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A PRACTITIONER'S ANALYSIS OF THE
LOSS OF PARENTAL CONSORTIUM IN KENTUCKY

by Susanne Cetrulo

INTRODUCTION

It has now been almost two years since the Kentucky Supreme Court rendered its “first impression” opinion in Giuliani v. Guiler. In that case, of course, the supreme court of this Commonwealth recognized a claim on behalf of minor children to recover for the loss of parental consortium when a parent is killed. In a recent case note in the Northern Kentucky Law Review, the author set forth a detailed analysis of the Giuliani decision in terms of its recognition of the right to recover for a cause of action that had not been previously recognized by the legislature of this Commonwealth.

The purpose of this article, however, is not to examine the court’s justification for the decision or its invasion of the province of the legislature. Rather, the purpose is to look at how the decision has impacted upon the practitioner, how it is being interpreted by the trial courts, and to analyze other claims and issues that might arise or arguably be presented as a result of the Giuliani decision.
REVIEW OF GIULIANI

The Giuliani case was essentially a medical malpractice case that resulted in a wrongful death action. Mrs. Giuliani died at the age of thirty-three during the labor and delivery of her fourth child. That child, and her other three minor children, were named as plaintiffs for a claim of loss of parental consortium through their father, as next friend. In addition, their father filed a claim for wrongful death as the administrator of his wife’s estate and filed his own claim for loss of consortium. At the trial court level, the loss of consortium claim on behalf of the children was dismissed by summary judgment.

Although the wrongful death claim was not yet decided, the plaintiffs persuaded the trial court to allow the summary judgment to be final and appealable. The court of appeals allowed this appeal from the dismissal of the children’s claim and affirmed the same, claiming itself bound by longstanding precedent not allowing any recovery by the minor children.

In the court of appeals’ decision affirming the trial court, the court encouraged the “[s]upreme [c]ourt to revisit this issue in light of modern developments in this area of the law.” Of course, the Kentucky Supreme Court accepted discretionary review and held that children should hereafter be permitted to bring loss of consortium claims to recover from a negligent wrongdoer for the loss of affection of their parent. As set forth previously, what that decision means for the practitioner in the Commonwealth of Kentucky is the focus of this article.

6. See Giuliani, 951 S.W.2d at 318.
7. Id.
8. Id.
9. Id.
10. Id. at 319.
11. Id.
12. Id.
13. Id.
14. Id. at 320.
ANALYSIS

In recognizing this new right of action for loss of parental consortium, the Kentucky Supreme Court noted the trend toward recognition of this claim found in other states. The court pointed out that since 1977, fifteen courts and two state legislatures had recognized the claim for loss of parental consortium on behalf of the children. The court did not address, however, the issue of whether a child’s loss of parental consortium should be considered derivative of a parent’s wrongful death action or a separate, independent claim.

In theory, the Giuliani case essentially holds that the loss suffered by each child is “separate and distinct” from the loss of any siblings and from the loss suffered by another parent. In practice, however, the question generally becomes one of whether the recognition of a child’s claim entitles the plaintiff to “per accident” policy limitations in the standard liability insurance policy, or whether that child’s claim is derivative and limited to the “per person/per injury” provisions. The Giuliani decision was silent on this issue, and that has become one of the new battlegrounds for practitioners under the decision.

A. A Derivative Claim or a Separate Recovery?

In many, if not most, of the cases in which the claim for loss of parental consortium will be asserted, there are automobile or other liability policies and/or uninsured or underinsured motorist policies available. Most of those standard insurance policies contain limitations in terms of the persons involved in the accident, with a specified sum being available if one person is injured, and an additional limitation on coverage where more than one person is injured in the same accident. The “per

15. Id. at 319-20.
16. Id. at 320.
17. Id. Interestingly, the court had declined to recognize this argument just two years earlier in Adams v. Miller, 908 S.W.2d 112, 116 (Ky. 1995) (citing Louisville & N.R. Co. v. Eakins’ Adm’t, 45 S.W. 529, 530 (Ky. 1898) (damages recoverable in a wrongful death action have been clearly defined and limited to the destruction of the decedent’s earning power)).
18. It is believed that several cases are pending throughout the state on this issue. The author is currently involved in such a case, Reed v. Allstate & Daley, No. 98-CA-001810 (Ky. Ct. App. 1998), now on appeal before the Kentucky Court of Appeals.
accident” and “per person” limitations have been analyzed in numerous courts throughout the country where it has been asserted that the claims of minor children of an accident victim should entitle those children to the “per accident” coverage. It appears the majority of the courts which have addressed this issue have concluded that the loss of services or consortium claim falls within the “per person” limit applicable to the bodily injured or deceased person.

1. The Standard Insurance Policy Provision

The standard automobile insurance policy will contain language regarding limits of liability for each person, such as “the maximum amount we will pay for damages arising out of bodily injury for one person in any one motor vehicle accident, including damages sustained by anyone else as a result of that bodily injury. . .” Additionally, such policies will generally define “bodily injury” as “physical or bodily injury, including sickness, disease, or death sustained.” As stated previously, the majority of courts which have addressed policies containing similar limiting language have concluded that the child's consortium claim, like a spousal consortium claim, is derived from the injuries of the single person and is, therefore, subject to the “per person” limits of such policies.

There is precedent for such a determination to be made in this Commonwealth under a case dealing with the spousal consortium claim. In Moore v. State Farm Mutual Insurance Company, a woman's husband was seriously injured in an automobile accident and recovered the “per person” limits for his injury. The spouse then brought a separate claim for loss of consortium of her husband resulting from his bodily injuries. The policy in Moore, contained the following language in its “per person” limits

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19. See Jane M. Draper, Annotation, Consortium Claim of Spouse, Parent or Child of Accident Victim as Within Extended Per Accident Coverage Rather Than Per Person Coverage of Automobile Liability Policy, 46 A.L.R.4th 735 (1987).
20. Id.
22. Id.
23. See Draper, supra note 19.
24. 710 S.W.2d 225 (Ky. 1986).
25. Id.
26. Id. at 226.
of liability: "[f]or all damages arising out of bodily injuries sustained by one person." 27

Because State Farm had already paid the policy limits to the physically injured spouse, the court held that the "per person" dollar limitation applied to all claims for damages arising out of the husband's physical injuries, whether or not such damages were claimed by the person suffering the physical injuries. 28 In so holding, the court adopted the view of the legal commentary set forth in the Annotation of 13 A.L.R.3d 1228 as follows: "In other words, all damage claims, direct and consequential, resulting from injury to one person, are subject to the limitation." 29

It appears from the author's review of several insurance policies that the standard language defining "per person" limitations, seen today, is even more favorable to the insurance company than what was considered in the Moore case. 30 In addition, like the policy in Moore, most policies further state specifically that such "per person" damages include those damages sustained by anyone else as a result of another's bodily injury or death. 31

When an insurance clause is unambiguous as written, it is not within the court's discretion to read into the policy new terms or conditions. 32 According to recent Kentucky case law, the terms of an insurance policy are to be enforced as drawn and the court cannot make a new contract for the parties unless the policy language is totally inconsistent with the insured's reasonable expectation of coverage. 33

Thus, while the Giuliani court ruled that the children now have a right to pursue an independent cause of action for loss of consortium of a parent, this right to bring the action by no means assures the action's success in the courts. As the court stated in Giuliani, the loss of parental consortium is simply another factor to be considered in reaching a fair and equitable conclusion to any constitutionally-protected wrongful death claim. 34 A possible guide to the court's thinking in this regard appears in the

27. Id.
28. Id.
30. MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, supra note 21.
34. See Giuliani, 951 S.W.2d at 322.
Giuliani opinion:

It should be remembered in this case that it is certainly not a foregone conclusion that any of the Giuliani plaintiffs will prevail at trial. The risk of double recovery, if any, is unconvincing as a reason to refuse to recognize a child’s claim for loss of parental consortium. Concerns that insurance costs will rise and that double recovery will supposedly occur are unconvincing. 35

On the other hand, it is interesting that the court specifically looked at the case history of the spousal loss of consortium claim, yet made no mention of the Moore decision, rendered in 1986.36 While the Moore decision was not overruled or criticized in Giuliani, plaintiffs’ attorneys will certainly argue that the court’s lack of reference to this decision leaves the door open for an attack upon the reasoning contained therein.

The Giuliani court did cite Department of Education v. Blevins37 as holding that “the parents’ claim for loss of a child’s consortium is independent and separate from a wrongful death action and shall not be treated as a single claim.”38 Similarly, it can be argued that the legislature, in section 411.135 of the Kentucky Revised Statutes, created a separate claim for a parent for loss of a child's consortium.39 As the Blevins court stated, although the claims may arise from the same injury, “they belong to separate legal entities and consequently should not be treated as a single claim.”40 These will undoubtedly be the arguments in support of allowing recovery under “per accident” limits.

Of course, the defense can likewise argue that if the court had intended to expand the loss of consortium recovery beyond what had been permitted in the past for spousal consortium claims, then the Moore decision would surely have been overruled. This author believes that the court has simply left this question open for another day. Thus, it is

35. Id.
36. See Moore, 710 S.W.2d at 225.
37. 707 S.W.2d 782 (Ky. 1986).
38. Id.
39. See KY. REV. STAT. ANN. § 411.135 (Banks-Baldwin 1998) (part of the wrongful death legislation allows for a parent to recover for the loss of companionship of a child).
extremely helpful to look at how other jurisdictions have addressed a child’s claim to separate limits under the “per person” provisions of standard insurance policies.

2. Review of Decisions From Other Jurisdictions

In *Auto Club Insurance Association v. Lanyon*, the Michigan court concluded that the bodily injury liability limit contained within a standard automobile policy did include derivative injuries such as the loss of a child’s consortium with a parent who suffered the original bodily injury. Similarly, the Supreme Court of West Virginia, in *Federal Kemper v. Karlet*, recently held that minor children would not be treated as separately-injured persons subject to separate “per person” limits under an automobile insurance policy. As the high court in West Virginia concluded:

> It appears to be fairly well settled in other jurisdictions that where there is one person bodily injured in an automobile accident and the policy contains a “per person” limitation covering all damages arising out of the bodily injuries sustained by that one person, loss of consortium claim by a child is recognized as arising out of the claim of the bodily-injured person and subject to the “per person” limitation.

Similar results have been found in other types of negligence cases. In *Tumlinson v. St. Paul Insurance Company*, a medical malpractice policy was scrutinized. The policy contained “per person” limits of $500,000 and stated that total liability for all damages sustained by one or more persons as a result of one occurrence should not exceed the limit of bodily-injury liability. In that case, a parent’s claim for loss of services

42. Id.
43. 428 S.E.2d 60 (W. Va. 1993).
44. Id.
45. Id. at 62.
47. Id. at 407.
was barred where the injured child recovered $500,000 for the malpractice.\(^\text{48}\) In short, the overwhelming authorities from numerous other jurisdictions have reached the same conclusion.\(^\text{49}\)

There are, however, some cases supporting the right of consortium claimants to extended coverage beyond the bodily injury/per person limitations. For instance, in 1985, one California court held that the “per occurrence” amount was recoverable for the loss of consortium sustained by the wife of a man who was severely injured in a tractor trailer/automobile accident.\(^\text{50}\) That appeals court was faced with the same type of policy limitations discussed above.\(^\text{51}\)

Nonetheless, it held that loss of companionship, emotional support, love, and sexual relations were real and direct injuries to the claimant and were personal and direct injuries to her, a separate person from her injured spouse.\(^\text{52}\) The court went on to explain that merging the wife’s injury with her husband’s under the “per person” limitations, in essence, would not provide any coverage for such losses, and would therefore defeat the public policy of California, as expressed by the state’s Supreme Court, in recognizing the loss of consortium claim.\(^\text{53}\)

Later, in *Hauser v. State Farm Mutual Insurance Company*,\(^\text{54}\) a different appeals court in California held that a wife’s loss of consortium claim did not constitute a separate cause of action, but rather was a derivative loss covered under the “per person” limit of the liability policy.\(^\text{55}\)

The court in *Hauser* stated that those decisions which had allowed the loss of consortium claim to be considered as a separate bodily injury had done so on the basis that the policy language included “loss of services” in its definition of bodily injury.\(^\text{56}\)

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\(^{48}\) Id. at 408.


\(^{51}\) Id. at 853-54.

\(^{52}\) Id. at 854-55.

\(^{53}\) Id. at 859-60.


\(^{55}\) Id.

\(^{56}\) Id. at 572.
Certainly, an argument could be made by those consortium claimants, since the adoption of *Giuliani*, that the child’s claim or spouse’s claim for loss of consortium constitutes a separate cause of action, distinct and independent from the cause of action of the person seeking compensation for physical injury. Those cases which have allowed additional recovery under the “per occurrence” or “per accident” limitations have found a major difference between those two causes of action in order to support their reasoning. For instance, in *Allstate Insurance Co. v. Handegard*, the Oregon appellate court determined that a spouse could recover for loss of services under the higher “per occurrence” coverage even though the bodily-injury definition specifically included “sickness, disease, or death to any person, including loss of services.” The court seemingly rationalized its decision by stating that the policy of insurance defined terms in a manner which differed from the ordinary understanding of those terms. The court concluded that the policy therein did not expressly address “from whose” liability limits a loss of services claim could be recovered. The Oregon court concluded that if bodily injury to any person meant physical injury and its consequences, including loss of services, then any additional person who sustained an injury would be entitled to a “per accident” recovery.

Finally, in some cases, the courts have simply allowed extended coverage despite limitations on “bodily injuries,” where insurers were estopped due to their own misconduct, to deny this extended coverage.

3. Kentucky Case Analysis

As set forth previously, the *Moore* decision would seem to be the most persuasive precedent for limiting the child’s loss of consortium claim to the “per person” policy limits of a standard liability policy. As can be seen from other courts’ decisions, the comparison of the child’s claim to a spousal consortium claim is quite common.

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58. Id.
59. Id. at 1389.
60. Id.
61. Id. at 1390.
62. See Draper, supra note 19.
63. Moore, 710 S.W.2d at 225.
However, there is even additional authority within prior Kentucky case law for limiting the child's claim to the “per person” limits. In Commonwealth Fire and Casualty Insurance Co. v. Manis, parents of a minor child filed a claim for loss of services and medical care resulting from an automobile accident in which their daughter was injured. The court agreed with Commonwealth Fire that recovery was limited to the daughter’s award which exhausted the liability limits of the insurer for “each person” suffering bodily injuries. The court pointed out that the policy language was plain, and that the limit of liability for bodily injury to one person included damages for the care and loss of services arising out of the injury. Seemingly, this case would also preclude any “per occurrence” or “per accident” recovery for a child’s claim for loss of parental consortium. Interestingly, this case was also completely ignored in the Giuliani discussion.

Giuliani, however, reached its ultimate recognition of this claim by referring to and following a “trend” developed in 15 other states. If one looks at the rulings of those same “trend-setting” states, it would appear that the parental consortium claim would be limited in Kentucky to the “per person” limits of available coverage.

B. Can You Recover for Loss of Parental Consortium of a Severely Injured Parent?

Another question which comes to mind when reviewing Manis, in light of Giuliani, is whether a child may recover for their loss of parental consortium of an injured, but not deceased, parent. The Giuliani court only stated that a child’s loss of parental consortium claim could be a derivative of a “wrongful death” action. The Giuliani decision did not address

64. 549 S.W.2d 303 (Ky. Ct. App. 1977).
65. Id.
66. Id. at 305.
67. Id.
68. Id.
69. See Giuliani, 951 S.W.2d at 319-20.
70. Of the 17 states referenced and consulted by the Giuliani majority for recognition of the "trend," only one, Massachusetts, has specifically ruled that the larger "per accident" limitation of liability was available to loss of consortium claims. See Bilodeau v. Lumbermens Mut. Cas. Co., 467 N.E.2d 137 (Mass. 1984).
71. See Giuliani, 951 S.W.2d at 322.
recovery for a claim of loss of consortium of a parent who had only been
injured.

In writing for the Kentucky Supreme Court in *Giuliani*, Justice
Wintersheimer noted that the court's prior decision in *Blevins* had
recognized a parent's claim for loss of a child's consortium as being
independent and separate from the wrongful death action. Of course, in
Kentucky, the wrongful death statute compensates only for the loss of the
decedent's earning power and does not include any compensation for the
affliction to the family as a result of the wrongful death. The court actually
cited and analyzed in depth section 411.130 of the Kentucky Revised
Statutes, Kentucky's wrongful death statute, throughout its analysis of this
new tort claim. It would seem, therefore, that the *Giuliani* court has only
recognized recovery for this claim where a parent has died.

This apparent limitation within the *Giuliani* decision, however, has
not prohibited filings throughout the Commonwealth for loss of parental
consortium on behalf of children whose parents merely have been injured.

What lies ahead from the appellate courts as to recovery for the loss of
services of a severely-injured parent?

Under the specific facts of the *Giuliani* case, defendants can easily
argue that a claim for loss of parental consortium would be limited to
children whose parents were killed and entitled to file a wrongful death
action. To the contrary, plaintiffs maintain that the logic of this decision
would easily apply to allow recovery for the serious personal injury of a
parent. In arguing for recognition of this claim on behalf of minor children,
it has long been stated that the remedy should be available to children in the
same means and manner in which it is available to adults. Certainly, the
loss of consortium of a spouse has not been limited to a wrongful death
scenario. The consortium claim generally has been viewed as one for loss

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72. *Id.* (citing Department of Educ. v. Blevins, 707 S.W.2d 782 (Ky. 1986)).
73. *Id.* at 325 (Cooper, J., dissenting).
74. *Id.* (citing KY. REv. STAT. ANN. § 411.130 (Banks-Baldwin 1998)). Justice Cooper,
in his dissent, argued that this statute fails to provide a basis for extending a right of
recovery to minor children for loss of parental care. He further noted that only the
legislature could create such a cause of action, as they did in 1968 when section 411.135 of
the Kentucky Revised Statutes was enacted to permit a parent to bring a claim for loss of
affection of a child.
75. See KY. REv. STAT. ANN. § 411.135 (Banks-Baldwin 1998); *Blevins*, 707 S.W.2d at
782.
76. See Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970).
of services. If a parent, due to a serious physical injury, is unable to provide parental services of financial support, training, parental attention, and society, then the child's claim should be as valuable, or more so, than if the parent is deceased. The majority of courts addressing this issue have so concluded.

In Reagan v. Vaughn, the high court of Texas held that a child could recover for loss of consortium when a third party caused serious, permanent and disabling injuries to their parent. The Reagan case was one of the first decisions in Texas to recognize a child's claim for loss of parental consortium. Numerous other cases had previously come through the appellate and the federal court system and resulted in holdings which stated that only the Kentucky Supreme Court or the legislature had the authority to recognize such a cause of action.

However, much like the court in Giuliani, the Texas Supreme Court in Reagan addressed the evolving process of the common law and the duty of the court to recognize its evolution. In Reagan, unlike the prior cases which had specifically addressed the Texas wrongful death statute, the parent was not killed. Rather, the child's father was involved in a fight with a patron at a bar who struck him on the head with a baseball bat, leaving him with a severe brain injury and the function of a six- or seven-year-old child. The court pointed out that there is no way that a serious, permanent, and disabling injury such as this to a parent would not visit upon the child an equally serious deprivation as would the death of a parent.

79. 804 S.W.2d 463 (Tex. 1990).
80. Id.
81. Id.
82. Id. (citing In re Aircrash at Dallas/Fort Worth Airport on August 2, 1985, 856 F.2d 28 (5th Cir. 1988)).
83. See Reagan, 804 S.W.2d at 464. The court had recognized the right of a parent to recover damages for loss of a child in Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983). The court recognized the right of a child to recover damages for loss of companionship from the death of the parent in Cavmar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985). Both of those cases involved interpretation of the Texas Wrongful Death Act.
84. See Reagan, 804 S.W.2d at 464.
85. Id.
86. Id. at 465.
Upon these facts, the court felt compelled to recognize this cause of action.\textsuperscript{87} The court rejected arguments that recognizing this cause of action would allow for the recognition of further actions in favor of siblings, grandparents, close friends, and so on.\textsuperscript{88} The Texas Supreme Court, referencing the Wisconsin Supreme Court, specifically held that the parent/child relationship and the husband/wife relationship are distinct from any other relationships between relatives.\textsuperscript{89}

Then, the Reagan court proceeded to establish three tests which should be considered in determining whether a loss of consortium claim is available.\textsuperscript{90} First, the court stated that the claim would require a serious, permanent, and disabling injury to a parent.\textsuperscript{91} Second, the plaintiff must show that the defendant physically injured the child’s parent in a manner subjecting the defendant to liability.\textsuperscript{92} Third, this court set forth factors which juries should consider in determining the amount of damages.\textsuperscript{93} These factors include, but are not limited to, the following:

\begin{itemize}
  \item a. The severity of the injury and its actual effect upon the parent/child relationship;
  \item b. The child's age;
  \item c. The nature of the child's relationship with the parent;
  \item d. The child's emotional and physical characteristics; and
  \item e. Whether other consortium-giving relationships are available to the child.\textsuperscript{94}
\end{itemize}

Of course, in Kentucky courts, spousal consortium claims have not been so narrowly drawn or defined.\textsuperscript{95} While juries have often limited recovery under this element of damage, such limitations have been of their

\textsuperscript{87} Id. at 466.
\textsuperscript{88} Id.
\textsuperscript{89} Id. (citing Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984)).
\textsuperscript{90} See Reagan, 804 S.W.2d at 466.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 466-67.
\textsuperscript{94} Id. at 467 (citing Villareal v. State, 160 Ariz. 474, 774 P.2d 213, 217 (1989)).
\textsuperscript{95} See KY. REV. STAT. ANN. § 411.145 (Banks-Baldwin 1998); Donna M. Bloemer & Rachel Payne Vardiman, Recognition of Loss of Parental Consortium in Kentucky, 3-Fall KY. CHILDREN’S RTS. J. 9 (1994).
own volition and not as a result of any limiting instruction. Should children's claims be treated differently?

In practice, it would seem that every complaint involving an injured parent should now include a claim for loss of services to the child. Again, if equal protection arguments are to be applied consistent with Giuliani, there would be no reason to limit a child's claim any more than a spouse's claim for the loss of services of the parent/spouse.

The granting of this additional instruction, and the allowance of additional evidence as to the effect of the injury upon minor children, will certainly have the potential of raising verdicts in favor of injured parties. Use of factors, such as those set forth in Reagan, may provide needed guidance on this new element of damages.

In Giuliani, the Kentucky Supreme Court determined that concerns that "insurance costs would rise, and that double recovery would supposedly occur," were unconvincing. The court felt all those concerns were outweighed by the need to protect children.

It is respectfully submitted that the clear logic of Giuliani will need to be applied to allow claims for injured parents, as well as deceased parents, which may indeed result in higher verdicts. Of course, such logic further mandates the need for a determination from the court as to whether those claims will be subject to the "per person" or "per occurrence or accident" limits of the standard insurance policy.

96. Id.
97. In practice, jury instructions on spousal consortium claims are generally limited to the items of damage and left to counsel to present factors in favor of, or against, an award for that loss. See 2 Palmore, Kentucky Instructions to Jurors § 39.06 (4th ed. 1989).
98. The Giuliani court did state its belief that "under a proper instruction . . . ," the jury would be capable of making a distinction between the claims of the parent and the claims of the children. Giuliani, 951 S.W.2d at 322.
99. Id. Interestingly, the Giuliani case, when remanded by the Supreme Court to be tried, resulted in a defense verdict with no award to the estate or the children. See 2 Kentucky Trial Court Review 14, at 2-3, July 21, 1998.
100. See Giuliani, 951 S.W.2d at 322.
CONCLUSION

As was previously pointed out in the prior case note on Giuliani, the recognition of this cause of action raises numerous other questions which are yet to be addressed. 101 Will claims on behalf of minor children be tolled by the statute of limitations? May a child recover for the loss of financial support without regard to any disability income which might be available? Will the court require the application of certain factors to determine the amount of damages to a child when such have not been required to submit a spousal consortium claim to a jury?

In at least one reported trial, conducted after the court's holding in Giuliani, a jury awarded a 17-year-old (minor) son $40,000 for the loss of parental consortium of his deceased father. 102 This was an automobile accident case, and the total award was for $329,367. 103 The reporter did not discuss the limits available to satisfy this judgment.

Finally, will the Kentucky courts follow the "trend" of other jurisdictions and enforce "per person" bodily-injury limitations contained within the standard automobile liability policies? If so, much of the debate and discussion of this new claim may be rather meaningless to the practitioner.

101. See Ramsey, supra note 4, at 468.
103. Id.
INTRODUCTION

In Britt v. Commonwealth, the Kentucky Supreme Court addressed the issue of whether juveniles, who use firearms in the commission of a felony and are convicted in circuit court, are subject to the prohibition against probation contained in Kentucky Revised Statute (KRS) section 533.060(1). Britt involved the separate cases of two juveniles (Brad Britt and Andre Morris) who were charged with committing robberies while armed with a gun. The cases, however, presented the same issue on appeal. This article will examine the legislation implemented to address the problem of juveniles who use guns in the commission of felonies, and how the Kentucky Court of Appeals and ultimately the Kentucky Supreme Court were required to make sense out of ostensibly conflicting statutes.

In 1994, the General Assembly partially abandoned the treatment model of juvenile courts in cases where the juvenile is charged with using a firearm in the commission of a felony. This was a departure

2. Deputy Appellate Defender, Office of the Jefferson County Public Defender. The authors would like to thank Mark Wettle, Esq., appellate counsel for Brad Britt, for providing them with copies of the appellate briefs and other pleadings in Britt v. Commonwealth.
3. 965 S.W.2d 147 (Ky. 1998).
4. Section 533.060(1) provides in pertinent part:
   When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge.

KY. REV. STAT. ANN. § 533.060(1) (Michie 1997).
5. Britt, 965 S.W.2d at 148.
6. Id.
from the policy established by the Unified Juvenile Code (Code) which became effective in 1987.8 The intent of the 1987 Code was explicitly stated in KRS 600.010.9

It included "a right to treatment reasonably calculated to bring about an improvement of [the child's] condition"10 and a commitment to the use of "less restrictive alternatives"11 so that a child12 would not be "removed from [the family] except when absolutely necessary."13 While in certain cases the Code provided that a child could be transferred to circuit court for trial and sentencing as a "youthful offender,"14 the "treatment model" still applied and a number of sentencing provisions mitigated the punishment that could be imposed.15 Under the Code, any sentence of imprisonment would be served in the juvenile facility until age eighteen, at which time the circuit court judge would make a decision to continue treatment, to probate or conditionally discharge the sentence, or to incarcerate the youthful offender in the adult correction system for the remainder of the sentence.16 Another provision of particular interest in this context was KRS 640.040(3)17 which exempted the convicted youthful offender from the prohibition of probation, parole or conditional discharge enforced by KRS 533.060.18

In 1994, House Bill 390, an omnibus bill "relating to crimes and punishments,"19 effected a major change in the manner by which juveniles charged with felonies involving the use of firearms were to be transferred and prosecuted.20 But forgetting Brickey's warning against "hasty and isolated changes" to legal codes, the General Assembly set

9. See KY. REV. STAT. ANN. § 600.010 (Michie 1997).
10. Id. at § 600.010(d).
11. Id. at § 600.010(c).
12. Id. at § 600.020(3) (defining child as "any person who has not reached his eighteenth birthday").
13. Id. at § 600.010(2)(c).
14. Id. at § 600.020(55) (defining youthful offender as "any person regardless of age, transferred to circuit court under the provisions of KRS Chapter 635 or 640 and who is subsequently convicted in circuit court").
17. Id. at § 640.040(3).
18. Id. at § 533.060(1); see also supra text accompanying note 4.
20. Id. at § 12(4).
the stage for a three-year round of litigation over the effect of the changes upon the disposition of juveniles charged with firearms felonies.\textsuperscript{21}

As originally proposed, House Bill 390 added a new subsection to KRS 635.020 which predicated eligibility for transfer to circuit court as a youthful offender upon (1) a current charge of a Class C or D felony, (2) use of a firearm in the commission of the offense, (3) at least one prior felony adjudication, and (4) age of fourteen or older when the offense was committed.\textsuperscript{22} The addition was consistent with the other sections of KRS 635.020 because transfer under all subsections of amended KRS 635.020 hinged upon a motion by the county attorney and an order of transfer by the juvenile court judge after an adversarial hearing.\textsuperscript{23}

The Senate received House Bill 390 on March 16, 1994.\textsuperscript{24} The Bill was reported to the Senate by the Judiciary Committee on March 23,


The Penal Code consists of more than 280 interrelated provisions which have been carefully meshed to achieve internal consistency within a unified statutory framework. Thus, amending a Code provision is wholly different from amending other types of statutes which are isolated provisions. Such statutes largely function independently and amendment, therefore, has little effect on other law. This is simply not the case when a Code is amended, and it is imperative that this be understood before further legislative changes are considered.

\textit{Id.}

\textsuperscript{22}See H.B. 390, Reg. Sess., 1994 Ky. H.J. 1849. The following language was proposed:

If a child charged with a Class C or Class D felony in which a firearm was used in the commission of the offense has on one (1) prior separate occasion been adjudicated a public offender for a felony offense, and had attained the age of fourteen (14) at the time of the alleged commission of the firearm related offense, the court shall upon motion of the county attorney made prior to adjudication that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.

\textit{Id.}; see also S.B. 390, Reg. Sess., 1994 Ky. S.J. 2758. Pursuant to section 635.020(2), a child age 14 or over charged with a capital offense or a Class A or B felony could be transferred without regard to the use of a firearm. \textit{See KY. REV. STAT. ANN. § 635.020(2)} (Michie 1997).

\textsuperscript{23}See 1994 Ky. H.J. 1849; see also 1994 Ky. S.J. 2758.

\textsuperscript{24}See 1994 Ky. S.J. 1737.
with a committee amendment that fundamentally altered the approach taken.\textsuperscript{25}

Any other provision of KRS Chapters 610 to 645 to the contrary not withstanding, if a child charged with a felony in which a firearm was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be tried in the Circuit Court as an adult offender and shall be subject to the same penalties as an adult offender, except that until he reaches the age of eighteen (18) years, he shall be confined in a secure detention facility for juveniles or for youthful offenders, unless released pursuant to expiration of sentence or parole, and at age eighteen (18) he shall be transferred to a facility operated by the Department of Corrections to serve any time remaining on his sentence.\textsuperscript{26}

The amended version was adopted March 28, the fifty-sixth legislative day of the sixty-day session.\textsuperscript{27} The House received the Senate version the next day and on March 30, the fifty-eighth day, the amended version was passed by the House.\textsuperscript{28} The Bill was approved by the Governor on April 11, and, pursuant to section 55 of the Constitution, became effective July 15, 1994.\textsuperscript{29}

**DISTRICT AND CIRCUIT COURT PROCEEDINGS**

The aforementioned committee amendment to House Bill 390 was incorporated into KRS 635.020.\textsuperscript{30} The amendment’s impact on the application of KRS 533.060(1) was the subject of litigation in the *Britt* and *Morris* cases.\textsuperscript{31} The facts underlying those cases are important to an understanding of the issue surrounding the sentencing of “youthful offenders.”

\textsuperscript{25} Id. at 2749.
\textsuperscript{26} Id. at 2766.
\textsuperscript{27} Id. at 3126.
\textsuperscript{28} See 1994 Ky. H.J. 4282-4283.
\textsuperscript{30} Id. at § 12.
\textsuperscript{31} See Britt, 965 S.W.2d at 149.
Brad Britt was seventeen years old when he was arrested for robbing a convenience store at gunpoint in June, 1995. Proceedings were commenced against him in the Juvenile Session of Jefferson District Court. Following a preliminary hearing, the district court judge found probable cause to believe that Britt committed first degree robbery, a Class B felony, and that he was over fourteen years of age. Britt’s case was, therefore, transferred to Jefferson Circuit Court pursuant to KRS 635.020(4). He was indicted and eventually pleaded guilty to the robbery charge. The Commonwealth opposed probation on the ground that it was prohibited by KRS 533.060(1) because a firearm was used in the commission of a Class B felony. At sentencing, the circuit court judge found that Britt was a “youthful offender” and was, therefore, eligible for probation pursuant to KRS 640.040(3). Britt was sentenced to ten years imprisonment but was probated after he spent six months in jail.

Andre Morris was charged with robbing an ice cream store at gunpoint in February, 1995. Since he was sixteen years old at the time of the robbery, proceedings were commenced against him in the Juvenile Session of Jefferson District Court. Following the proceedings, the district court judge found probable cause to believe that Morris committed first degree robbery with a firearm and was over fourteen years of age at the time. Accordingly, Morris’ case was transferred to Jefferson Circuit Court. The grand jury returned an indictment which charged Morris with first degree robbery.

32. Id. at 148.
33. Id.
34. See KY. REV. STAT. ANN. §§ 515.020(2), 500.080(4)(a) (Michie 1997).
35. See Britt, 965 S.W.2d at 148.
36. Id.
37. Id.
39. Section 640.040(3) provides that “[n]o youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.” KY. REV. STAT. ANN. § 640.040(3) (Michie 1997).
40. See Britt, 965 S.W.2d at 148.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
In October, 1995, Morris entered a conditional guilty plea to a charge of second degree robbery, a Class C felony.\textsuperscript{46} Although use of a firearm is not an essential element of the offense, all agreed that a pistol was used in the robbery which occurred in January, 1995.\textsuperscript{47} After the plea of guilty was accepted, Morris filed a motion to conduct final sentencing in his case pursuant to KRS Chapter 640, the “youthful offender” chapter of the Unified Juvenile Code.\textsuperscript{48} The immediate purpose of the motion was to determine his eligibility for probation or conditional discharge at the time of sentencing. KRS 533.060(1), if applicable, would have made Morris ineligible because a firearm had been used in the robbery.\textsuperscript{49} But if Morris had been transferred as a youthful offender, KRS 640.040(3) would exempt him from ineligibility under that statute.\textsuperscript{50}

Although the circuit judge had reservations about what he considered “quick fix all inclusive legislation” and the policy of the statute,\textsuperscript{51} he concluded that he could not “modify the plain language of the statute to achieve what this [c]ourt perceived to be a more equitable result” and ordered that Andre Morris should “be sentenced in all respects as an adult except as set out in KRS 635.020(4).”\textsuperscript{52} The agreed upon sentence of eight years imprisonment was imposed in December, 1995.\textsuperscript{53} Morris appealed the circuit court’s ruling to the court of appeals as did the Commonwealth in Britt’s case.\textsuperscript{54}

\textbf{COURT OF APPEALS PROCEEDINGS}

In the court of appeals, the Commonwealth argued that KRS 533.060(1) required that Britt be denied probation.\textsuperscript{55} The Commonwealth noted that the only exceptions to the mandatory

\begin{itemize}
\item \textsuperscript{46} Id.; see Ky. Rev. Stat. Ann. § 515.030(2) (Michie 1997); see also Ky. R. Crim. P. 8.09 (West 1997).
\item \textsuperscript{47} See Commonwealth v. Morris, No. 95-CR-1362, at 207 (Jefferson Cir. Ct. 1995).
\item \textsuperscript{48} See Britt, 965 S.W.2d at 148; Morris, No. 95-CR-1362, at 207.
\item \textsuperscript{51} See Morris, No. 95-CR-1362, at 208. “Did the legislature really intend to re-institute the death penalty for 14 year olds?” Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 213-15.
\item \textsuperscript{54} See Britt, 965 S.W.2d at 148.
\end{itemize}
language in KRS 533.060(1) are for victims of domestic violence and juveniles who are found to be "youthful offenders" under KRS 640.040(3). The Commonwealth argued that the latter exception was inapplicable to Britt because of the change in Kentucky law on July 15, 1994.\textsuperscript{57}

Prior to July 15, 1994, the district court had to follow a two-step procedure in all cases in order to waive jurisdiction over a juvenile and transfer his or her case to circuit court.\textsuperscript{58} As of July 15, 1994, the class of juveniles eligible to be transferred to circuit court was significantly expanded by the enactment of KRS 635.020(4) which provided for a mandatory transfer to circuit court of all juveniles who "had attained the age of fourteen (14) years" at the time they committed "a felony in which a firearm was used."\textsuperscript{59} Juveniles who met those criteria "shall be tried in the [c]ircuit [c]ourt as an adult offender and shall be subject to the same penalties as an adult offender."\textsuperscript{60} Thus, the discretion traditionally vested in the district court to determine whether a juvenile should be transferred to circuit court was eliminated in cases where a juvenile met the criteria set forth in KRS 635.020(4). It was this automatic transfer statute that sent Britt's case to circuit court.

In the court of appeals, the Commonwealth argued that the circuit court erroneously considered Britt to be a "youthful offender" and, therefore, exempt from the prohibition to probation contained in KRS 533.060(1).\textsuperscript{61} The Commonwealth maintained that only the Juvenile Session of the district court and not the circuit court could

\textsuperscript{56} See Appellant's Brief at 3-4, Britt (No. 96-CA-0019-MR); see also supra text accompanying note 39.

\textsuperscript{57} See Appellant's Brief at 3-4, Britt (No. 96-CA-0019-MR).

\textsuperscript{58} See KY. REV. STAT. ANN. § 640.010(2) (Michie 1997). In the first proceeding, the court had to find probable cause to believe that a crime was committed, that the juvenile committed it, that the juvenile was of "sufficient" age, and had "the requisite number of prior adjudications." \textit{Id.} at § 640.010(2)(a). In the second proceeding, the court was required to consider seven statutory factors "before determining whether the child's case shall be transferred to the Circuit Court." \textit{Id.} at § 640.010(2)(b).


\textsuperscript{60} KY. REV. STAT. ANN. § 635.020(4) (Michie 1997). The statute further provided for juveniles to be "confined in a secure detention facility for juveniles or for youthful offenders, unless released pursuant to expiration of sentence or parole, and at age eighteen (18) he shall be transferred to a facility operated by the Department of Corrections to serve any time remaining on his sentence." \textit{Id.}

\textsuperscript{61} See Britt, No. 96-CA-0019-MR, slip op. at 2.
determine whether Britt was a "youthful offender." The Commonwealth took the position that the circuit court's ruling was in conflict with KRS 635.020(4) which stated that Britt "shall be tried in the circuit court as an adult offender and shall be subject to the same penalties as an adult offender notwithstanding any other provision of KRS Chapters 610 to 645 to the contrary." For the Commonwealth, the words "same penalties" in KRS 635.020(4) were significant. The Commonwealth argued that "probation is not the same penalty as serving a sentence." Thus, the circuit court by granting probation to Britt did not subject him to the same penalty as an adult offender who would have been ineligible for probation under KRS 533.060(1).

In response to the Commonwealth's argument, Britt offered the court of appeals two grounds on which to affirm the circuit court's ruling. Britt first argued that the Commonwealth's attempt to characterize probation as merely another penalty was contrary to case law, which distinguished a court's duty "to impose a penalty on a convicted individual from its ability to defer the imposition of that penalty." Britt further argued that the legislative intent underlying the statute supported his position that he was eligible for probation because in situations where the General Assembly intended "to exclude certain defendants from consideration of probation, it has done so by specific statute." Thus, when KRS 635.020(4) and KRS 640.040(2) were read together, the General Assembly intended that juveniles who were at least fourteen years of age and used a firearm in the commission of a felony were to be prosecuted in circuit court without the waiver hearing ordinarily required by KRS 640.010. Those juveniles, however, were still eligible for probation.

Britt's second argument was one of statutory construction. Britt noted that KRS 640.040 was amended and reenacted by the General

62. See Appellant's Brief at 8-9, Britt (No. 96-CA-0019-MR).
63. Id. at 9.
64. Id.
65. Id.
66. Id.
67. See Appellee's Brief at 3, Britt (No. 96-CA-0019-MR).
68. Id. at 5.
69. Id.
70. Id. at 6.
71. Id.
72. Id.
Assembly in the legislative session in which KRS 635.020(4) was enacted.\(^{73}\) Thus, Britt reasoned that if the Commonwealth’s position prevailed, then the ameliorative provisions of KRS 640.040(3) would be rendered a nullity.\(^{74}\) Britt relied on the fundamental rule of statutory construction that the specific statute prevailed over a more general statute.\(^{75}\) He also argued that if the language of the statutes were ambiguous, then the rule of lenity applied and the defendant was entitled to have the statutes construed in his favor.\(^{76}\) The Commonwealth, however, reiterated its argument that probation is a penalty for purposes of KRS 635.020(4), and that the language of that statute could be applied without resorting to the rules of statutory construction.\(^{77}\)

On direct appeal to the court of appeals, Morris pursued the line of argument made at final sentencing.\(^{78}\) The Commonwealth emphasized the phrases “tried in the circuit court as an adult offender” and “subject to the same penalties as an adult offender” in support of its claim that a juvenile in Morris’ position was an “adult offender.”\(^{79}\) In response, Morris’ attorney argued that he was a youthful offender and that the “same penalties as an adult” referred only to the imposition of a term of years and not to the possibility of probation.\(^{80}\) The appellate briefs reflected the same arguments.\(^{81}\) The appeal was submitted for decision without oral argument in September, 1996.\(^{82}\)

At this same time, the appeal in *Commonwealth v. Britt*\(^{83}\) was proceeding independently in the court of appeals. Neither attorney knew that there was another case with the same issues under submission to the court of appeals at that time. Morris’ argument was that:

> careful examination of the statutory language shows that a child who falls under the provisions of the statute

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\(^{73}\) Id. at 6-7; see Act of Apr. 11, 1994, ch. 396, §§ 12, 14, 1994 Ky. Acts.

\(^{74}\) See Appellee’s Brief at 7, *Britt* (No. 96-CA-0019-MR).

\(^{75}\) Id.; see also Heady v. Commonwealth, 597 S.W.2d 613, 614 (Ky. 1980).

\(^{76}\) Id.

\(^{77}\) See Appellant’s Reply Brief at 1, 2, *Britt* (No. 96-CA-0019-MR).


\(^{79}\) Id. at 16:31:25; 16:36:29.

\(^{80}\) Id. at 16:33:48; 16:42:34.

\(^{81}\) See generally Briefs, *Morris*, (No. 96-CA-0047-MR).


shall be tried in the circuit court as an adult offender and shall “be subject to the same penalties as an adult offender.” It does not state that the child is no longer considered a youthful offender.  

Morris continued that in any event, probation or ineligibility for probation could not be considered a penalty, as the penalties for violation of the Penal Code are set out in the individual statutes denouncing the offenses. Morris reasoned that probation is a mitigation of the penalty prescribed by law and that the reference to “same penalties as an adult” could not logically refer to eligibility for probation. The ruling of the court of appeals on this subject was the same as that rendered in Commonwealth v. Britt.

The court of appeals took the unusual step of considering Britt’s case en banc. In a sharply divided opinion, the court reversed the circuit court’s order granting probation. The majority opinion, authored by Judge Johnson, found that the General Assembly “created the classification of ‘adult offender’ in an attempt to address the problems associated with youths, crime and guns.” The majority viewed the enactment of KRS 635.020(4) as the creation of “a new classification under which offenders fourteen to seventeen years of age who commit a felony with a firearm are to be treated as adults for all purposes related to that crime and not as a juvenile pursuant to Chapter 640.” Britt was therefore considered to be an adult offender and subject to the prohibition against probation contained in KRS 533.060(1). Britt’s argument that denial of probation was not a penalty was rejected as “mere semantics.” Accordingly, the circuit court’s order granting Britt probation was reversed and remanded for resentencing.

84. Appellant’s Brief at 20, Morris (No. 96-CA-0047-MR).
85. Id. at 21-22.
86. Id. at 22.
87. See No. 96-CA-0019-MR, slip op. at 4.
88. Id. at 1.
89. Id. at 4.
90. Id. at 3.
91. Id.
92. Id.
93. Id. at 4.
94. Id.
Five judges dissented from the majority opinion. Judge Knopf argued in dissent that the General Assembly did not intend "for KRS 635.020(4) to abrogate youthful offender status for juvenile firearm felonies." It was his view that the statute simply provided for the automatic transfer to circuit court of juveniles who were charged with using firearms in the commission of felonies. The statute merely obviated the need to make the findings required by KRS 640.010. Judge Knopf criticized the majority’s conclusion that KRS 635.020(4) created a new classification, i.e., “a minor tried as an adult offender” and he argued that such a classification not only fell outside the parameters of the statute but it also nullified much of the Juvenile Code. Judge Knopf found that KRS 635.020(4) paralleled a number of provisions in KRS Chapter 640 and thus the majority misinterpreted the statute. Moreover, the majority’s interpretation of the statute “radically alter[ed]” the special treatment and protection historically afforded juveniles by Kentucky law. Judge Knopf agreed that juveniles who were transferred to circuit court were, in general, treated as adults but he also recognized that KRS Chapter 640 created “clear guidelines for treating youthful offenders differently than adult offenders.” That distinction, however, was abolished by the majority opinion for “one subclass of felonies committed by juveniles.” The problem caused thereby, as Judge Knopf saw it, was the “enormous potential for inconsistent dispositions” in the prosecution of felonies committed by juveniles.

Judge Knopf readily acknowledged the General Assembly’s ability to create a new classification for juveniles treated as adult offenders. He argued, however, that KRS 635.020(4) was not the clear expression of legislative intent, which was necessary to support the majority’s radical departure from the treatment of juvenile offenders previously afforded them under Kentucky law. Thus, Judge Knopf

95. Id. at 4. Judge Buckingham did not participate in the case.
96. Britt, No. 96-CA-0019-MR, slip op. at 5 (Knopf, J., dissenting).
97. Id.
98. Id. at 5, 7.
99. Id. at 6-7.
100. Id. at 7.
101. Id.
102. Id. at 8.
103. Id.
104. Id.
105. Id.
concluded that in the “absence of an express mandate from the legislature . . . the more viable interpretation of KRS 635.020(4) is that the General Assembly merely intended to bypass the proof required under KRS 640.010 in order to transfer a child charged with a felony involving a firearm to circuit court.” Accordingly, he believed that the sentencing procedures of KRS 640.040(3) were applicable to Britt, at least to the extent that they did not conflict with the specific provisions of KRS 635.020(4). Therefore, the circuit court correctly ruled that there was no statutory prohibition against probating Britt.

Chief Judge Wilhoit also filed a dissenting opinion and concurred in the result reached by Judge Knopf. He considered the entire statutory scheme to be ambiguous at best and, as a result, the rule of lenity applied. He noted that KRS 640.010(1) “unambiguously” classified juveniles who fell within the parameters of KRS 635.020(4) as “youthful offenders” and that KRS 640.040(3) “unambiguously” exempted youthful offenders from the provisions of KRS 533.060. In Chief Judge Wilhoit’s view, the problem was that the word “penalties” contained in KRS 635.020(4) was subject to multiple interpretations. Thus, the rule of lenity required that the statute be construed in Britt’s favor.

By January, 1997, when the court of appeals rendered its opinion, the General Assembly had amended KRS 635.020(4) and, significantly, had amended the definition of the term “youthful offender.” In its 1996 Regular Session, the General Assembly modified KRS 635.020(4) to divide the ungainly single sentence provision into two sentences dealing with the separate subject matters. The statute now also explicitly provided for a preliminary hearing. The definition of “youthful offender” was amended by the addition of a reference to persons transferred pursuant to KRS Chapter 635 to the

106. Id.
107. Id. at 8-9.
109. Id. (Wilhoit, C.J., dissenting).
110. Id.
111. Id.
112. Id. at 10.
113. Id. at 9.
115. Id. at § 40(4).
116. Id.
already extant reference to KRS Chapter 640.117 But inexplicably, the General Assembly imposed a deferred effective date of July 15, 1997, for both amendments.118 These changes were critical to the result in Morris and Britt in light of the Kentucky Supreme Court’s ultimate characterization of KRS 635.020(4) as a transfer statute in Commonwealth v. Halsell,119 rendered in November 1996.120

In petitioning the court of appeals for a rehearing,121 Britt pointed out that the General Assembly had amended the definition of “youthful offender.”122 KRS 600.020(55) defined “youthful offender” as “any person regardless of age, transferred to [c]ircuit [c]ourt under the provisions of KRS Chapter 635 or 640 and who is subsequently convicted in [c]ircuit [c]ourt.”123 The reference to KRS Chapter 635 in the definition of “youthful offender” left no doubt that the legislature intended for juveniles similarly situated to Britt to be eligible for probation and to be exempt from the provisions of KRS 533.060(1).124

In his petition for rehearing, Morris presented the General Assembly’s amendment to KRS 635.020(4) to the Court of Appeals noting that in Halsell the Supreme Court had held that a transfer could be justified under either KRS 635.020(4) or KRS 640.010(2).125 As to the change of definition, Morris pointed out that any child sentenced on or after July 15, 1997, would be sentenced as a youthful offender.126 From this, Morris concluded that the General Assembly amended the definition to make it clear that the reference to penalties in KRS 635.020(4) was limited to the term of years that could be imposed and was not intended to preclude the ameliorative sentencing procedures found in KRS Chapter 640, the chapter dealing with youthful offenders.127 Morris also argued that it was impossible to conceive of a rational basis for discriminating between those sentenced before and those sentenced after

117. Id. at § 9(55).
118. Id. at §§ 67(1), 67(6).
119. 934 S.W.2d 552 (Ky. 1996).
120. Id. at 556.
121. See Ky. R. Civ. P. 76.32 (West 1997).
122. See Appellee’s Petition for Rehearing at 2, Britt (No. 96-CA-0019-MR).
124. See Appellee’s Petition for Rehearing at 2-3, Britt (No. 96-CA-0019-MR).
125. See Appellant’s Petition for Rehearing at 2-3, Morris (No. 96-CA-0047-MR).
126. Id. at 3.
127. Id. at 3.
The petition was denied on the ground that "[t]he petition does not meet th[e] high standard" imposed by rule 76.32(2) of the Kentucky Rules of Civil Procedure.  

SUPREME COURT PROCEEDINGS  

After Britt’s petition for rehearing was denied, he filed a motion for discretionary review in the supreme court. As grounds for the motion, Britt maintained that the court of appeals’ opinion not only contradicted the plain language of the pertinent statutes but also conflicted with the rules of statutory construction. Britt again argued that the intent of the General Assembly was to exempt him from the proscription against probation contained in KRS 533.060(1). That intent was manifested in the aforementioned 1996 amendment to the definition of "youthful offender." Thus, to the extent that the court of appeals interpreted KRS 635.020(4) as creating "a new classification" of fourteen- to seventeen-year-old offenders who used a firearm in the commission of a felony, the court’s opinion was in conflict with the amended definition of "youthful offender."

Morris also filed a motion for discretionary review in which he contrasted the position of the court of appeals majority with the actions taken by the General Assembly. The majority opinion had held that KRS 635.020(4) "created a new classification" of juveniles who were "to be treated as adults for all purposes related to [their] crime." As an adult could not be a youthful offender, and as its own precedent characterized probation ineligibility as a punishment, the majority concluded that Morris could not be eligible for probation. Morris conceded that "[b]ut for the 1996 amendment to the term ‘youthful

128. Id. at 3-4.  
129. See Order Denying Petition for Rehearing, Morris (No. 96-CA-0047-MR).  
130. See Ky. R. Civ. P. 76.20 (West 1997).  
131. See Appellant’s Motion for Discretionary Review at 4, Britt (No. 97-SC-283-DG).  
132. Id. at 4-5.  
133. Id. at 4.  
134. Id. at 6-8.  
136. Id.  
137. Id. at 4; see Ratcliffe v. Commonwealth, 719 S.W.2d 445 (Ky. Ct. App. 1986).
offender’ this analysis could be persuasive.”

Morris argued the inclusion of those transferred pursuant to KRS Chapter 635 in the definition of youthful offender was the decisive indicator of legislative intent, and this evolution of the law mandated review of the court of appeals’ disposition. The motion was expedited for consideration and review was granted in June, 1997.

The supreme court granted Britt’s motion for discretionary review after the court of appeals denied his petition for rehearing. In the supreme court, Britt framed the issue as whether a juvenile who is transferred to circuit court pursuant to KRS 635.020(4) is still eligible for probation as a youthful offender under KRS 640.040(3). The task before the supreme court was to resolve an apparent conflict between KRS 640.040(3) and KRS 635.020(4) and decide whether Britt was a youthful offender under the former statute or an adult offender under the latter. As in the court of appeals, Britt’s argument was premised on the rules of statutory construction and the legislative intent underlying the statutes.

Britt first argued that there was no true conflict between KRS 635.020(4) and KRS 640.040. He maintained that KRS 635.020(4) was merely a transfer provision by which the General Assembly allowed juveniles who used firearms to be automatically transferred to circuit court. KRS 635.020(4) was just a vehicle by which a circuit court obtained jurisdiction over a juvenile’s case. In support of his argument, Britt cited Commonwealth v. Halsell in which the supreme court upheld the constitutionality of KRS 635.020(4). Britt argued that he was still subject to the “ameliorative provisions of KRS Chapter 640,”

138. Id. at 2.
139. Id. at 11-12.
141. See Appellant’s Brief at 1, Britt (No. 97-SC-283-DG).
142. Britt, 965 S.W.2d at 147.
143. See Appellant’s Brief at 4, 7, Britt (No. 97-SC-283-DG); see Britt, 965 S.W.2d at 149.
144. See Appellant’s Brief at 4, Britt (No. 97-SC-283-DG).
145. Id. at 3-6.
146. Id. at 4-5.
147. 934 S.W.2d 552 (Ky. 1996).
148. Id. at 556 (recognizing that section 635.020(4) of the Kentucky Revised Statutes provides for an automatic transfer of certain juvenile offenders to circuit court).
notwithstanding the mandatory transfer.\textsuperscript{149} Thus, the statutes could be harmonized and achieve the legislative objectives underlying them\textsuperscript{150}. Consequently, the majority opinion in the court of appeals rested on the faulty premise that the statutes created a new classification of juvenile offender who was to be treated as an adult offender for all purposes related to the crime over which the circuit court had jurisdiction.\textsuperscript{151} Britt urged the supreme court to reject the court of appeals’ conclusion because the Juvenile Code’s definitions of “child”\textsuperscript{152} and “youthful offender”\textsuperscript{153} gave no indication that the legislature intended to create such a new classification of juvenile offender.\textsuperscript{154}

Britt argued that the plain language of KRS 635.020(4) reflected a legislative intent to bypass the discretionary transfer procedure set forth in KRS 640.010(2)(a) and (b) in favor of an automatic transfer to circuit court for juveniles who commit crimes with firearms.\textsuperscript{155} If there were doubts about the construction of the statute, then the rule of lenity required that the statute be interpreted in the defendant’s favor.\textsuperscript{156} Britt also noted that “KRS Chapters 600 to 645 shall be interpreted to effectuate [certain] express legislative purposes which included strengthen[ing] and maintain[ing] the biological family unit and offer[ing] all available resources to any family in need of them.”\textsuperscript{157} In addition, “the court shall show that other less restrictive alternatives have been attempted or are not feasible in order to insure that children are not removed from families except when absolutely necessary.”\textsuperscript{158} Lastly, “any child brought before the court under KRS Chapter 600 to 645 shall

\textsuperscript{149} See Appellant’s Brief at 4-5, Britt (No. 97-SC-283-DG).
\textsuperscript{150} Id.
\textsuperscript{151} See Britt, No. 96-CA-0019-MR, slip op. at 3.
\textsuperscript{152} See Ky. Rev. Stat. Ann. § 600.020(5) (Michie 1997). The statute provides: “‘Child’ means any person who has not reached his eighteenth birthday unless otherwise provided.” Id.
\textsuperscript{153} See Ky. Rev. Stat. Ann. § 600.020(55) (Michie 1996). The statute provides: “‘Youthful offender’ means any person regardless of age, transferred to Circuit Court under the provisions of KRS Chapter 640 and who is subsequently convicted in Circuit Court.” Id. Effective July 15, 1997, the definition was amended to include persons “transferred to Circuit Court under the provisions of KRS 635 or 640.” Id.
\textsuperscript{154} See Appellant’s Brief at 5, Britt (No. 97-SC-283-DG).
\textsuperscript{155} Id. at 6-9.
\textsuperscript{156} Id. at 5.
\textsuperscript{157} Id. at 7; see Ky. Rev. Stat. Ann. § 600.010(2)(a) (Michie 1997).
\textsuperscript{158} Appellant's Brief at 7, Britt (No. 97-SC-283-DG); see also Ky. Rev. Stat. Ann. § 600.010(2)(c) (Michie 1997).
have a right to treatment reasonably calculated to bring about an improvement of his condition." Britt argued that these objectives would be abrogated if juveniles transferred to circuit court pursuant to KRS 635.020(4) were ineligible for probation as the court of appeals ruled.

Britt continued to argue, as he did in the court of appeals, that denial of probation is not a penalty or punishment as those terms are defined in the Penal Code, and he again noted that, where the legislature has prohibited certain defendants from being considered for probation, it has done so by specific statute and not by implication. Britt's last argument was that his position was supported by a 1996 amendment to KRS 600.020(55) which defined "youthful offender" as "any person, regardless of age, transferred to [c]ircuit [c]ourt under the provisions of KRS Chapters 635 or 640 and who is subsequently convicted in [c]ircuit [c]ourt." Since the statute was amended to include a specific reference to KRS Chapter 635, Britt reasoned that the legislature unequivocally brought juveniles transferred pursuant to KRS 635.020(4) within the definition of "youthful offender." They were not adult offenders as the court of appeals found, and consequently, as a "youthful offender," Britt was eligible for probation under KRS 640.040(3). That was the true intent of the General Assembly.

In the supreme court, the Commonwealth argued that KRS 635.020(4) not only expanded the definition of adult offender to include a juvenile who used firearms in the commission of a felony, but also superseded any provision of KRS Chapter 640 which would treat those juveniles as youthful offenders. The Commonwealth argued that the language of KRS 635.020(4) was unambiguous and should be literally interpreted. "Persons meeting the criteria are by the plain wording of
the statute, adults.” Consequently, they came within the scope of KRS 533.060(1) which prohibited probation for certain felonies.

Even if the language of the statute could be considered to be ambiguous, an examination of legislative intent supported the Commonwealth’s argument that juveniles in Britt’s position were statutorily ineligible for probation. The Commonwealth noted that the original version of the statute required that juveniles who fell within its parameters were to be treated as youthful offenders. The General Assembly, however, did not adopt that version of the statute when it was enacted. Thus, the Commonwealth maintained that Britt’s argument hinged on a version of the statute that was never put into effect.

The Commonwealth further argued that the purposes of the Unified Juvenile Code, insofar as they sought to maintain the family unit and provide treatment for juveniles, were “in some instances secondary to the safety of the community.” Since the legislature was presumed to be aware of KRS 533.060(1) before it enacted KRS 635.020(4), the Commonwealth reasoned that “it must be presumed that the legislature intended for persons such as [Britt] to be denied consideration for probation when it mandated that he be tried as an adult with the same penalties as an adult offender.” The Commonwealth also cited the first clause of KRS 635.020(4) in support of its argument that KRS 635.020(4) is the more specific, and therefore controlling, statute.

The Commonwealth also argued that denial of probation under KRS 533.060(1) was part of the penalty for first degree robbery when committed with a firearm. The Commonwealth took the position that if the legislature intended KRS Chapter 640 to apply to KRS 635.020(4), then it would have so specified as it did in KRS 635.020(2), (3), (5), (6) and (7).

170. Id. at 5.
171. Id. at 6.
172. Id. at 7.
173. Id. at 7-8.
174. Id. at 5-6.
175. Id. at 8.
176. Id.
178. See Appellee’s Brief at 8, Britt (No. 97-SC-283-DG).
179. Id. at 9-10.
180. Id. at 10-11.
With respect to Britt’s argument that the 1996 amendment to the definition of “youthful offender” brought him within the scope of KRS 640.040(3), the Commonwealth maintained that although KRS Chapter 635 contained provisions which applied to procedures for juvenile offenders, KRS 635.020(4) was an exception to those provisions. In the Commonwealth’s view, juveniles who came within the ambit of KRS 635.020(1) were to be prosecuted as juveniles and, therefore, did not fall within the definition of “youthful offender” under KRS 600.020(55).

KRS 635.020(2), (3), (5), (6) and (7) made specific reference to KRS Chapter 640 and mandated youthful offender prosecution. Juveniles, to whom those five paragraphs applied, fell within the amended definition of KRS 600.020(55). As for those juveniles to whom KRS 635.020(4) applied, they too fell within the amended definition of KRS 600.020(55) but they were to be prosecuted as adults and transferred to an adult penal facility upon reaching the age of eighteen. They were not to be returned to juvenile court for final sentencing as is required of youthful offenders. Thus, the court of appeals correctly ruled that KRS 635.020(4) created a new classification which required that all fourteen to seventeen year olds who committed a felony with a firearm were to be treated as adult offenders for all purposes related to that crime. KRS Chapter 640, therefore, had no application to such offenders and the plain meaning of KRS 635.020(4) was not changed by the 1996 amendment to KRS 600.020(55). Accordingly, the Commonwealth concluded that the decision of the court of appeals should, therefore, be affirmed.

In his appellant’s brief, Morris advised the Supreme Court that the 1994 amendment to KRS 635.020 precluded a smooth reconciliation of its provision with the remainder of the Unified Juvenile Code, particularly KRS Chapter 640. But, he also argued, because his

181. See supra note 153 and accompanying text.
182. See Appellee’s Brief at 11, Britt (No. 97-SC-283-DG).
183. Id. at 12.
184. Id.
185. Id.
186. Id. at 12-13.
187. Id. at 13; see KY. REV. STAT. ANN. § 640.030(3) (Michie 1997).
188. See Appellee’s Brief at 13, Britt (No. 97-SC-283-DG).
189. Id. at 13.
190. Id. at 11-13.
191. See Appellant’s Brief at 6, Morris (No. 97-SC-285-DG).
construction presented the fewest contradictions and incorporated the intent reflected by the 1996 amendments to KRS 635.020(4) and KRS 600.020(55), the court should adopt it as the best that could be achieved under the circumstances. The briefs for both parties recited well-established principles of statutory construction and contained numerous case citations for those principles. Each party, however, faced obstacles that precluded strict reliance on those principles.

Morris faced a problem of timing. The 1996 amendments changing the definition of youthful offender and changing the grammatical structure of KRS 635.020(4) favored a construction that would allow consideration of probation. Unfortunately for him, these amendments had been given a delayed effective date by the General Assembly. The general rule of construction established by the General Assembly in KRS 446.080(3) and KRS 446.110 prohibits retroactive application of a statute in the absence of an express legislative declaration that it should be so construed. Morris' criminal liability was incurred in 1995.

The Commonwealth's problem arose from the strong policy of the Court of Justice against repeal by implication. Although the phrase "adult offender" appeared twice in the 1994 version of KRS 635.020(4), the General Assembly never defined the term or expressly indicated that a juvenile transferred to circuit court under that statute was transformed from a youthful offender to an adult. The Commonwealth also had to explain why the General Assembly amended KRS 600.020(55) in 1996 to include persons transferred under KRS Chapter 635 within the definition of youthful offender. This was a critical problem because the only transfer provision in KRS Chapter 635 is KRS 635.020(4). A final problem was the grammatical change to KRS 635.020(4). Where

192. Id. at 7.
194. See Ky. Rev. Stat. Ann. §§ 466.080(3), 466.110 (Michie 1997). Section 466.080(3) provides that "[n]o statute shall be construed to be retroactive unless expressly so declared." Section 466.110 provides that "[n]o new law shall be construed to repeal a former law, nor as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law." Id.
195. See Britt, 965 S.W.2d at 148.
previously that section had been a single sentence begun with a clause that read, "[a]ny other provisions of KRS Chapters 610 to 645 to the contrary notwithstanding," in 1996, the General Assembly divided the statutory language into two sentences. The "any other provisions" clause modified only the first sentence which dealt with transfer from district to circuit court. The second sentence of the revised statute dealt with the manner of disposition of persons convicted in circuit court after that transfer. The sweeping intent purportedly indicated by the "any other provisions" clause did not apply to the disposition sentence.

The supreme court ruled in favor of the juveniles. The majority opinion in Britt consists of three printed pages of which almost two pages are devoted to recitation of the procedural histories of the two cases, to references to the opinion of the court of appeals, and to an exposition of the arguments presented by the opposing parties. Justice Stumbo noted that discretionary review was granted because of the "differing results reached by each circuit judge and the badly splintered court of appeals decisions." She explained that the majority believed that the "evolution of KRS 635.020 and the 1996 [a]mendment of KRS 600.020(55) shed light on the legislative intent behind KRS 635.020(4)." That intent was "merely to facilitate transfer of juveniles accused of committing a felony with a firearm to the circuit court by bypassing the proof required under KRS 640.010." Thus, the Justice concluded, "KRS 635.020(4) does not create a new category of adult offender that precludes children transferred pursuant to it from eligibility for the ameliorative provisions of KRS 640.040." The court explained its conclusion by considering the changes to the Unified Juvenile Code by the General Assembly in 1994 and 1996.

It is interesting to note that the majority opinion made no explicit reference to any of the established canons of statutory construction. Nor

200. Id.
201. Id.
202. See id.
203. See Britt, 965 S.W.2d at 150.
204. Id. at 148-49.
205. Id. at 149.
206. Id.
207. Id.
208. Id.
209. Id. at 149-50.
did the court refer to any case precedents other than to note in passing that it upheld the constitutionality of the expedited transfer procedure of KRS 635.020(4) in Commonwealth v. Halsell. Rather, the majority opinion adopted a pragmatic approach in response to the actions of the General Assembly.

To determine the intent of the 1994 amendment to KRS 635.020(4), the court found it useful to examine the juvenile transfer procedure prior to those amendments. Before 1994, KRS 635.020 permitted the county attorney to initiate transfer proceedings. The decision to make the motion was left to the county attorney. The decision to transfer the child was "left to the discretion of the juvenile court judge after considering a number of factors set out in KRS 640.010(2)(b)." If the child were transferred, KRS 640.010(2)(c) provided that he would be "proceeded against in the circuit court as an adult." According to the majority, this phrase meant that the juvenile was to be proceeded against "pursuant to the Rules of Criminal Procedure and the Rules of Evidence rather than under the special adjudicatory procedures set out in Chapter 610 and 635 of the Juvenile Code."

Under the original Code plan, transfer to circuit court was necessary "because only the circuit courts may impose a term of years penalty for a felony." However, "upon conviction of a qualifying offense . . . , the juvenile was dealt with as a 'youthful offender.'"

Thus, the purpose of KRS 635.020 and KRS 640.010(2) was to permit the [c]ourt to impose the same term of years upon a juvenile for which an adult would be liable, but to otherwise leave the circuit judge discretion to probate or conditionally discharge the juvenile, send the

210. Id. at 150.
211. Id. at 149-50.
212. Id. at 149.
213. Id.
214. Id.
215. Id.; KY. REV. STAT. ANN. § 640.010(2)(c) (Michie 1997).
216. Britt, 965 S.W.2d at 149.
217. Id. at 150.
218. Id.
As to the 1994 Amendment, the court, relying on the “any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding” language, determined (as Britt and Morris argued) that the effect of the amendment was “to facilitate transfer of juveniles accused of committing a felony with a firearm to the circuit court by bypassing the proof required under KRS 640.010(2).”220 The majority opinion rejected the claim that the General Assembly intended to create an entirely new class of “adult offenders” by the use of the words in the 1994 Amendment.221 Rather, the court concluded, if the General Assembly had meant to make this change, “it would have done so explicitly by giving a definition for the term analogous to the definition of ‘youthful offender’ set out in KRS 600.020.”222 In addition, the majority noted that acceptance of the argument concerning “adult offenders” would result in “unintended and unjust results.”223 The court noted that a fourteen-year-old transferred under KRS 635.020(4) as an adult could be sentenced to death because the exemption from the death penalty for those under sixteen provided by KRS 640.040(1) applies only to youthful offenders.224 The majority concluded that it had no reason to believe that the General Assembly “intended to permit the execution of fourteen-year-olds who use guns but to prohibit execution of fifteen-year-olds who use knives or blunt objects to kill others.”225

The 1996 amendment of the definition of youthful offender by the General Assembly confirmed the majority’s belief “that KRS 635.020(4) is nothing more than a provision designed to simplify the transfer of juvenile felony firearms offenders to circuit court.”226 The majority noted the obvious effect of this amendment, “that every child transferred to circuit court under KRS 635.020(4) after its effective date of July 15, 1997, would be transferred as a youthful offender.”227

219. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id.
court agreed with the contention that “this amendment shows that this was the intention of the General Assembly all along.”

The court concluded that all juveniles transferred pursuant to KRS 635.020(4), regardless of the date of transfer, are to be considered youthful offenders and thus “eligible for the ameliorative sentencing provisions of KRS Chapter 640.” The court reversed the opinion of the court of appeals with respect to Morris and Britt. Morris’ case was remanded to the circuit court “for sentencing in accordance with the provisions set out in KRS Chapter 640.”

According to Justice Wintersheimer, “the majority misconstrues the clear language of the statute and misinterprets the equally clear legislative intent by injecting a tortured and erroneous interpretation of both the language and intent of the General Assembly.” KRS 635.020(4) provides in part that:

if a child charged with a felony in which a firearm was used in the commission of the offense has attained the age of 14 years at the time of the commission of the alleged offense, he shall be tried in the circuit court as an adult offender and shall be subject to the same penalties as an adult offender . . . .

Justice Wintersheimer agreed with the court of appeals in “that KRS 635.020(4) created a new classification under which offenders 14 to 17 years of age, who commit a felony with a firearm, are to be treated as adults for all purposes related to that crime and not be treated as juveniles.” Since Britt and Morris were both over fourteen and under eighteen years of age when they committed their respective armed offenses, they are subject to this new classification of juvenile offenders.

228. Id.
229. Id.
230. Id.
231. Id.
232. Britt, 965 S.W.2d at 151 (Wintersheimer, J., dissenting).
233. Id.
234. Id.
235. Id.
Justice Wintersheimer also found that the lenity rule has no application where the statute is not ambiguous.\textsuperscript{236} Pursuant to KRS 446.080, “all statutes shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.”\textsuperscript{237} According to KRS 635.020(4), the individual “chooses to be treated as an adult offender”\textsuperscript{238} when they commit an offense using a firearm.\textsuperscript{239} By using a firearm, the individual juvenile has increased “the criminal conduct... to that of an adult, and therefore adult consequences must necessarily follow.”\textsuperscript{240} Justice Wintersheimer concluded that legislative intent was “abundantly clear when they stated that offenders between the ages of 14 and 17 who commit a felony with a firearm are to be treated as adults for all purposes related to that crime notwithstanding the provisions of the juvenile code.”\textsuperscript{241}

CONCLUSION

The simplicity of the supreme court opinion in Britt belies the problems presented during the course of litigation. Britt was a case of statutory interpretation in which both parties could present credible arguments in support of their respective constructions of the statute. But in the end, the canons of construction were of limited use to the supreme court in disposing of the question. The court was faced with a situation in which the only solution to the statutory construction problem was to examine the General Assembly’s later works and rely on the changed definition of youthful offender in KRS 600.020(55). Britt is a reminder that Brickey’s advice concerning amendment of code provisions should be followed. Different language or placement of part of the text of KRS 635.020(4) in Chapter 640 could have avoided the confusion that made Britt v. Commonwealth necessary.

\textsuperscript{236} Id.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
KENTUCKY TORT LIABILITY FOR FAILURE TO REPORT FAMILY VIOLENCE

by James T. R. Jones

INTRODUCTION

The Kentucky Legislature has recognized an important truth: in order to prevent family violence, whether it involves child, spouse or elder abuse, the State first must detect it. Thus, Kentucky statutes mandate that designated, mostly professional, individuals report instances of child, abuse, by "[a]ny person, including, but not limited to, physician, law enforcement officer, nurse, social worker, cabinet [Cabinet for Human Resources] personnel, coroner, medical examiner, alternate care facility employee, or caretaker having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation." Ky. REV. STAT. ANN. § 209.030(2) (Banks-Baldwin 1996). See Travis A. Fritsch & Kathy W. Frederich, Mandatory Reporting of Domestic Violence and Coordination With Child Protective Services, 3 DOMESTIC VIOLENCE REP. 51 (1998); see also Martha L. Coulter & Ronald A. Chez, Domestic Violence Victims Support Mandatory Reporting: For Others, 12 J. FAM. VIOL. 349 (1997). Section 403.785(1) specially requires law enforcement agencies to report abuse, Ky. REV. STAT. ANN. § 403.785(1) (Banks-Baldwin 1998); this statute does not supplant law enforcements' obligations under the abuse reporting statutes. Ky. REV. STAT. ANN. § 403.715(5) (Banks-Baldwin 1996). Under section 620.030(1), child abuse in Kentucky must be reported by "[a]ny person who knows or has reasonable cause to believe that a child is dependent, neglected or abused . . . ." Ky. REV. STAT. ANN. § 620.030(1) (Banks-Baldwin 1996). The statute goes on to provide:

(2) Any person, including but not limited to a physician, osteopathic physician, nurse, teacher, school personnel, social worker, coroner, medical examiner, child-caring personnel, resident, intern, chiropractor, dentist, optometrist, emergency medical technician, paramedic, health professional, mental health professional, peace officer or any organization or agency for any of the above, who knows or has
spouse\textsuperscript{4} or elder\textsuperscript{6} abuse to the authorities, who then can protect the endangered victim (or face liability themselves).\textsuperscript{7} Abuse reporters are immune from civil or criminal liability for reporting in good faith,\textsuperscript{8} and traditional privileges like the physician-patient privilege are abrogated by the reporting requirement.\textsuperscript{9} If those required to report do not do so, the

reasonable cause to believe that a child is dependent, neglected or abused, regardless of whether the person believed to have caused the dependency, neglect or abuse is a parent, guardian, person exercising custodial control or supervision or another person, or who has attended such child as a part of his professional duties shall, if requested, in addition to the report required in subsection (1) of this section, file with the local law enforcement agency or the Kentucky State Police or the Commonwealth's or county attorney, the cabinet or its designated representative within forty-eight (48) hours of the original report a written report.

\textit{Id.} Even a sitting judge is obliged to report abuse of which he or she learns. See Fugate v. Fugate, 896 S.W.2d 621 (Ky. Ct. App. 1995). This article focuses on professionals required to report, such as physicians and other healthcare workers, social workers, educators, clergy, mental health professionals, law enforcement agencies/officers and judges.


The physician must report abuse regardless of the wishes of the patient. See Domestic Violence--Duty, supra, at 166; Domestic Violence--Role, supra, at 11.

6. See §§ 209.020(4)(a), 209.030 (Banks-Baldwin 1998). In a sense, elder abuse is a hybrid between child abuse and spouse abuse. This article focuses on reporting of child abuse and spouse abuse, but the reader should recognize that elder abuse reporting raises many of the same issues, and that civil liability of non-reporters of elder abuse is as salutary as in child or spouse abuse cases. For more on elder abuse and liability of non-reporters, see Battered Spouse III, supra note 2, at 218-20; Seymour Moskowitz, Saving Granny From The Wolf: Elder Abuse and Neglect--The Legal Framework, 31 Conn. L. Rev. 77 (1998).

7. For more on governmental liability for failure to protect family violence victims, see Battered Spouse I and Battered Spouse II, supra note 2.


statutes impose criminal liability upon them.\textsuperscript{10} In \textit{Commonwealth v. Allen}\textsuperscript{11} a majority of the Kentucky Supreme Court, in a decision which could prove seminal for mandatory abuse reporting in Kentucky, recently emphasized the requirement, and compelling need, for strict compliance with the abuse reporting laws.\textsuperscript{12}

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\textsuperscript{10} It is a Class B misdemeanor not to report child, elder, or spouse abuse. See §§ 209.990(1), 620.990 (Banks-Baldwin 1998).

\textsuperscript{11} 980 S.W.2d 278 (Ky. 1998).

\textsuperscript{12} In this case, Betty Allen was a teacher and Pamela Cook was a counselor at a middle school in Bullitt County. When they learned in the autumn of 1992 that Donald C. Mullins, an industrial-arts teacher, allegedly had sexually abused several sixth-grade girls (Mullins eventually was convicted of one count of second-degree sexual abuse), they reported this to principal Joe Mills. Allen and Cook, however, did not report the abuse to the authorities listed in section 620.030 of the Kentucky Revised Statutes, the Kentucky child abuse reporting statute. Mills himself did not promptly report the problem to outside authorities; unfortunately, in the interim Mullins abused another victim. When the story finally came out, Mullins was arrested. Allen and Cook were charged in 1993 with a misdemeanor for failure to report their knowledge to the proper authorities (Mills apparently also was charged with this offense; see \textit{Commonwealth v. Allen}, 980 S.W.2d at 282 (Cooper, J., concurring)). Their case then languished in the courts. Twice a Bullitt County District Judge dismissed the charges against Allen and Cook, at least in part because that court felt telling the principal about the problem was sufficient compliance with the reporting statute by Allen and Cook. In \textit{Commonwealth v. Allen}, the Kentucky Supreme Court reinstated those charges in a 4-3 decision, rejecting in the process the substantial compliance argument. Thus, in a case where the court easily could have said Allen and Cook had done enough by reporting to Mills (as, indeed, the three dissenters argued, see \textit{id.} at 282-84 (Johnstone, J., dissenting)), it instead strictly construed the mandatory abuse reporting statute and thus reinvigorated strict construction of that law. As Chief Justice
Criminal liability would seem to provide a strong incentive to report, but prosecutors rarely prosecute those whom the law requires to report violence, yet, who fail to do so. Thus, victims suffer, at least in part, because of the unwillingness of health and other professionals to report violence to state officials who might help the victims with information, services, or both. Something must be done in order to force professionals to act when they will not do so voluntarily; although a salutary result, Allen may be inadequate to make criminal penalties a realistic incentive for reporting.

Experience has demonstrated that imposing civil liability upon unresponsive professionals both compensates injured family violence victims and inspires all such professionals to act appropriately thereafter lest they face future civil liability. In all these cases, the potential defendant is not the actual attacker of the victim. Rather, the defendant is someone who should have done something which might have prevented the subsequent violence, yet did not, and harm resulted. Any liability, of course, will only be for injuries the victim suffered after the time when the professional should have acted. Many cases have held that such a defendant's inaction

Lambert explained in his majority opinion, the "statutory language could not be more definitive." Id. at 281. The Chief Justice discussed why as a policy matter Allen and Cook should have reported the abuse to the proper authorities; perhaps most importantly, there is no guarantee that a supervisor will . . . relay the report to governmental authorities, particularly with regard to such a sensitive matter. A supervisor, especially a school principal who would be a colleague of a teacher accused of abuse, might well be reluctant to tell authorities that a colleague or subordinate is a suspected child abuser. By requiring each person with knowledge to report child abuse in his or her individual capacity, the General Assembly more nearly assured that the suspected abuse would be investigated by state authorities.

Id. at 280 (emphasis added). In this case, of course, Mills did not report, and another victim suffered as a result. See supra text accompanying this note.

13. See, e.g., Battered Spouse III, supra note 2, at 212. In Kentucky, this author knows of no prosecutions of non-reporters of spouse or elder abuse. While there have been a few prosecutions of non-reporters of child abuse, enforcement of the reporting statute is spotty at best and prosecutions have uncertain results -- witness Commonwealth v. Allen, where the case has been pending since 1993 and still awaits trial.


15. See supra text accompanying note 12.

16. See, e.g., Battered Spouse III, supra note 2, at 192-94, 204 and n.58.

17. With regard to this timing issue, a leading child abuse expert states the following: [t]he only harms or injuries that are considered are those that occurred
is a cause in fact and proximate cause of the victim's injuries or death, and, accordingly, the defendant is as liable for them as the actual perpetrator. Indeed, in his concurring opinion in Commonwealth v. Allen, Justice Cooper emphasized the causal connection between non-reporting and future violence — "[i]f Appellees had obeyed their statutory duty when they were informed of [the child abuser's] abuse of his first two victims, the third victim might have been spared the same fate."  

This article will summarize United States authority on holding professionals liable in tort for non-reporting of abuse, and will explain why Kentucky should impose liability in such cases. There are obvious benefits for doing so, as the threat of civil liability can force professionals to report violence to the authorities who can, and must, act to stop it. Of course, the usual types of liability claims, such as medical malpractice, are as viable in abuse cases as in all others.

**TORT LIABILITY FOR FAILURE TO REPORT CHILD ABUSE**

United States professionals (and others with reporting obligations) can face negligence liability when they fail to report child abuse. Landeros v. Flood is the leading pro-liability decision. In that case, the mother of an eleven-month-old girl took her to a California hospital for treatment. The child had been severely battered, but the examining physician did not...
report her condition to the authorities. Instead, the child was sent home with her mother. Once there, she suffered further severe abuse until another doctor at another hospital correctly diagnosed her condition and reported it. As a result, she was taken from her mother. The child's representative then sued the original physician and hospital in common law and statutory negligence for the injuries the child suffered after they discharged her into her mother's care. The California Supreme Court upheld the two causes of action.

Turning initially to common law negligence, the Landeros court found the physician had a duty to report because of the reporting statutes, which "evidence a determination by the Legislature that in the event a physician does diagnose a battered child . . . due care includes a duty to report that . . . to the authorities." Because the court concluded that it was a question of fact whether the defendant physician should have foreseen that the child would be injured if the physician merely discharged her to her mother without first reporting the abuse, the court rejected the physician's contention of superseding intervening cause/proximate cause as a matter of law. Finally, and as an alternative to common law negligence, the Landeros court upheld the use of statutory negligence as a means of holding civilly liable a physician who did not report child abuse to the authorities pursuant to the requirements of a reporting statute.

United States courts have regarded Landeros somewhat cautiously in various cases featuring defendants who were medical professionals, educators, child welfare workers, counselors, or clergy. On the common law negligence front, several tribunals have imposed a duty to report child abuse.

24. Id.
25. Id.
26. Id.
27. Id.
28. Statutory negligence is negligence based upon violation of the standard of care created by a legislative enactment. The breach of the statute can give an injured plaintiff evidence of fault, or can even make the wrongdoer conclusively negligent because of the breach. See Battered Spouse III, supra note 2, at 209-10. In Landeros, the child alleged statutory negligence due to failure to report under the child abuse statute and two related laws requiring physicians and hospitals to report injuries inflicted in violation of the criminal law. See Landeros, 551 P.2d at 392.
29. Landeros, 551 P.2d at 390.
30. Id. at 394 n.8.
31. Id. at 395-96. See also supra text accompanying note 17.
32. Landeros, 551 P.2d at 396-97.
In *J.A.W. v. Roberts*, a former child sexual abuse victim sued a number of individuals who knew about his abuse but did not report it. The Court of Appeals of Indiana reaffirmed the general proposition that "knowledge of another's peril, even knowledge of the existence of criminal activity, standing alone, imposes no common law duty on one possessing such knowledge to take any affirmative action." When it considered one clergyman/defendant, however, the *J.A.W.* court tentatively found differently. The plaintiff alleged he and this clergyman had spoken in excess of fifty times over a four-year period about the plaintiff's sexual relationship with his foster father, all while the clergyman was counseling the plaintiff on spiritual matters. The court held that if this were true, a special relationship would have existed between the plaintiff and this clergyman which could generate a duty on the clergyman's part to report the abuse. The court noted that it was foreseeable to this clergyman that the plaintiff's foster father would continue molesting the plaintiff unless the clergyman reported the abuse, and ruled that "the foreseeability of continued abuse weighs in favor of imposing a common law duty to report alleged child abuse to the authorities."

The Indiana court in *J.A.W.*, and courts in some other jurisdictions, agree with *Landeros* that there can be a common law tort duty to report child abuse. Other tribunals have been less charitable. A number of courts have indicated there is no common law duty to report possible child abuse. Kentucky has not ruled on this issue, but the analysis in *Landeros* and *J.A.W.* should prove persuasive.

When United States courts have considered statutory negligence in failure to report child abuse cases, the post-*Landeros* record also has been mixed. Tribunals in states like New York, Michigan, and Tennessee have

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34. Id. at 806.
35. Id. at 809.
36. Id. at 811.
37. Id.
38. Id.
39. Id. at 812.
agreed with California's *Landeros* decision that statutory negligence applies to physicians and other mandatory abuse reporters who do not report. A number of other jurisdictions, however, have refused to extend statutory negligence to violations of child abuse reporting statutes. For example, in *Borne v. Northwest Allen County School Corp.*, the Indiana Court of Appeals concluded that the legislative purpose in enacting Indiana's child abuse statutory scheme was not to create a private right of action against non-reporters of abuse. Since the legislature did not intend for a private right of action, statutory negligence, in turn, would not lie. Several other courts have agreed with *Borne's* characterization of the nature of legislatures' intent when enacting mandatory child abuse reporting laws. A typical case holds that being in the protected class (by being a child abuse victim) does not suffice to generate statutory negligence coverage; the victim must "demonstrate a clear legislative intention to provide for civil remedies." Reporting laws, these courts hold, are intended to protect the general public rather than a specific class of individuals.

Regardless of these cases, however, courts should exercise their considerable discretion and extend statutory negligence to violations of child abuse reporting laws. These laws certainly were enacted to help protect children from abuse (even if there were other rationales for them), and ought to qualify for statutory negligence. These laws are analogous to the order of protection statutes in domestic violence cases, which various United States courts have indicated qualify for statutory negligence treatment.


45. *Id.* at 1203.

46. *Id.*

47. *See, e.g.*, Isely, 880 F. Supp. at 1148; *Kansas State Bank*, 819 P.2d at 602-04.


50. *See, e.g.*, Raucci v. Town of Rotterdam, 902 F.2d 1050, 1056 (2d Cir. 1990); Sorichetti v. City of New York, 482 N.E.2d 70, 76 (N.Y. 1985); *Battered Spouse II*, supra note 2, at
The domestic violence provisions arguably benefit the general public, but in addition, they more specifically help protect an unfortunately large group of individuals from injury attributable to domestic violence. If, as the courts have found, battered spouses' orders of protection merit statutory negligence treatment, so should child abuse victims covered by a mandatory reporting law.

Kentucky long has recognized and enforced the statutory negligence doctrine. In the seminal case of Lomayestewa v. Our Lady of Mercy Hospital, a psychiatric patient was injured when she fell or jumped from the window in her room in the psychiatric ward of the defendant hospital. The hospital had violated a Kentucky administrative regulation by not placing a detention screen on the window to prevent a patient from falling or jumping from it. The court imposed statutory negligence on the hospital since the patient "was one of the class of persons intended to be protected by the regulation, and her jump from the window was an event that the regulation was designed to prevent." Various Kentucky cases have applied statutory negligence to violations of the types of provisions described in the Lomayestewa standard. In Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, the Kentucky Supreme Court specifically adopted the Restatement (Second) of Torts definition of when a court should apply statutory negligence in a given case:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to

23-29, 37-38. The decision in Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. Ct. App. 1992) should not affect this point. In Ashby, the court failed to find a special relationship when the police did not enforce a protection order, resulting in the death of an abused spouse. In so doing, the court confused the special relationship required to establish a negligence duty with the special relationship needed to bring a 42 U.S.C. § 1983 (1994) action pursuant to DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). These are two very different types of special relationships, and presumably the Kentucky courts will resolve the Ashby confusion when the issue properly is presented to them.

51. 589 S.W.2d 885 (Ky. 1979).
52. Id. at 886.
53. Id.
54. Id. at 887.
56. 736 S.W.2d 328 (Ky. 1987).
be exclusively or in part:

(a) to protect a class of persons which includes the one whose interest is invaded, and  
(b) to protect the particular interest which is invaded, and  
(c) to protect that interest against the kind of harm which has resulted, and  
(d) to protect that interest against the particular hazard from which the harm results.\(^5\)

On the other hand, a court may conclude the enactor of a statutory provision did not intend for it to give rise to a statutory negligence claim/duty. The Restatement (Second) of Torts further states that:

The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively:

(a) to protect the interests of the state or any subdivision of it as such, or  
(b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or  
(c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public, or  
(d) to protect a class of persons other than the one whose interests are invaded, or  
(e) to protect an interest other than the one invaded, or  
(f) to protect against other harm than that which has resulted, or  
(g) to protect against other hazards than that from which the harm has resulted.\(^5\)

\(^{57}\) Id. at 334-35 (quoting Restatement (Second) of Torts § 286 (1965)).  
\(^{58}\) Restatement (Second) of Torts § 288 (1965). See, e.g., Freehauf v. School Bd. of Seminole County, 623 So. 2d 761, 763-64 (Fla. Dist. Ct. App. 1993) (stating that child abuse reporting statutes appear to be more like a statute intended for the safety and welfare
Kentucky courts uphold, or reject, statutory negligence claims on the basis of the various tenets of this provision's search for legislative intent. The obvious question is whether Kentucky courts will view mandatory reporting laws as the types of provisions courts should enforce through statutory negligence. As noted, various courts have applied the Restatement doctrine in child abuse reporting situations. They believe that statutory negligence furthers the legislative purpose -- to guard abused children from further abuse -- which gave rise to the original protective legislation. Numerous commentators on child abuse reporting have agreed that those who do not report should be liable for statutory negligence.

But what about the various child abuse rulings to the contrary? These decisions indicate that reporting violations do not fit the parameters of statutory negligence because the legislature did not intend it and could present a real roadblock for the attorney representing an abused child with a claim against a non-reporting professional in a Kentucky court.

Regardless of these cases, Kentucky courts should extend statutory negligence to violations of the child abuse reporting law. Its principal reason for enactment was to help protect children from abuse and under the terms of the Restatement this law qualifies for statutory negligence. Because of the general public, and not one which would provide for a private cause of action).


60. See cases cited supra note 42.


The basic elements of this theory are that: (1) the physician, by failing to report a suspected case of child abuse, violated his statutory duty; (2) as a proximate result of that violation, the child suffered subsequent injuries; (3) the child was a member of the class of persons which the statute was designed to protect; and (4) the subsequent injuries were the result of acts that the statute was designed to prevent.


62. See supra notes 43-49 and accompanying text.

63. See supra notes 43-49 and accompanying text.
of its focus on abused children, the reporting statute does not protect merely
the state at large, which would transgress the Restatement. 64 Employing
statutory negligence will help motivate reporters to take actions which will
facilitate protection for child abuse victims, a legislative purpose which
meets any statutory negligence test. As a New York court recently and
succinctly stated:

The purpose and intent of the statutory scheme is to
encourage the prompt reporting of all suspected cases of
child abuse . . . . [I]mposing civil liability for a breach of
the mandated duty to report further encourages the prompt
reporting of suspected abuse . . . . We conclude that a
mandated reporter is obligated to report suspected cases of
child . . . abuse . . . and may be held liable for a breach of
that duty . . . .65

Kentucky should rule similarly. Such a result certainly will befit a reporting
law so recently reinforced by the Kentucky Supreme Court in Commonwealth v. Allen. 66

Whether or not they hold professionals liable for not reporting child
abuse, many United States courts, in a related cause of action, assess liability
upon medical professionals, and especially mental health professionals, if
they do not warn foreseeable victims of their patients’ dangerous
propensities." Courts hold that physicians have a duty to disclose certain

64. See supra note 58 and accompanying text.
citations omitted); see also Ham v. Hospital of Morristown, Inc., 917 F. Supp. 531, 537
(E.D. Tenn. 1995) (applying Tennessee law). Here the court stated:
The reporting statute . . . is not intended for the protection of the general
public. It is intended to protect children only and, more specifically,
those children who are the victims of brutality, neglect, and physical
and sexual abuse . . . . [T]he reporting statute creates a legal obligation
to report suspected brutality, neglect, or physical or sexual abuse of
children and the failure to report “can give rise to liability.”
Id. (quoting Doe v. Coffee County Bd. of Educ., 852 S.W.2d 889, 909 (Tenn. Ct. App.
1992)).
66. See supra text accompanying note 12.
67. Special problems may arise in child abuse situations, since the victim may be too young
to heed a warning and the parent of the victim may be the abuser. Warning the authorities
will resolve the problem, and meshes nicely with mandatory reporting laws. See Tarasoff
things against the wishes of the patient, for the benefit of others, such as in the contagious disease cases, or their offshoot, the well-known Tarasoff v. Regents of the University of California line of authorities.

In Tarasoff, a patient told a mental health professional that he intended to kill a woman who had spurned the patient's romantic advances. The professional never warned the intended victim of the threats. When she subsequently was murdered by the patient, her survivors sued the professional, alleging the professional negligently failed to warn. The California Supreme Court found there was a special relationship between the patient and his therapist, and that this relationship created a duty toward third parties. The court held that if the threats were definite and focused on an identifiable target, the mental health professional had a duty to warn and was liable for an unreasonable failure to do so. Various other jurisdictions have adopted the Tarasoff approach. Some have limited its scope via statute, but even under such laws, a professional may be liable for not warning about a patient's actual threat of physical violence, communicated by the patient to the professional, against a clearly identified or reasonably identifiable victim whom the patient then harms. As Kentucky Revised Statute Section 202A.400(1) provides:

No monetary liability and no cause of action shall arise against any qualified mental health professional for failing to predict, warn of or take precautions to provide protection from a patient's violent behavior, unless the patient has

v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).
68. See, e.g., Reisner v. Regents of Univ. of Cal., 37 Cal. Rptr. 2d 518 (Cal. Ct. App. 1995) (physician had duty properly to warn about patient's AIDS); DiMarco v. Lynch Homes-Chester County, Inc., 583 A.2d 422 (Pa. 1990) (physician had duty properly to warn about patient's hepatitis B); Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993) (physician had duty to warn about patient's Rocky Mountain Spotted Fever).
70. Id. at 339.
71. Id. at 340.
72. Id.
73. Id. at 343-44.
74. Id. at 345.
76. E.g., IDAHO CODE § 6-1902 (1991); IND. CODE § 34-4-12.4-2 (1987).
77. See, e.g., KY. REV. STAT. ANN. § 202A.400 (Banks-Baldwin 1996).
communicated to the qualified mental health professional an actual threat of physical violence against a clearly identified or reasonably identifiable victim, or unless the patient has communicated to the qualified mental health professional an actual threat of some specific violent act.78

Kentucky courts will enforce Tarasoff in a case which satisfies the statutory criteria.79

This liability theory can be important whenever a child abuser voices concrete threats against a victim to his therapist. If the therapist does nothing and the abuser harms the victim, the victim has a Tarasoff claim against the mental health professional. Such a charge could go in tandem with a failure to report abuse allegation. Hence, the professional would be liable both for not reporting abuse to the authorities and for not warning an intended violence victim of the risk the victim faced.

TORT LIABILITY FOR FAILURE TO REPORT SPOUSE ABUSE80

Various United States jurisdictions recognize that child abuse is not the only type of family violence which must be reported to the government if it is to be detected and properly handled.81 In particular, detection of domestic violence is a serious problem due to the reluctance of many victims to go to the police for help. Instead, they often turn to medical professionals for aid. For example, as many as thirty percent of women treated in hospital emergency rooms are there because of domestic violence.82 Physicians can help the increasing number of battered women by reporting, to the proper authorities, the numerous known or suspected abuse cases they see, yet they refuse in overwhelming numbers to do so.83

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78. Id. at § 202A.400(1) (emphasis added).
80. See supra note 6 and accompanying text regarding elder abuse and liability for failure to report.
81. See generally sources cited supra note 2.
82. For a more detailed discussion of domestic violence reporting, see Battered Spouse III, supra note 2.
83. See Battered Spouse III, supra note 2, at 196-97.
these professionals\textsuperscript{84} to report?

As in the child abuse situation, civil liability can provide the incentive that inspires physicians to identify the otherwise unknown victims of insidious crimes, and thus the perpetrators as well. Although to date no United States courts have ruled on this point, the rationales of \textit{Landeros} and the cases which impose liability for failure to report child abuse also should apply to spouse abuse.\textsuperscript{85}

When common law liability is the issue, it seems clear from cases like the infectious disease decisions or \textit{Tarasoff} that physicians and related professionals owe a duty to the battered women they serve.\textsuperscript{86} When they have the requisite relationship with a battered spouse, they also should have the duty to report abuse of that person regardless of the existence of a mandatory reporting law. They should be civilly liable for any injuries the spouse suffers which are proximately caused by the physician's failure to discharge that obligation. Mandatory reporting has numerous salutary results;\textsuperscript{87} civil liability of non-reporters is justified notwithstanding the opposition of many who point to alleged problems due to breach of confidentiality, denial of patient self-determination, or various other concerns.\textsuperscript{88}

Review of the child abuse precedents demonstrates some of the problems in convincing tribunals to hold spouse abuse non-reporters liable on a common law basis. Courts which have rejected \textit{Landeros} and \textit{J.A.W.} may be even less likely to impose common law liability in domestic violence cases, which involve presumably competent adults rather than children. \textit{Landeros} itself would seem to support such liability, although child and spouse abuse situations may be distinguishable.

\textsuperscript{84} Although physicians are not the only professionals who would need to report spouse abuse, many reporters probably would be medical professionals.


\textsuperscript{86} See cases cited supra notes 68-69.

\textsuperscript{87} \textit{See Battered Spouse III, supra} note 2, at 223-26.

\textsuperscript{88} \textit{Id.} at 227-46.
Regardless of how United States courts view proclaiming a common law duty for physicians to report domestic violence, they should not hesitate to declare a reporting obligation in any of the many jurisdictions which have some version of statutorily-mandated reporting. These jurisdictions include the states, in particular Kentucky, with well-developed spouse abuse reporting requirements, as well as others with more general reporting laws. Typical of the general laws are those (1) requiring physicians to report injuries caused by firearms, knives, or other sources attributable to criminal acts, and (2) immunizing physicians from liability for their reports. Even the American Medical Association agrees that physicians should report violent acts committed against their patients when a statute mandates that they do so. The statutory negligence doctrine will provide the basis for holding the physicians negligent if they do not report as required by statute.

The recent child abuse precedents could be worrisome when statutory negligence for a failure to report domestic violence is the issue. All those cases involved specific child abuse reporting laws, which were focused in a relatively narrow way. Yet, as noted, some courts have refused to apply statutory negligence to those provisions. On the other hand, in all but a few states, the only reporting laws which apply to spouse abuse are general ones which extend to crimes across the board. These laws, accordingly, are even more vulnerable to attack than the child abuse provisions because at least the child abuse laws apply only to children. And even the laws in states, like Kentucky, with specific spouse abuse reporting laws similar to specific child abuse reporting statutes, are vulnerable to attack like the child abuse laws addressed in cases like Borne v. Northwest Allen County School Corp. Still, the statutory negligence

89. For a good, overview of the area, including an extensive collection of statutory citations, see Ariella Hyman et al., Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?, 273 JAMA 1781 (1995) (noting that forty-five states then had some sort of domestic violence reporting law).
91. See supra notes 43-49 and accompanying text.
92. Or, if the laws applied to more than children, they were roundly attacked as not constituting suitable foundations for statutory negligence. See Fischer v. Metcalf, 543 So. 2d 785, 790 (Fla. Dist. Ct. App. 1989).
doctrine ought to apply whether the statute in question is a specific spouse abuse reporting law or a general crime reporting provision. The public policy which favors mandatory reporting as a major initiative in the effort to protect domestic violence victims, as recently reiterated in Commonwealth v. Allen,\textsuperscript{94} equally should favor courts using the statutory negligence approach as a means for making reporting an even more effective tool. The judiciary ought freely to use it regardless of narrow decisions to the contrary.\textsuperscript{95}

Note that the reporting law, and potential liability for non-reporting, are not limited to the physician or other professional who does not report that a patient may be a battered spouse. It may apply to others, such as the pediatrician who notices that the adult who brings in a child for treatment is an apparent spouse abuse victim. It also applies to the physician/dentist/teacher/clergy whose patient tells her that the patient/student/parishioner is a spouse abuser. This clearly could raise problems for psychiatrists and other mental health providers, who view the confidentiality of their relationships with their patients as sacrosanct. As noted above,\textsuperscript{96} the Kentucky adult protection reporting statute waives any privilege that otherwise might apply here, and immunizes any good-faith reporter from civil or criminal liability for breach of confidence. In so doing, it follows the lead of numerous cases which have held that confidentiality concerns must give way to the public need to know about dangerous contagious diseases, child abuse, or potentially dangerous individuals.\textsuperscript{97} In these reporting cases, psychiatrists and other physicians are required by the Kentucky statute, on pain of potential civil and criminal liability, to report their reasonable suspicion of spouse abuse.\textsuperscript{98}

Strong policy reasons support imposing civil liability against non-reporters of family violence. The protective, preventive and social benefits of reporting, especially by physicians, are numerous. For example, such a

\textsuperscript{94} See supra text accompanying note 12.
\textsuperscript{95} As an alternative to statutory negligence, Kentucky courts could consider employing the common law statutory tort doctrine. See Battered Spouse III, supra note 2, at 255-60. This should not prove necessary, however, given Kentucky's repeated use of statutory negligence principles.
\textsuperscript{96} See supra notes 8-9 and accompanying text.
\textsuperscript{97} See, e.g., Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976); Hope v. Landau, 486 N.E.2d 89 (Mass. 1985); Jones v. Stanko, 160 N.E. 456 (Ohio 1928).
\textsuperscript{98} See supra notes 8-9 and accompanying text.
requirement increases the number of abuse reports turned in to the authorities. This increase is advantageous because these reports help society detect and prevent crime (abuse); identify and offer protection, information and services to the victims of abuse, and collect data on the problem of family violence. Identification particularly is advanced since otherwise it is very difficult for the authorities to determine which individuals are abuse victims unless either the abuse is reported or the abuse is so bad for so long that it becomes obvious (and quite possibly causes permanent injuries or is fatal). Data collection is also a real issue, as without obligatory reports there is significantly less information available for measuring this type of criminal activity (and if statistics show abuse is a major problem, society is much more likely to respond to it both with attention and adequate resources).

If courts require reporting, they will demonstrate concern over family violence and a commitment to public action. Abusers who go unreported often continue their behavior, and ultimately may kill or severely injure their victims. Mandatory reporting reminds the many professionals who are reluctant to report abuse that they have to report whether they want to or not. Domestic violence is a crime which will not truly be curtailed until it is reported to the appropriate authorities as fully as any other offense. Once they learn of the violation, the authorities can take suitable steps, including offering voluntary protective services to the victims and possibly prosecuting the abuser. This can protect and empower the victim.

99. See Besharov, supra note 17, at 24 (finding that reported cases of child abuse went from 150,000 in 1963 to 1.3 million in 1981).
101. See Aaron, supra note 61, at 184 (suggesting that identification of abuse victims is an essential step in preventing further abuse).
102. See Battered Spouse III, supra note 2, at 224.
104. See, e.g., Bell and Tooman, supra note 100, at 347; Besharov, supra note 61, at 67 (reporting that over 40 percent of the children who died from abuse in Texas over a three-year period died as a result of the failure to report previous abuse).
105. See Besharov, supra note 17, at 25, 27.
107. See Battered Spouse III, supra note 2, at 225.
as well as hold the batterer accountable for his actions which, in turn, helps his victim (by stopping the abuse -- hopefully forever). Required reporting does other worthwhile things. It helps those victims who are too intimidated by their batterers to seek help. It gives physicians and others a means for having possible abuse cases investigated and provides a central place to send information about their battered patients. Required reporting can encourage some to report what they otherwise might fear to bring out absent the defense that mandatory reporting provides. Mandatory reporting lets the professional see that the authorities take reports of abuse seriously, and forces all physicians, not just the ones who report abuse voluntarily, to bear ratably the various economic and non-economic costs of reporting. Examples of these costs of reporting include time spent in filing reports and, perhaps, testifying in court; lost income for time spent on reporting rather than treating other patients; cost of office staff who help in the reporting process; and lost income from patients who change physicians as they do not want a physician who reports abuse to treat them or their victims -- probably not a problem if all physicians report pursuant to an obligatory rule.

The principal arguments against mandatory reporting, and thus against civil liability of non-reporters, focus on a woman's right of self-determination and the confidentiality of the physician-patient relationship. Both are serious issues, but neither justifies blocking a reporting requirement. The self-determination issue is whether reporting a battered spouse's condition to the state merely reflects appropriate governmental concern over the safety of its citizens or constitutes officious intermeddling

108. Id.
109. Id.
110. See Vicki Gottlich, Beyond Granny Bashing: Elder Abuse in the 1990s, 28 CLEARINGHOUSE REV. 371, 374 (1994) (noting that in 1991 alone, 1.57 million older persons were subjected to abuse, neglect, and exploitation).
111. See John Palincsar & Deborah Crouse Cobb, The Physician's Role in Detecting and Reporting Elder Abuse, 3 J. LEGAL MED. 413, 437-38 (1982).
112. See Yelas, supra note 103, at 788 (finding that, especially in small towns, mandatory reporting of abuse relieved some of the community pressure that the reporters might otherwise have felt).
113. See Battered Spouse III, supra note 2, at 225-26.
114. Id. at 227.
in a competent adult's life which is intolerable in a free society. Its resolution requires a consideration of the nature of domestic violence.

Spouse abuse is a terrible social problem involving controlling, violent, criminal behavior against those often unable to protect themselves. If such conduct happened in any other context, society would not tolerate it. But, because it typically arises in a relationship, and with a woman as the victim, it has been treated differently -- as a "private" concern, not for any, much less state, intervention. However, abusive acts are not "private," regardless of against whom they are directed. Spouse battering is as "public" a problem as any robbery or assault, rape or murder, and needs to be pursued just as vigorously whether or not the victim demands outside intervention. By keeping areas mostly involving women "private," society has kept them out of view, and also out of thought. Such treatment has meant that problems like child abuse, elder abuse, and spouse abuse have continued for centuries without serious interference or restriction from any outside source. Finally, the government is starting to get involved and is making a dent in these problems; claims that they are "private" matters can only hinder government's efforts.

When a problem is public, the government must try to deal with it, and that can mean -- in addition to offering information and protective services -- prosecuting or otherwise pursuing criminals regardless of the wishes of the victims, because crime is an offense against both individual

115. Id. at 235.
116. Id.
118. See Battered Spouse III, supra note 2, at 235.
120. Id.
121. See Battered Spouse III, supra note 2, at 236.
122. See Howard Holtz & Kathleen K. Furniss, The Health Care Provider's Role in Domestic Violence, 8 Trends In Health Care, L. & Ethics 47, 50 (1993) (finding that traditionally police have treated violence in the home differently from violence on the streets).
123. See Battered Spouse III, supra note 2, at 236.
124. Id.
victims and society, not just the victims alone.\textsuperscript{125} Victim safety and wishes must be considered, but cannot govern what society does.\textsuperscript{126} After all, the victim's "wishes" may not be her own at all, but rather those of the batterer who controls her.\textsuperscript{127} The state does intrude into the victim's life when it acts on mandatory abuse reports, but then it frequently meddles with people's lives (hopefully for valid reasons) pursuant to tax laws, motor vehicle registration, and drivers' licensing provisions without having these actions successfully challenged for violating individual independence and self-determination.\textsuperscript{128}

Requiring reporting, and follow-up investigations, is not so onerous for the victims that the community ought to ignore the abuse inflicted upon them in order to protect their right to be left alone.\textsuperscript{129} This is particularly true in light of society's distinct interest in preventing an ongoing pattern of violence from permanently injuring or killing its members, as domestic violence tends to be continuing behavior rather than an isolated criminal act.\textsuperscript{130} If victims cannot,\textsuperscript{131} or will not, protect themselves, then government must step in to prevent worse things from happening in the future.\textsuperscript{132} The victims' needs can be met through counseling and other spouse abuse resources after their physical safety is assured.\textsuperscript{133} Helping those in severe need is not really "paternalistic," or at least not in any negative sense. Society has to look after itself and its members, even if that entails occasional interference with someone's present perceptions, perhaps ill-founded,\textsuperscript{134} of her wishes.\textsuperscript{135} Although the issue is not without doubt, on balance, the fundamental right to self-determination should not overcome

\textsuperscript{125} Id.
\textsuperscript{126} Id. at 236-37.
\textsuperscript{127} See Mary E. Ausmus et al., Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships, 15 HAMLINE L. REV. 115, 132-34, app. A. (1991) (providing an example of the technique an abuser might use to impose his will upon the victim).
\textsuperscript{128} See Battered Spouse III, supra note 2, at 237.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} See Bryant & Panico, supra note 106, at 420 (stating that an abused woman may be very vulnerable).
\textsuperscript{132} See Battered Spouse III, supra note 2, at 237.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 238 n. 236.
\textsuperscript{135} Id. at 236.
the state's obligation to protect its citizens and enforce the law.\textsuperscript{136} Mandatory reporting is a valuable, measured tool which must be upheld, although it certainly should be implemented so as to minimize any negative effects it may have.\textsuperscript{137}

The other major category of objection to mandatory reporting focuses on medical and legal concepts of confidentiality in the physician-patient relationship.\textsuperscript{138} A partial answer is that it is legally permissible to relate otherwise confidential information to the authorities when some compelling public purpose, such as protecting battered women from further abuse, is served by so doing (especially when, as in Kentucky, the confidentiality of such information is preserved).\textsuperscript{139} But that may not so completely resolve the ethical question of whether a breach of confidentiality truly is justified even in egregious domestic violence situations so that it precludes further discussion.\textsuperscript{140} Battered women face an ethical balancing process as their interest in confidentiality is measured against society's interest in protecting them from further abuse.\textsuperscript{141} There must be exceptions to confidentiality when they are necessary for the welfare of the patient or others.\textsuperscript{142} As noted, such exceptions are made in the United States when the issue is the reporting of child abuse or contagious disease (as in the HIV cases).\textsuperscript{143} Given the gravity of the violence problem, the public need to identify its victims and perpetrators should resolve the confidentiality issue in favor of disclosure.\textsuperscript{144}

In the United States, medical professionals may face both common law and statutory negligence liability when they do not report domestic

\textsuperscript{136} Id.
\textsuperscript{137} Id. at 238.
\textsuperscript{138} See Bryant & Panico, supra note 106, at 420 (stating that a trusting relationship cannot be created with mandatory reporting of abuse).
\textsuperscript{139} See Battered Spouse III, supra note 2, at 238.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 238-39.
\textsuperscript{142} See Douglas J. Besharov, The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect, 23 VILL. L. REV. 458, 477-78 (1978) (discussing the importance of abrogation of privileged communication in child abuse cases).
\textsuperscript{143} See supra notes 65, 68 and accompanying text.
\textsuperscript{144} This is consistent with the United States Supreme Court ruling in Veronia School District v. Acton, 515 U.S. 646 (1995) (holding that the benefits of mandatory random drug testing of student athletes outweigh their privacy concerns); and Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (notifying neighbors when a convicted sex offender moves into the neighborhood does not transgress the offender's confidentiality rights).
violence to the authorities, the abuse continues, and the victim suffers additional harm. Although unprecedented to date in spouse abuse situations, such liability has been imposed in child abuse situations and will further the policy of mandatory reporting. Kentucky courts can, and should, impose such liability in spouse abuse cases. Moreover, Tarasoff liability also is a real possibility in many cases. Just like child abusers, spouse abusers may voice their violent intentions to their therapists (indeed, the facts of Tarasoff itself closely resemble a spouse abuse/stalking situation). These twin liability theories will give professionals dual grounds for reporting lest they face a two-pronged complaint for damages.

CONCLUSION

In abuse situations, prompt reporting of the abuse to the appropriate authorities is an essential first step in dealing with the problem. It increases victim safety and reduces the risk of further harm. At present, those best able to report too often decline to get involved, and experience demonstrates that most prosecutors have not utilized criminal prosecution as a practical remedy to the non-reporting problem. Instead, civil tort liability for negligence could provide the best incentive for reporting. A number of states have taken the first steps towards this salutary use of tort law, and now Kentucky should do so as well using both its recently revitalized abuse reporting laws and general tort principles as a basis. When it does, it greatly will facilitate the early detection of family violence and speed the time when government effectively can prevent it in the future.
KENTUCKY WORKERS’ COMPENSATION LAW UPDATE:
ISSUES FACING EMPLOYERS, EMPLOYEES,
MEDICAL PROVIDERS, INSURERS
AND PRACTITIONERS AS HOUSE BILL 1
CONTINUES TO EVOLVE

by James Michael Kemp¹ and Laurie Goetz Kemp²

INTRODUCTION

The Commonwealth of Kentucky first adopted a workers’ compensation act in 1916 in order to provide a recovery system for replacement income and medical benefits to workers who had suffered “on-the-job” injuries.¹ In an effort to curtail the estimated cost to employers of one billion dollars per year, Governor Paul E. Patton and the General Assembly completed a dramatic and drastic overhaul of the Kentucky workers’ compensation system by passing House Bill 1 during the 1996 Extraordinary Session.² Although evident to most involved in the workers’ compensation system, House Bill 1 has had a dramatic impact upon Kentucky substantive and procedural law. Most would agree that since its passage on December 12, 1996, Kentucky workers’ compensation law continues to evolve through the passage of new regulations and holdings rendered by the Kentucky Workers’ Compensation Board, the Kentucky Court of Appeals and the Kentucky Supreme Court. However, still more issues arise each day as practitioners,

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⁴. See KY. REV. STAT. ANN. § 342 (Banks-Baldwin 1997). Section 342 of the Kentucky Revised Statutes was amended by House Bill 1 which became effective December 12, 1996. KY. REV. STAT. ANN. § 342 (Banks-Baldwin 1997).
claims handlers, employees and employers attempt to interpret the
workers' compensation statutes, regulations and judicial holdings.

This article will attempt to outline the changes to Kentucky law
since the passage of House Bill 1. It will also discuss and identify issues
and potential problems facing claimants, practitioners, employers and
claims handlers. In light of the fact that many claims currently working
their way through the litigation process are governed by substantive law
in effect prior to the effective day of House Bill 1, this article will
conclude with a summary of important judicial decisions.

STATISTICS

Due to the drastic changes brought about by the passage of
House Bill 1, great attention has been paid to statistics which may show
the success and impact of the new law. The Department of Workers
Claims and the Commissioner have published reports outlining key
areas, which they believe show the success of the new system.

A primary goal of House Bill 1 was to make the workers' compensation system in Kentucky more affordable for employers.

According to the United States Department of Commerce, Bureau of
Economic Analysis, Kentucky's total wages and salaries amounted to over
$29 billion in 1990, as compared to $45 billion in 1997. The estimated
total costs associated with Kentucky's workers' compensation system
were approximately $688 million and $932 million for the same respective
periods. Total premiums reported by self-insureds and insurance carriers
during these years were $566 million and $852 million, respectively.

Prior to its passage, predictions that House Bill 1 would result in a
massive rush by employees to "opt out" of the workers' compensation system were vastly overestimated. To illustrate, there are approximately

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5. House Bill 1 became effective on December 12, 1996.
7. See also KY. DEPT OF WORKERS CLAIMS, COMMISSIONER'S 1997 FOURTH QUARTERLY
8. Id. at 9.
9. Id.
10. Id.
11. Id. at 26.
80,000 Kentucky business entities employing a workforce of around 1.7 million persons. In 1996, 13,807 filed Workers Form 4 rejections of the workers’ compensation system notices. In 1997, however, that number dropped to just 8,483.

To illustrate the number of injuries in this Commonwealth, consider the following statistics. In fiscal year 1992-1993, there were 94 work-related deaths in Kentucky, compared to 77 deaths in fiscal year 1996-1997. In fiscal year 1996-1997, there were 35,254 first reports of injury or disease filed with the Department of Workers Claims. Of this amount, approximately 51% were for “muscles and tissues,” 25% were for skin conditions or chemical exposures, 10% were for “graphic” or traumatic injuries, 2.5% for repetitive motion injuries and 2% related to dust diseases. Included in these numbers were also 10,984 reported cases of back injuries, which is the single most frequent injury suffered by Kentucky workers.

Of these reported injuries in the fiscal year 1996-1997, 66.7% of the first reports of injury were filed on behalf of injured male workers. The following percentages demonstrate the applicable age groups of the claimants: ages 50 and older, 13.5%; 42-50, 18.7%; 35-41, 20.3%; 26-34, 25.9%; 18-25, 19.2%; and under age 18, 2.4%.

Despite the decrease in the number of workers who opt out of the system, 1997 resulted in a decrease in claims filed. In 1989, there were 4,803 claims filed by injured workers. This number steadily increased until its peak in 1994, when 11,075 claims were filed. Arguably in expectation of House Bill 1, 10,915 claims were filed in 1996. However, in the first year since the passage of House Bill 1, 6,865 claims were filed.

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12. Id.
13. Id. at 42.
14. Id.
15. Id. at App. A.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
on behalf of injured workers. In fact, this downward trend continues according to the most recent data available. Claims filed in the second quarter of 1998 show a 16% decrease from the first quarter of 1998.

All the news is not good for employers and insurers. There was an increase in the number of closed claims reopened since the passage of House Bill 1. In fiscal year 1996-1997, there were approximately 1,200 reopenings filed to adjudicate the various issues permitted by statute, as opposed to approximately 1,100 in fiscal year 1993-1994.

Another purported intention of House Bill 1 was to “streamline” the system by adding a new layer of adjudication. Beginning on May 21, 1997, arbitrators began conducting benefit review conferences to resolve workers’ compensation claims and other disputes, and the first benefit review determinations were rendered soon thereafter. To illustrate the effect of this new layer of litigation, 1,081 claims were resolved before arbitrators by settlement, benefit determinations, voluntary dismissals or transfers to Administrative Law Judges (ALJs) in the fourth quarter of 1997. Of these cases, 35% were settled and 58% were disposed of through benefit review determination.

In 1997, the twelve ALJs issued more than 3,300 opinions. During the fourth quarter of 1997, the ALJs conducted 354 informal conferences and 377 hearings adjudicating claims directly assigned to them and those on appeal from arbitrators’ benefit determinations. In the second quarter of 1998, each of six ALJs served a six-month term as an arbitrator. Acting as arbitrators, the ALJs were assigned 534 cases,

28. Id.
29. Id.
30. Id.
33. Ky. Dep’t of Workers Claims, Commissioner’s Quarterly Activity Report
conducted 387 benefit review conferences and rendered 158 benefit review determinations.\textsuperscript{34} ALJs conducted 452 formal hearings and rendered 412 opinions.\textsuperscript{35}

Although not all directly attributable to House Bill 1, there were 1,193 appeals to the Workers' Compensation Board, 343 petitions to the Kentucky Court of Appeals, and 117 cases heard by the Kentucky Supreme Court in fiscal year 1996-1997.\textsuperscript{36} This compares to 789, 248 and 53 appeals to these respective authorities in fiscal year 1991-1992.\textsuperscript{37} In the first quarter of 1998, 196 appeals were filed with the Workers' Compensation Board and 444 Board decisions remained on appeal before the Kentucky Court of Appeals and the Kentucky Supreme Court.\textsuperscript{38}

**AMENDED KENTUCKY ADMINISTRATIVE REGULATIONS**

In recent months, the Kentucky Administrative Regulations (KAR) have been amended to change Form 113, as well as procedures for utilization review and medical bill audits under the workers' compensation system. Unfortunately, many of these changes arguably add to the confusion and misuse of utilization review and medical bill audits. The following outlines the most notable changes and their impact.

A medical bill audit is defined as the review of medical bills for services which have been provided to assure compliance with adopted fee schedules.\textsuperscript{39} Utilization review is the review of the medical necessity and appropriateness of medical care and services to recommend payment for a compensable injury or disease.\textsuperscript{40} Each insurance carrier or self-insured is to have a utilization review and medical bill audit program in place which has been approved by the Department of Workers Claims.\textsuperscript{41}

\(\text{(April 1 - June 30, 1998) (1998).}\)
\textsuperscript{34. Id.}\textsuperscript{35. Id.}\textsuperscript{36. See KY. DEP'T OF WORKERS CLAIMS, FISCAL YEAR 1996-97 ANNUAL REPORT App. A (1998).}\textsuperscript{37. Id.}\textsuperscript{38. See KY. DEP'T OF WORKERS CLAIMS, COMMISSIONER'S QUARTERLY ACTIVITY REPORT (January 1 - March 31, 1998) (1998).}\textsuperscript{39. See 803 KY. ADMIN. REGS. 25:190 § 1 (1998).}\textsuperscript{40. Id.}\textsuperscript{41. Id. at § 3.}\)
Utilization review is to commence when the carrier or self-insured has notice that the claims selection criteria have been met, unless the claim is being denied as noncompensable. The claims selection criteria are as follows:

1. Medical costs cumulatively exceed $3,000;
2. Worker has missed a total of 30 days from work;
3. A medical provider requests preauthorization for a medical treatment or procedure;
4. Notification of a surgical procedure;
5. Receipt of a treatment plan requesting placement into a resident work hardening, pain management or medical rehabilitation program pursuant to 803 KAR 25:096 section 5(1)(c); or
6. An ALJ orders a review.

When preauthorization of medical treatment has been requested, the most recent version of the regulations requires the carrier or self-insured to forward the utilization review decision to the medical provider and the employee within two working days of the initiation of the utilization review process, unless additional information is required. In other words, the carrier or self-insured has only two days from the date the preauthorization request was made to conduct utilization review and convey a decision. This two-day time period was a significant change and some would argue, a serious burden to the obligors.

First, it places the carrier or self-insured in a precarious position given that the majority of vendors performing utilization review services are off site, and in some cases, out of state. As a practical matter, this requires the carrier or self-insured to immediately request utilization review upon request for preauthorization. Secondly, the carrier or self-insured has little time to forward all relevant medical information to the vendor and obtain appropriate review, so that a report can be received and forwarded to the medical provider and employee in two days.

An extension of time can be obtained if the medical provider seeking

42. Id. at § 5.
43. Id. at § 5(1).
44. Id. at § 5(2)(a)(1).
the preauthorization has failed to provide a treatment plan or copies of necessary records and reports. In those instances, a request for the additional information must be made within the initial two-day period. The medical provider then has ten days to submit the requested information. The utilization review decision must be rendered within two working days following receipt of the information.

If preauthorization has not been requested, the review is retrospective and the time period is slightly increased. The carrier or self-insured must forward the initial utilization review decision to the medical provider and the employee within ten days of the initiation of the utilization review process. Again, if additional information is needed, a request to the medical provider tolls the time.

A medical provider may request an expedited determination for proposed treatment when the lack of the proposed treatment could reasonably be expected to lead to serious physical or mental disability or death. This expedited determination must be given within twenty-four hours of the request. An affidavit of the medical provider and/or the plaintiff should support the request.

If the utilization review supports a denial of the treatment, a written notice styled “Utilization Review – Notice Of Denial” must be sent to the employee and the medical provider within the time parameters set forth above. This notice must include a statement of the medical reasons for denial; the name, state of licensure and medical license number of the reviewer and an explanation of utilization review reconsideration rights.

After the initial utilization review decision has been received, any aggrieved party may seek reconsideration. The request for reconsideration must be made within fourteen days of receipt of written

45. Id. at § 5(2)(a)(2).
46. Id.
47. Id.
48. Id.
49. Id. at § 5(2)(b).
50. Id.
51. Id. at § 5(3).
52. Id.
53. Id.
54. Id. at § 7.
55. Id.
56. Id. at § 8(1)(a).
notice of denial. The reconsideration of the initial utilization review must be conducted by a different reviewer of at least the same qualifications as the initial reviewer. A written decision of the request for reconsideration must be issued within ten days of receipt of the request. If the decision was not rendered by a board eligible or certified physician in the appropriate specialty or sub-specialty, a second request for reconsideration can be made. However, once the claim has been reviewed by a board eligible or certified physician in the appropriate specialty or sub-specialty, the decision is final and a medical fee dispute must be filed if further recourse is desired.

In cases involving the fee charged by a medical provider, a medical bill audit must begin within seven days of receipt of the bill to confirm compliance with the fee schedule, accuracy of the charges and that the physician rendering services has been designated on Form 113. The initiation of the audit does not toll the thirty-day period for challenging or paying medical expenses under section 342.020(1) of the Kentucky Revised Statutes. However, initiation of utilization review does toll payment and the thirty-day period begins to run on the date of the final utilization review decision.

Every medical bill audit program must have a reconsideration process allowing any aggrieved party to appeal the initial decision. As in utilization review proceedings, a request for reconsideration can be made by an aggrieved party. The request must be made within fourteen days of receipt of written notice of denial. Reconsideration must be conducted by a different reviewer of at least the same qualifications as the initial reviewer. Additionally, a written decision must be issued within ten days

57. Id.
58. Id. at § 8(1)(b).
59. Id. at § 8(1)(c).
60. Id. at § 8(2)(a).
61. Id. at § 8(2)(b).
62. Id. at § 5(5).
63. Id. at § 5(6).
64. Id. at § 5(4).
65. Id. at § 8.
66. Id.
67. Id. at § 8(1)(a).
68. Id. at § 8(1)(b).
of receipt of the request for reconsideration.\(^{69}\)

In June, 1998, the Legislative Regulations Review Subcommittee also amended regulations relating to Form 113, "Designation of Physician." Specifically, an employee has a duty to fill out a Form 113 only where there is a need for "continuing medical treatment."\(^{70}\) However, in these situations, employers or carriers have been granted the authority to suspend all benefits payable under Chapter 342 of the Kentucky Revised Statutes if the injured employee fails to complete and return Form 113 in a timely manner.\(^{71}\)

**MANAGED CARE**

Due to the decrease in time allowed for utilization review and medical bill audits, and the increase in enforcement by the Department of Workers Claims of these regulations, more carriers and employers have opted for managed care plans.\(^{72}\) In 1997, the number of Kentucky employees covered by managed care plans rose to 45% of the total workforce, an increase from only 11.7% in 1995.\(^{73}\) The Department of Workers’ Claims has approved 33 plans to date.\(^{74}\)

Within a managed care program, there are internal checks for utilization review to proceed without the same difficulties facing those outside a managed care program. The burden of utilization review is lessened in managed care plans because they provide more liberal and extensive preauthorization mechanisms due to the proactive role taken by the case manager from the date of the injury.\(^{75}\) In fact, many managed care programs require preauthorization of any and all treatment plans thus reducing the need for utilization review of each individual procedure.\(^{76}\) Furthermore, the relationship and connection that exists between the medical provider seeking approval of payment and the managed care plan

\(^{69}\) Id. at § 8(1)(c).
\(^{70}\) Id. at § 2.
\(^{71}\) Id. at § 3(5).
\(^{73}\) See Ky. Dep’t of Workers Claims, Status Report on Utilization Review and Medical Fill Audit in Non-Managed Care 18-19 (October 1997) (1997).
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id.
itself also enhances the flow of information and communication. In addition to the benefits of utilization review proceedings, managed care plans also give the employer greater control over all aspects of employee medical treatment. Without managed care, the only control an employer or carrier has over the treatment provided is through Form 113, “designation of physician,” discussed above. However, managed care plans generally allow employers and carriers to limit the group of physicians from which the employee chooses, except in very limited circumstances. For these reasons, it is very likely that the number of employees covered by managed care plans will continue to rise in the future.

FORM 110 REVISIONS

Another change made to the forms used in workers' compensation came about in April, 1998, when the Department of Workers Claims drastically changed Form 110, “Agreement as to Compensation.” These changes may have been made in response to the court of appeals' holding in Gray v. Madisonville Country Club. The court held that the percentage of disability agreed to in a settlement was not binding for purposes of evaluating pre-existing, active disability in a subsequent claim.

The revised Form 110 now requires specific information regarding the amounts of temporary total disability and medical benefits paid, the last date a medical payment was made, and a total of any contested or unpaid medical expenses. All functional impairment ratings given by physicians must be listed on the form and copies of the reports providing each impairment rating must be attached to the agreement. In addition, the parties must attach a copy of the most recent medical report addressing physical restrictions and a completed Form 113 if medical treatment is continuing. The form also now specifically asks if the

77. Id. at 19-20.
79. Id.
81. Id.
82. Id.
settlement includes a buyout of past or future medical expenses.\textsuperscript{83} A section on the new Form 110 addresses the plaintiff's employment information.\textsuperscript{84} The employee must describe the type of work performed and wages earned at the time of injury.\textsuperscript{85} Also included is the date of return to work and wages earned upon return.\textsuperscript{86} Finally, the employee must describe the type of work performed at the time of settlement.\textsuperscript{87}

The new two-page Form 110 requires additional time and consideration in preparing. It is also necessary that the settlement calculations and method of payment be included on the form.\textsuperscript{88} With these additional steps, there can be no question that an arbitrator or Administrative Law Judge now has much more pertinent information to provide a basis to accept or reject the terms of a settlement. It would seem that by signing the order approving the settlement, the arbitrator or Administrative Law Judge is making a finding of fact regarding the occupational disability suffered by the plaintiff allowing these percentages to be binding in future reopenings.

\textbf{UNAUTHORIZED PRACTICE OF LAW}

Not all portions of House Bill 1 have been accepted by the legal community. In fact, two provisions that enable employees to proceed without representation of counsel have been successfully challenged by the Kentucky Bar Association. The first of these provisions is section 342.320(9) of the Kentucky Revised Statutes which states: "[n]otwithstanding any provisions of law to the contrary, the provisions of this chapter shall not be construed or interpreted to prohibit non[-]attorney representation of injured workers covered by this chapter."\textsuperscript{89}

The Kentucky Bar Association's Unauthorized Practice of Law Committee reviewed this provision and rendered an opinion which was

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} KY. REV. STAT. ANN. § 342.320(9) (Banks-Baldwin 1997).
adopted by the Board of Governors and published as KBA U-52. In this
decision, it was determined that non-attorneys may not represent injured
workers before the Department of Workers Claims. The decision is
 premised on Section 116 of the Kentucky Constitution and Supreme Court
Rule 3.020. Section 116 of the Constitution vests sole jurisdiction over the
practice of law in the Kentucky Supreme Court. Supreme Court Rule
3.020 defines the practice of law and does not authorize law representation
before the Department of Workers Claims.

This same decision also addressed and found portions of section
342.329(1) of the Kentucky Revised Statutes to promote the unauthorized
practice of law. Kentucky Revised Statute 342.329(1) creates a new
division of the Department of Workers Claims known as the “Workers
Compensation Claims Services.” In this division, state employees,
referred to as “Workers Compensation Claims Specialists”, are to assist
injured employees in pursuing claims against employers for workers’
compensation benefits. Included in the duties of the workers
compensation claims specialists set forth in the statute are “advising all
parties of their rights and obligations under this chapter” and “assisting
workers in obtaining medical reports, job descriptions, and other materials
pertinent to a claim for benefits and preparing all documents necessary for
a claim.”

The Board of Governors’ Opinion found these descriptions to be
“duties normally associated with an attorney.” However, there is no
requirement in the statute that the Workers Compensation Claims
Specialist be an attorney. Therefore, under Kentucky Constitution
Section 116 and Supreme Court Rule 3.020, those performing these

(Summer 1997).
91. Id.
92. Id.
93. Id.
94. Id.
95. See KY. REV. STAT. ANN. § 342.329(1) (Banks-Baldwin 1997).
96. Id.
97. Id. at § 342.329(1)(c).
98. Id. at § 342.329(1)(d).
(Summer 1997).
100. See KY. REV. STAT. ANN. § 342.329(1) (Banks-Baldwin 1997).
duties who are not attorneys are engaged in the unauthorized practice of law.\textsuperscript{101}

This opinion has been appealed to the Kentucky Supreme Court and a final opinion is awaited. One of the main focuses in the development of House Bill 1 was to create a system in which claimants were not required to hire attorneys. Thus, a supreme court decision agreeing with the Board of Governors' Opinion would be a strong blow to that goal and to House Bill 1.

**UNFAIR CLAIMS SETTLEMENT PRACTICES ACT**

Another change to Chapter 342 through House Bill 1 which has significant impact on carriers and employers was the inclusion of section 342.267 of the Kentucky Revised Statutes.\textsuperscript{102} This provision states that where an insurer or self-insured entity engages in claims settlement practices in violation of Chapter 342 or section 304.12-230 of the Kentucky Revised Statutes, also referred to as the Unfair Claims Settlement Practices Act (UCSPA), the commissioner shall fine the offender from $1000-$5000 per violation.\textsuperscript{103} Where it has been found that there are a pattern of violations, the commissioner can request that the Department of Insurance revoke the certificate of self-insurance or certificate of authority for the insurer.\textsuperscript{104}

Specific areas of concern for carriers under the UCSPA\textsuperscript{105} include the failure to act reasonably and promptly, the failure to conduct a reasonable investigation before denying a claim, the failure to act in good faith in order to effectuate prompt and fair settlements of claims in which liability has become reasonably clear, and requiring an injured worker to institute litigation to recover amounts due them under the law. Nothing in the language of these statutes seems to apply these standards to the attorneys involved in the litigation of claims.\textsuperscript{106}


\textsuperscript{102} See KY. REV. STAT. ANN. § 342.267.

\textsuperscript{103} \textit{id}.

\textsuperscript{104} \textit{id}.

\textsuperscript{105} \textit{id} at § 304.12-230.

\textsuperscript{106} \textit{id}. (a greater duty and risk of liability under these provisions may apply if the attorney is shown to be acting as the agent for the insurance company).
When a violation under section 342.267 of the Kentucky Revised Statutes has been alleged, the commissioner refers the matter to a workers compensation claims specialist for investigation and attempted mediation.\textsuperscript{107} If the alleged violation is found to have merit and cannot be resolved by the workers compensation claims specialist, an investigation report with recommendations for further action is filed with the commissioner.\textsuperscript{108} The commissioner and General Counsel then review the information and investigative report and one of four actions is taken.\textsuperscript{109} The commissioner may issue a citation or levy a penalty.\textsuperscript{110} The commissioner may issue a show cause order to the carrier or self-insured explaining the violation and giving notice of an informal hearing during which additional evidence may be gathered.\textsuperscript{111} The commissioner may also limit the violation to a warning letter.\textsuperscript{112} If insufficient evidence was found in the investigation, the commissioner may dismiss the allegation as unsubstantiated.\textsuperscript{113}

An aggrieved party has recourse through an appeal to an ALJ if notice of contest is filed with the commissioner within fifteen days of receipt of the citation or penalty.\textsuperscript{114} The ALJ may ask for proposed stipulations and witness and exhibit lists from the parties.\textsuperscript{115} A formal hearing is also to be conducted in accordance with Chapter 13B of the Kentucky Revised Statutes.\textsuperscript{116} The ALJ’s order may then be appealed to Franklin Circuit Court under 13B.140 and section 342.990(6) of the Kentucky Revised Statutes.\textsuperscript{117}

This provision has been utilized and tested at least one hundred times since its adoption. By June 1998, 37 files had been dismissed as unsubstantiated, 19 files closed as settled, 8 letters of warnings had been issued, and 35 show cause orders had been issued with informal hearings.

\textsuperscript{108} Id. at § 2(7).
\textsuperscript{109} Id. at § 2(8).
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at § 3.
\textsuperscript{115} Id. at § 4.
\textsuperscript{116} Id. at § 5(1).
\textsuperscript{117} Id. at § 6(2).
still pending. No citations or revocations had been issued.

One question that has arisen from the development of section 342.267 of the Kentucky Revised Statutes is whether this provision creates a private cause of action to claimants subject to violations of the UCSPA. While no clear answer exists, it would seem that there was no such intent by the legislature. A review of the history of section 342.267 of the Kentucky Revised Statutes during the special session in December, 1996 shows that the Senate rescinded a floor amendment specifically granting such employees the right to maintain a civil action.

MEDICAL EVALUATIONS PURSUANT TO SECTION 342.315 OF THE KENTUCKY REVISED STATUTES

Another change brought about by House Bill 1, and now implemented, is the creation of university medical evaluations. Under section 342.315 of the Kentucky Revised Statutes, a new system of evaluation of permanent impairment and disability was established. The Commissioner contracted with the University of Kentucky and University of Louisville medical schools to evaluate workers who have injuries covered by Chapter 342 of the Kentucky Revised Statutes.

In injury cases, this statute gives arbitrators or ALJs authority to refer a plaintiff for evaluation at one of the medical schools whenever a medical question is at issue. This motion may be made by either party or on the arbitrator’s or ALJ’s own motion. In cases of hearing loss or occupational disease, the evaluation is mandatory.

The physicians performing these evaluations render reports encompassing their findings and opinions. These clinical findings and opinions of the designated evaluator are to be given presumptive weight by arbitrators and ALJs and the burden to overcome such findings and

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119. See KY. REV. STAT. ANN. § 342.267 (Banks-Baldwin 1997) (the statute does not explicitly provide for a private cause of action).
120. Id. at § 342.315.
121. Id.
122. Id.
123. Id.
opinions falls on the opponent of that evidence.\textsuperscript{124} If an arbitrator or ALJ rejects the clinical findings and opinions of the designated evaluator, he or she must specifically state in an order the reasons for rejecting the evidence.\textsuperscript{125}

The cost of these evaluations is to be paid solely by the employer or its workers' compensation carrier and must be remitted within thirty days of the receipt of a statement of the evaluation.\textsuperscript{126} The employer or workers' compensation carrier is also responsible for forwarding mileage expense to the employee within seven days of the notice of the evaluation.\textsuperscript{127}

By the end of the fourth quarter in fiscal year 1997, 905 workers were referred to university evaluations.\textsuperscript{128} Of those, 207 related to claims for hearing loss, 538 involved coal workers pneumoconiosis and 26 for injury or other occupational disease claims.\textsuperscript{129} Eighty-six percent (86\%) of those evaluated for hearing loss were found to suffer some degree of hearing impairment. Sixty-eight percent (68\%) were found to meet the threshold requirements and be occupationally related so as to allow an eight percent (8\%) permanent partial impairment to the body as a whole.\textsuperscript{130}

In the coal workers cases, thirty six were class I respiratory impairments\textsuperscript{131} and eleven were class II impairments.\textsuperscript{132} Of those with impairments, only ten were found to be occupationally related and showed positive x-rays for coal workers pneumoconiosis so as to allow an award of disability benefits.\textsuperscript{133}

As the provisions of the "New Act" become more familiar to practitioners, arbitrators and ALJs, the "315" exams are becoming more common place in injury claims. Compared to the year following the

\begin{thebibliography}{133}
\bibitem{124} Id. at § 342.315(2).
\bibitem{125} Id.
\bibitem{126} Id. at § 342.315(4).
\bibitem{127} Id.
\bibitem{128} See Ky. Dep't of Workers Claims, Commissioner's Quarterly Activity Report (October 1 - December 31, 1997) (1998).
\bibitem{129} Id.
\bibitem{130} Id.
\bibitem{131} Id. (class I impairment indicates pulmonary function of more than 55\% but less than 80\% of predicted normal).
\bibitem{132} Id. (class II impairment indicates pulmonary function of less than 55\% of predicted normal).
\bibitem{133} Id.
\end{thebibliography}
passage of House Bill 1 in which only 26 cases involving injuries or non-coal workers pneumoconiosis were referred for "315" evaluations, in the second quarter of 1998, 111 plaintiffs with injury claims were evaluated.\textsuperscript{134} One reason for this increase may be the trend of treating physicians refusing, or charging additional fees, to perform impairment rating analysis. The "315" evaluation offers the plaintiff an impairment assessment at the expense of the employer. Further, as more claims for injuries occurring on or after December 12, 1996 are filed, and plaintiffs are forced to submit a functional impairment rating in order to receive benefits, the "315" evaluations will only continue to rise.

One criticism that has already arisen of these medical examinations relates to the charges. The universities do not have to follow the normal medical fee schedule imposed on other medical providers in the workers' compensation system. The statute allows the universities to charge a "reasonable fee not exceeding fees established by the commissioner."\textsuperscript{135} Those fees were negotiated in a contract with the medical schools. As the number of individuals referred to university examinations increases, it is believed more pressure will be placed on the commissioner to limit the charges allowed.

CONSTITUTIONAL CHALLENGES TO HOUSE BILL 1

Since its passage, numerous cases have been filed in circuit courts throughout the state challenging the constitutionality of House Bill 1. In fact, there has been a long history of attempts to hold various provisions of Chapter 342 of the Kentucky Revised Statutes unconstitutional.

One case in particular has drawn a fair amount of attention. On December 1, 1997, just 355 days after its passage, Leslie Circuit Court Judge R. Cletus Maricle declared House Bill 1 unconstitutional.\textsuperscript{136} The case had been filed by former employees of the Shamrock Coal Company who had been denied workers' compensation benefits because, although in the early stages of black lung, their symptoms did not reach the threshold required by the new law.

Judge Maricle denied Shamrock Coal's motion to dismiss based on


\textsuperscript{135} KY. REV. STAT. ANN. § 342.315(3) (Banks-Baldwin 1997).

on the exclusive remedy provision,\textsuperscript{137} holding that House Bill 1 denies individuals their constitutional right to seek damages.\textsuperscript{138} Therefore, the plaintiffs were entitled to a jury trial. The court went on to state that the "opt out" provision of the workers' compensation act is also unconstitutional because workers are not afforded an opportunity to make an informed decision on whether to accept the Act as the exclusive remedy.\textsuperscript{139}

Shamrock sought a writ of prohibition to prevent the Leslie Circuit action to continue in the Kentucky Court of Appeals. On July 8, 1998, the court of appeals affirmed Judge Maricle's ruling by denying the relief requested under Rule 76.36 of the Kentucky Rules of Civil Procedure.\textsuperscript{140} Shamrock has appealed this decision to the Kentucky Supreme Court.\textsuperscript{141} While this case revolves around black lung cases, the possible ramifications of a Supreme Court decision allowing injured employees to sue their employers without opting out of the system, even if limited to coal workers, are hard to imagine. Employers, carriers and lawmakers are sure to watch this case closely.

As is indicated above, House Bill 1 is not the first workers compensation provision to be challenged as unconstitutional. Challenges have been made and continue to be made. The Kentucky Supreme Court recently addressed the constitutionality of the requirement codified in section 342.316(4)(b) of the Kentucky Revised Statutes,\textsuperscript{142} which requires a claimant to have been exposed to the hazards of pneumoconiosis in Kentucky for a certain time period. In \textit{Mullins v. Manning Coal Co.},\textsuperscript{143} a claimant was denied retraining incentive benefits (RIB) under section 342.732(1) after it was established that he was exposed to the hazards of pneumoconiosis for only one year.\textsuperscript{144} It was argued that this threshold requirement violated the claimant's equal protection rights under the United States Constitution as well as section 14 of the Kentucky

\textsuperscript{137} See KY. REV. STAT. ANN. § 342.690 (Banks-Baldwin 1997).
\textsuperscript{138} See \textit{Grubb}, No. 97-CI-00015 (defendant’s motion to dismiss denied December 1, 1997).
\textsuperscript{139} Id.
\textsuperscript{142} KY. REV. STAT. ANN. § 342.316(4)(b).
\textsuperscript{143} 938 S.W.2d 260 (Ky. 1997).
\textsuperscript{144} Id. at 261.
Constitution by denying a remedy for the injurious exposure.\textsuperscript{145} The court found that the statutory provision did not violate equal protection principles because it was rationally related to a legitimate state interest.\textsuperscript{146} The Kentucky General Assembly may classify groups within these provisions so long as the "objective is legitimate and the classification is rationally related to that interest."\textsuperscript{147} The court went on to say that the legislature has a legitimate interest in providing a workers' compensation system that will sustain itself and continue to compensate disabled workers and, to further this interest, can prevent forum shopping by workers from other states who are already afflicted with the disease.\textsuperscript{148} Concluding, the court held that the provision did not fail to provide a remedy under section 14 of the Kentucky Constitution because the Act was not predicated upon redressing a wrong which has caused injury.\textsuperscript{149} An employee's right to benefits under Kentucky workers' compensation law is purely statutory, and therefore, section 14 was not applicable given the legislature's power to limit such benefits.\textsuperscript{150}

Two other distinct constitutional issues were also decided in Edwards v. Louisville Ladder.\textsuperscript{151} The first issue raised by the employee was whether the exclusion of nonwork-related disability in determining whether a claimant is totally disabled under section 342.730(1) of the Kentucky Revised Statutes violated Sections 14 and 54 of the Kentucky Constitution.\textsuperscript{152} Section 14 purports to guarantee a remedy to all persons who have injury to his person, whereas section 54 proscribes the General Assembly from limiting the amount recovered for injuries to person or property.\textsuperscript{153} The court held that this provision was constitutional because the Act deals with work-related injuries and the resulting compensation.\textsuperscript{154} Although no further explanation or analysis was provided regarding these constitutional provisions, the claimant was deemed to have waived any rights she may have possessed by electing to proceed in the workers' compensation system.

\textsuperscript{145} Id. at 262.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 263.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} 957 S.W.2d 290 (Ky. Ct. App. 1997).
\textsuperscript{152} Id. at 294.
\textsuperscript{153} See KY. CONST. §§ 14, 54.
\textsuperscript{154} See Edwards, 957 S.W.2d at 294.
compensation system. 155

Although the Louisville Ladder decision recognized that sections 14 and 54 preserve for all persons, including injured employees, the common law remedy in tort against a party at fault, an employee can make a voluntary election to waive these rights by express or implied conduct or actions. 156 In fact, the foundation for declaring the workers' compensation system constitutional is based upon the recognition of this principle. Citing Wells v. Jefferson County, 157 the court reaffirmed that a "presumed acceptance" could suffice to constitute the waiver and acceptance of the Act. 158 The panel also cited with acceptance the holding in Greene v. Caldwell, 159 which reasoned that Kentucky's workers' compensation law does not deprive workers of any constitutional rights, but merely affords a means by which a class of individuals can recover for injuries or deaths occurring in the course of their employment. 160

The second issue presented and addressed in this case was whether the "tier-down" provision of former section 342.730(4) of the Kentucky Revised Statutes violated the claimant's due process and equal protection rights under the Kentucky Constitution, and otherwise constituted unlawful age discrimination. 161 This provision was upheld under the presumption that a worker's level of compensation often decreases as a result of retirement, reduction of work, or other means around the age of sixty-five. 162 Due process or equal protection rights are violated if the classification or deprivation of liberty rest on grounds wholly irrelevant to a reasonable state objective. 163 Citing the applicability of the "rational basis" test to the review of this case, the court found that the use of age to classify workers in this provision is rationally related to

155. Id. (employees are provided the right to "opt out" of the workers' compensation system under Kentucky Revised Statutes section 342.395(1). However, the guaranteed medical and income benefits provided for work-related injuries, irregardless of the employer's fault or other tort principles, are likewise waived by the employee who invokes this option).
156. Id.
157. 255 S.W.2d 462 (Ky. 1953).
158. See Edwards, 957 S.W.2d at 294.
159. 186 S.W. 648, 652 (Ky. 1916).
160. See Edwards, 957 S.W.2d at 295.
161. Id.
162. Id. at 296.
163. Id. at 295.
the scale down of earning capacity encountered by workers.¹⁶⁴

Although probably dictum given the outcome of the other issues, the court found that the claimant’s tort theories were irrelevant to the case given that the advent of Kentucky’s workers’ compensation system “practically abolished the common law relating to the tortious liability” between an employer and employee.¹⁶⁵ This system of recovery is the exclusive remedy for any injuries falling within its purview, except for intentional injuries caused by an employer.¹⁶⁶ In conclusion, the Louisville Ladder panel ruled that this claimant waived any tort claim she may have had against the employer by failing to allege that she opted out of the workers compensation system.¹⁶⁷

As is evidenced by these cases, constitutional challenges to the various provisions of the Workers’ Compensation Act will continue to be made by practitioners. As a practice tip to anyone planning to join in these challenges, the court of appeals recently held that any party alleging the unconstitutionality of a statute must give notice to the Attorney General’s office prior to the entry of judgment.¹⁶⁸

RECENT JUDICIAL DECISIONS

Although House Bill 1 made dramatic changes to Kentucky workers’ compensation law, many substantive provisions of section Chapter 342 of the Kentucky Revised Statutes were not altered or repealed. Additionally, as the law in effect at the time of the injury is the law of the case, practitioners and courts continue to revisit former versions of the law in reopenings and appeals. There are several recently published court of appeals and supreme court cases which address these aspects and are noteworthy. The holdings in these cases show the continued evolution of workers’ compensation practice in Kentucky.

In Ashland Exploration, Inc. v. Tackett,¹⁶⁹ the ALJ’s decision to

164. Id. at 296.
165. Id. at 294 (citing Morrison v. Carbide and Carbon Chemicals Corp., 129 S.W.2d 547 (Ky. 1939)).
166. Id.
167. Id.
169. 971 S.W.2d 832 (Ky. Ct. App. 1998).
award total disability benefits to an injured worker who had returned to work at an equal or greater wage for three months was upheld by the court of appeals. The employer argued unsuccessfully that the worker's recovery could not exceed the factor obtained by doubling the functional impairment rating under former section 342.730(1)(b) of the Kentucky Revised Statutes. Ultimately, this decision establishes that the referenced statutory provision may be inapplicable where an employee is injured, returns to work for some period of time, and ultimately leaves the employment due to an inability to perform the job responsibilities.

In Clarion Manufacturing Corp. of America v. Justice, the claimant appealed a decision of the ALJ who dismissed the claim because the claimant had misrepresented her level of education on a pre-employment application. The employer asserted that all permanent employees were required to have a high school diploma and thus argued that the employee had failed to comply with a condition precedent to its offer of employment. In the absence of a valid contract of employment, the employer argued that claimant was not an "employee" for purposes of receiving workers' compensation benefits. The Kentucky Supreme Court discussed the three-prong test enunciated in Divita v. Hopple Plastics and overruled the decision of the ALJ to dismiss the claim given the absence of a false statement by the employee concerning her physical condition. In summary, an employer must rely on an employee's false representation as to a physical condition and there must be a causal connection between the misrepresentation and resulting injury.

The Kentucky Supreme Court addressed an issue which had been the subject of much debate in Leeco, Inc. v. Smith. The issue was the appropriate method of computing the employer and special fund's entitlement to "tier down" or reduction of income benefits from the time the worker reaches age sixty-five until the end of their life expectancy.

Simply put, section 342.730(4) of the Kentucky Revised Statutes permits the reduction of a claimant's income benefit by ten percent.

170. Id. at 833.
171. Id. at 834.
172. 971 S.W.2d 288 (Ky. 1998).
173. Id. at 289.
174. 858 S.W.2d 214 (Ky. Ct. App. 1993).
175. See Clarion Mfg. Corp. of Am., 971 S.W.2d at 291.
176. 970 S.W.2d 337 (Ky. 1998).
annually from age sixty-five through age seventy, where the injury occurs before the sixty-fifth birthday. Ultimately, the court rejected the "weeks approach" from *Southern v. R.B. Coal Co., Inc.* and adopted what has commonly been referred to as the "dollars approach." This requires the employer and special fund to share proportionately in the benefit reduction occurring between age sixty-five and the end of the claimant's projected life expectancy. This decision reaffirmed the holding of *Leeco, Inc. v. Crabtree,* which held that the apportionment of the projected award should not occur until after its projected value has been computed. When the claimant outlives the projected life expectancy, the special fund receives the "tier down" or reduction provided by section 342.730(4) of the Kentucky Revised Statutes.

Additionally, this court ruled that an award of income benefits under section 342.732(1)(d) of the Kentucky Revised Statutes, in a claim which had been held in abeyance for a number of years while the employee continued his employment, were payable at the rate in effect at the time the claim was filed. However, the benefits would not begin until the date of last injurious exposure or actual disability occurred, as mandated by section 342.316(1)(b) of the Kentucky Revised Statutes.

The court addressed several other issues related to the "tier down" of income benefits required by former section 342.730(4) of the Kentucky Revised Statutes in *Wynn v. Ibold, Inc.* First, the court rejected the claimant's constitutional challenge to the "tier down" provision. The employee asserted that this reduction of benefits, beginning at age sixty-five, violated his constitutional due process and equal protection rights because it lacked a legitimate state purpose. This argument was rejected, and the provision upheld, given that the classification is intended to avoid a duplication of income, namely private retirement and old-age social security payments, which are available to this class of workers. With regard to the issue of how to calculate the "tier down" yearly reduction,

177. 923 S.W.2d 902 (Ky. Ct. App. 1996).
178. *See Leeco Inc.,* 970 S.W.2d at 339.
179. 966 S.W.2d 951 (Ky. 1998).
180. *Id.* at 955.
181. *See Leeco Inc.,* 970 S.W.2d at 339.
182. 969 S.W.2d 695 (Ky. 1998).
183. *Id.* at 697.
184. *Id.*
the court stated that each annual reduction of income benefits should equal ten percent of the original award, so that the employee would receive forty percent of the original award when the final reduction occurs at age seventy. 185

Many Kentucky employees do not work in a traditional office or factory setting and frequently must travel from one location to another. Due to this, a question which often arises is whether injuries sustained in an automobile accident are compensable as workers’ compensation claims. Two recent Kentucky Supreme Court decisions addressed these situations.

In Receveur Construction Co. v. Rogers, 186 the court addressed the issue of whether a worker’s death in a company provided automobile occurred during the course and scope of his employment. The basic facts of the case were that the employee was on his way home to Campbellsville from a job site in Louisville in the company-provided vehicle. The truck was required for the employee’s work duties and the employer paid for all related fuel charges. The court recognized the “going and coming rule” that holds injuries sustained by workers going to or returning from their place of work are noncompensable because the hazards encountered in these journeys are not incident to the employer’s business. 187 In this instance, the employee was providing a service to his employer at the time of his death and the claim was held work-related under the service to the employer exception to the going and coming rule. 188

A similar issue was discussed by the court in Olsten-Kimberly Quality Care v. Parr. 189 In this case, claimant was a home health nurse who was required to travel to patient’s residences to perform her work-related duties. The employee’s travel was necessitated by, and in furtherance of, the employer’s business interests given that it was essential to the completion of the work duties. Therefore, the travel fell within the service to the employer exception to the coming and going rule and was ruled compensable. 190

For many years, practitioners have been troubled with issues that

185. Id.
186. 958 S.W.2d 18 (Ky. 1997).
187. Id. at 20.
188. Id. at 21.
189. 965 S.W.2d 155 (Ky. 1998).
190. Id. at 158.
can arise when an employee's condition or malady is related to years of repetitive or cumulative trauma. Although the issues are too numerous to discuss at length in this article, House Bill 1 attempted to clarify this issue and the definition of injury now clearly includes this type of harmful change to the body. Additionally, several recent cases addressed these issues and may be helpful in deciding the compensability of future injuries, as well as reopened claims.

In Rogers v. Vermont American Corp., a claimant was employed in heavy manual labor with the defendant for approximately eighteen years. Although the claimant had felt pain over a period of several months while at work, a right-arm injury manifested outside the work environment. The medical evidence was conflicting regarding the relationship of the employment to the injury, with one physician stating that the arm had weakened over time due to the employment. Plaintiff relied on this evidence to claim that he was entitled to compensation for the work-related harmful changes irregardless of the fact that the condition became disabling due to a nonwork-related injury. The Rogers court rejected this argument, and held that "an injury which occurs due to a nonwork-related incident is not compensable due solely to the fact that the strenuous nature of the claimant's employment caused non-disabling wear and tear which was aroused into a disabling condition by the nonwork-related incident."

In Addington Resources, Inc. v. Perkins, an employer filed a motion to reopen in order to contest the payment of medical expenses it alleged arose out of a nonwork-related injury, rather than the previous compensable 1990 back injury. The claimant re-injured his back while outside the course and scope of his employment, but presented testimony from a treating physician who opined that he would not have sustained the subsequent injury in the absence of the original work-related injury.

The Perkins court phrased the issue as whether the underlying

191. 936 S.W.2d 775 (Ky. Ct. App. 1997).
192. Id. at 776.
193. Id.
194. Id.
195. Id. at 777.
196. Id.
197. 947 S.W.2d 421 (Ky. Ct. App. 1997).
198. Id. at 422.
medical problem resulting from the subsequent injury was a natural consequence of the compensable injury, and therefore, the responsibility of the employer.\textsuperscript{199} The employer was held liable for the medical expenses\textsuperscript{200} even though the subsequent injury was to a different part of the back and followed a nonwork-related incident.\textsuperscript{201} Relying on the "direct and natural consequence rule,"\textsuperscript{202} the court ruled that a subsequent injury, whether an aggravation of an original injury or a new and distinct injury, is compensable if it is the direct and natural result of the compensable injury.\textsuperscript{203}

The Kentucky Court of Appeals handed down two decisions which should greatly affect the conduct of parties in civil litigation involving the payment of workers' compensation benefits. First, the court discussed the issue of subrogation rights in \textit{AIK Selective Self Insurance Fund v. May}.\textsuperscript{204} Here, the employee's settlement agreement with the defendant specifically excluded the subrogation claim asserted by the workers' compensation carrier, but this carrier moved to have the court apportion the proceeds anyway. The court ruled that the carrier could only recover "the same items of damages" that were paid or for which they would be liable to pay in the future.\textsuperscript{205} Therefore, where a release excludes a subrogation interest and does not specifically reference payment for medical expenses or income replacement, the insurer must continue the litigation in order to recover upon the subrogation interest.

In \textit{Great American Insurance Co. v. Witt},\textsuperscript{206} the court was required to address the method for computing a subrogation interest after a jury verdict. In this case, the employee recovered $57,391 from a workers' compensation carrier for income and medical benefits. Subsequently, a civil action was filed by the injured employee against a product manufacturer for claimant's injuries, and the employer was named as a

\textsuperscript{199} Id.

\textsuperscript{200} Id. See also \textsc{Ky. Rev. Stat. Ann.} § 342.020 (Banks-Baldwin 1997). Kentucky Revised Statute section 342.020(1) requires that the employer pay for the cure and relief from the effects of a work-related injury or occupational disease. \textit{Id.}

\textsuperscript{201} See \textit{Addington Resources, Inc.}, 947 S.W.2d at 423.

\textsuperscript{202} Id.

\textsuperscript{203} Id. (citing Beech Creek Coal Co. v. Cox, 237 S.W.2d 56 (Ky. 1951)).

\textsuperscript{204} 957 S.W.2d 257 (Ky. Ct. App. 1997).

\textsuperscript{205} Id. at 260.

\textsuperscript{206} 964 S.W.2d 428 (Ky. Ct. App. 1998).
defendant. The jury awarded the employee $157,391 in total damages. The award was comprised of $57,391 for the workers' compensation benefits and $100,000 for pain and suffering. In addition, the jury apportioned twenty percent of the fault to the employee, twenty percent to the employer and sixty percent to the manufacturer.

The Witt court mandated that the subrogation recovery be reduced by the employer's and employee's apportioned fault. Under the reasoning of a recently decided uninsured motorist case, the Witt court ruled that the plaintiff was entitled to be "made whole" and receive her share of damages before the subrogor could recover. This case should be read by anyone involved in a civil claim involving a workers' compensation subrogor, in order to understand the steps necessary for computing each party's recovery.

_Cabinet For Workforce Development v. Cummins_, addressed the standard applicable for increasing a claimant's compensation in the way of the fifteen percent penalty provided by section 342.165 of the Kentucky Revised Statutes. This statutory provision permits the imposition of the penalty when an employer intentionally fails to comply with a specific statute or administrative regulation and this failure causes or contributes to the injury. _Cummins_ addressed the effect of section 338.031 of the Kentucky Revised Statutes, which is known as the "general duty" clause of the Kentucky Occupational Safety and Health Act (KOSHA). This duty requires every employer to provide an employment which is free from recognized hazards that are likely to cause death or physical harm to an employee. Although a violation of section 338.031(1) of the Kentucky Revised Statutes can be the basis for the imposition of a fifteen percent penalty in a workers' compensation claim, especially where the employer's failure constitutes a gross disregard of patently obvious, basic safety concepts, the claimant has the burden to establish the employer's

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207. Id.
208. Id. at 429.
209. Id.
211. See Great Am. Ins. Co., 964 S.W.2d at 430.
212. 950 S.W.2d 834 (Ky. 1997).
213. Id. at 837.
214. See KY. REV. STAT. ANN. § 338.031(a) (Banks-Baldwin 1997).
215. See Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996).
Where the employer's actions leading to a worker's injury or death are more contemplated, section 342.610(4) of the Kentucky Revised Statutes provides a potential civil remedy to the worker. This statutory provision, interpreted recently in *Zurich American Insurance Co. v. Brierly*, allows the injured worker or his dependents to receive benefits provided under Chapter 342 of the Kentucky Revised Statutes or file an action at law for the damages sustained. In *Zurich*, a county coroner ruled that an employer had deliberately placed the decedent worker in a known, unsafe and hazardous position at the time of the explosion which led to his death. This provision is one of the exceptions to the exclusive remedy provision of section 342.690(1) of the Kentucky Revised Statutes, and the court ruled that a jury may determine whether the deliberate intention standard of section 342.610(4) of the Kentucky Revised Statutes has been met in a civil setting. A word of caution is necessary to practitioners, however, in light of the court's explicit holding that the act of bringing the civil suit waived all rights to compensation under Chapter 342 of the Kentucky Revised Statutes.

*Begley v. Mountain Top, Inc.*, discussed the issue of which employer should be held liable for workers' compensation benefits to an employee who had contracted pneumoconiosis. In this case, the employee was continuously exposed to coal dust with multiple employers over a period of approximately twenty years. The Kentucky Supreme Court ruled that in order to determine the responsible employer in an income benefit claim when there have been successive employers, one must determine the employment which constitutes the worker's last injurious exposure at the time the employee ceases working. Although the rule may seem inequitable given that the successive employment may have been short in duration, or not fully the cause of the employee's condition, liability is invoked because the injurious exposure received does

216. See Cummins, 950 S.W.2d at 837.
217. 936 S.W.2d 561 (Ky. 1997).
218. Id. at 562.
219. Id.
220. Id. at 564.
221. 968 S.W.2d 91 (Ky. 1998).
222. Id. at 93.
223. Id. at 96.
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contribute, at least to some extent, to the worker's contraction of the disease.\footnote{224}{Id.}

An employer is required to pay for all expenses related to medical, surgical and hospital treatment, as well as nursing, medical and surgical supplies and appliances, which serve to cure, treat or relieve the effects of a work-related injury or occupational disease.\footnote{225}{See Ky. REV. STAT. ANN. § 342.020(1) (Banks-Baldwin 1997).} In \textit{Bevins Coal Co. v. Ramey},\footnote{226}{947 S.W.2d 55 (Ky. 1997).} the court was asked to address the appropriateness of payment for extensive nursing services to a spouse of an injured worker who sustained double amputation to the lower limbs. The court began by stating that the language of the statute does not preclude a homemaker spouse from providing medical and nursing services, and explicitly rejected the ALJ's denial of compensation under the reasoning that such services should only be provided by one with actual medical training.\footnote{227}{Id. at 56, 59.} Given the devastation which was imposed on the injured claimant, the goal of this statute should be to relieve the symptoms, restore function, and return the injured worker, to the extent possible, to the same condition which existed prior to the traumatic injury.\footnote{228}{Id. at 56.} The \textit{Bevins} court ultimately held that administering medications, massages, heat applications, preparing meals and assisting with personal needs were related to the cure and relief of the double amputation.\footnote{229}{Id. at 59.} So long as the services are medically necessary, performed competently, and serve to cure or relieve the effects of the injury, in-home attendant or nursing services performed by an injured worker's spouse are to be compensable under section 342.020(1) of the Kentucky Revised Statutes.\footnote{230}{Id.}

In light of the frequency of change and the numerous amendments enacted in the workers' compensation statutes, questions often arise as to whether these changes should be applied to a particular claim. The Kentucky Supreme Court addressed this issue in two decisions, \textit{Spurlin v. Adkins}\footnote{231}{940 S.W.2d 900 (Ky. 1997).} and \textit{Benson's, Inc. v. Fields}.\footnote{232}{941 S.W.2d 473 (Ky. 1997).} In \textit{Spurlin}, the court ruled that
the 1994 amendment to section 342.730(1) of the Kentucky Revised Statutes, prohibiting consideration of nonwork-related disability when determining the extent of a worker's occupational disability, was a substantive change and could not apply to a cause of action which arose prior to the provision's effective date. The court explained the concept of remedial legislation as a provision "relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights ..."

In Benson's, Inc., the court reviewed an amendment to section 342.1202(2) of the Kentucky Revised Statutes which placed a ceiling on the special fund's liability for income benefits to fifty percent of the income benefits awarded for permanent disability. In this case, an ALJ refused to apply section 342.1202(2) of the Kentucky Revised Statutes and ruled that the special fund was liable for the entire portion of the disability. The court refused to shift a portion of a claimant's potential recovery from the special fund to the employer based upon this legislative enactment, because the changes in liability were substantive rather than remedial or procedural in nature. Generally, the legislature does not intend for a statutory amendment to be applied to causes of action, which arose before its effective date, unless the language contains an express statement to that effect. This rule also has a statutory origin. To conclude, the court noted that, where an amendment affects the amount of income benefits, the amendment is substantive in nature and the law in effect on the date of injury or last injurious exposure controls the parties' rights.

Miller v. East Kentucky Beverage/Pepsico, Inc. evidences the broad discretion that was placed with the ALJs prior to the passage of

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233. See Spurlin, 940 S.W.2d at 901 (the amendment to Kentucky Revised Statutes section 342.730(1) was in response to the holding in Teledyne – Wirz v. Willhite, 710 S.W.2d 858 (Ky. Ct. App. 1986)).
234. Id. (citing 73 AM. JUR. 2d Statutes § 354 (1974)).
235. See Benson's Inc., 941 S.W.2d at 477.
236. Id.
237. See KY. REV. STAT. ANN. § 446.080(3) (BANKS-BALDWIN 1997). The statute provides in pertinent part that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Id.
238. See Benson's Inc., 941 S.W.2d at 477.
239. 951 S.W.2d 329 (Ky. 1997).
House Bill 1. Even where a claimant alleges that overwhelming evidence compels a different conclusion on an issue such as the extent of occupational disability, the ALJ, as the finder of fact, has the sole authority to judge the weight, credibility and inferences to be drawn from the record.240

In Leslie County Fiscal Court v. Adams,241 a worker who had been awarded RIB benefits was found to be totally disabled due to a subsequent, work-related injury. The employer sought a credit for the extent to which benefits payable under the RIB award overlapped the period of income benefits payable for the injury. Relying on Estep Coal Co. v. Ward,242 the court refused to allow the credit based upon the principle that benefits for an occupational injury take precedence over those for an occupational disease.243 Although this decision cites the Kentucky Court of Appeals opinion that held a worker who receives multiple, concurrent awards cannot be compensated for more than a total disability, it was noted that the claimant in Adams had no occupational disability at the time of the RIB award.244

CONCLUSION

As is demonstrated by this article, Kentucky workers' compensation law is far from settled. It is continuing to evolve through the passage of new statutes and regulations, the rendering of appellate court decisions, and the continued challenging and questioning of those practicing in this area of law. In the November, 1998 election, a proposed constitutional amendment would have required annual legislative sessions making it likely that workers’ compensation law would have been a topic of the General Assembly in a February, 1999 session. Although this amendment failed, it is still possible that a special session may be called as was done by Governor Patton in 1996 to address workers’ compensation.245 If there is no special session, the topic will certainly be

240. Id. at 331.
241. 965 S.W.2d 152 (Ky. 1998).
242. 421 S.W.2d 367 (Ky. 1967).
243. See Leslie County Fiscal Court, 965 S.W.2d at 154.
244. Id. at 153.
245. See Ky. CONST. § 80 (allowing the governor to call a special session of the General Assembly).
at issue in the general session of the year 2000. There can be no question that we have not heard the final word on the benefits provided under Chapter 342 of the Kentucky Revised Statutes.
TO THE BRINK OF INSANITY:
"EXTREME EMOTIONAL DISTURBANCE" IN KENTUCKY LAW

by Eric Y. Drogin

INTRODUCTION

Anna, a first-year associate with the public defender office, was in no particular hurry to seek the services of a mental health professional. At least, not for her client.

Stacks of folders lay everywhere. Most of them contained reports and chart notes of her client’s thirteen state psychiatric hospitalizations. Usually, Anna would have been thrilled to have so much potentially mitigating evidence. Last week, in her very first murder case, the jury had returned a verdict of “guilty but mentally ill.” Anna wasn’t sure that this amounted to an actual guarantee of treatment, but it certainly sounded a lot better than just plain “guilty.”

This new homicide case, however, was different. Instead of familiar, helpful diagnoses like “schizophrenia,” “mental retardation,” or “delusional disorder,” two disturbing terms continued to surface: “antisocial” and “malingering.” The more Anna read about these labels, the less she liked them. It was increasingly obvious why Dan, Anna’s more experienced colleague, had seemed relieved to transfer this case to her, claiming a seemingly attenuated “conflict of interest.”

Anna made a telephone call to Carl, the psychologist who had helped with her first murder case. Carl had already examined her current client in the context of an earlier assault charge. He confirmed Anna’s worst suspicions: “This guy is a sociopath, and a pathological liar. He’s been seen by every psychiatrist in the state, and they’ll all tell you he’s been trying to fake a serious mental illness for years.”

Hanging up, Anna was positive she wouldn’t be pursuing an insanity defense. Her client had also seemed quite competent to stand

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trial. Maybe too competent. In fact, he seemed to know more about the
day-to-day workings of the local circuit court than she did. Thank
goodness, Anna reflected, that she had another card up her sleeve. The
victim in this case had been shot while walking out of a rent-by-the-hour
motel room with her client’s wife.

Anna concluded that she would try this as a case of extreme
emotional disturbance (EED). If nothing else, she would get her client’s
murder charge reduced to first degree manslaughter, and then maybe she
could get him some sort of deal. Either way, she was determined to
keep her client’s mental health history out of her arguments and away
from the jury. At most, she would ask a so-called “pure” expert to
describe how the sudden exposure to circumstances at the motel might
have had an effect on her client.

When she filed notice of her intent to rely upon EED in
“mitigation,” with evidence about how knowledge of adultery might
affect a spouse, Anna smiled grimly as the prosecutor moved to have her
client examined at the state’s correctional psychiatric center. “Of
course,” she thought, “he knows about my client’s mental health
background from the assault case, and wants to go on a fishing
expedition.” Anna’s smile vanished, however, when the judge granted
the prosecution’s motion on the spot. Her arguments that EED was not a
“mental health defense” fell on seemingly deaf ears. After the hearing,
Anna was still dumbfounded. She hadn’t suggested that her client had
been so much as “cranky,” much less “mentally ill.” How could this
have happened?

Successive waves of judicial interpretation have effectively
transformed Kentucky’s EED doctrine into an insanity defense without
the requirement of an underlying psychiatric disorder. Such an outcome
was probably inevitable, given the ambiguity inherent in EED’s
statutory construction. After a review of the previous common law
standard, the statutory response thereto, and the progression of modern
case law, this article will propose a resolution for this situation in
Kentucky.
VOLUNTARY MANSLAUGHTER

The Kentucky Court of Appeals \(^2\) established its classic common law standard for voluntary manslaughter \(^3\) in *Shorter v. Commonwealth*: \(^4\)

"If the act of killing was committed under the influence of passion or in heat of blood, produced by reasonable provocation, that is, such as is ordinarily calculated to excite the passion beyond control, and before a reasonable time has elapsed for the passion to cool and reason to resume its habitual control, out of regard for the frailties of human nature, the crime is mitigated and designated as voluntary manslaughter and a lesser penalty inflicted. \(^5\)

At first glance, one might wonder how acts committed under the influence of a "passion beyond control" could be "voluntary." This conundrum has two plausible solutions. First, "voluntary" manslaughter was a misnomer. The only difference between the common law threshold for voluntary manslaughter and the second prong of the "insanity defense" \(^6\) was that a requirement of "provocation" resulting in

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\(^2\) In 1976, the "Kentucky Supreme Court" replaced the "Kentucky Court of Appeals" (hereinafter, the "Court of Appeals") as the highest "state court" in the Commonwealth of Kentucky. See KY. REV. STAT. ANN. § 21A.010 (Banks-Baldwin 1997). See also THE KENTUCKY ENCYCLOPEDIA 233 (John E. Kleber ed., 1992) (describing the circumstances surrounding this transition under the section entitled "court system").

\(^3\) Generically, "voluntary manslaughter" may be defined as follows: "It is the unlawful taking of human life without malice and under circumstances falling short of willful, premeditated, or deliberate intent to kill and approaching too near thereto to be justifiable homicide." BACK'S LAW DICTIONARY 964 (6th ed. 1990).

\(^4\) 67 S.W.2d 695 (Ky. 1934).

\(^5\) Id. at 696. See also Perciful v. Commonwealth, 279 S.W. 1062, 1064 (Ky. 1925) (noting that "[i]n its ordinary acception, manslaughter is the unlawful, willful, and felonious killing of another in sudden heat of passion or in sudden affray, and without previous malice, and not in the necessary or apparently necessary self-defense of the slayer").

\(^6\) Kentucky's eventual adoption of the Model Penal Code (Proposed Official Draft 1962) standard for the "insanity defense" (KY. REV. STAT. ANN. § 504.020) reflected extant common law doctrine. See KY. PENAL CODE § 510 commentary (Final Draft November, 1971); See also Terry v. Commonwealth, 371 S.W.2d 862, 864-65 (Ky.
“passion” was substituted for that of a pre-existing condition of “mental illness.” Either way, defendants’ actions had to be beyond their control.

Alternatively, the second possible solution is that “voluntary” manslaughter meant just what it said. Under these circumstances, defendants were provoked into a knowing but beleaguered state of “passion.” Under the “influence” of that “passion,” their judgment failed them, and they committed acts that without initial “provocation” would otherwise have amounted to murder. Defendants could have refrained, had they chosen to do so, from killing.

The first construction addresses an outright absence of volition, as defendants would be incapable of exercising control, or even considering it. Under the second construction, defendants would be making poor choices -- in essence, committing cognitive errors because their judgment would be clouded by the emotional shock they had just endured. Clearly, defendants encountering this scheme would

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7. Kentucky law defines “mental illness” as “substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one’s affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological or emotional factors.” Ky. Rev. Stat. Ann. § 504.060(6) (Banks-Baldwin 1997). Although the “symptoms” must be “recognized,” (presumably in the form of a consistent pattern of attribution and application by mental health professionals), this construction prevents limitation of the disease or process basis for “insanity” or “incompetence to stand trial” to specific psychiatric “diagnoses.”

8. In Kentucky, a person is guilty of murder when “[w]ith the intent to cause the death of another person,” he or she “causes the death of such person or of a third person,” or “wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.” Ky. Rev. Stat. Ann. § 507.020 (Banks-Baldwin 1997).

prefer, if possible, to identify themselves with the former state of mind, but would find the latter much easier to prove.¹⁰

In *Tarrence v. Commonwealth*¹¹ the Court of Appeals appeared to acknowledge the duality of the *Shorter* test by accommodating both potential interpretations:

No matter how violent the slayer's passion may have been, it will not relieve him of the implication of murder unless it was engendered by the degree or character of provocation to kill as would have naturally overcome and suspended the self-control of a man of fair, ordinary and average disposition or will power or cause such a one to act rashly or without due deliberation or reflection.¹²

On the other hand, the Court of Appeals in *Henderson v. Commonwealth*, addressing the narrower issue of the role of intoxication in obtaining a voluntary manslaughter instruction, seemed inclined to apply the higher putative threshold:

In order to require or to authorize an instruction on voluntary manslaughter the evidence must justify an inference that the killing resulted either from a sudden affray or from sudden heat of passion induced by reasonable provocation. In a murder case, evidence of intoxication calls for a voluntary manslaughter instruction if, but only if, it would justify a reasonable doubt on the part of the jury that at the time of the offense the defendant had the capacity "of appreciating the nature or quality of his acts and . . . the ability to

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¹¹. 265 S.W.2d 40 (Ky. 1953).
¹². *Id.* at 51 (emphasis added).
¹³. 507 S.W.2d 454 (Ky. 1974).
entertain malice or criminal intent. In other words, it must amount virtually to insanity.”

Up through Richards v. Commonwealth, the last published appellate opinion in Kentucky on this topic within the common law framework, a finding of voluntary manslaughter continued to require “a showing of (a) sudden affray or (b) sudden heat of passion, upon provocation.”

Kentucky courts failed to describe how juries should determine whether defendants had actually experienced a sufficient quantum of “passion,” focusing instead on the restraint and resiliency of the “reasonable man,” and whether the alleged “provocation” would have been severe enough to inflame him. This reflected the norm in other American common law jurisdictions, as well as in Great Britain.

14. Id. at 456-57 (quoting Hall v. Commonwealth, 81 S.W.2d 404, 407 (Ky. 1935)).
15. 517 S.W.2d 237 (Ky. 1974).
16. Id. at 241.
17. See Rice v. Commonwealth, 472 S.W.2d 512 (Ky. 1971); Vinson v. Commonwealth, 412 S.W.2d 565 (Ky. 1967); Bentley v. Commonwealth, 354 S.W.2d 495 (Ky. 1962); Pennington v. Commonwealth, 344 S.W.2d 407 (Ky. 1961); Jones v. Commonwealth, 311 S.W.2d 190 (Ky. 1958); Sikes v. Commonwealth, 200 S.W.2d 956 (Ky. 1947). For a rare Kentucky elaboration of this standard beyond the words “reasonable man,” see Tarrence v. Commonwealth, 265 S.W.2d 40, 51 (Ky. 1953) (describing “a man of fair, ordinary and average disposition or will power”).
18. In general, “[t]he reasonable American ... is provoked by a serious battery, and the sight of adultery. He is not provoked by words, or the sight of only impending adultery or upon finding one’s girlfriend with another man.” Joshua Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J. CRIM. L. & CRIMINOLOGY 421, 430 (1982) (emphasis in original).
20. As a rule, “the ordinary or reasonable American who kills in passion is also not homosexual, and is wholly devoid of ‘extraordinary character and environmental deficiencies.’” Dressler, supra note 18, at 430 (quoting People v. Morse, 452 P.2d 607, 621 (Cal. 1969)). The “fairness” of this perspective “has come under a good deal of question. For one thing ... if a person with ‘serious mental and emotional deficits’ is confronted with a situation that would be grave enough to provoke an ordinary man, he should plainly be entitled to at least the same consideration that the law would allow that ordinary man.” Jon C. Blue, Defining Extreme Emotional Disturbance, 64 CONN. B.J. 473, 477 (1990).
It may be instructive to consider the decision-making process a mental health expert would have undertaken, to assist in determining the presence or absence of voluntary manslaughter, in light of *Shorter* and then *Tarrence.*

After *Shorter*, the expert would have considered:

1) Was there provocation?
2) Did the provocation produce passion?
3) Was the provocation of the sort ordinarily calculated to excite the passion beyond control?
4) Was there a killing?
5) Did the killing occur under the influence of the passion?
6) Did the killing occur before reasonable time elapsed for the passion to cool?
7) Did the killing occur before reasonable time elapsed for reason to resume its habitual control?

After *Tarrence*, the third consideration would also include: "or cause rash action without due deliberation or reflection?" Under either construction, a defendant would have to convince a jury that the answer to each of these questions was "yes" in order to support a finding of voluntary manslaughter.

**EXTREME EMOTIONAL DISTURBANCE**

**A. Statutory Provisions**

In 1974, Kentucky legislators abandoned common law voluntary manslaughter in favor of the standard of "extreme emotional disturbances."
disturbance” (EED) and described this concept within the context of a new murder statute:23

[A] person shall not be guilty [of murder] if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.24

In addition, Kentucky’s new definition of “manslaughter in the first degree”25 included the following proscribed activity: “with intent to cause the death of another person, [one] causes the death of such person or of a third person under circumstances which do not constitute murder because [one] acts under the influence of extreme emotional disturbance, as defined in [the murder statute].”26

Despite the implications of this language, the reader will note that the murder statute never specifically “defined” EED.27 Rather, it only required that the EED in question have a “reasonable explanation or excuse,” and ordained from whose perspective to determine that the “explanation or excuse” was “reasonable.”28 The murder statute provided no guidance concerning the differences (if any) between an “explanation” and an “excuse,” what might constitute a “disturbance,” how to characterize that “disturbance” as “emotional,” or what degree of “extremity” would suffice to qualify that “disturbance” as a sufficient

24. Ky. Rev. Stat. Ann. § 507.020(1)(a) (Banks-Baldwin 1997). This definition is virtually identical to that currently found in the Model Penal Code, regarding killings “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.” II Model Penal Code § 210.3(1)(b) (1980).
26. Id. at § 507.030(1)(b).
27. Id. at § 507.020(1)(a).
28. Id.
basis for mitigation (or a defense). Overall, a literal reading of the statute leads to the conclusion that one could experience EED per se, whatever it might mean, and still be guilty of murder.

29. Id.

30. By contrast, the commentary accompanying the statutory description of "manslaughter in the first degree" was (and is) highly illuminating:

Subsection (1)(b) serves to include within manslaughter in the first degree what was known at common law as "voluntary manslaughter." This offense was generally described as "[a]n intentional homicide committed in a sudden rage of passion engendered by adequate provocation, and not the result of malice conceived before the provocation . . . ." Perkins, Criminal Law 52 (2d ed. 1969). When this subsection is read in conjunction with KRS 507.020(1)(a) it should be clear that in combination they serve to reduce murder to manslaughter in the first degree.

The most significant change brought about by subsection (1)(b) is an abandonment of the common law requirement that the killing occur in "sudden heat of passion" upon "adequate provocation." Adopted in its place is the requirement that the homicide be committed "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." Under this standard, which was borrowed from the Model Penal Code, mitigation is not restricted to circumstances which would constitute provocation "in the ordinary meaning of the term, i.e. an injury, injustice or affront perpetrated by the deceased upon the actor." Model Penal Code § 201.3, Comment 1 (Tent. Draft No. 9, 1959). In other words, it is possible for any event, or even words, to arouse extreme mental or emotional disturbance, as that phrase is used here.

A second significant change accomplished by subsection (1)(b) is the addition of a subjective element to the test used for determining the mitigation issue. The test set forth is an objective one: is there a "reasonable explanation or excuse" for the mental or emotional disturbance? But, in making that determination, the triers of fact are required to place themselves in the actor's position as he believed it to be at the time of his act. This is intended to replace the common law requirement that the provocation must be of a nature calculated to inflame the passions of the ordinary reasonable man. Perkins, Criminal Law 56 (2d ed. 1969). It is important, and should be acknowledged as important, that the standard proposed by this subsection gives triers of fact a substantial amount of flexibility in assessing mitigating circumstances surrounding a homicide. The advisability of such has been supported in this way:

There will be room for argument as to the reasonableness of the explanations or excuses
EED also found its way into the mitigation of various degrees of assault, as well as mitigation for mandatory consideration in sentencing hearings for capital murder trials. In the former context, EED was tied to its "definition" in the murder statute; in the latter, no "definition" was suggested at all.

B. Permissive Construction

From the late-1970's through the mid-1980's, the newly designated Kentucky Supreme Court felt its way forward with the pristine EED provisions. The new statute's lack of an implicit "provocation" requirement soon produced results quite different from the old Shorter and Tarrence constructions. Two cases, Ratliff v. Commonwealth and Edmonds v. Commonwealth, typify the early judicial accommodation of this change.

offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced. Model Penal Code § 201.3, Comment 5 (Tent. Draft No. 9, 1959).


31. See generally KY. REV. STAT. ANN. ch. 508 (Banks-Baldwin 1997) ("Assault and Related Offenses"). In any prosecution for first-degree, second-degree, or fourth-degree assault, "in which intentionally causing physical injury or serious physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020." KY. REV. STAT. ANN. § 508.040(1) (Banks-Baldwin 1997).

32. In these cases, "the judge shall consider, or he shall include in his instructions to the jury for it to consider" a series of potential mitigating circumstances during sentencing. KY. REV. STAT. ANN. § 532.025(2) (Banks-Baldwin 1997). Once such circumstance is when "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime." KY. REV. STAT. ANN. § 532.025(2)(b)(2) (Banks-Baldwin 1997).

33. See supra note 31 and accompanying text.

34. See supra note 32 and accompanying text.

35. Hereinafter, the "court." See supra note 2.

36. 567 S.W.2d 307 (Ky. 1978).

37. 586 S.W.2d 24 (Ky. 1979).
In 1976, Clarsie Jane Ratliff shot a clerk to death in a local
general store. At trial:

Two expert psychiatrists testified that appellant suffered
from schizophrenia-paranoid type. Both experts agreed
that she was very likely psychotic at the time of the
shooting and was unable to comprehend what was
occurring. The appellant’s own testimony indicated that
she was under the delusion that a sizeable number of
town’s people ... had formed a conspiracy to run her
out of town.

During questioning after her arrest, Clarsie had told a detective
that various persons looked as if “they was going to jump me,” and that
“[t]hat lady (the victim) looked at me as if she was going to pull my
hair.” The trial resulted in a murder conviction.

In its analysis of the trial court’s decision, the court observed
that “[t]he record is replete with evidence of an emotional disturbance
which, if believed by the jury, could have served to mitigate the degree
of culpability under our present Penal Code.” Mandating a new trial
on the basis that the judge had failed to instruct the jury on EED, the
court forcefully concluded that “[i]f the foregoing evidence would not
permit an objective jury to reasonably doubt the absence of extreme
emotional disturbance in this case, there is no use having this element
expressed in the Penal Code as a circumstance permitting mitigation.

In 1979, the court heard the case of Edmonds v. Commonwealth.
Albert Edmonds had been indicted for murder in

38. See Ratliff, 567 S.W.2d at 309.
39. Id. As one might expect, such findings were presented in the context of an
unsuccessful insanity defense. The court ruled that the trial judge had committed
“prejudicial error” by “confining [the jury’s] inquiry solely to the existence of the
completely exculpating circumstance of mental disease or defect to the high degree of
legal insanity at the time of the commission of the offense.” Id. at 308.
40. Id. at 309.
41. Id. at 308.
42. Id. at 309.
43. Id.
44. 586 S.W.2d 24 (Ky. 1979).
1975, just over five months after the EED law came into effect.45 He habitually took "a self-prescribed and self-compounded medication mixture of alcohol and sodium bromide or alcohol and potassium bromide for headaches and nervousness," which would cause him to act in a "bizarre manner," including times when he would "blank out."46

Still married to his spouse of fourteen years, the fifty-five year old Albert was "infatuated" with Betty Renfro, a twenty-three year old widow with two children.47 Albert became convinced that Betty was dating another man.48 One day, "after Betty and her children had returned home [from a picnic]," witnesses saw Albert "take a pistol out of his pocket and shoot Betty. She fell to the ground and [Albert] ran for help."49 While a witness drove to the hospital, Albert "sat in the back seat, holding Betty in his arms."50 He encouraged the driver to hurry to the hospital and continually assured Betty that she wouldn't die. Alas, she did.51

Noting that the trial court had failed to provide an instruction on EED, and granting a new trial for that reason,52 the court observed that: "the Attorney General attempts to define extreme emotional disturbance to show that it is a derivative of what was formerly known as 'heat of passion.' We find it unnecessary to define extreme emotional disturbance. It is suffic[jent] to say that we know it when we see it."53

C. Backlash

The following decade witnessed an inevitable reaction to rulings of the nature of Ratliff and Edmonds. In 1980, the court heard the case

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45. Id. at 25.
46. Id. at 26.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id. at 27. Justice Stephenson dissented in this case (as he had in Ratliff, 567 S.W.2d at 310), noting that "I do not agree that there is sufficient evidence in this case to require an instruction on extreme emotional disturbance." Edmonds, 586 S.W.2d at 29 (Stephenson, J., dissenting).
53. Edmonds, 586 S.W.2d at 27. The appellate record is devoid of any reference to "provocation" or any similar term.
of *Gall v. Commonwealth*. Two years earlier, Eugene Gall had robbed a small grocery store with a .357 magnum revolver. Minutes later, he was involved in a shoot-out with two Kentucky State Policemen, wounding one of them twice. Police soon charged Eugene with the rape and murder of 12-year-old Lisa Jansen, who had disappeared earlier the same day as the robbery.

A psychologist and a psychiatrist examined Eugene prior to (and over the course of) trial. These doctors both initially concluded that Eugene was competent to stand trial, but the psychologist, who had "maintained a fairly continuous observation of [Eugene's] conduct throughout the course of the trial," eventually concluded that Eugene

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54. 607 S.W.2d 97 (Ky. 1980).
55. Id. at 100.
56. Id.
57. Id. at 101.
58. Id. at 101, 105.
59. Id. at 101, 103. Regarding the possible employment of an "insanity defense," the court noted that "[a] major factor conducing to [the psychologist's] conclusion in this respect was that Gall did not have much faith in the defense of insanity, preferring rather to cast his main defense along the lines of reasonable doubt." Id. at 105. Dismissing the trial judge's failure to provide "a peremptory instruction of acquittal on the ground that as a matter of law the evidence established [Gall's] insanity at the time of the offense," the court concluded that:

> [W]e certainly cannot hold that the postfactum opinions of his experts were so compelling that reasonable minds could not fail to be convinced by them. Moreover, considering the nature of chronic paranoid schizophrenia, the mental illness from which he was alleged to be suffering, and the testimony to the effect that it not only was of long standing but probably not curable, the observations made by [psychiatrist] Dr. Chutkow on the basis of his examination of Gall on April 30, 1978, cast considerable doubt that he was afflicted with that disease on April 5, 1978. We recognize, of course, that one may be "insane" and yet competent to stand trial, and that the direct purpose of this examination was to determine his competence to stand trial, but the fair import of Dr. Chutkow's testimony was that he found no evidence of paranoid schizophrenia existing at that time. Even if [psychologist] Dr. Noelker's testimony were accepted at face value, he conceded that there were periods of remission in which Gall could function in a legally sane manner. Gall himself did not take the stand, and there was no eyewitness testimony showing the circumstances immediately attending the rape and murder.

Id. at 107.
"had now transcended the bounds of reality, [and] that although he continued to be competent in all other respects, 'in my opinion he has disassociated himself from this trial and he is participating in it much more as the attorney than the defendant.'\textsuperscript{60} The trial judge called in a second psychiatrist, who testified that "in his opinion [Eugene] was mentally competent to participate in his defense and quite capable of making intelligent decisions in so doing."\textsuperscript{61} The judge agreed, and the trial proceeded, with the eventual blessing of the court on appellate review.\textsuperscript{62}

After Eugene’s murder conviction, the court addressed the role of EED in this case:

[The defendant] presents two arguments on the subject of extreme emotional disturbance. The first is that the Commonwealth did not produce any evidence that he did not act under the influence of extreme emotional disturbance, hence the evidence was not sufficient to support the trial court’s instruction on murder. The second is that the “extreme emotional disturbance” phase of the murder instruction was fatally deficient in omitting the words, “the reasonableness of which is to be determined from the standpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.”\textsuperscript{63}

The court reviewed the common law history of “voluntary manslaughter,”\textsuperscript{64} and then examined the relatively new statute defining “manslaughter in the first degree,” with considerable attention to the

\textsuperscript{60} Id. at 105.
\textsuperscript{61} Id.
\textsuperscript{62} Id. Regarding Eugene's attempt to convince the jurors that the police officer finding Lisa's body had shot her himself, the court observed, that "[c]onsidering what the public has become accustomed to seeing on television nowadays, we do not think this ploy by Gall, in an attempt to lay a seed of doubt in the mind of some one or more of the jurors, was so outlandish as to raise a question of his mental competence." Id. at 106 (footnote omitted).
\textsuperscript{63} Id. at 107 (citation omitted).
\textsuperscript{64} Id. at 108.
minutiae of the commentary accompanying that statute. Asserting that "[a]n instruction on murder need not require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance unless there is something in the evidence to suggest that he was," the court observed that:

In this case there was no eyewitness evidence of the killing, and the defendant himself did not testify. Assuming that he was the guilty party, as the jury found him to be, there is not a shred of evidence to suggest that he was acting under the influence of an emotional disturbance, or that there were any circumstances existing at the time of the killing to provoke or stimulate such a disturbance, except for the evidence that he suffered from a mental illness from which the jury could have found, but did not find, that he was insane. The nature of that illness was chronic paranoid schizophrenia, which was characterized not only as "an extreme emotional disturbance," but "the most severe personality disorder that we are able to diagnose."

By this reasoning, the court reasserted, quite specifically, that some form of "provocation" was sine qua non for the EED calculus. Addressing Eugene's second argument that a new trial should occur because of the omission of statutory language regarding "reasonableness," the court drove this point further home by maintaining that "[o]bviously that particular language is appropriate only when there is evidence suggesting that the emotional disturbance was precipitated by some event or circumstance the defendant believed to exist," concluding that "[i]n this case there was no evidence to suggest that the appellant's motivation involved any 'belief' on his part with regard to the circumstances that induced the alleged emotional disturbance."

65. Id. See supra note 30 for the complete text of that commentary.
66. Id. at 109 (emphasis in original).
67. Id. (emphasis added).
68. Id. Finding "no substantial error" in the instructions provided at trial, the court added in this regard that Ratliff "is factually distinguishable in this particular respect." Id. at 109-10. Presumably this refers to the "beliefs" held by the defendant in Ratliff, as
Setting the scene for arguments to come, the court opined that:

There is much to be said for the proposition that an emotional disturbance inhering in a mental illness is not the kind of an emotional disturbance contemplated by the statute, in view of its historical development and the expression in the Commentary to the effect that it may be aroused by "any event, or even words," as quoted above. Assuming, however, that a mental disorder, whether or not it amounts to legal insanity, may constitute a reasonable "explanation or excuse" for extreme emotional disturbance, it was incumbent upon the trial court to require the negating of that factor in its instruction on murder, which was done. That is not to say that once the issue is raised (by evidence sufficient to ground a reasonable doubt) the Commonwealth must meet it with countervailing evidence. Unless the evidence raising the issue is of such probative force that otherwise the defendant would be entitled as a matter of law to an acquittal on the higher charge (murder), the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof. Otherwise it would never be possible to convict a defendant of murder if there were no eyewitnesses and if, for example, he testifies that he acted in self-defense, or was intoxicated out of his mind, or was acting under the influence of extreme emotional disturbance. 69

69. Id. at 109 (citation and footnote omitted). Despite this detailed discourse, the court was compelled to observe a few years later that:

We are continually beset with arguments founded upon "extreme emotional disturbance" despite the articulation of its meaning and impact in Gall v. Commonwealth, Ky., 607 S.W.2d 97, 108-109 (1980)[sic]. It is our opinion that the principal cause of this problem is the failure of this court, in Gall, to specifically overrule those portions of [prior cases] which declare that the absence of extreme emotional distress [sic] is an essential element of the crime of murder and require the Commonwealth to prove such absence, even in those
D. A New Definition

In the 1985 case of McClellan v. Commonwealth, these issues came to a head:

Raymond McClellan was the fifth husband of Bernadette McClellan. Her third husband was the decedent, Gary Stutzenberger. Raymond met Bernadette in 1980 when she was employed as a waitress in a topless bar in Louisville, Kentucky. Bernadette testified that about a week before Gary was murdered, Raymond threatened her with a knife, and she separated from him and returned to work at the topless bar. There she encountered her former husband, Gary, and eventually moved into his apartment.

Raymond was unsuccessful in his attempts to persuade Bernadette to return to him. Just two days before the homicide, he purchased a rifle. On the day before the homicide his automobile collided with a van driven by Gary, in which Bernadette was a passenger. Raymond followed the van as it drove away, and eventually wound up at a police station where a warrant was taken for Raymond’s arrest.

That evening, Raymond rented an apartment in the same building in which Gary and Bernadette were living. In the early morning hours he heard them return home. Armed with his rifle, he went to their apartment, knocked on the door and identified himself as a police officer.

cases where there is no evidence whatever indicating emotional disturbance. To the extent that such cases declare absence of extreme emotional distress [sic] to be an element of the crime of murder, they are expressly overruled.

Wellman v. Commonwealth, 694 S.W.2d 696, 697 (Ky. 1985) (emphasis in original).
70. 715 S.W.2d 464 (Ky. 1986).
Gary opened the door, but slammed it shut and locked it when he saw Raymond. Raymond then shot the lock off the door, and forced his way into the apartment. When Bernadette emerged unclothed from beneath the bed, Raymond shot and killed Gary, kidnapped Bernadette, and took her from the building. They eventually proceeded to a farmhouse in Indiana where they were surrounded by police, and he was forced to surrender.\textsuperscript{71}

Among fifty separate issues raised for review on appeal of Raymond’s murder conviction,\textsuperscript{72} the court was asked to rule on the following defense allegations: that “no rational trier of fact could fail to conclude” that Raymond had acted under EED, that the prosecutor had “misstated the law” regarding EED, and that the murder and manslaughter in the first degree statutes were “void for vagueness because there is no definition of the term ‘extreme emotional disturbance.’”\textsuperscript{73}

In response, the court recalled its earlier dismissal of the need for a definition of EED in \textit{Edmonds},\textsuperscript{74} and reasoned instead:

To say that, “we know it when we see it,” overlooks the fact that it is not the court but a jury that must make a factual determination of whether a particular defendant acted under the influence of extreme emotional disturbance. Without some standard or definition a jury is left to speculate in a vacuum as to what circumstances might or might not constitute extreme emotional disturbance.\textsuperscript{75}

\textsuperscript{71. Id. at 466.}
\textsuperscript{72. Id.}
\textsuperscript{73. Id. at 467. As we shall see, Raymond’s attorneys and their colleagues in the defense bar may have come to wish that they had never raised the last issue at all.}
\textsuperscript{74. See Edmonds, 586 S.W.2d at 27-28. See also supra notes 44-53 and accompanying text.}
\textsuperscript{75. McClellan, 715 S.W.2d at 467.}
Noting that "[s]ince the General Assembly did not define [EED]," it becomes necessary for the court to do so," the court reflected on the statutory definitions of insanity and mental illness. The court concluded that "[i]t is easy in the vernacular to equate insanity, mental disease, and mental illness with emotional disturbance, but in law they are separate and distinct concepts." Reflecting on its earlier ruling in Ratliff, the court stated:

[T]his court indicated that extreme emotional disturbance was akin to a lesser-degree defense of insanity. Ratliff suffered from schizophrenia -- paranoid type and experienced delusions of conspiracies against her. . . . It was held that a jury might reasonably believe that she was not legally insane, but was nevertheless emotionally disturbed.

Our holding in Ratliff . . . was in error. A mental disease which does not in itself result in a lack of capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law does not rise to the level of insanity, nor does it, in itself, constitute extreme emotional disturbance. . . . [S]tanding alone, evidence which tends to establish insanity or mental illness is not sufficient to establish extreme emotional disturbance.

With this observation, the court reiterated the essential role of some form of provocation in the existence of true EED. Acknowledging that "a reasonable explanation of extreme emotional

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76. This would appear to include the 1974 commentary to section 507.030 of the Kentucky Revised Statutes, which provides considerable detail regarding the "reasonableness" of various "explanations" or "excuses," but no specific definition of EED per se. See supra note 30 and accompanying text.

77. McClellan, 715 S.W.2d at 467.

78. See supra note 6 and accompanying text.

79. See supra note 7 and accompanying text.

80. McClellan, 715 S.W.2d at 468.

81. See supra notes 36, 38-43 and accompanying text.

82. McClellan, 715 S.W.2d at 468.

83. Id.
disturbance is not limited to specific acts of provocation by the victim but may relate to any circumstance that could reasonably cause an extreme emotional disturbance,” the court confirmed that “[a]lthough its onset may be more gradual than the ‘flash point’ normally associated with sudden heat of passion, nevertheless, the condition must be a temporary disturbance of the emotions as opposed to mental derangement per se.”

The court then proceeded to deliver its formal definition of EED:

Extreme emotional disturbance may reasonably be defined as follows: Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under circumstances as defendant believed them to be.

With this definition, the court purported to take “mental disease” out of the EED calculus, except to the extent that the defendants’ arrival at this “temporary” state of mind could be understood in terms of their misperception of the surrounding circumstances. For example, defendants could suffer from insane delusions, believing that passersby were intending to harm them, and believing that their otherwise innocuous statements were threats of assault, as long as there were some

84. Id. (emphasis added).
85. Defense counsel may derive some small comfort from the nature of this wording, which suggests that there may be, in fact, some other “reasonable” definition, by the court’s own implicit admission.
86. McClellan, 715 S.W.2d at 468-69.
specific act or circumstance, other than the delusions themselves, that could be perceived as a "provocation."\(^{87}\)

This construction, however, was short-lived. In the 1987 case of *Smith v. Commonwealth*,\(^{88}\) the court began to move toward a much more restrictive view of the nature of "provocation" than that expressed in *McClellan*\(^{89}\) . . . or, at least, that is the way in which its actions were ultimately interpreted.\(^{90}\)

Bill Dee Smith shot and killed Bill Dupin "in a deserted spot underneath the K&I Bridge on the Ohio River bank in Jefferson County, Kentucky," and later gave a lengthy and detailed statement to the police.\(^{91}\) In that statement, Bill Dee described his recollection of the reason for the shooting:

> Because I was tired of him coming around Edna with his tolu trying to sell it and get it and to get, get her to go to bed with him for the tolu, cause she's pregnant with my baby. And I was plannin' on marrying her. I just got tired of it. Tired of seeing him do all these things, plus he's been taking other women and doing the same thing down the same places. I just got tired of . . . tired and mad. I guess halfway crazy whenever I just seen him around there. And I knew, knew he was gonna be doing something like that.\(^{92}\)

On appeal, the court rejected appellate defense counsel's argument that the ensuing murder conviction should be reversed for lack of an EED instruction:

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87. The reader may wonder at this juncture how the court could have purported to overrule *Ratliff* by virtue of this decision. Apparently, although the defendant in *Ratliff* may have experienced a sufficient nature and degree of provocation by *McClellan* standards, the expressed reasoning of the court in *Ratliff* failed to take the need for such provocation into account. *See Ratliff v. Commonwealth*, 567 S.W.2d 307, 308-09 (Ky. 1978).

88. 737 S.W.2d 683 (Ky. 1987).

89. *See McClellan*, 715 S.W.2d at 468; *see also supra* text accompanying notes 97-105.

90. *See infra* notes 97-105 and accompanying text.

91. *Smith*, 737 S.W.2d at 685.

92. *Id.* at 685-86.
Appellant contends that his discovery of Dupin, with his trousers down in the truck with Edna, caused him to be emotionally disturbed, half-crazed as he put it.

... Nothing in those statements indicate a temporary state of mind or one so disturbed or inflamed as to overcome appellant’s judgment and cause him to act uncontrollably. His conduct was planned because he was “tired” of the way the victim had been behaving. We find no claim by the appellant that he was unable to control his actions. It is not the obligation of the Commonwealth to prove the absence of an extreme emotional disturbance.93

While agreeing that the evidence in this case “[fell] short of circumstances inferring a state of insanity,” Justice Leibson disagreed, in a stinging dissent, with the assertion that “a reasonable interpretation of [EED] requires that the accused act ‘uncontrollably,’ if this means a mental condition so severe that one is completely incapable of conforming one’s conduct to the requirements of the law.”94 Noting that “[t]his is the definition of insanity . . . and not of [EED],”95 he observed:

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93. Id. at 686 (emphasis added) (citation omitted).
94. Smith, 737 S.W.2d at 691 (Leibson, J., dissenting).
95. Id.
We seem to have come to a definition of "extreme emotional disturbance" which is so narrow as to render the term nonexistent. There was ample evidence in the present case from which to conclude that the accused was emotionally disturbed, and extremely so. The trial court's refusal to instruct on this theory left the jury with a choice between only intentional and wanton murder. 96

_Foster v. Commonwealth_ 97 involved the case of LaFonda Fay Foster and Tina Powell, who were convicted of five separate counts of murder, committed over the course of a long and complicated evening of killings at multiple sites. 98 At trial, defense counsel argued that Foster "was raised in a dysfunctional family where she was physically and emotionally abused," and that her "past drug and alcohol abuse" explained why "she often lost her temper and directed her 'rage' towards people around her." 99 A psychologist testified that Foster was "an extremely emotionally disturbed child," an "extremely emotionally disturbed adolescent," and "an extremely emotionally disturbed and drug dependent adult." 100

On appeal, the court averred that:

Despite this "evidence," Foster failed to prove that the killings were caused by a "triggering" event. Since the adoption of the penal code, we have undertaken to set out what evidence is required to support an instruction on [EED]. We have explained in prior opinions that the event which triggers the explosion of violence on the

96. _Id._ Justice Leibson added that "[t]here was evidence from which the jury could believe that when the accused committed the crime he was enraged, driven 'halfway crazy' by a tormentor who was using the offer of drugs to repeatedly seduce his pregnant girlfriend, the woman he loved and intended to marry." _Id._ at 690.
97. 827 S.W.2d 670 (Ky. 1992).
98. _Id._ at 672-75.
99. _Id._ at 678.
100. _Id._ Another "psychologist" (who was "an expert in dysfunctional families") testified during the penalty phase at trial in support of the notion that Foster "was physically and emotionally abused as a child and that she grew up in a dysfunctional family." _Id._ at 680.
part of the criminal defendant must be sudden and uninterrupted.101

Curiously, the court cited McClellan and Smith as the bases for this assertion.102 The reader will recall that, in McClellan, the court had established that “a reasonable explanation of extreme emotional disturbance is not limited to specific acts of provocation by the victim but may relate to any circumstance that could reasonably cause an extreme emotional disturbance.”103 In Smith, the court’s analysis had focused not on the nature of any provocation, but rather on the lack of any evidence offered that the appellant had been “unable to control his actions.”104 Nonetheless, the court in Foster concluded that “it is wholly insufficient for the accused defendant to claim the defense of [EED] based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown.”105

E. The “Police Officer at the Elbow”

In the 1994 case of Cecil v. Commonwealth,106 the court reviewed the murder conviction of Gabrielle Cecil.107 Gabrielle had been dating Ronnie Hibbard “off and on” for about a year when she began to share an apartment with Loren Collard.108 Eventually, Ronnie started to date Loren instead, and although Gabrielle initially “resented” this change, “after a time she apparently became reconciled and the three of them shared many activities.”109 However, Gabrielle’s mood began to sour, and a series of confrontations ensued.110 When Loren informed

101. Id. at 678 (citations omitted).
102. Id.
103. McClellan, 715 S.W.2d at 468. See also supra note 84 and accompanying text.
104. Smith, 737 S.W.2d at 686. See also supra note 93 and accompanying text.
105. Foster, 827 S.W.2d at 678. The court’s use of the qualifier “unless” suggests that an evidentiary basis in “gradual victimization from [a defendant’s] own environment” remains a relevant factor in the EED calculus.
106. 888 S.W.2d 669 (Ky. 1994).
107. Id. at 671.
108. Id.
109. Id.
110. Id. at 671-72.
Gabrielle one day that she and Ronnie were going to get married, Gabrielle "became angry but remained calm." The next day:

Ms. Collard and Mr. Hibbard drove to a Wal-Mart store at about eleven o'clock to buy a new telephone. The appellant saw Ms. Collard's car in the parking lot, parked her car nearby, and walked to the store. As Ms. Collard and Mr. Hibbard were leaving the store, they met Ms. Cecil in the doorway.

As the three of them were walking across the parking lot talking, the appellant raised a .38 pistol which she had been holding down at her side and shot Mr. Hibbard in the head. The pistol was about one foot away. Several eyewitnesses saw the shooting and heard the appellant scream, "I've shot him," and then thrust the pistol into the hands of a bystander as she ran into the store. She telephoned her mother and asked her to send her stepfather, saying, "It's bad, it's real bad." 112

Gabrielle told the first police officer on the scene that Ronnie had "abused" her, and that they had "had a squabble the night before." She told him repeatedly that she had "barely pulled the trigger." At trial, Gabrielle added that she had thought that Ronnie had "jumped" at her and the gun "went off." 115

After reviewing its McClellan definition of EED, the court drew upon the "provocation" standard it had outlined in Foster. 117

111. Id. at 672.
112. Id.
113. Id.
114. Id.
115. Id. The court concluded that "there was certainly no evidence that the appellant acted out of any need for self-protection; at most was her testimony that the victim might have 'jumped' at her or 'verbally abused her.' No one could seriously contend that her use of deadly physical force was necessary at that time to protect herself against death or serious physical injury." Id. at 674.
116. See supra note 86 and accompanying text.
117. See supra notes 101-05 and accompanying text.
The appellant bought the murder weapon only a month or so before the killing, as her relationship with the victim and Ms. Collard continued to deteriorate. She carried it in her automobile on the day of the murder when she followed the victim and Ms. Collard to the Wal-Mart parking lot. She removed the pistol from the car and carried it on her person as she stalked them into the store. Before they could return to Ms. Collard’s car, Ms. Cecil drew the pistol, held it within a foot of the victim’s head, and pulled the trigger. That was the only “triggering” event that occurred that day.\textsuperscript{118}

The court noted that “three mental health experts examined Ms. Cecil and found that she was mentally ill,” specifically that she suffered from “borderline personality disorder.”\textsuperscript{119} One expert, a psychiatrist, identified “symptoms of difficulty in personal relationships, self-mutilative behavior, low self-esteem, difficulty in being alone, and temper.”\textsuperscript{120} Another expert, a clinical psychologist, provided a forensic opinion:

\begin{quote}
\textsuperscript{118} Cecil, 888 S.W.2d at 673.

\textsuperscript{119} Id. Some clinical features of borderline personality disorder are as follows:

Borderline personality disorder patients almost always appear to be in a state of crisis. Mood swings are common. The patients can be argumentative at one moment and depressed at the next and then complain of having no feelings at another time.

The patients may have short-lived psychotic episodes (so-called micropsychotic episodes), rather than full-blown psychotic breaks, and the psychotic symptoms of borderline personality disorder patients are almost always circumscribed, fleeting, or in doubt. The behavior of borderline personality disorder patients is highly unpredictable; consequently, they rarely achieve up to the level of their abilities. The painful nature of their lives is reflected in repetitive self-destructive acts. Such patients may slash their wrists and perform other self-mutilations to elicit help from others, to express anger, or to numb themselves to overwhelming affect.

\end{quote}


\textsuperscript{120} Cecil, 888 S.W.2d at 673-74.
He recognized that she had been under stress for a long time. The primary stress for her was the difficulty in handling the intensity of a close relationship and seeing that relationship slipping away. Although [he] felt that the appellant's judgment was blurred and her behavior affected because of her emotions and the emotional stress she was under, he did not believe she suffered from insanity. He also testified that the appellant was acting intentionally and would not have shot the victim had a police officer been standing at her elbow.121

Dissenting in regard to the court's conclusion that no instruction on EED had been warranted at the trial level,122 Justice Leibson asserted that:

In [McClellan], our court reduced the EED concept to the legal equivalent of temporary insanity or irresistible impulse . . . . The Penal Code section on EED does not require an "uncontrollable" act to the exclusion of "evil or malicious purposes." This is a gloss the court has added to the statute to return to the common law's sudden heat of passion. Rather, the Penal Code recognizes that a combination of significantly distorted mental perception and malice diminishes the degree of culpability . . . . The drafters of the Penal Code have written EED into the Penal Code as an element reducing murder to manslaughter, and we have written it out. No jury reading and applying the McClellan definition of EED literally could apply it in any circumstance where it did not believe the accused acted from irresistible impulse, where the accused would have killed with a policeman at her elbow, but this is not the function for EED the Penal Code intended.123

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121. Id. at 673.
122. Id. at 674.
123. Id. at 677-78 (Leibson, J., dissenting) (citations omitted) (quoting McClellan, 715 S.W.2d at 468-69). Justice Leibson concluded his dissent by stating that "[w]e should
Indeed, when one considers what an expert witness would have been asked to establish under the strictest interpretation of the old common law rubric of "voluntary manslaughter," the emerging elements mirror the court’s Cecil construction: specific provocation of the sort “calculated to excite . . . passion beyond control,” resulting in such passion as actually did “overcome” and “suspend” a defendant’s “self-control.” The only practical difference between this model and that of Kentucky’s “insanity” defense is that the existence of some “triggering event” is substituted for an extant “mental condition.”

In Coffey v. Messer, “mental health” factors assumed a central role in the determination of EED. Jeffrey Coffey was charged with rewrite the instruction on EED propounded in McClellan to properly explain its function.” Id. at 678 (Leibson, J., dissenting).

124. See supra notes 4-22 and accompanying text.

125. Shorter v. Commonwealth, 67 S.W.2d 695, 696 (Ky. 1934).

126. Tarrance v. Commonwealth, 265 S.W.2d 40, 51 (Ky. 1953).

127. “Insanity” means that [sic], as a result of mental condition, lack of substantial capacity either to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of law.” KY. REV. STAT. ANN. § 504.060(5) (Banks-Baldwin 1997).

128. Indeed, the statute fails to define that “mental condition” to which the “insanity” defense refers. Id. Might this “condition” itself not result from some form of provocation? See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STAT. MANUAL OF MENTAL DISORDERS 424-29 (4th ed. 1994) (describing diagnostic criteria for “Posttraumatic Stress Disorder”). “Mental illness” does have a statutory definition. See KY. REV. STAT. ANN. § 504.060(6) (Banks-Baldwin 1997). It would not be unreasonable to argue that the state of mind required by the court’s current perspective on EED closely resembles “substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one’s affairs and social relations . . . associated with maladaptive behavior . . . related to [for example] social factors.” Id. See also Stanford v. Commonwealth, 793 S.W.2d 112, 115 (Ky. 1990) (applying the statute in this fashion to exclude mental health evidence supporting EED). The purpose of this analysis is not, of course, to suggest that EED and the “insanity defense” should be interchangeable or equivalent, but rather to emphasize the reasons for which they may be confused. It is also worth noting that while attorneys and expert witnesses will frequently recommend innovations in statutory and case law, that should not compromise their effectiveness in providing valid advocacy and opinions within the existing legal framework.

129. 945 S.W.2d 944 (Ky. 1997) (the appellee was Circuit Court Judge Roderick Messer since this was an appeal from the Court of Appeals decision affirming the Circuit Court Judge’s order granting the Commonwealth’s motion for a mental health evaluation of the defendant).
the murders of “fifteen-year-old Taiann Wilson and seventeen-year-old Matthew Coomer.” His attorneys arranged for him “to be evaluated by a mental health professional in preparation for trial.”

Approximately five months later:

[T]he Commonwealth filed a motion to compel discovery of mental health evidence, so that it could determine whether to move for a separate mental examination . . . . At that time, Appellant had not given notice . . . of his intention to introduce expert mental health testimony. His response to the Commonwealth’s motion stated that he did not intend to prove mental illness or insanity and had not given notice of any mental health defense which would entitle the prosecution to its own evaluation.

This situation soon changed. Less than a month later, Jeffrey’s attorneys “gave written notice of his intention to introduce mental health evidence at trial.” However, they noted that they were unable to determine at that time whether Jeffrey was eligible for an “insanity defense,” whether he was “competent to stand trial,” or whether he was “under the influence of [EED] at the time of the charged offenses.”

Five weeks later, prosecutors renewed their discovery motion, also moving for “an order requiring [Jeffrey] to submit to a mental examination by a psychiatrist selected by the Commonwealth.”

130. Id. at 946-47.
131. Id. at 944.
132. Id. The current author was that “mental health professional”; he did not provide any opinion on EED at trial.
133. Id. at 945.
134. Id.
135. Id. While such motions (and resulting orders) often call for evaluation by a “psychiatrist,” Kentucky law provides for appointment of a psychiatrist and/or psychologist in a range of forensic mental health contexts. See, e.g., Ky. REV. STAT. ANN. § 504.070(3) (Banks-Baldwin 1997) (appointment of a “psychologist or psychiatrist” for evaluation of “mental illness or insanity”); Id. at § 504.100(1) (appointment of a “psychologist or psychiatrist” for evaluation of “incompetency to stand trial”); Id. at § 387.540(1) (appointment of a “physician,” a “psychologist,” and a “social worker” to the “interdisciplinary team” for evaluation of “disability” in the context of guardianship and/or conservatorship).
response, the trial judge held that “evidence of [EED] does bear on the issue of guilt,” and ordered that “the Commonwealth shall have the right to have the defendant submit to a mental exam.”

Two months after the trial judge’s order:

Appellant underwent a second mental health evaluation by an expert of his choice. [Two days later], he filed another notice of his intent to introduce mental health expert testimony at trial. Specifically, the notice stated that (1) Appellant was not currently incompetent to stand trial and/or assist in his defense; (2) Appellant did not intend to present an insanity defense at trial; and (3) Appellant did intend to introduce the testimony of a mental health expert to support Appellant’s claim of [EED] and in any penalty phase of the trial.

Within ten days, the trial court “entered an order granting the Commonwealth’s motion for a mental health evaluation,” Jeffrey’s attorneys unsuccessfully requested a writ of prohibition from the court of appeals, the denial of which led to appeal “as a matter of right.”

On appeal, the court maintained that:

Appellant first asserts that [the statute] authorizes the Commonwealth to obtain a mental health examination

136. Coffey, 945 S.W.2d at 945.
137. Id.
138. Id. The appellate record does not reflect why it would have been necessary to enter such an order twice. Id. Perhaps the initial order acknowledging the Commonwealth’s “right” to have Jeffrey “submit to a mental health exam” was considered distinct from one actually directing that such an exam occur. See supra note 136 and accompanying text.
139. Coffey, 945 S.W.2d at 945. “In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court . . . .” KY. CONST. § 115.
140. This statute, regarding “[e]vidence by defendant of mental illness or insanity; examination by psychologist or psychiatrist by court appointment; rebuttal by prosecution,” reads as follows:

(1) A defendant who intends to introduce evidence of his mental illness or insanity at the time of the offense shall file written notice of his intention at least twenty (20) days before trial.
only if the defendant gives notice of his intention to introduce expert testimony relating to a defense of insanity or mental illness. In fact, the statute does not mention the word “defense,” but rather authorizes an examination if the defendant gives notice of his intent to introduce evidence of mental illness or insanity at trial. In Stanford v. Commonwealth,141 we held that the definition of mental illness was broad enough to include [EED] and that the defendant’s failure to give notice justified the trial court’s decision to exclude the defendant’s mental health evidence.142

The court did not conclude that concerns regarding “mental illness” per se provided the only basis on which the Commonwealth was entitled to subject defendants to a mental health evaluation:

(2) The prosecution shall be granted reasonable time to move for examination of the defendant, or the court may order an examination on its own motion.

(3) If the court orders an examination, it shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant’s mental condition. If it appears the examination will not be completed before the trial date, the court may, on its own motion or on motion of either party, postpone the trial date until after the examination.

(4) No less than ten (10) days before trial, the prosecution shall file the names and addresses of witnesses it proposes to offer in rebuttal along with reports prepared by its witnesses.

KY. REV. STAT. ANN. § 504.070 (Banks-Baldwin 1997).

141. 793 S.W.2d 112 (Ky. 1990).

142. Coffey, 945 S.W.2d at 945 (citation omitted). In Stanford, the trial court had excluded a psychologist’s guilt-phase testimony (preserved by avowal) to the effect that defendant Jessie Dale Stanford “was likely to be an alcohol or drug abuser” and “a disturbed individual who suffers from [a] psychological disorder.” On appeal, the court concluded that the exclusion was proper because defense counsel had failed “to file a written notice of [Jessie’s] intention to introduce such evidence at least twenty days before trial,” adding that “[m]ental illness is broadly defined . . . and includes many of the concepts contained in the excluded testimony.” Stanford, 793 S.W.2d at 114-15.
Regardless of the [statutory] language . . . [Kentucky Rules of Criminal Procedure]143 authorize a mental examination of the defendant if he gives notice of his intention to introduce expert testimony "relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt . . . ."144

The court also noted that:

Appellant posits that even if EED falls within the category of "any other mental condition," it does not bear upon the issue of guilt, since EED is not a defense, but only a mitigating factor which serves to reduce the

143. This rule, regarding "[d]iscovery and inspection," reads in pertinent part as follows:

(B)(i) If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, at least 20 days prior to trial, or at such later time as the court may direct, notify the attorney for the commonwealth in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(ii) When a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may, upon motion of the attorney for the Commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony.

KY. R. CRIM. P. 7.24.

144. Caffey, 945 S.W.2d at 945 (emphasis in original) (quoting KY. R. CRIM. P. 7.24). "Mental condition" is not defined anywhere in the Kentucky Rules of Criminal Procedure, but the reader will recall that the term surfaces in at least one other context: the "insanity" defense. See supra notes 127-28 and accompanying text.
charged offense of murder to the lesser offense of first-degree manslaughter.

Although we have occasionally described EED as a mitigating circumstance, it is, in fact, a defense to the extent that its presence precludes a conviction of murder. We have often characterized EED as a defense, and it is referred to as a "defense to the crime" in the mitigating circumstances section of our capital penalty statute. Once evidence is introduced to prove the presence of EED, its absence becomes an element of the offense of murder.

In this fashion, the court determined conclusively that EED was a "defense," one that the definition of "mental illness" was "broad enough to include," and one for which prosecutors were entitled to discovery and an evaluation by their own expert, "[w]hen the

145. See supra note 32 and accompanying text.
146. Coffey, 945 S.W.2d at 945-46 (citations and footnote omitted). The court cited Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980) as the basis for this assertion. Id. at 946. See also supra notes 54-69 and accompanying text. It acknowledged that Wellman had contained the following statement: "The presence or absence of [EED] is a matter of evidence, not an element of the crime [of murder]." Wellman v. Commonwealth, 694 S.W.2d 696, 697 (Ky. 1985). Claiming that subsequent decisions had taken this quote "out of context," the court opined:

In Wellman, there was no evidence that the defendant was acting under the influence of EED at the time of the offense. The holding in Wellman was that the Commonwealth is not required to prove the absence of EED if there is no evidence tending to prove its presence. However, once evidence of EED is introduced, its absence is included as an element in the instruction on murder per [the statute].

Coffey, 945 S.W.2d at 946. See also Wellman, 694 S.W.2d at 697 (lamenting the Court's previous failure "to specifically overrule those portions of [prior cases] which declare that the absence of [EED] is an essential element of the crime of murder and require the Commonwealth to prove such absence") (second emphasis added). The commentary to Kentucky's manslaughter statute mentions "mitigation" four different times, but never refers to a "defense." KY. REV. STAT. ANN. § 507.030 commentary (1974) (Banks-Baldwin 1997). See supra note 30.

147. See Coffey, 945 S.W.2d at 946.
148. Id. at 945.
149. The terms "examination" and "evaluation" are often used interchangeably, but technically, one or more of the former may be conducted in the context of the latter. See Eric Drogin & Curtis Barrett, Forensic Mental Health Assessment: Moving from
defendant intends to introduce expert mental health evidence to prove that defense.\footnote{\textit{Examination to Evaluation}, \textit{The Advocate}, Jan. 1996, at 130 (a journal of criminal justice education and research published by The Kentucky Department of Public Advocacy).}

CONCLUSION

By stages, the Kentucky Supreme Court has moved over the past two decades to fill in the interpretive gaps in Kentucky’s murder\footnote{\textit{Coffey}, 945 S.W.2d at 946-47.} and first degree manslaughter\footnote{\textit{See Ky. Rev. Stat. Ann. § 507.020 (Banks-Baldwin 1997). \textit{See supra} notes 23-24, 30 and accompanying text.} notes 23-24, 30 and accompanying text.} statutes. After an initial period of permissive construction,\footnote{\textit{See supra} notes 36-53 and accompanying text.} the court gradually developed more specific (and arguably more restrictive) requirements for “triggering events,”\footnote{\textit{See supra} notes 101-05, 118 and accompanying text.} “uncontrollable” reactions thereto,\footnote{\textit{See supra} notes 86, 93 and accompanying text.} and prosecutorial access to mental health evidence.\footnote{\textit{See supra} notes 129-50 and accompanying text.} In the process, Kentucky’s standard for EED has increasingly come to resemble its “insanity” defense, both functionally and procedurally. The most eloquent commentary in this regard has been that of Justice Leibson, whose dissenting opinions appear to have traced the current state of affairs primarily to the inclusion of the term “uncontrollably” in the EED definition provided in \textit{McClellan}.\footnote{\textit{See supra} notes 94-96, 123 and accompanying text.} It is unlikely that redrafting the relevant criminal statutes would settle the issues that have continued to surface in the succeeding waves of EED opinions, but if the court were to reconsider the requirement that actions resulting from EED be “uncontrollable,”\footnote{\textit{See supra} note 127 and accompanying text.} it might remove a troublesome similarity to an “insanity” defense that requires an inability to “conform one’s conduct to the requirements of the law.”\footnote{\textit{Ky. Rev. Stat. Ann. § 504.060(5) (Banks-Baldwin 1997). \textit{See supra} note 127 and accompanying text.}
In the case of Commonwealth v. Eldred, the Supreme Court of Kentucky held that, under Kentucky's capital sentencing procedure, the Commonwealth is not automatically precluded from seeking the death penalty in a retrial following a defendant's successful appeal, when the jury in the first trial found proof of a statutory aggravating factor beyond a reasonable doubt but did not vote to impose the death penalty. This holding is in conflict with the United States Supreme Court ruling in Bullington v. Missouri, which held that a defendant given a life sentence rather than the death penalty in his first trial could not be retried on the death penalty after a successful appeal. Writing for the majority in a four-to-three decision, Justice Johnstone found the Kentucky capital sentencing statute to be significantly different from the capital sentencing statutes analyzed by the United States Supreme Court in Bullington and Arizona v. Rumsey. As a result, the general rule laid down in those cases, precluding the state from retrying a defendant on the death penalty issue after a successful appeal when he was given a life sentence in the initial trial, is not controlling in this Commonwealth.
particular importance to the majority was the wide range of sentencing alternatives given to the jury in the penalty phase of Kentucky's bifurcated proceeding for capital cases. This note examines the reasoning of the court, and whether the Kentucky capital sentencing statutes are sufficiently distinctive from those in Missouri and Arizona to justify the Commonwealth being given a second bite at the death penalty apple.

BACKGROUND

A. Facts

Frank Eldred was convicted of murder and arson by the Circuit Court of Russell County. The Commonwealth sought to impose the death penalty at his first trial. During the penalty phase, the jury found the statutory aggravating circumstance of murder for profit and designated this finding in writing. "The jury recommended a sentence of life without the possibility of parole for twenty-five years (hereinafter Life-25), rather than [the] death [penalty]." Subsequently, the trial court imposed the recommended sentence for the murder conviction.

The Kentucky Supreme Court overturned Eldred's conviction of first-degree arson and murder for reasons unrelated to the appeal. At retrial, the Commonwealth notified Eldred that it again would seek the death penalty. Eldred moved, pursuant to Bullington and Rumsey, to prohibit the Commonwealth from seeking the death penalty at a retrial. The trial court granted Eldred's motion, and the Commonwealth appealed the trial court's ruling to the Kentucky Supreme Court.

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9. Id.
10. See Eldred v. Commonwealth, 906 S.W.2d 694, 699 (Ky. 1995) [hereinafter Eldred I].
11. Id. at 697.
12. See KY. REV. STAT. ANN. § 532.025(2)(a)(4) (Banks-Baldwin 1996). The statute provides that the following is an aggravating circumstance: "[t]he offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit." Id.
13. See Eldred II, 973 S.W.2d at 44.
14. Id.
15. Id.
16. See Eldred I, 906 S.W.2d at 700.
17. See Eldred II, 973 S.W.2d at 44.
18. Id.
19. Id.
Supreme Court reversed the trial court, and held that Kentucky's capital sentencing procedure did not bar the Commonwealth from seeking the death penalty at Eldred's new trial. The court rejected the argument that the original jury recommendation of a sentence of life without parole for twenty-five years was tantamount to an implied acquittal of the death penalty. Therefore, the retrial of the death penalty did not trigger Double Jeopardy Clause concerns, and Bullington was inapplicable.

B. Previous Case Law: The General Rule and Its Exceptions

In Stroud v. United States, the United States Supreme Court held that the Double Jeopardy Clause did not prevent a defendant whose conviction was reversed from receiving a more severe sentence upon retrial than he received at his first trial. The Court found that imposition of the death penalty on the defendant at retrial, after he had received a lesser sentence at the previous trial, did not give rise to a violation of the Double Jeopardy Clause of the United States Constitution. This general rule has been affirmed several times by the United States Supreme Court, as well as the high court of Kentucky.

Before Bullington was decided, the United States Supreme Court had decided two cases that carved out an exception to the general rule set forth in Stroud. First, if an appellate court reverses a conviction on the

20. Id.
21. Id. at 48-49.
22. U.S. CONST. amend. V. The Double Jeopardy Clause states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Id.
23. Eldred II, 973 S.W.2d at 49.
25. Id.
26. Id.
27. See North Carolina v. Pearce, 395 U.S. 711 (1969) (holding that double jeopardy protection imposes no absolute prohibition on the imposition of a harsher sentence at retrial after a defendant has succeeded in having the original conviction set aside); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (holding that the possibility of a higher sentence on retrial does not impermissibly "chill" the exercise of a criminal defendant's right to challenge his first conviction by direct appeal or collateral attack); United States v. DiFrancesco, 449 U.S. 117 (1980) (holding that an increased sentence imposed upon review by a federal court does not constitute multiple punishment in violation of the Double Jeopardy Clause).
28. See Bruce v. Commonwealth, 465 S.W.2d 60 (Ky. 1971) (holding that double jeopardy was not violated by imposition of a more severe sentence on retrial than that which resulted from the original conviction).
grounds that the evidence at trial was insufficient to support a conviction (e.g., no reasonable jury could have found the defendant guilty on the evidence presented), then no reprosecution is allowed. Second, the conviction of a lesser-included offense operates as an implied acquittal of the greater offense, and a defendant cannot be retried on the greater offense at a subsequent trial after a successful appeal. These cases represent a departure from the "clean slate" doctrine recognized in Stroud and specifically denoted in North Carolina v. Pearce. There is no clean slate for the retrial, and reprosecution may be limited or disallowed, if "a jury agrees or an appellate court decides that the prosecution has not proved its case."

C. The Bullington Exception

In Bullington, the United States Supreme Court examined the application of double jeopardy as it applies in the context of bifurcated capital prosecution and sentencing proceedings. Robert Bullington was found guilty of capital murder in a Missouri state court proceeding. Upon completion of the sentencing phase, the jury fixed his punishment not at death, but at imprisonment for life without eligibility for probation or parole for 50 years (hereinafter Life-50). He was subsequently granted a new trial and the state served notice that it intended to seek the death penalty again at his retrial. The defense sought to strike the notice, and the issue ultimately reached the Missouri Supreme Court. The court sustained the state's position and held that the United States Constitution did not bar the imposition of the death penalty upon the defendant at his new trial, and did not chill his ability to seek redress for any constitutional violation committed at his initial trial.

31. See Pearce, 395 U.S. at 721 (1969). There is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction, because the original conviction has been nullified and "the slate wiped clean." Id.
32. Id.
34. Id. at 430.
35. Id. at 435.
36. Id. at 436.
37. Id.
38. Id. at 436-37.
39. See State ex rel. Westfall v. Mason, 594 S.W.2d 908 (Mo. 1980).
The United States Supreme Court granted certiorari "in order to consider the important issues raised by petitioner regarding the administration of the death penalty." The Court began by recognizing that "the Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged." The Court also noted that they had never extended that principle to sentencing; therefore, the Double Jeopardy Clause "imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside." The Court reasoned that the imposition of a particular sentence normally "is not regarded an acquittal of any more severe sentence that could have been imposed."

The Supreme Court then noted that the Missouri capital sentencing procedure, which resulted in the imposition of a life sentence on defendant Bullington at his first trial, was significantly different than those employed in any of the Court's cases where the Double Jeopardy Clause was held inapplicable to sentencing. In particular, the Missouri capital sentencing procedure had the "hallmarks" of a trial on guilt or innocence, unlike the sentencing procedures in the Court's previous cases. The jury "was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute." Also, the prosecution did not simply recommend what it felt to be the appropriate punishment. Rather, "[i]t undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts."

40. Bullington, 451 U.S. at 437.
42. Id. at 438.
43. Id.
44. Id. at 438-39. The Court went on to say: "[i]n Pearce, Chaffin, and Stroud, there was no separate sentencing proceeding at which the prosecution was required to prove--beyond a reasonable doubt or otherwise--additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer's discretion was essentially unfettered." Id. at 439.
45. Id. at 438. See, e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 18 n.1 (1973) (sentencing statute contained no standards to guide the jury in exercising its discretion).
47. Id.
Thus, the Missouri sentencing procedure in *Bullington* was like a trial on the issue of guilt (death) or innocence (Life-50) in all relevant respects.\(^{48}\) This is in contrast to the usual sentencing proceeding where "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] a decision to the effect that the government has failed to prove its case.'"\(^{49}\) In essence, the Missouri procedure "require[d] the jury to determine whether the prosecution ha[d] 'proved its case.'"\(^{50}\) The Supreme Court noted that the life sentence which the defendant received at his first trial was a determination that "'the jury ha[d] already acquitted the defendant of whatever was necessary to impose the death sentence.'"\(^{51}\)

*Bullington* was reaffirmed in *Arizona v. Rumsey*.\(^{52}\) In *Rumsey*, the United States Supreme Court found the Arizona capital sentencing procedure to be indistinguishable from that of Missouri for double jeopardy purposes.\(^{53}\) Consequently, the defendant's initial sentence of life imprisonment was an implied acquittal of the death penalty, precluding his being retried on the issue of death.\(^{54}\) The Court identified the characteristics of a sentencing proceeding that make it comparable to a trial for double jeopardy purposes: (1) the limited discretion of the sentencer; (2) the fact that the sentencer must make its decision based on substantive standards and evidence introduced in a separate proceeding which resembles a trial; and (3) that the prosecution has to prove certain statutorily-defined facts beyond a reasonable doubt to support a death sentence.\(^{55}\) The death sentence of the defendant at retrial after a life sentence at the initial trial, as in *Bullington*, violated the Double Jeopardy Clause because the defendant's "initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding -- whether death was the appropriate punishment for respondent's offense."\(^{56}\)

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48. *Id.*
49. *Id.* at 443 (quoting Burks v. United States, 437 U.S. 1, 15-16 (1978)).
50. *Id.* at 444.
51. *Id.* at 445 (quoting State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, J., dissenting)).
53. *Id.* at 212.
54. *Id.*
55. *Id.* at 209.
56. *Id.* at 211.
The Court in *Rumsey* also held that two distinguishing factors in the case did not amount to a constitutional distinction making it an exception to the holding in *Bullington*.

First, the fact that the sentencer in Arizona was the judge rather than the jury did not "render the sentencing proceeding any less like a trial." Second, the Court found that reliance on an error of law by the judge did not change the "double jeopardy effects of a judgment that amounts to an acquittal on the merits." In *Rumsey*, the judge misconstrued "the statute defining the pecuniary gain aggravating circumstance[,]" and relied on this in imposing the sentence of life. The Court held that an acquittal on the merits barred a retrial on the issue "even if based on legal error."

A subsequent United States Supreme Court opinion succinctly frames the issue in these cases: "the relevant inquiry ... before us is whether the sentencing judge or the reviewing court has 'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners." The case which must be proven is "that the death penalty is appropriate."

D. The Kentucky Supreme Court Holding in Commonwealth v. Eldred: Merely a Different Kind of Sentence or Another Bite of the Apple?

The Kentucky Supreme Court, in *Commonwealth v. Eldred*, framed the issue as "whether Kentucky's capital sentencing procedure so closely resembles Missouri's capital sentencing procedure that Eldred's sentence of Life-25 at his first trial precludes the Commonwealth from seeking the death penalty at Eldred's retrial, due to the Commonwealth's failure to prove that Eldred deserved the death penalty at his first trial." After stating the general rule for Double Jeopardy analysis and the exception found in *Bullington* and *Rumsey*, the

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57. *Id.* at 210-11.
58. *Id.* at 210. See also *United States v. Morrison*, 429 U.S. 1, 3 (1976) (holding that the Double Jeopardy Clause treats bench and jury trials alike).
59. *Rumsey*, 467 U.S. at 211.
60. *Id.*
61. *Id.*
63. *Id.* at 155 (emphasis in original).
64. *Eldred II*, 973 S.W.2d at 45.
court identified the relevant characteristics of the Missouri and Arizona capital sentencing procedures that made them comparable to a trial for constitutional purposes. The court then noted that the Kentucky capital sentencing procedures shared a number of characteristics with both the Missouri and Arizona capital sentencing procedures:

Kentucky has a bifurcated proceeding for sentencing in capital cases; the jury is guided by detailed statutory guidelines as to aggravating and mitigating circumstances; the death penalty cannot be recommended by a jury unless it finds the presence of at least one of the statutory aggravating factors and so designates this finding in writing; the sentencing hearing involves the submission of evidence and presentation of argument in a trial-like proceeding; and the Commonwealth has the burden of proving beyond a reasonable doubt the existence of any aggravating factors.

The court found only one relevant difference between Kentucky's capital sentencing scheme and that of Missouri and Arizona. "Under Kentucky's procedure, the jury is not restricted to only two choices in the range of punishment that it may recommend." Under Kentucky law, if a defendant is found guilty of a capital crime, the jury may recommend death, Life-25, life imprisonment, or a term of years not less than 20 years. Under the law of both Missouri and Arizona, after a defendant is found guilty of a capital crime, the sentencer has only two choices in the range of punishment that it can impose: death or a sentence of life without the possibility of probation or parole for a set number of years.

To the Kentucky Supreme Court, this was an important distinction, and since Kentucky has no "either/or decision of death or life" in its capital sentencing procedure, its scheme is not analogous to a trial decision of guilt or innocence, as were those of Missouri and

65. Id.
66. Id. at 45-46.
67. Id. at 46.
68. See KY. REV. STAT. ANN. § 532.030(1) (Banks-Baldwin 1996).
69. See Eldred II, 973 S.W.2d at 45.
Arizona. In fact, the court stated that "[u]nder Kentucky's capital sentencing procedure, the issue before the jury is not whether death is an appropriate sentence, but rather, the issue is what sentence is appropriate for the defendant." To Justice Johnstone, this wider amount of discretion awarded to the sentencer means that "the jury is not required to choose between death and not death." Thus, he felt that a jury recommendation of one sentence was not "an implied acquittal of any higher sentence."

The court also distinguished Eldred from the Bullington and Rumsey cases on a factual basis. At Eldred's first trial, "[t]he jury found, in writing, the aggravating factor of murder for hire. This clearly distinguishes the instant case from both Bullington and Rumsey." The Bullington Court held that the capital sentencing procedure in that case contained standards by which it could be determined whether the prosecution had proved its case. The court in Eldred concluded that the standards noted in the Bullington opinion amount to a burden upon the state "to prove the existence of aggravating factors beyond a reasonable doubt." Since the first jury in the Eldred case found an aggravating factor to exist, "there was an express finding by the jury that the prosecution had carried its burden that death was an appropriate sentence for Eldred."

In summary, the court in Eldred found neither (1) an insufficiency of evidence upon which to impose the death penalty, nor (2) an implied acquittal of the death penalty when a lesser sentence is recommended by the jury. Since the court found that the Bullington exception rested upon one of these two grounds, and that neither was applicable to the Kentucky capital sentencing procedure, the

70. Id. at 47.
71. Id.
72. Id.
73. Id. at 48.
74. Id. at 46.
75. See Bullington, 451 U.S. at 444.
76. Eldred II, 973 S.W.2d at 47.
77. Id.
78. See Burks v. United States, 437 U.S. 1 (1978) (holding that a defendant may not be retried if the reversal of his conviction was on grounds of insufficient evidence with which to convict him).
79. See Green v. United States, 355 U.S. 184 (1957) (holding that a defendant convicted of second-degree murder at his initial trial cannot be convicted of first-degree murder at a retrial if he successfully attacks his conviction on appeal).
Commonwealth was not precluded from seeking the death penalty at Eldred’s retrial. 80

E. Chief Justice Stephens’ Dissent

Dissenting in the opinion, Chief Justice Stephens found that all the “hallmarks of a trial on guilt or innocence” delineated in Bullington were present in the Eldred sentencing proceeding. 81 In his view, the Commonwealth had the burden to prove two things beyond a reasonable doubt in order to obtain a death penalty for Eldred: “(1) the existence of an aggravating factor, and (2) that Eldred should be sentenced to death.” 82 Since the jury ultimately recommended a sentence of Life-25, Eldred was acquitted of the death penalty. 83 With the Commonwealth having had one chance to convince a jury that Eldred deserved the death penalty, Justice Stephens would not have allowed them “to take a second bite of the apple.” 84

F. Justice Lambert’s Dissent

Justice Lambert felt that the only difference between Kentucky’s capital sentencing procedure and those of Missouri and Arizona (i.e., that the sentencer in Kentucky is not limited to only two choices), was a “distinction . . . without any meaningful difference.” 85 He cited the dissenting opinion from the ruling of the Missouri Supreme Court in the Bullington case for the proposition that “the jury ha[d] already acquitted the defendant of whatever was necessary to impose the death penalty.” 86

80. See Eldred II, 973 S.W.2d at 46.
82. See Eldred II, 973 S.W.2d at 49 (Stephens, C.J., dissenting). Justice Lambert and Justice Stumbo joined in this dissent. According to the Chief Justice, these “hallmarks” include: “(1) a bifurcated sentencing proceeding, (2) a burden on the state to prove beyond a reasonable doubt that death is the appropriate sentence, (3) production of evidence at the separate sentencing proceeding to meet the burden of proof, and (4) guidance for the jury in its deliberations about the penalty.” Id.
83. Id.
84. Id.
85. Id.
86. Id. at 50 (Lambert, J., dissenting). Chief Justice Stephens and Justice Stumbo joined in this dissent.
87. Id. (quoting State ex rel. Westfall v. Mason, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, J., dissenting)).
To Justice Lambert, a defendant in this circumstance should not have to face the death penalty upon retrial. 88

ANALYSIS

In finding that Eldred could face the death penalty upon retrial, after the jury in the initial trial recommended a sentence of Life-25 which the judge imposed, Justice Johnstone essentially distinguished the case from Bullington and Rumsey based on two factors: (1) the wider discretion given to the sentencer under Kentucky capital cases, and (2) the fact that the jury in the instant case found the existence of an aggravating factor at Eldred's first trial.

A. Kentucky Capital Sentencing Procedure

Death penalty procedures in most states have undergone vast changes in the years since the United States Supreme Court struck down all death penalty schemes, as they then operated, in the 1972 case of Furman v. Georgia. 89 The Supreme Court found the state capital sentencing procedures then in operation to violate the Eighth Amendment because infliction of the death penalty was unpredictable due to the lack of guided discretion given to sentencers in death penalty cases. 91 States responded with either guided discretion statutes that aided the sentencer in death penalty cases, which ultimately were upheld, 92 or

88. Id.
89. 408 U.S. 238 (1972). There is no majority opinion, rather an opinion by each of the five justices in the majority. A fair reading of the consensus of their views indicates that unpredictable infliction of the death penalty under the states' unguided discretion schemes violated the Eighth Amendment of the United States Constitution as to "cruel and unusual punishments." See U.S. CONST. amend. VIII.
90. U.S. CONST. amend. VIII. The amendment provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.
91. See discussion supra note 89.
92. See Gregg v. Georgia, 428 U.S. 153 (1976). Justice Stewart noted several features which supported the constitutionality of guided discretion statutes: the statute created a separate sentencing proceeding at which the state and the defendant could offer evidence not presented at the guilt phase; the statute offered the jury express guidance in identifying aggravating circumstances and requiring the jury to find at least one of the aggravating circumstances enumerated in the statute before it voted for death; the jury was instructed to consider any individualized mitigating circumstances that might outweigh the aggravating circumstances; the defendant had a right of automatic appeal to the state supreme court for review of the death sentence; and the state supreme court was
automatic death penalty statutes, which removed all sentencer discretion and which ultimately were struck down.93 Kentucky's statute fit into the latter category, and its 1974 mandatory death penalty was held unconstitutional.94

The current Kentucky statutory mechanism in capital cases has been found constitutional.95 Under current Kentucky law, the defense counsel must first be given notice that the Commonwealth intends to seek the death penalty.96 At trial, the issue of the defendant's guilt is determined first, and if the defendant is found guilty, a second hearing is conducted to determine the punishment.97 In the sentencing phase, additional evidence is heard, including any "additional evidence in extenuation, mitigation, and aggravation of punishment . . . ."98 Specifically, the sentencer "shall . . . consider . . . any mitigating circumstances or aggravating circumstances otherwise authorized by law and any . . . statutory aggravating or mitigating circumstances which may be supported by the evidence[.]"99 After evidence and arguments, the

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94. See Boyd v. Commonwealth, 550 S.W.2d 507 (Ky. 1977) (holding unconstitutional section 532-030(1) of the Kentucky Revised Statutes as it existed prior to the 1976 amendment).
95. See McQueen v. Commonwealth, 669 S.W.2d 519 (Ky. 1984).
96. See Perdue v. Commonwealth, 916 S.W.2d 148 (Ky. 1995).
97. See KY. REV. STAT. ANN. § 532.025(1) (Banks-Baldwin 1996) (subsection (1)(a) is for sentencing hearings before a judge, and subsection (1)(b) for those before a jury).
98. Id.
99. Id. at § 532.025(2). Subsection (2)(a) enumerates the aggravating circumstances and subsection (2)(b) lists those in mitigation. For purposes of brevity, they are not listed, but it should be noted that they are similar to aggravating and mitigating circumstances found in many other state capital sentencing statutes. Some of the common aggravating factors found in most statutes include: murder for hire or profit, prior violent convictions, murder of police officers or other state officials, murder committed while engaged in other violent felonies, and multiple murders. Common mitigating factors include: lack of a prior criminal record, youth of the defendant, defendant's relatively minor participation in the crime, and the emotional and/or mental status of the defendant at the time of the murder (which will mitigate against the death penalty though it will not serve as a defense to the crime charged). See, e.g., ALA. CODE §§ 13A-5-49, -51, -52 (West 1998); COLO. REV. STAT. ANN. §§ 16-11-103(4), (5) (West 1998); CONN. GEN. STAT. ANN. §§ 53a-46a(h), (l) (West 1997); MD. CODE ANN. art 27 §§ 413(d), (g) (West 1998); MISS. CODE ANN. §§ 99-19-101 (5-7) (West 1998); N.H. REV. STAT. ANN. §§ 630:3(VI), (VII) (West 1998); N.J. STAT. ANN. §§ 2C:11-3(c)(4), (5) (West 1998); N.M. STAT. ANN.
sentencer must consider all relevant evidence in aggravation and mitigation and make its sentence determination based upon these findings.\textsuperscript{100} If a jury is the sentencer, it recommends a sentence for the defendant and the trial judge then fixes a sentence "within the limits prescribed by law."\textsuperscript{101}

According to the relevant statute, whether the sentencer is a judge or jury, at least one of the statutory aggravating factors must be found before a sentence of death or Life-25 may be imposed.\textsuperscript{102} Subsequent case law, however, has held that the Commonwealth is not strictly limited to the statutory aggravating factors in its effort to establish death as the proper sentence.\textsuperscript{103} Likewise, a capital defendant must be allowed to present any relevant mitigating evidence, whether statutory or not.\textsuperscript{104} Kentucky law is in line with constitutional mandates calling for capital sentencing to be individualized and structured in such a way as to "prevent the penalty from being administered in an arbitrary and unpredictable fashion."\textsuperscript{105} The second phase of a bifurcated Kentucky capital case functions as a "trial" on the issue of sentencing.\textsuperscript{106}

B. The Burden

The majority in \textit{Eldred} framed the issue as a comparison of the Kentucky capital sentencing procedure with that of Missouri, as laid out in \textit{Bullington}, and based on what it deemed to be relevant differences, determined that \textit{Bullington} was not dispositive.\textsuperscript{107} It then found that the Commonwealth "proved its case" that death was an appropriate sentence for Eldred based on the fact that an aggravating factor was found to exist beyond a reasonable doubt.\textsuperscript{108} This is only the first hurdle. For the Commonwealth to establish that death is the appropriate sentence, it has

\section*{Footnotes}

\begin{itemize}
  \item[100.] See \textit{KY. REV. STAT. ANN. §§ 532.025(1), (2) (Banks-Baldwin 1996).
  \item[101.] Id. at § 532.025(1)(b).
  \item[102.] Id. at § 532.025(3). The aggravating factors are found in § 532.025(2)(a).
  \item[103.] See Jacobs v. Commonwealth, 870 S.W.2d 412 (Ky. 1994) (no error in permitting attempted rape as aggravating circumstance for imposing death penalty).
  \item[105.] Id. at 541.
  \item[106.] \textit{See Eldred II}, 973 S.W.2d at 49 (Stephens, C.J., dissenting).
  \item[107.] Id. at 49.
  \item[108.] Id. at 47.
\end{itemize}
the burden of production (existence of an aggravating factor beyond a reasonable doubt), and the burden of persuasion (based upon all of the evidence, whether death is the appropriate sentence). They were not required, however, to make specific written findings concerning mitigation. It is not illogical to assume that the jury felt that the mitigating factors outweighed the aggravating factor when considering the evidence as a whole, and that the prosecution failed to clear the second hurdle.

The court in Eldred concluded that the sentencing standards referred to in Bullington are the “state’s burden to prove the existence of aggravating factors beyond a reasonable doubt.” This conclusion is problematic for two reasons. First, in Bullington, the Court states that, even if certain elements are proven beyond a reasonable doubt, the prosecution must prove these elements “before the death penalty may be imposed.” Plainly, the Court understood that the finding of an aggravating circumstance was only the initial step in the jury’s determination of whether death was warranted, as it quoted Missouri Approved Instructions holding the same. Second, the standards to which the United States Supreme Court referred were the “substantive standards to guide the discretion of the sentencer.” This included any evidence in “extenuation, mitigation, and aggravation of punishment.” These standards were examined by the Court to see if the jury was properly guided in exercising its discretion regarding whether to impose the death penalty. The proper inquiry under Bullington, and the ultimate issue, is whether the sentencer or reviewing court has concluded that the prosecution proved its case that death is the appropriate
penalty. In the Eldred case, a finding of an aggravating factor, existing alone, is only proof that death may be an appropriate penalty.

C. A Distinction Without a Difference?

The wider discretion given to Kentucky capital sentencers does distinguish Eldred from the Bullington and Rumsey cases. The issue then becomes whether this distinction amounts to a constitutional difference of such significance as to remove Eldred from the holding common to those cases.

The Court in Eldred stated:

[t]he Bullington exception to the general rule of Stroud and Pearce can be viewed as resting on either of two alternative grounds: 1) unless the State produces sufficient evidence to support the death penalty at a defendant’s first trial, the Double Jeopardy Clause prevents the State from seeking the death penalty at retrial; and/or 2) a sentence of less than death acts as an implied acquittal of the death penalty.

What the United States Supreme Court is actually doing in Bullington is using two examples to point out one exception to the rule that allows retrial of a defendant who has succeeded in overturning his conviction. The exception is that a retrial of a conviction is barred “whenever a jury agrees or an appellate court decides that the prosecution has not proved its case.” The Court then applies the principle of that exception, previously only applicable in a guilt or innocence phase, to a capital sentencing procedure. The Court reasons that, given the substantive standards by which the sentencer is guided, the capital sentence scheme resembles a trial on the issue of guilt or innocence. Therefore, a sentence of life imprisonment means that “the jury has already acquitted the defendant of whatever was necessary to impose the death penalty.

120. Eldred II, 973 S.W.2d at 46.
121. See Bullington, 451 U.S. at 442-43.
122. Id. at 443.
123. Id. at 444.
124. Id.
As such, the *Eldred* court’s analysis of the two above-stated grounds, upon one or both of which it found the *Bullington* exception to rest, is unnecessary.\(^{126}\) The only analysis necessary in *Eldred* is that which concerns capital sentencing processes and whether, in Kentucky, the imposition of a sentence of Life-25, as in *Eldred*, can be seen as an acquittal of the death penalty, implied or otherwise.\(^{127}\) In other words, the issue should be whether Eldred’s “initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding -- whether death was the appropriate punishment for [his] offense.”\(^{128}\)

The court in *Eldred* found that the sentencer in Kentucky, unlike those in Missouri or Arizona, did not have the either/or decision of death or life, but could impose any of four different penalties upon a finding of guilt.\(^{129}\) This difference led the court to conclude that “Kentucky’s capital sentencing procedure does not have the particular hallmark of a trial on guilt or innocence in common with the capital sentencing procedures found in Missouri and Arizona.”\(^{130}\) The court cites *Bullington* for the proposition that a wide range of penalties left to the sentencer’s discretion is what distinguishes *Bullington* from previous cases before the Court.\(^{131}\) Equally important to the decision in *Bullington*

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\(^{125}\) *Id.* at 445 (quoting *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, J., dissenting)).

\(^{126}\) See *Eldred II*, 973 S.W.2d at 46. The "grounds" are referred to by the court as exceptions to the general rule in *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969). This is a reference to *Burks v. United States*, 437 U.S. 1 (1978) (holding that insufficiency of evidence to convict at the first trial bars a retrial), and *Green v. United States*, 355 U.S. 184 (1957) (holding that conviction of a lesser included offense at the first trial bars a retrial of the greater offense), respectively. As both of these cases deal with convictions, the only portion of *Burks* and *Green* applicable to the instant case, since it is a capital sentencing determination, is the single exception for which they stand (i.e., an acquittal, even if implied, bars a retrial on the issue).

\(^{127}\) See *Bullington*, 451 U.S. at 444-45. The Court said, “[b]oth *Burks* and *Green* . . . state an exception to the general rule relied upon in *North Carolina v. Pearce*. That exception is applicable here, and we therefore refrain from extending the rationale of *Pearce* to the very different facts of the present case.” *Id.*

\(^{128}\) *Eldred II*, 973 S.W.2d at 46 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984)).

\(^{129}\) *Id.*

\(^{130}\) *Id.* at 47.

\(^{131}\) *Id.* at 47-48. With some selective editing of the *Bullington* decision, the court in *Eldred II* states:
was that the wide range of discretion previously given to sentencers contained no standards by which to guide that discretion.\textsuperscript{132}

The sentencer in Kentucky is given a wider range of potential penalties than those in Missouri or Arizona.\textsuperscript{133} But in \textit{Eldred}, as in other Kentucky death penalty cases and in \textit{Bullington}, the jury was given standards by which to guide its discretion.\textsuperscript{134} A separate hearing was held, and additional evidence was presented, which the jury was to consider as it "bore on the question of punishment."\textsuperscript{135} At the conclusion of the penalty phase, the jury was instructed: "[i]f upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment."\textsuperscript{136} Though the range of sentences was wider than that in \textit{Bullington} (death or Life-50), there were only two possible outcomes: death, or imprisonment for a minimum of twenty years.\textsuperscript{137} Having found an aggravating factor to exist,\textsuperscript{138} the jury then recommended a sentence

\textit{In Pearce, Chaffin, and Stroud, \ldots} the sentencer’s discretion was essentially unfettered\ldots. In \textit{Pearce}, the judge had a wide range of punishments from which to choose\ldots. And in \textit{Chaffin}, the discretion given to the jury was extremely broad. That defendant,\ldots could have been sentenced to death, to life imprisonment, or a prison term of between 4 and 20 years.

\textit{Id.} at 48 (citing \textit{Bullington}, 451 U.S. at 439-40).

\textsuperscript{132} See \textit{Bullington}, 451 U.S. at 439-40. The relevant part of the \textit{Bullington} decision reads in full:

\begin{quote}
In \textit{Pearce, Chaffin, and Stroud,} there was no separate sentencing proceeding at which the prosecution was required to prove--beyond a reasonable doubt or otherwise--additional facts in order to justify the particular sentence. In each of those cases, moreover, the sentencer’s discretion was essentially unfettered. In \textit{Stroud}, no standards had been enacted to guide the jury’s discretion. In \textit{Pearce}, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in \textit{Chaffin}, the discretion given to the jury was extremely broad. That defendant, convicted in Georgia of robbery, could have been sentenced to death, to life imprisonment, or to a prison term of between 4 and 20 years. The statute contained no standards to guide the jury’s exercise of its discretion.
\end{quote}

\textit{Id.} (citations omitted).


\textsuperscript{134} See Brief for Appellee at 6, \textit{Eldred II} (No. 96-SC-788-TG).

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Id.} at 3.
of Life-25, one of only two penalties that require an aggravating factor to exist. 139 It is no stretch to conclude that the prosecution failed to prove "whatever was necessary to impose the death sentence." 140 It is also worth noting that the trial judge in Eldred’s first trial imposed the jury-recommended sentence, rather than the death penalty, which was within his discretion. 141

In Schiro v. Farley, 142 the United States Supreme Court found that a jury recommendation of a lesser sentence than death to the trial judge did not constitute an acquittal of death when the judge subsequently disregarded the jury recommendation and imposed the death penalty. 143 The jury’s choice of penalty was only a recommendation and therefore the defendant was not acquitted of the death penalty in any sense; and since the penalty was not final until entered by the judge who considered the same evidence as the jury, there was not a “second proceeding." 144 In Eldred, the jury recommendation was followed and a judgment was entered for a penalty of Life-25, and the Circuit Judge stated that the sentencing proceeding was “explicitly an acquittal of whatever the jury needed to believe in order to impose the death penalty.” 145

The only difference between the statutes in Bullington and Rumsey, and the Kentucky statute in the Eldred case, is the wider range of penalties available to the sentencer in Kentucky. 146 The choice of only two sentencing alternatives was mentioned in the Bullington opinion and it was relevant to the Court’s decision, but it was not isolated as being constitutionally mandated in similar case analyses. The Court in Bullington stated:

many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing

139. Id.; see KY. REV. STAT. ANN. § 532.025(3) (Banks-Baldwin 1996).
141. See Eldred II, 973 S.W.2d at 44 (Ky. 1998). Under Kentucky law, the trial judge actually imposes the sentence. See KY. REV. STAT. ANN. § 532.025(1) (Banks-Baldwin 1996).
143. Id.
144. Id. at 790.
145. See Brief for Appellee at A-1, Eldred II (No. 96-SC-788-TG).
146. See Eldred II, 973 S.W.2d at 46.
Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty....

Kentucky has such a proceeding. When the Commonwealth gives notice that it will seek the death penalty, and in a separate sentencing proceeding affirmatively seeks to meet the burdens of production and persuasion necessary for a jury to determine that death is the appropriate penalty, a subsequent recommendation of Life-25 by the jury, and a judgment of Life-25 entered by the judge, should be final. The Commonwealth has had "one fair opportunity to offer whatever proof it could assemble," and should not be entitled to another. 148

The Eldred court also distinguished the case at bar from Bullington and Rumsey on the factual basis that, unlike the other cases, the sentencer in Eldred made "an express finding of the existence of an aggravating factor beyond a reasonable doubt." 149 Thus, the court concluded that since there was such a finding, "the prosecution had carried its burden that death was an appropriate sentence for Eldred." 150

However, as previously noted, this is only the initial burden of production which the prosecution must carry. 151 The United States Supreme Court has also confronted this issue, in Poland v. Arizona, 152 where it stated:

[a]agravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment .... Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty) ....

147. Bullington, 451 U.S. at 446.
149. Eldred II, 973 S.W.2d at 47.
150. Id.
151. See discussion supra Part III.B.
152. 476 U.S. 147 (1986).
153. Id. at 156 (quoting Bullington, 451 U.S. at 438).
Since the Court found that the existence of an aggravating circumstance did not "convict" the defendant, it is clear that the prosecution must do more to prove its case that "the defendant deserve[s] the death penalty."\footnote{154}{Id. at 153 n.3.} That extra burden is found in the jury instructions in the \textit{Eldred} case, in which the jury was told that the prosecution had to prove "upon the whole case, [beyond] a reasonable doubt whether the defendant should be sentenced to death."\footnote{155}{Brief for Appellee at 6, \textit{Eldred II} (No. 96-SC-788-TG).}

In the \textit{Eldred} sentencing phase, the jury was given evidence in aggravation and an instruction to consider whether three specific mitigating factors existed.\footnote{156}{Id. at 3. The factors were: (1) that Frank Eldred can function well in prison; (2) that Frank Eldred offered no resistance upon his arrest; and (3) that Frank Eldred can be rehabilitated. \textit{Id}.} Since they found the existence of an aggravating circumstance, the recommended sentence of Life-25 had to mean one of three things: (1) the aggravating circumstance was insufficient to warrant death; (2) evidence in mitigation outweighed the aggravating circumstance; or (3) even if mitigation did not outweigh aggravation, the aggravating circumstance was not sufficient.\footnote{157}{See \textit{State ex rel. Westfall v. Mason}, 594 S.W.2d 908, 925 (Mo. 1980) (Seiler, J., dissenting).} Regardless of the reasons, the jury did not find that the defendant deserved the death penalty, the Circuit Judge entered a sentence consistent with that recommendation, and the Commonwealth should not be allowed "to take a second bite of the apple."\footnote{158}{\textit{Eldred II}, 973 S.W.2d at 49 (Stephens, C.J., dissenting).}

\textbf{D. The Problem With \textit{Eldred}}

The Supreme Court of Kentucky reversed Eldred's initial conviction, holding that he was denied a fair trial because: (1) he was denied a continuance which he should have been granted; (2) he was denied discovery of relevant evidence; and (3) prejudicial evidence was improperly admitted against him.\footnote{159}{\textit{See Eldred I}, 906 S.W.2d 694 (Ky. 1995).} Despite these prejudicial errors, the jury did not agree with the Commonwealth's arguments to recommend the death penalty.\footnote{160}{\textit{Id}.} If the case at bar becomes final, it will put future

\begin{footnotes}
\item 154. \textit{Id}. at 153 n.3.
\item 155. Brief for Appellee at 6, \textit{Eldred II} (No. 96-SC-788-TG).
\item 156. \textit{Id}. at 3. The factors were: (1) that Frank Eldred can function well in prison; (2) that Frank Eldred offered no resistance upon his arrest; and (3) that Frank Eldred can be rehabilitated. \textit{Id}.
\item 157. See \textit{State ex rel. Westfall v. Mason}, 594 S.W.2d 908, 925 (Mo. 1980) (Seiler, J., dissenting).
\item 158. \textit{Eldred II}, 973 S.W.2d at 49 (Stephens, C.J., dissenting).
\item 159. \textit{See Eldred I}, 906 S.W.2d 694 (Ky. 1995).
\item 160. \textit{Id}.\end{footnotes}
similarly-situated defendants in a precarious position. They must accept a prison sentence that is constitutionally infirm, or face the death penalty a second time. The Pennsylvania Supreme Court succinctly framed this conundrum by stating that “[t]his makes the price of appeal from an erroneous judgment in a first degree murder case the risk of a man’s life.” Similarly, the California Supreme Court has observed that “[s]ince the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.”

The Kentucky Supreme Court has chosen to distinguish the Eldred case from both Bullington and Rumsey. As a result, the court has removed Eldred from the exception announced in those cases on the basis of both a procedural difference and a factual difference. But there is one important fact common to these three cases. In each case, the defendant was given a sentence of life imprisonment without parole or probation for a set number of years and, absent errors in the initial trial sufficient to overturn the conviction, a retrial of the death penalty never would have become an issue. A fundamental principle underlying the idea that precludes double jeopardy is that a state “should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity...” The Commonwealth has been given “one fair opportunity to offer whatever proof it could assemble” that Eldred’s appropriate sentence was death. As Justice Lambert stated, “[h]e should not have to face the death penalty a second time.”

The Eldred majority had trouble reconciling prior cases with the

161. Commonwealth v. Littlejohn, 250 A.2d 811, 815 (Pa. 1969) (holding that the Commonwealth was precluded from seeking the death penalty in a second bifurcated trial against a defendant sentenced to life imprisonment in the first trial).
162. See People v. Henderson, 386 P.2d 677, 686 (Cal. 1963) (holding that in a bifurcated trial the prohibition against double jeopardy precluded the imposition of a death sentence upon a defendant after the reversal of the first judgment sentencing him to life imprisonment).
163. See Eldred II, 973 S.W.2d at 46. The procedural difference is that the Kentucky sentencer has more than two sentencing choices. Id.
164. Id. The factual difference is that an aggravating factor was specifically denoted in the first Eldred trial. Id.
166. Burks v. United States, 437 U.S. 1, 16 (1978).
167. Eldred II, 973 S.W.2d at 50 (Lambert, J., dissenting).
implied acquittal theory as it would function within Kentucky's broader range of penalties available to the capital sentencer. 168 It stated:

[t]aken to its extreme, the implied acquittal theory results in any sentence being an implied acquittal of any higher sentence. This result is incompatible with Pearce and our decision in Bruce. We reject any such outcome out of hand. Thus, had Eldred's jury returned a recommendation of 20 years' imprisonment, this recommendation would not have been an implied acquittal of a term of years greater than 20 or an implied acquittal of life.... [T]he only conceivable way that Kentucky's capital sentencing procedure can be amenable to an analogy with the implied acquittal exception found in Green and extended in Bullington, is to view any sentence other than death as a sentence of not death, but at the same time, in order to be consistent with Pearce, not to view this same sentence as an implied acquittal of any greater offense other than death. 169

There is much merit to this argument. Had Eldred received a sentence of twenty years (the ostensible minimum punishment for a capital crime), he would have a difficult time arguing that he should be shielded from further litigation that would seek to give him a greater term of imprisonment. But Eldred received a sentence of Life-25, which means that the defendant was given the longest mandatory term of years available to the sentencer under the statute. 170 If the death penalty is

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168. *Id.* at 48.
169. *Id.* (emphasis in original). The court continued:

a recommended sentence of twenty years would have to be viewed as an implied acquittal of death, but it could not be viewed as an implied acquittal of a term of years greater than twenty years, an implied acquittal of life, or an implied acquittal of Life-25. This result stretches the implied acquittal exception of Green to the breaking point.

*Id.* (emphasis in original).

170. See *supra* note 5 for the range of penalties. At the time Eldred was sentenced, the maximum mandatory sentence a defendant could receive before becoming eligible for parole was 25 years. See *Ky. Rev. Stat. Ann.* §§ 532.030, 439.3401 (Banks-Baldwin 1996).
precluded upon a retrial, he has no reason to concern himself with further litigation of any term of imprisonment. "Further litigation is the only hope he has." 171 However, one jury having rejected death as the appropriate penalty for Eldred, the Commonwealth should not have an opportunity to convince a second jury to impose the death penalty.

The majority in *Eldred* found that the purpose of the second stage of a capital trial is merely to assign punishment within the range of punishments provided by statute, and that after the Commonwealth has proven the existence of an aggravating factor, the ultimate issue is the same as in any other bifurcated felony trial. 172 The majority framed that issue as "[w]hat punishment is appropriate for the particular defendant." 173 It found "no constitutional distinction between death and all other possible sentencing options available to a jury in the penalty phase of a capital trial in Kentucky." 174 But the United States Supreme Court has rejected this view: "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." 175 *Bullington* found the modern capital punishment statutes to be "unique." 176 This characterization "derives from the fundamental principle that death is 'different,' . . . and that heightened reliability is required at all stages of the capital trial." 177 Before death can be imposed, a sentencer must consider the totality of

171. See State v. Harris, 919 S.W.2d 323, 330 (Tenn. 1996) (applying the same rationale to a defendant given a death sentence in his initial trial).
172. Id.
173. *Eldred II*, 973 S.W.2d at 48.
174. Id. The majority reaches this conclusion by finding that Stroud v. United States, 251 U.S. 15 (1919) (holding that imposition of death sentence at retrial, after the defendant had received a lesser sentence for the same offense at a previous trial, did not place the defendant within second jeopardy), had not been overruled in *Bullington* and therefore the death penalty was not removed from the general rule that imposition of a lesser sentence does not prevent the prosecution from seeking a higher sentence at retrial. Id. While the United States Supreme Court did not overrule *Stroud*, it refused to extend its reasoning to the "very different situation" in *Bullington*. See *Bullington*, 451 U.S. at 446 (1981).
176. *Bullington*, 451 U.S. at 422 n.15.
the circumstances in both aggravation and mitigation, and this includes "consideration of the character and record of the individual offender and the circumstances of the particular offense . . . ."178 The initial trial in Eldred followed these mandates, and the jury rejected the Commonwealth's offer of proof that death was the appropriate penalty for the defendant. The judge agreed and imposed a sentence of Life-25. That was the first bite.

CONCLUSION

Courts that have distinguished Bullington have done so because either: (1) the case before them did not involve a capital sentencing procedure,179 or (2) a defendant was given the death penalty in an initial proceeding.180 Since the death penalty is implicated in the Eldred case, the issue for the court is whether the Commonwealth can ignore the initial jury's implicit acquittal of what is necessary to justify the death penalty for Eldred, and on retrial ask a second jury to find that which was fully considered and rejected by the first. If the holding by the majority is allowed to stand, it will mean that Eldred, "and others similarly spared the death sentence by a jury in the second stage of a capital trial, must forfeit the jury's implied acquittal of the death penalty in order to challenge an unconstitutional conviction."181 The choice between accepting an infirm conviction and exposure to second jeopardy of death

178. Woodson, 428 U.S. at 304.
179. See United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir. 1990) (distinguished from Bullington on the basis that it was not a death penalty proceeding); Carpenter v. Chapleau, 72 F.3d 1269, 1273 (6th Cir. 1996) (Kentucky PFO proceeding is not like a death penalty trial, therefore Bullington not applicable); United States v. Horak, 833 F.2d 1235, 1246 (7th Cir. 1987) (rationale of Bullington cannot be extended to RICO forfeiture); People v. Monge, 941 P.2d 1121, 1128 (Cal. 1997) (Bullington not applicable in noncapital sentencing proceeding); Denton v. Duckworth, 873 F.2d 144, 146 (7th Cir. 1989) (Bullington not applicable to habitual offender determination).
180. See, e.g., Ford v. Wilson, 939 S.W.2d 258, 263 (Ark. 1997) (Bullington not applicable when the defendant is given the death penalty at his first trial); State v. Smith, 944 S.W.2d 901, 920 (Mo. 1997) (en banc) (Bullington not applicable when jury deadlocked on death penalty issue at first trial but judge imposed the death penalty); State v. Harris, 919 S.W.2d 323, 330 (Tenn. 1996) (Bullington not applicable when defendants were initially sentenced to death); Davis v. Kemp, 829 F.2d 1522, 1532 (11th Cir. 1987) (Bullington not applicable when defendant has not been "acquitted" of the death penalty as he was given the death penalty in his initial trial).
181. State ex rel. Westfall v. Mason, 594 S.W.2d 908, 929 (Mo. 1980) (Seiler, J., dissenting).
is simply unconscionable.
Punitive damages are designed to punish the conduct of a defendant and to deter both the defendant and other comparable parties from engaging in similar activities in the future. These damages are also made available as a means of persuading an otherwise reluctant or discouraged plaintiff into pursuing litigation against wrongdoers. Punitive damages are awarded exclusive of compensatory or nominal damages, although some states may impose statutory caps on punitive awards. These caps are often a multiple of the amount of compensatory damages awarded.

Kentucky has defined punitive damages as "exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." The plaintiff must prove by clear and convincing evidence that the defendant acted with "oppression, fraud, or malice." When assessing the amount of punitive damages, Kentucky allows the trier of fact to consider the likelihood that the defendant's conduct would have resulted in serious harm, the defendant's awareness of that likelihood, the defendant's profit from the misconduct, the duration and concealment of the conduct, and any attempts by the defendant to remedy

1. See Restatement (Second) of Torts § 908(1) (1977).
4. See Mabry, supra note 2, at 190.
5. Id.
7. Id. at § 411.184(2).
8. Id. at § 411.186(2)(a).
9. Id. at § 411.186(2)(b).
10. Id. at § 411.186(2)(c).
11. Id. at § 411.186(2)(d).
the result of his misconduct.\textsuperscript{12}

The use of punitive damages in the American judicial system has always been criticized.\textsuperscript{13} While the entire concept of punitive damages is often attacked,\textsuperscript{14} the increase in mass tort litigation during the last twenty-five years has brought to the forefront the contention that levying successive punitive damages against a single defendant for a single course of conduct is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.\textsuperscript{15} The United States Supreme Court has often considered the validity of punitive damages awards, but it has repeatedly refused to overturn any such award on the basis of excessiveness under the due process argument until \textit{BMW of North America, Inc. v. Gore}.\textsuperscript{17}

The Kentucky Supreme Court recently granted discretionary review in \textit{Owens-Corning Fiberglas Corp. v. Golightly} for the primary purpose of evaluating whether a punitive damages award was in violation of the defendant's due process rights.\textsuperscript{18} In its decision, the Kentucky Supreme Court used the element of "mass tort" to distinguish the instant case from \textit{BMW} and did not apply the United States Supreme Court's test for determining whether a punitive damages award was in violation of due process.\textsuperscript{20} In so doing, the Kentucky Supreme Court weakened its otherwise impeccable holding and forewent an excellent opportunity to further defeat the defendant's claim that the award of successive punitive damages had reached an excessive level and was in violation of its due process rights. The purpose of this note is to review the Kentucky Supreme Court's decision in \textit{Owens-Corning} and to demonstrate the applicability of the United States Supreme Court's decision in \textit{BMW}.

\begin{itemize}
\item \textsuperscript{12} Id. at § 411.186(2)(e).
\item \textsuperscript{13} See Mabry, supra note 2, at 188.
\item \textsuperscript{14} See RESTATEMENT (SECOND) OF TORTS § 908 cmt. f (1977).
\item \textsuperscript{15} See Dennis Neil Jones et al., Comment, \textit{Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process}, 43 ALA. L. REV. 1, 1-2 (1996).
\item \textsuperscript{16} See Rob S. Register, Note, \textit{BMW of North America, Inc. v. Gore: The Supreme Court Rejects a Punitive Damage Award on Due Process Grounds}, 48 MERCER L. REV. 1273 (1997).
\item \textsuperscript{17} 517 U.S. 559 (1996).
\item \textsuperscript{18} 976 S.W.2d 409 (Ky. 1998).
\item \textsuperscript{19} Id. at 410.
\item \textsuperscript{20} Id. at 413.
\end{itemize}
BACKGROUND

The U.S. Supreme Court’s interpretation of the U.S. Constitution is binding on all lower courts. The Kentucky Supreme Court is bound by the U.S. Supreme Court’s determination as to what qualifies as due process in the context of the U.S. Constitution. Since the instant case was granted review for the primary purpose of determining whether a punitive damages award was excessive and therefore in violation of the Due Process Clause of the U.S. Constitution, the scope of this background will be curtailed to the handling of this issue in the U.S. Supreme Court.

Several recent U.S. Supreme Court decisions have examined whether certain punitive damages awards can be defined as excessive and thus violate the due process protection afforded by the U.S. Constitution. In 1991, the Court granted certiorari in Pacific Mutual Life Insurance Co. v. Haslip and considered the validity of punitive damages that were more than four times the amount of compensatory damages awarded, more than two hundred times the actual monetary losses of the plaintiff, and in far excess of any state fines applicable to the defendant’s conduct. The Court refused to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable” with respect to the amount of a punitive damages award. However, the Court examined the various aspects of procedural review of punitive damages awards and the number of checks and balances used to insure against excessive award amounts and determined that the defendant’s due process rights had not been violated.

21. See Wagers v. Sizemore, 300 S.W. 918, 920 (Ky. 1927).
22. See Owens-Corning, 976 S.W.2d at 414.
23. Id. at 410.
25. 499 U.S. 1 (1991). In this case a health insurer and its agent were sued by an insured after it was discovered that the agent repeatedly failed to remit the premiums that he had collected to the insurer, thus resulting in the denial of benefits to the insured. Id. at 4-7.
26. Id. at 23.
27. Id. at 18.
28. Id. at 18-24.
In 1993, the Court granted certiorari in *TXO Production Corp. v. Alliance Resources Corp.* and considered the constitutionality of a punitive damages award that was more than five hundred times the amount of actual damages. While the Court recognized that this amount may seem at first impression to be excessive, the court evaluated the situation with a “general concern of reasonableness” and took into consideration such things as the bad faith, trickery, fraud and deceit of the defendant. Even though the amount of punitive damages was held not to be in violation of the defendant’s due process rights, the Court again refrained from outlining a set of criteria to be used in making this determination.

The Court had thus far only concluded that punitive damages could not be “grossly excessive.” In 1996, however, the Court again evaluated the constitutionality of a punitive damages award in *BMW of North America, Inc. v. Gore* and for the first time outlined three “guideposts” to be used in determining whether an award amount is so excessive as to be in violation of due process. The case involved a defendant who had knowingly sold approximately one thousand cars with defective body paint. The plaintiff was the owner of one of these cars and he sued as an individual, but argued that the amount of punitive damages awarded should be reflective of the defendant’s entire course of conduct. The jury agreed

29. 509 U.S. 443 (1993). In this case the owner of oil and gas rights sued a large oil production company after that company used bad faith and deceit to break its original royalty agreement with the rights owner. *Id.* at 446-50.
30. *Id.* at 451. The jury awarded $10 million in punitive damages and $19,000 in actual damages. *Id.*
31. *Id.* at 458.
32. *Id.* at 462. The Court noted:

The punitive damage award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner’s wealth, we are not persuaded that the award was so “grossly excessive” as to be beyond the power of the State to allow.

*Id.*
33. *Id.*
34. *Id.*
36. *Id.* at 574-75.
37. *Id.* at 564.
38. *Id.* The plaintiff claimed that the cars, which sold for $40,000, were “devalued” by ten percent. *Id.* He calculated his actual damages to be $4,000, but argued that “$4 million
and awarded the plaintiff a punitive damages award of $4,000,000, an amount that was one thousand times the compensatory damages amount.\textsuperscript{39}

Despite a subsequent fifty percent reduction in this amount by the state supreme court,\textsuperscript{40} the defendant obtained certiorari with the U.S. Supreme Court and asserted that the amount was excessive and in violation of its due process rights.\textsuperscript{41} The Court agreed\textsuperscript{42} and established three criteria to be used when evaluating whether a punitive damages award is excessive: "the degree of reprehensibility of the defendant's conduct,"\textsuperscript{43} the ratio between the punitive damages awarded and the actual harm inflicted on the plaintiff,\textsuperscript{44} and the difference between the magnitude of the punitive damages amount and the "civil or criminal penalties that could be imposed for comparable misconduct."\textsuperscript{45}

The Court acknowledged that these criteria did not establish a "bright line marking the limits of a constitutionally acceptable punitive damages award,"\textsuperscript{46} but it concluded that "elementary notions of fairness enshrined in our constitutional jurisprudence" required that these three "guideposts" be used in determining whether a punitive damages award was excessive and in violation of due process.\textsuperscript{47}

\textbf{FACTS}

\textit{A. The Conduct of Owens-Corning Fiberglass Corp.}

Between the years 1953 and 1972, Owens-Corning Fiberglas (hereinafter referred to as OCF), either in its own capacity or through its parent company Owens-Illinois, manufactured, marketed, and sold a product called Kaylo.\textsuperscript{48} Kaylo was a pipe covering material that contained ten to

\textsuperscript{39} Id. at 565.
\textsuperscript{40} See BMW of North America, Inc. v. Gore, 646 So. 2d 619, 629 (Ala. 1994).
\textsuperscript{41} See BMW, 517 U.S. at 567-68.
\textsuperscript{42} Id. at 574-75.
\textsuperscript{43} Id. at 575.
\textsuperscript{44} Id. at 580.
\textsuperscript{45} Id. at 583.
\textsuperscript{46} Id. at 585.
\textsuperscript{47} Id. at 574-75.
\textsuperscript{48} See Owens-Corning, 976 S.W.2d at 410-11.
twenty percent asbestos. As early as 1941, OCF obtained information concerning the potential dangers of asbestos. This information was initially collected and placed in a file for possible use in promoting the advantages of a fiberglass pipe-covering product that OCF was also manufacturing.

The installers of this fiberglass product were insisting upon higher wages as compensation for the skin rashes and itching associated with handling fiberglass. The strategy of OCF was to use the information concerning the adverse effects of asbestos to demonstrate to the fiberglass handlers that the only available alternative to fiberglass posed even greater health risks. An additional objective of OCF was to use the information to cause disruptions between the union leadership and the insulation installers.

By 1944, the information possessed by OCF clearly indicated that asbestos handlers could and did develop asbestosis. This information was further reinforced by testing being performed directly on the Kaylo product. By the mid-1950s, OCF changed strategy and began a campaign to conceal any adverse information about Kaylo. By this time OCF had realized the profitability of Kaylo and the campaign of concealment was designed to sustain these profits. These efforts manifested in the distribution of brochures claiming Kaylo to be “non-irritating” and “non-toxic.” OCF inter-office memoranda indicated that the “present concern is to find some way of preventing [the research indicating the hazards of

49. See Appellees' Brief at 2, Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 410 (Ky. 1998) (No. 96-SC-970-D).
50. Id.
51. Id. at 2-3.
52. Id. at 2.
53. Id. at 3.
54. Id.
55. Id. at 4.
56. Id. at 4-6. A Kaylo warning was given in an interim report from Saranac Laboratory dated October 30, 1948 that concluded: “Kaylo, because of its content of an appreciable amount of fibrous chrysotile, is capable of producing asbestosis and should be handled as a hazardous industrial dust.” Id. at 5 (emphasis in original).
57. Id. at 6.
58. Id. at 9.
59. Id. at 7-8. The brochure reads: “Easy Fabrication - ordinary tools of the trade, sufficient for all cutting, scoring or sawing. Light-weight, pleasant handling and non-irritating, non-toxic nature make it a well-liked workers’ material.” Id. at 7.
asbestos] from creating problems and affecting sales."  

In the 1960's, OCF adopted the goal of selling as much of the Kaylo product as possible before the government banned asbestos. OCF initiated a research and development program to find a non-asbestos substitute for Kaylo to ensure a market-ready product to sell once asbestos was banned. However, the program resources were redirected towards increasing the potential of Kaylo after a substantial demand for the Kaylo product presented itself by way of a large insulation project at DuPont. The objective of OCF was to maximize sales and maximize profits. The dangers associated with asbestos and the lives of thousands of men were of no concern to OCF.

B. Golightly and Asbestosis

Between 1951 and 1984, Carl Golightly worked as a maintenance mechanic and insulator at Martin Marietta. Golightly was constantly exposed to asbestos as his job required both the removal and replacement of old Kaylo and the installation of new Kaylo. These tasks required the sawing of the Kaylo product which subsequently created a dust containing asbestos fibers. Golightly consequently inhaled this dust.

Asbestos causes diffuse fibrosis in the small air sacs and air passages in the lungs. The onset of asbestosis is insidious and the symptoms of coughing and wheezing are similar to those of bronchial asthma. Shortness of breath first appears only upon physical exertion, but later occurs even at rest. The associated cough, chest pain, emaciation, and

60. Id. at 10 (quoting OCF interoffice memoranda dated Nov. 29, 1965).
61. See Appellees' Brief at 10, Owens-Corning (No. 96-SC-970-D).
62. Id.
63. Id. at 11.
64. Id. at 9-12.
65. Id. at 10.
66. See Owens-Corning, 976 S.W.2d at 411.
67. Id.
68. Id.
69. Id.
70. See 8 TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 229 (Paul David Cantor ed., 1962) [hereinafter TRAUMATIC MEDICINE].
71. Id.
72. Id.
weakness all gradually increase until the blood becomes deficient of oxygen and the heart becomes subject to congestive failure. 73

C. Procedural History of the Case

Golightly brought suit against OCF and nineteen other defendants, claiming that his occupational exposure to asbestos caused him to develop asbestosis and laryngeal cancer. 74 The case against OCF went to trial in September of 1994, 75 the other nineteen defendants either having settled out of court or having been dismissed before trial. 76

At trial, Golightly introduced the testimony of three medical doctors. 77 A pulmonologist testified that Golightly definitely had asbestosis and that the exposure to Kaylo was a substantial contributing cause. 78 A specialist in pulmonary pathology testified that Golightly’s exposure to asbestos was a substantial cause of his throat cancer. 79 Evidence about the aforementioned conduct of OCF concerning the concealment and misrepresentation of the health effects of Kaylo was also introduced. 80

The jury rendered a verdict against OCF based on the theory of strict liability. 81 The jury awarded Golightly $290,000 in compensatory damages and $435,000 in punitive damages. 82 In response to the comparative negligence instruction given by the court, the jury assigned 100% fault to OCF. 83 OCF thereafter made motions for judgment notwithstanding the verdict and for a new trial, 84 but the trial judge overruled the motions and the court of appeals affirmed. 85 The Supreme Court of Kentucky granted discretionary review for the primary purpose of

73. Id.
74. See Appellant’s Brief at 1, Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 410 (Ky. 1998) (No. 96-SC-970-D.)
75. Id. at 2.
76. Id. at 1.
77. See Appellees’ Brief at 1, Owens-Corning (No. 96-SC-970-D).
78. Id.
79. Id.
80. See Owens-Corning, 976 S.W.2d at 411.
81. Id.
82. Id. at 410.
83. Id. at 411.
84. See Appellant’s Brief at 2, Owens-Corning (No. 96-SC-970-D).
85. See Owens-Corning, 976 S.W.2d at 410.
determining whether punitive damages were awarded “in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”

THE COURT'S REASONING

Before considering the due process implications of the punitive damages award, the Kentucky Supreme Court first dispensed with OCF's argument that a directed verdict was appropriate on the punitive damages issue because the Kaylo product was in conformance with the state of the art during the time of manufacture. The supreme court refuted OCF's contention on the grounds that the purpose of state of the art protection was "not to insulate an entire industry from liability just because every member of that industry was manufacturing and distributing a product known to be inherently dangerous." The protection was designed to shield manufacturers from liability when potential hazards were unknown. Since OCF was aware of the dangers of asbestos, this protection was unavailable.

The supreme court then considered OCF's argument that the imposition of punitive damages in the instant case would be excessive and thus violate its due process rights. OCF contended that the $35,000,000 in punitive damages awarded against it in prior litigation involving the Kaylo product was punishment enough for its conduct. Support for this argument was taken from Juzwin v. Amtorg Trading Corp., where it was held that "due process requires that a limit be placed upon a defendant's

86. Id. at 410.
87. Id. OCF was relying on section 411.310(2) of the Kentucky Revised Statutes which states:
   In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.
KY. REV. STAT. ANN. § 411.310(2) (Banks-Baldwin 1997) (emphasis added).
88. Owens-Corning, 976 S.W.2d at 411.
89. Id.
90. Id.
91. Id. at 410.
92. Id. at 412.
liability for punitive damages for a single course of conduct." 94 Additionally, the Juzwin court held that punitive damages awards will be disallowed in cases where a defendant can provide "competent proof that liability for punitive damages has already been imposed upon them for the conduct alleged to be the basis of a punitive damage claim in this action." 95 The Kentucky Supreme Court dismissed this contention on three grounds. 96 First, the supreme court recognized that the majority opinion across the nation was that "successive awards of punitive damages for the same course of conduct do not violate the Due Process Clause." 97 Second, the supreme court pointed out that the holding in Juzwin was later reversed on the grounds that such a policy would be impractical if not impossible to implement. 98 Problems associated with multiple jurisdictions and prior awards dictate that the problem be solved only through national legislation or by the U.S. Supreme Court. 99 Third, the supreme court noted that such a policy was contrary to common sense in that it insulated defendants from liability on the sole basis that they managed to injure "a large amount of people." 100 "Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages." 101

The Kentucky Supreme Court acknowledged that the punitive damages in the instant case may seem large when considered under the context of the broader situation and the prior awards, but noted that Kentucky law allows the magnitude of the damages to be based on the nature of the defendant's acts and the bearing that these acts had on the harm resulting to the plaintiff. 102 Consideration was given to the fact that OCF, despite its knowledge of the dangers of asbestos, continued to market the product and released information claiming Kaylo to be "non-toxic" and

94. Id. at 1065.
95. Id.
96. See Owens-Corning, 976 S.W.2d at 412.
97. Id.
99. Id.
100. Id. at 413.
102. See Owens-Corning, 976 S.W.2d at 412-13.
"non-irritating." The plaintiff's injury was the direct result of this egregious conduct and this relationship could easily allow a jury to consider the punitive damages amount as reasonable. The supreme court then turned its attention to BMW of North America, Inc. v. Gore, the recent U.S. Supreme Court decision that outlined three "guideposts" to be used in determining whether a punitive damages award was excessive and in violation of due process. The Kentucky Supreme Court distinguished BMW from the instant case on the basis that BMW "involved one award to one plaintiff and did not address whether the Due Process Clause prohibits multiple awards to multiple plaintiffs injured as a result of a mass tort." This was the basis for the supreme court's reasoning that BMW did not require the punitive damages award in the instant case to be reversed. The supreme court did not consider the situation in any more detail and did not apply the three "guideposts" outlined by the U.S. Supreme Court in BMW.

The supreme court then proceeded to evaluate OCF's argument that its due process rights were violated because Kentucky law provides an inadequate system of review of punitive damages award amounts. The controlling authority for OCF's contention is the recent U.S. Supreme Court decision in Honda Motor Co. v. Oberg. In Honda, it was held that a policy which did not provide for judicial review of the amount of punitive damages awards at either the trial court or the appellate court was in violation of a defendant's due process rights.

Kentucky law requires that a trial judge review and scrutinize a punitive damages award. The judge may order a new trial if it is determined that the verdict is in violation of any of the criteria as outlined

103. Id. at 413.
104. Id.
106. Id. at 574-75.
107. Owens-Corning, 976 S.W.2d at 413.
108. Id.
109. Id.
110. Id. at 413-14.
111. Id. at 414.
113. Id. at 435.
114. See Owens-Corning, 976 S.W.2d at 414.
in Kentucky Rule of Civil Procedure 59.01.\textsuperscript{115} If the judge approves the amount of punitive damages, the amount is presumed to be proper.\textsuperscript{116} However, an appellate court may reverse the finding of the trial judge if it is found to be "clearly erroneous."\textsuperscript{117}

The standard of "clearly erroneous" requires that the appellate court determine that the award amount is supported by evidence that is capable of inducing "conviction in the minds of reasonable men."\textsuperscript{118} To reach this determination, the appellate court will have to review all of the evidence that was presented at trial.\textsuperscript{119} Since a strong level of review is required at both the trial and appellate levels, the system of review available in Kentucky does not violate a defendant's right to due process.\textsuperscript{120}

The supreme court then considered OCF's third and final argument that its due process rights had been violated.\textsuperscript{121} OCF claimed that since it presented evidence that Kaylo conformed to the state of the art during the time of manufacture, a jury instruction should have been made detailing the availability of this defense.\textsuperscript{122} Failure of the trial court judge to give this instruction was, according to OCF, a violation of due process.\textsuperscript{123}

\footnotesize

\textsuperscript{115} Id. (citing KY. R. CIV. P. 59.01). Civil Rule 59.01 provides:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

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d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

e) Error in the assessment of the amount of recovery whether too large or too small.

f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

\ldots

\textsuperscript{116} See Owens-Corning, 976 S.W.2d at 414 (citing Kentucky case law as outlined in Davis v. Graviss, 672 S.W.2d. 928, 932 (Ky. 1984) and Fowler v. Mantooth, 683 S.W.2d 250, 253 (Ky. 1984)).

\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 414-15.

\textsuperscript{120} Id. at 415.

\textsuperscript{121} Id.

\textsuperscript{122} See Owens-Corning, 976 S.W.2d at 415 (referring to KY. REV. STAT. ANN. § 411.310(2) (Banks-Baldwin 1997)).

\textsuperscript{123} Id.
Notwithstanding the earlier determination that this defense was unavailable to OCF, the Kentucky Supreme Court proceeded to demonstrate that the instruction was not given due to OCF's own failure to conform to procedural rules. Well before the beginning of the trial, the trial judge required all of the original twenty defendants to submit their desired jury instructions in accordance with Kentucky civil rules. Several of the defendants submitted jury instructions encompassing the state of the art defense. OCF tendered a two-sentence document which adopted all of the jury instructions submitted by the other defendants.

The supreme court noted that the purpose of the trial judge's order was to create a "Master File" of the documents common to all the litigation over this issue. Since several defendants submitted a multitude of instructions, it would be almost impossible for the trial judge to know exactly which instruction was desired by OCF. The instruction was not given simply because the trial judge was unaware of exactly what instruction OCF desired, not because OCF was being denied due process.

The supreme court also noted that Kentucky civil rules require a party to have "offered" a jury instruction to the court before it can claim as error the failure to give such an instruction. By merely adopting the

124. Id. at 411.
125. Id. at 415-16.
126. Id.
127. Id. at 416.
128. Id. at 416. The document submitted by OCF contained the following language:

comes the defendant, Owens-Corning Fiberglas Corporation, and pursuant to the Court’s Standing Order regarding asbestos personal injury litigation, and hereby expressly adopts the Master Jury Instructions filed on behalf of all other defendants in these cases. Defendant Owens-Corning Fiberglas Corporation, pursuant to the terms of the Standing Order, reserves the right to amend or supplement jury instructions in this matter.

Id. at 416.
129. Id. at 415.
130. Id. at 416.
131. Id.
132. Id. (referring to Ky. R. Civ. P. 51(3)). Civil Rule 51(3) states:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.
instructions of the other defendants, OCF did not properly offer its desired instruction to the trial court. This failure to conform to the procedural guidelines thus precluded OCF from raising any error with respect to the omission of these jury instructions.

The supreme court concluded by stating that "the judgment of the McCracken Circuit Court and the decision of the Court of Appeals" were affirmed. All the justices of the Kentucky Supreme Court concurred.

ANALYSIS: BMW CASE DISCOUNTED

The Kentucky Supreme Court examined the holding in BMW of North America, Inc. v. Gore and determined that it did not warrant a reversal of the punitive damages against OCF. The rationale was that BMW dealt only with one award to one plaintiff. This fact was held to distinguish BMW from the instant case since OCF was claiming multiple awards to multiple plaintiffs in a mass tort case was in violation of due process. While the rationale of the Kentucky Supreme Court is perfectly sound legal judgment and is in no way incorrect, it is not beyond contention. The U.S. Supreme Court decided BMW within the context of mass tort and the holding is applicable to the instant case.

OCF has in the past and will continue in the future to make an argument that the punitive damages rendered against it have reached a grossly excessive level and are in violation of its due process rights. To simply exclude BMW from consideration due to the difference in the number

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Ky. R. Civ. P. 51(3) (emphasis added).
133. See Owens-Corning, 976 S.W.2d at 416.
134. Id.
135. Id.
136. Id.
138. See Owens-Corning, 976 S.W.2d at 413.
139. Id.
140. Id.
142. OCF is unable to estimate the exact extent of the expected litigation concerning the Kaylo product beyond the year 1999. See Appellant's Brief at 9, Owens-Corning (No. 96-SC-970-D).
of plaintiffs and the number of awards may expose the holding in the instant case to future scrutiny. The supreme court could have eliminated any future scrutiny of its opinion simply by using the three "guideposts" from BMW in its analysis of the instant case. The reason for this is that these "guideposts" validate the punitive damages award and strengthen the holding of the Kentucky Supreme Court in Owens-Corning Fiberglas Corp. v. Golightly. 143

This proposal can be synthesized in four parts. First, the tremendous amount of money associated with this litigation warrants that any decision rendered in this matter be made with meticulous precision. Second, OCF and the plaintiff in BMW presented strikingly similar arguments to the respective courts and the cases are not as different as determined by the Kentucky Supreme Court. Third, in BMW, the United States Supreme Court did not totally remove the aspect of mass tort from their analysis and the respective holding may be applicable to the instant case. Fourth, the punitive damages rendered against OCF can easily be shown to be within constitutionally acceptable limits by applying the "guideposts" as outlined in BMW.

A. High Stakes Involved in the Litigation

When the litigation over the Kaylo product is considered collectively, the stakes are tremendous. The cost of the litigation has already exceeded by several hundred fold the profits generated by the sale of the Kaylo product. 144 OCF has already spent in excess of $28,000,000 and has placed $150,000,000 in reserve for use in this litigation. 145 The remaining 1.13 billion dollars in insurance coverage may be exhausted before the litigation is complete. 146 These staggering economic facts warrant that any decision rendered in this situation be made with detail and precision.

B. Parallels Between OFC and the Plaintiff in BMW

The plaintiff in BMW and the defendant in the instant case essentially argue for the implementation of the same principle. In BMW, the plaintiff

143. 976 S.W.2d 409 (Ky. 1998).
144. See Appellant's Brief at 8, Owens-Corning (No. 96-SC-970-D).
145. Id.
146. Id.
submitted evidence that BMW had engaged in deceptive sales practices in approximately one thousand other instances. It was the plaintiff's contention that the punitive damages amount awarded to him should also be reflective of all of these other acts. The plaintiff reasoned that the only way to properly punish BMW and properly deter it from comparable future conduct was to award punitive damages based upon the entire pattern of behavior.

In the instant case, OCF presents an argument based on the same merits. OCF claims that the conduct that injured Golightly was part of a larger pattern of behavior. This conduct has already been severely punished by the award of massive punitive damages in prior cases. It is the contention of OCF that since these prior awards are more than sufficient punishment for its conduct, no punitive damages are required in this case.

Both parties are arguing that a continuous course of conduct that injures a multitude of individuals should be punished only one time. The only difference between the two arguments is that the BMW plaintiff wanted this concept to be applied pro-actively while OCF wants this concept to be applied retroactively. The two cases may be distinguishable on the number of awards involved. However, the fact that both parties are asserting that the same principle be used in arriving at an acceptable punitive damages amount warrants that the BMW case be considered in more detail when deciding the instant case.

C. BMW Considered in the Context of Mass Tort

The Kentucky Supreme Court concluded that BMW, on its face, did not apply to mass tort cases. The basis for this conclusion can be found by a short review of the history of the case. In BMW, the trial court reasoned that since BMW had committed similar acts of fraud across the nation, the original amount of punitive damages awarded to the plaintiff was

147. See BMW, 517 U.S. at 564.
148. Id.
149. Id.
150. See Appellant’s Brief at 8-9, Owens-Corning (No. 96-SC-970-D).
151. See Owens-Corning, 976 S.W.2d at 412.
152. Id.
153. Id. at 413.
not excessive. The fact that one plaintiff received all these punitive damages was of no consequence. The Alabama Supreme Court rebuked this theory on the grounds that a local court did not have the authority to punish a defendant for acts committed outside of its jurisdiction.

The U.S. Supreme Court agreed and held that the punitive damages could not be reflective of the defendant’s entire course of conduct. However, the U.S. Supreme Court did not totally remove the aspect of “mass tort” from its holding in BMW. During its meticulous and detailed analysis of the appropriateness of the punitive damage award against the defendant, the Court considered BMW’s activities as a collective whole under each of the three “guideposts.”

When considering the reprehensibility of BMW’s conduct under the first “guidepost,” the Court recognized that “repeated misconduct is more reprehensible than an individual instance of malfeasance.” The laws of other jurisdictions and how they would bear on BMW’s conduct in those jurisdictions was given consideration. The term recidivist was often used to refer to the defendant. The element of “mass tort” was clearly present in this analysis.

The potential harm to other parties affected by BMW’s actions was given consideration when the second “guidepost” was evaluated. The complete course of BMW’s conduct was analyzed when the ratio of punitive damages to harm was determined. When considering the sanctions for comparable misconduct under the third “guidepost,” the criminal and civil

155. Id. at 628.
156. Id. at 627.
157. See BMW, 517 U.S. at 573.
158. Id. at 575.
159. Id. at 577.
160. Id. at 577-78. The Court considered applicable statutes from both California and Illinois. Id. at 578. The Court also considered statutes from Louisiana, Alabama, Arizona, Indiana, North Carolina, and Oklahoma. Id. at 578 nn.27-28.
162. See BMW, 517 U.S. at 582. The court considered the potential harm to both the plaintiff and the other purchasers of the automobiles. Id.
163. Id. The Court considered the ratio of harm to punitive damages both within the jurisdiction of the plaintiff and within a collective whole of other applicable jurisdictions. Id. at nn.35-36.
fines for similar malfeasance in states other than the controlling jurisdiction were reviewed. The concept of "mass tort" was clearly used in the analysis under these "guideposts." In his powerful dissent to the majority opinion in BMW, Justice Scalia found no logical reason or legal authority that precluded the consideration of BMW's collective conduct with respect to the amount of punitive damages.

The Kentucky Supreme Court was correct in determining that BMW only involved one award to one plaintiff, while the main issue in the instant case involved multiple awards to multiple plaintiffs. However, the previous analysis clearly shows that BMW was decided in the context of a "mass tort." Since the instant case also involved a mass tort, the holding in BMW should have been reviewed in more detail and the BMW case should not have been so quickly discounted.

D. The Three Guideposts of BMW Applied to the Conduct of OFC

In BMW, the U.S. Supreme Court held that three "guideposts" should be used when determining whether a punitive damage award is excessive and violates a defendant's right to due process. Consideration should be given to the degree of reprehensibility of the defendant's conduct, the ratio between the punitive damages awarded and the actual harm inflicted on the plaintiff, and the difference between the magnitude of the punitive damages amount and the civil or criminal penalties for comparable conduct.

BMW is applicable to the instant case on two grounds. The parties involved in both cases asserted similar principles with respect to the appropriateness of punitive damages amounts. Both cases involved the element of mass tort. The three "guideposts" will be applied to the instant case to demonstrate that the Kentucky Supreme Court could have used BMW to validate the punitive damages award in the instant case and further defeat the argument made by OCF.

The first "guidepost" concerning the degree of reprehensibility of the defendant's conduct requires that the punitive damages award be in

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164. Id. at 584. The Court evaluated the punitive amount compared to civil penalties in Arkansas, Florida, Georgia, Indiana, New Hampshire, and New York. Id. at n.40.
165. Id. at 603 (Scalia, J., dissenting).
166. See BMW, 517 U.S. at 575-76.
167. Id. at 575.
proportion to the severity of the offense. In BMW, the court noted that "indifference to or reckless disregard for the health and safety of others," deliberate false statements, and acts of affirmative misconduct all qualify as reprehensible conduct that can warrant a substantial punitive damages award. In the instant case, OCF continued to market the Kaylo product despite its knowledge that asbestos was hazardous to human health. It deliberately published brochures claiming Kaylo to be "non-toxic" and "non-irritating," even though it knew otherwise.

This entire course of misconduct was done with the complete knowledge of the possible ramifications. The course of conduct spanned three decades and affected thousands of people. When viewed in the context of the first "guidepost," the punitive damages awarded in the instant case and in the prior litigation involving the Kaylo product are not excessive.

The second "guidepost" requires that there be a comparable relation between the amount of punitive damages awarded and the actual damages suffered by the victim. While a reasonable ratio between punitive and compensatory damages is generally considered to be between two and four, a higher ratio may be appropriate if the value of non-economic harm is hard to determine. In the instant case, the punitive damages were only one and one half times the amount of compensatory damages.

There has been a total of approximately $35,000,000 in punitive damages levied against OCF in litigation relating to the Kaylo product. More than 185,000 lawsuits have been filed in this matter. When considered in the broader context, the ratio of punitive damages to harm

168. Id.
169. Id. at 576.
170. Id. at 579.
171. See Owens-Corning, 976 S.W.2d at 411.
172. Id. at 413.
173. Id. at 411.
174. See Appellant's Brief at 7-8, Owens-Corning (No. 96-SC-970-D).
175. See BMW, 517 U.S. at 580.
176. Id. at 581.
177. Id. at 582.
178. See Owens-Corning, 976 S.W.2d at 411 ($435 million in punitive damages versus $290 million in compensatory damages is a ratio of 1.5).
179. Id. at 412.
180. See Appellant's Brief at 8, Owens-Corning (No. 96-SC-970-D).
done is even smaller than in the instant case. These ratios are well within the limits as prescribed in *BMW*.

The final "guidepost" involves a comparison between the punitive damages award and criminal or civil penalties available for similar misconduct. 181 In the instant case, there was substantial evidence that OCF "intentionally concealed, minimized, and even misrepresented the health effects of working with the product." 182 When considered along with OCF's aggressive sales practice and profit motives, these actions could be considered to be comparable to fraud.

The actions of OCF caused Golightly to develop asbestosis and throat cancer, 183 two medical conditions which eventually result in death. 184 Several of the victims of OCF's conduct may ultimately die from this harm. If the cause of death is not directly attributable to asbestos, the quality of life may have been drastically reduced by exposure to the product. The criminal and civil penalties applicable to OCF's conduct would be substantial. An individual committing such egregious acts may be subject to a prison term and significant fines. When viewed in comparison to these possibilities, neither the punitive damages awarded in the instant case or in the prior litigation over the Kaylo product appear out of line with comparable penalties.

The "guideposts" for evaluating whether punitive damages are excessive and in violation of due process as outlined in *BMW* do not require a reversal of the award in the instant case. The Kentucky Supreme Court arrived at the same conclusion, but only by distinguishing the two cases. Since a thorough analysis of the instant situation in the context of the *BMW* "guideposts" would have only supported and strengthened the holding, the supreme court should have performed this evaluation.

**CONCLUSION**

By ruling that successive punitive damages awards are not in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Kentucky Supreme Court has joined the

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181. See *BMW*, 517 U.S. at 583.
182. *Owens-Corning*, 976 S.W.2d at 411.
183. *Id.*
184. See *Traumatic Medicine*, supra note 70, at 229.
majority of state supreme courts with respect to this issue.\footnote{185 See SUCCESSIVE PUNITIVE AWARDS CONSTITUTIONAL, 17 No. 1 PROD. LIAB. L. & STRATEGY 1 (The New York Law Publishing Co. 1998).} With the exception of BMW, the supreme court thoroughly evaluated all relevant authority to arrive at its holding. The constitutionality of successive punitive damages awards can easily be justified in light of the supreme court's reasoning. However, the most striking argument in favor of upholding the punitive damages award against OCF can be found in the decision of the Kentucky Court of Appeals in the concurring opinion of Judge Combs.

In the one paragraph opinion, Judge Combs refrains from a lengthy legal argument and asserts the following common sense reasoning: "[w]hat we must remember is that an individual life has been severely impaired. The award by this jury attempted to address one litigant vis-a-vis a tortfeasor -- rendering largely irrelevant (to his life) the undoubtedly excessive impact on OCF of punitive awards."\footnote{186 Owens-Corning Fiberglas Corp. v. Golightly, 4 Ky. Ct. App. Op. No. 95-CA-0135-MR (Action No. 92-CI-303) p. 8 (Oct. 4, 1996) (Combs, J., concurring) (emphasis in original).}