to a "safe and nurturing home" by finding that, while parents have a right to custody of their children, it is the "child's best interests," using the "least detrimental alternative approach, which should control all custody determinations." Instead, the decisions continue the artificial distinction between parental custody disputes and those involving a parent and a third party. As a result, the natural parents' rights are protected at the expense of the child.

The court is unwilling to recognize that a child's welfare should be of the utmost significance in all custody disputes, and has actually found that the parental right to custody is the equivalent of the child's best interest. Therefore, it is left to the Kentucky legislature to place greater emphasis on the rights of children in custody disputes and acknowledge that the "best interests" of a child should be controlling in all custody determinations.
