KENTUCKY SURVEY ISSUE

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FEATURE ARTICLE

A SURVEY OF KENTUCKY EMPLOYMENT LAW

by Richard A. Bales† & Joseph S. Burns‡

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I. INTRODUCTION

This survey-article is designed as a practical tool for practitioners who practice employment law in the Commonwealth of Kentucky. In particular, each section provides summaries of relevant Kentucky cases, with an emphasis on those cases arising within the past three years. Section II, which involves the employment-at-will doctrine, is broken down into two categories, common law claims and statutory claims. The common law claims discussed in Section A are the following: (1) public policy exception to the employment-at-will doctrine; (2) contractual modifications of the employment-at-will doctrine (which includes (a)

† Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. Special thanks to Cheryl Bruner, Thomas Ebendorf, Professor Jennifer Jolly-Ryan and Gail Langendorf.
‡ Staff member of the Northern Kentucky Law Review, Salmon P. Chase College of Law. Mr. Burns received his BA from Northern Kentucky University in English, Summa Cum Laude, and is a candidate for JD in May 2002. Special thanks to Gail Langendorf.
written modifications and (b) oral modifications); (3) fraud, misrepresentation, and estoppel; (4) obligation of good faith and fair dealing; (5) negligent hiring, retention, and supervision of employees; (6) intentional infliction of emotional distress; (7) defamation; and (8) drug testing. The statutory claims discussed in Section B are the following: (1) workers' compensation retaliation, (2) Kentucky Whistle Blower Act, (3) Kentucky Civil Rights Act. Topics discussed in Section III include (1) trade secrets, (2) noncompete agreements, and (3) the employee's duty of loyalty.

II. EMPLOYMENT-AT-WILL DOCTRINE

A discussion of the employment-at-will-doctrine necessarily begins with the acknowledgment of two fundamental principles. First, a contract, whether it is oral, written, formal, or informal, is the basis of an employment relationship. Second, an employment contract that contains no specified period of duration is viewed as "employment at will," which can be terminated by either the employer or the employee. While the employment-at-will doctrine is currently in existence in Kentucky, several exceptions—based both on statutory and common law principles—have developed to provide an otherwise "at-will" employee a cause of action.

A. Common Law Claims:

1. Public Policy Exception To The Employment-At-Will Doctrine

In Firestone Textile Co. v. Meadows, the Kentucky Supreme Court held that an employee has a cause of action in tort for retaliatory discharge when the discharge is contrary to a fundamental public policy as evidenced by a constitutional or statutory provision. The court, while recognizing that ordinarily an employer may terminate an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible," concluded that
Kentucky Revised Statute (KRS) § 342,9 which pertains to workers' compensation benefits, evinced a public policy that an employee "has a right to be free to assert a lawful claim for [workers' compensation] benefits without suffering retaliatory discharge."10

Two years later, in Grzyb v. Evans,11 the Kentucky Supreme Court, expanding on the Firestone decision, clearly delineated the public policy exceptions to the employment-at-will doctrine: (1) the discharge must be contrary to a fundamental and well-defined public policy as evidenced by a constitutional or statutory provision; or (2) the discharge must be due to the employee's failure or refusal to violate a law in the course of employment.12

In Boykins v. Housing Authority of Louisville,13 the plaintiff, Karen Boykins, was employed as an executive secretary by the Housing Authority of Louisville (HAL). After Boykins' infant son was injured in an apartment owned, operated, and managed by HAL, Boykins, on behalf of her infant son, filed a negligence suit against HAL.14 HAL fired Boykins. Boykins brought a second suit, this time in her own name, alleging that she had been fired in retaliation for having brought the first suit, and that her discharge violated the Kentucky Constitution's guarantee of open access to the courts.15 The Jefferson County Circuit Court entered summary judgment for HAL, and Boykins appealed.16 After the Court of Appeals affirmed in part and remanded, Boykins appealed.17

In deciding whether the "open-courts" provision created an exception to the terminable at-will doctrine, the Kentucky Supreme Court revisited its prior decisions in Firestone18 and Grzyb.19 The court reasoned that the "open-court" provision has nothing to do with employment rights, and that there is no "employment-related nexus between the constitutional policy stated in section 14 and Boykin's discharge."20 The court held that, since there was no well-defined public policy evidenced by a constitutional or a statutory provision which prohibited HAL from discharging her in retaliation for filing suit, Boykins had stated no cause of action.21

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9 Note, this decision by the Kentucky Supreme Court was before the 1984 enactment of Kentucky Revised Statute (KRS) § 442.197, which prohibited employers from retaliating against employees for their pursuit of worker's compensation claims.
10 Firestone, 666 S.W.2d at 731.
11 700 S.W.2d 399 (Ky. 1985).
12 Id. at 401.
13 842 S.W.2d 527 (Ky. 1992).
14 See id.
15 Kentucky Constitution section 14 states that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."
16 See Boykins, 842 S.W.2d at 527.
17 Id.
18 666 S.W.2d 730 (Ky. 1983).
19 700 S.W.2d 399 (Ky. 1985).
20 Boykins, 842 S.W.2d at 530. The court reasoned that the underlying policy of the "open-courts" provision is to ensure that the government provides open-courts to all for appropriate judicial remedy, and that when Boykins filed suit against HAL, she found the court's door open to her. Id.
21 See id.
In *Nelson Steel Corp. v. McDaniel,* the plaintiff, Dale McDaniel, had filed two workers' compensation claims with a prior employer before he began employment with Nelson Steel Corporation (Nelson Steel). Nelson Steel discharged McDaniel, ostensibly as part of a reduction in workload and availability. McDaniel sued in Fayette Circuit Court, alleging that Nelson Steel had wrongfully discharged him due to his prior filings for worker's compensation benefits. Both parties moved for summary judgment.

After the trial court overruled McDaniel's motion for summary judgment and sustained Nelson Steel's motion for summary judgment, McDaniel appealed. The Court of Appeals focused particularly on whether the retaliatory discharge exception to the terminable-at-will doctrine encompasses compensation claims filed against prior employers. In reversing the judgment, the Court of Appeals held that the protection afforded by KRS § 342.197 was not limited to claims against current employers, but could also be extended to those situations, like McDaniel's, where the workers' compensation claim had been filed under a prior employer. Nelson Steel appealed.

The Kentucky Supreme Court, after acknowledging that no Kentucky case specifically addressed the "prior employer question," turned to its earlier decision in *Firestone.* According to the court, the *Firestone* exception to the terminable-at-will doctrine centered on whether the discharge was "motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law." Distinguishing between the nature of the discharge in *Firestone* and that of McDaniel, the court reasoned that, rather than being retaliatory in nature, the discharge of McDaniel rested on solely economic reasons, "albeit such reasons had their basis in saving on the cost of worker's compensation premiums."

Accordingly, the court ruled against McDaniel, concluding that neither KRS § 342.197(1) nor any other provision of the Workers' Compensation Act evidenced a "well-defined public policy" regarding discharging an employee for purely economic reasons, such as prior workers' compensation claims filed while under the employment of a previous, different employer.

The most recent case involving the Kentucky public policy exception is *Barlow v. Martin-Brower Co.* In that case, Eric Barlow, who was employed as

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22 898 S.W.2d 66 (Ky. 1995).
23 See id.
24 Id.
25 Id.
26 Id.
27 Id.
28 666 S.W.2d 730 (Ky. 1983).
29 *Nelson Steel Corp.*, 898 S.W.2d at 67.
30 Id. The Court's distinction rests on questionable reasoning. First, in both types of cases, the employer's underlying motive is likely to be economic: to get rid of an employee who is likely to file future workers' compensation claims. Second, McDaniel, like the plaintiff in *Firestone,* was "punished...for seeking the benefits to which he [was] entitled by law," even if the punishment was meted out by a different employer. Third, the policy behind *Firestone*—to protect an employee who files a lawful workers' compensation claim—is subverted by the holding of *McDaniel.*
31 See id. at 68.
32 202 F.3d 267 (6th Cir. 2000).
a truck driver with Martin-Brower Co. (Martin-Brower), alleged that he was wrongfully discharged because he had refused to violate time and safety regulations promulgated under both federal and state law. Barlow brought an action against Martin-Brower in the United States District Court for the Western District of Kentucky. Finding that the administrative remedy available to Barlow under the federal Surface Transportation Assistance Act (STAA) was exclusive, the district court granted Martin-Brower's motion to dismiss.

On appeal to the Sixth Circuit, Barlow argued that, even if the STAA is exclusive under federal law, this was no impediment to his Kentucky state-law claims based on wrongful discharge in violation of public policy. The STAA expressly prohibits discrimination against an employee in the terms of his employment because he refuses to operate a vehicle in violation of "a regulation, standard or order of the United States related to commercial motor vehicle safety or health." Relying on Grzyb—which specifically indicated that when the statutory provision declaring an act unlawful also provides the civil remedy, that remedy is exclusive—the Sixth Circuit reasoned that, to the extent the alleged public policy emanated directly from the STAA, the STAA's administrative remedy was exclusive of all other possible remedies. However, Barlow argued that the asserted public policy did not emanate exclusively from the STAA, but also was evidenced by state law. In particular, Barlow relied on KRS § 281.730(3), under which the Kentucky "Secretary of Transportation Cabinet may adopt . . . the provisions of 49 C.F.R. § 395." Accordingly, in 601 K.A.R. § 1:005(2), the Kentucky Secretary of Transportation Cabinet did adopt the federal maximum driving time regulations of 49 C.F.R. § 395 (2000). Barlow argued that this regulation evidenced a public policy in Kentucky that was violated by his termination.

Citing Grzyb, which requires the asserted public policy to be defined by constitutional or statutory provision, the Sixth Circuit reasoned that the public policy asserted by Barlow was not well-defined by constitutional or statutory provision, but only by an administrative regulation. As KRS § 281.730(3) was enacted by the Kentucky legislature merely to authorize the Secretary of the Transportation Cabinet to adopt regulations defining maximum time, the court concluded that Barlow's discharge did not contravene the legislative will.
enabling the Secretary to adopt such regulations. The court ultimately held that, though Barlow’s discharge may have “contravened the policy evidenced by the [administrative] regulation, such a policy was insufficient to support [Barlow’s] state public policy claim under the theory recognized in Grzyb.”

2. Contractual Modifications Of Employment-At-Will Doctrine

The general rule is that, when the period of employment is indefinite, either the employer or the employee may terminate the contract without cause. However, additional exceptions to the employment-at-will doctrine, aside from those based on the narrow public policy exception discussed above, may exist based on an oral or written modification of the employment agreement. For instance, even if no specified period of duration concerning the length of the employment is specified, the parties may agree that the employment relationship is not terminable at will.

The salient case on this point is Shah v. American Synthetic Rubber Corp. The plaintiff, Anil Shah, was employed by American Synthetic Rubber Corp. (ASRC) as a chemical engineer. When Shah began negotiating with ASRC for employment, he had been working eleven years with Monsanto Corporation, a job which had provided him with substantial fringe benefits, including stock purchases, a retirement plan, and life insurance. Shah claimed that he surrendered such benefits by accepting an employment contract with ASRC, a contract under which, Shah alleged, he would serve a ninety-day probationary period during which ASRC could discharge him for any cause, but after which he would become a permanent employee, dischargeable only for cause in accordance with personnel policies and procedures. A supervisor of ASRC defined the term, “for cause,” as a situation involving “work-connected performance, insubordination, violation of policy or rules, or lack of work.”

After being fired, Shah brought an action in the Jefferson Circuit Court for breach of contract. Shah claimed that, in violation of the employment contract, ASRC had terminated him without cause. ASRC argued that not only was Shah discharged for cause, but he also was employed for an indefinite period of time, rendering his employment terminable at will. Based on its finding that Shah’s

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45 Id.
46 Id.
47 E.g., Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1984); Production Oil Co. v. Johnson, 313 S.W.2d 411 (Ky. 1958); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977).
49 655 S.W.2d 489 (Ky. 1983).
50 See id. at 491.
51 Id.
52 Id.
53 Id. at 489.
54 Id.
employment was for an indefinite period of time and, therefore, terminable at
will, the trial court sustained ASRC's motion for summary judgment. The
court of appeals affirmed, finding that there was merely a contract for employment-at-
will.

The Kentucky Supreme Court reversed, finding that, based on the
sophistication of the parties and the surrounding circumstances, it was unlikely
that the parties intended to incorporate the employment-at-will doctrine into the
contract. The court noted, considering the factual findings by the lower court,
including the negotiations between the parties, the usage of business, and the
nature of the employment, the jury could find the existence of a "just cause"
employment contract. The court held that "parties may enter into a contract of
employment terminable only pursuant to its express terms—as 'for cause'—by
clearly stating their intention to do so, even though no other consideration than
services to be performed or promised, is expected by the employer, or performed
or promised by the employee."

3. Written Modifications Of The Employment-At-Will Doctrine

In Nork v. Fetter Printing Co., three cases were appealed simultaneously
and presented common issues relating to whether employee handbooks and
employer policy manuals could alter the employment-at-will doctrine by
manifesting an expression of contractual agreement. After finding that each of
the policy manuals and employee handbooks contained disclaimers stating that
employment was at-will, the Kentucky Court of Appeals held that, though the
policy manuals and employee handbooks described the expectations and
assurances with respect to employment terms and discharge, due to the existence
of the disclaimers, they were not tantamount to expressions of contractual
agreement and, therefore, the employment was at will.

In Norris v. Filson Care Home Ltd., the plaintiff, Pamela Norris, filled out a
one-page application for employment as a nurse's aide with Filson. The
application contained a paragraph indicating employment was "at will." Norris
was also required to sign a form acknowledging receipt of the "Employee
Handbook-Personnel Policies." The employee handbook stated that new
employees were subject to a three-month probationary period during which they

\[55\] See Shah, 655 S.W.2d at 489.
\[56\] Id.
\[57\] Id. at 491.
\[58\] Id.
\[59\] Id. at 492.
\[60\] 738 S.W.2d 824 (Ky. Ct. App. 1987).
\[61\] Id.
\[62\] Id. at 826. Each of the policy manuals and handbooks also contained disclaimers, stating that
employment was at will. Id.
\[64\] Id.
\[65\] Id.
\[66\] Id.
could be terminated for any reason. In addition, the employee handbook contained a detailed list of offenses, as well as a warning system, which stated in pertinent part:

If an employee is to be discharged for unsatisfactory service after the three-month period is completed, a warning notice will be given and placed in the employee’s file...The employee will be verbally counseled by his supervisor making it clear to the employee what he did wrong...Three warnings within a twelve-month period of time will be grounds for dismissal.

After receiving a satisfactory evaluation at the end of her three-month probationary period, Norris was subsequently dismissed without receiving any warnings from her supervisors. Norris thereupon filed suit in Jefferson Circuit Court for wrongful discharge, alleging that the employee handbook modified her original employment contract to the extent that she could only be discharged for cause. Filson argued that the employee handbook did not modify the employment-at-will relationship. The trial court granted Filson’s motion for a directed verdict, and Norris appealed.

The Kentucky Court of Appeals focused on two specific aspects of the employee handbook. First, while noting that the handbook described a “probationary period” of employment during which an employee could be fired for any reason, the court reasoned that, in a true employment-at-will relationship, it is not necessary to describe a probationary period, since the relationship may naturally be terminated at any time. Based on this, the court concluded that Filson must have contemplated something other than “at will” employment for the post-probationary period. Second, while the employee handbooks in contained disclaimers expressly stating that employment was at will, the employee handbook issued to Norris contained no such disclaimer.

Based on the characteristics of the employee handbook, including the language of the probationary period, its warning system, different categories of offenses, and lack of a disclaimer, the court concluded that there was evidence of a clear intention to modify the employment-at-will relationship. In reversing the trial court’s judgment, the court held that, due to the modification of the employment relationship, after the ninety-day probationary period, Norris’ employment was permanent, subject to discharge for cause.

In Hines v. Elf Atochem North America Inc., the plaintiff, Regina Hines, worked as a full-time salaried nurse at the Elf Atochem North America, Inc. plant

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67 Id.
68 Id. at *2.
69 See Norris, 1990 WL 393903, at *2.
70 Id.
71 Id.
72 Id. at *3.
73 Id.
74 Id.
75 See Norris, 1990 WL 393903, at *3.
76 Id.
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(Elf Atochem). Hines obtained an extended medical leave from work due to stress-related conditions.78 Approximately two months later, according to Elf Atochem's Manager of Industrial Relations, Hines told the plant's physician that although Hines personal physician had released her to return to work, she nonetheless was not willing to do so unless certain employment conditions were satisfied.79 Elf Atochem construed Hines' demands as a "necessary prerequisite for her to return to work."80 Elf Atochem rejected the requested changes, and considered Hines as having voluntarily resigned.81 Hines then wrote a letter to Elf Atochem, contending that she had not been released to return to work, and that she had not intended to resign.82 Hines then filed a diversity action in the United States District Court for the Western District of Kentucky, claiming that Elf Atochem had breached an implied contract created both by provisions in the employment policy regarding the termination of salaried employees, and by posted rules of conduct.83 Elf Atochem moved for summary judgment, asking the court to find as a matter of law that, since there was no clear intent to modify the employment-at-will status of Hines, there was no implied employment contract.84

The district court found that, since the policy regarding the termination of salaried employees did not state a clear intention that Hines could not be dismissed without just cause, Hines was an employee-at-will when hired.85 However, the court then turned to the posted rules of conduct, which stated: "Our labor agreements have always explicitly recognized [sic] the Company's right to discharge, suspend, or otherwise discipline for just cause."86 In considering the posted rules of conduct, the court concluded that, based on the clear intent to create a "just cause" relationship, as well as the fact that there was no disclaimer or limiting language, there was sufficient evidence to indicate a modification to the employment-at-will relationship had occurred.87 The court, therefore, denied Elf Atochem's motion for summary judgment regarding the implied contract.88

In Noel v. Elk Brand Mfg. Co.,89 Hilda Noel, who had worked for Elk Brand for approximately twenty years, before her employment was terminated, developed severe carpal tunnel syndrome, which eventually led to her being moved to a non-production job.90 Noel and twenty-nine other employees were laid off. Although twenty of the laid-off employees were expected to be off work

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78 See id. at 551.
79 Id.
80 Id.
81 Id.
82 Id.
84 Id.
85 Id. at 552.
86 Id.
87 Id.
88 Id.
90 See id.
five days or less, the remaining employees, including Noel, were given "P" status, indicating that they would be eligible for recall according to the company's need for their work in the order of their productivity. Noel, who had the lowest production average at Elk Brand, did not apply for re-employment. Instead, she sued Elk Brand in Trigg County Circuit Court for breach of contract. After the trial court dismissed Noel's complaint, she appealed to the Kentucky Court of Appeals.

On appeal, Noel claimed that there was a material issue of fact as to whether Elk Brand's employee manual had created a contract between her and the company. Elk Brand argued that the case was governed by Nork, in which the Kentucky Court of Appeals held that an at-will relationship was not abrogated by an employee manual which contained an express disclaimer stating that it was not a contract and that employment was at-will. Noel argued that Elk Brand's disclaimer was significantly different from the disclaimers at issue in Nork on two grounds. First, she pointed out that the Elk Brand employee handbook did not expressly provide that she was an at-will employee. Second, she emphasized that the handbook specifically stated that employees could rely on the company for wages, benefits, holidays, seniority, and workforce adjustment. However, noting that the employee handbook stated that it was "not a contract," the court concluded that neither the lack of "at-will" language, nor the inclusion of reliance language, rendered Elk Brand's disclaimer ineffective. Accordingly, the court held that Noel was an at-will employee with no contractual right to continued employment.

4. Oral Modifications Of The Employment-At-Will Doctrine

In Audiovox Corp. v. Moody, the plaintiff, Vicky Moody, filed a breach of contract claim in Jefferson Circuit Court against Audiovox Corporation (Audiovox). Moody was employed as an office manager at Audiovox Kentucky. Hass was Moody's immediate supervisor. After Moody became suspicious that Hass was diverting company funds to his own use, she attended a meeting of credit managers at Audiovox's New York office, taking along company books that allegedly contained evidence of Hass' diversions of company funds. Although Moody claimed that she was initially hesitant to

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91 Id.
92 Id.
93 Id. at *1.
94 See Nork, 738 S.W.2d at 825.
95 See Noel, 2000 WL 331769, at *1.
96 Id.
97 Id.
98 Id.
99 Id.
100 737 S.W.2d 468 (Ky. Ct. App. 1987).
101 See id. Audiovox Kentucky is a wholly-owned subsidiary of Audiovox Corp. Id.
102 Id.
103 Id.
reveal her suspicions concerning Hass, she claimed that Audiovox assured her that, if she divulged what she knew, she would not be discharged, and that Hass would not be informed that she had told.\textsuperscript{104} When an audit of Audiovox Kentucky revealed no discrepancies, Hass summoned Moody to his office, questioned her about what she had disclosed to the parent company, and then fired her.\textsuperscript{105} Moody maintained that an oral contract, which altered the employment-at-will doctrine, arose between herself and Audiovox Corp. during the meeting in New York.\textsuperscript{106} The trial court found in favor of Moody on her breach of contract claim, and Audiovox Corp. appealed.

On appeal, Audiovox argued that, even if an oral contract did arise between itself and Moody, it was unenforceable as within the statute of frauds, KRS § 371.010.\textsuperscript{107} The court, after indicating that the statute of frauds does not apply if a contract is capable of being performed within one-year,\textsuperscript{108} reasoned that, well within one-year of the alleged contract which was created in New York, "the contingency which would have triggered its performance occurred; that is, Hass' learning or suspecting that Moody had incriminated him."\textsuperscript{109} According to the court, Audiovox Corp. could have performed the contract by intervening on Moody's behalf, but instead chose to breach the contract.\textsuperscript{110} Thus, the court found that the oral contract was sufficient to modify the employment-at-will doctrine with respect to Moody being discharged for incriminating Hass, and that the contract did not fall within the statute of frauds.\textsuperscript{111} The court, therefore, upheld the verdict in favor of Moody.

In \textit{Hammond v. Heritage Communications, Inc.},\textsuperscript{112} Lisa Hammond brought an action in the Barren County Circuit Court against her former employer, Heritage Communications, Inc. (Heritage), for breach of an implied contract. At the time of her termination, Hammond was an employee of radio stations WKAY-AM and WGGC-FM, both of which were owned by Heritage. Hammond alleged that, despite the fact that she had been encouraged by her supervisor to appear in \textit{Playboy} magazine, after a nude photograph of her appeared in the March 1986 issue of \textit{Playboy}, she was terminated.\textsuperscript{113} The trial court granted Heritage's motion for summary judgment on Hammond's breach of contract claim, finding that, since there was no mutuality of obligation between the parties, there was no contract between Hammond and Heritage.\textsuperscript{114}

The Kentucky Court of Appeals reversed, holding that an issue of fact existed as to whether the parties had entered into an oral contract, thereby

\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} See Moody, 737 S.W.2d at 470.
\textsuperscript{107} Id.
\textsuperscript{109} Moody, 737 S.W.2d at 470.
\textsuperscript{110} See id.
\textsuperscript{111} Id.
\textsuperscript{112} 756 S.W.2d 152 (Ky. Ct. App. 1988).
\textsuperscript{113} See id.
\textsuperscript{114} Id.
modifying Hammond's status as an at-will employee. The court found: There was no dispute that Hammond's supervisor had told her that, if her photograph appeared in Playboy, she would not be terminated. Hammond was entitled, concluded the court, "to establish that her status was altered by the oral assurances made to her and that she was thereafter working under the terms of an oral contract for a specific period of time" to be determined according to the facts, including the understanding of the parties. In Buchholtz v. Dugan, Wolfgang Buchholtz sued the University of Kentucky (UK) and various university directors, claiming that he had been wrongfully discharged in violation of an oral modification to his employment contract. In 1968, Buchholtz was hired by Robert Drake, Dean of the College of Engineering, as manager of the UK College of Engineering Machine Shop. Drake informed Buchholtz that he was permitted to conduct private consulting work, up to one day per week, as long as such private consulting did not impede on his UK duties or compete with local machine shops. Over the next several years, Buchholtz undertook various private jobs, using the machine shop and shop materials, as well as other machinists' under his supervision, to assist him in his private consulting work. Buchholtz likewise did not reimburse UK for the use of the shop machines, scrap materials, or the machinists work. Subsequently, two major changes occurred at UK. First, Robert Dugan became Buchholtz's supervisor and a hostile relationship developed between the two. Second, Ray Bowen became Dean of the College of Engineering, replacing Robert Drake. After Dugan discovered what he perceived to be discrepancies in Buchholtz's time sheets and a possible misappropriation of funds, an internal audit was conducted, which revealed that, over a five-year period, UK machinists had worked approximately 1,394 hours on private projects for Buchholtz; such projects, since they were not billed through UK, had cost the University $23,745. UK ultimately terminated Buchholtz for violating UK staff personnel and policy procedures, falsification of records, and dishonesty on the job.

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115 Id. at 154.
116 Id.
117 Id.
118 977 S.W.2d 24 (Ky. Ct. App. 1998).
119 Id. at 25.
120 Id.
121 Id. The court found:
Machinists under [Buchholtz's] supervision who worked on his private projects recorded their work by the client's names on their time sheets, and Buchholtz recorded this as 'non-billable' time. He billed for the work privately, collected consulting fees through a post office box, paid machinists personally for their work, and deposited his earnings in his credit union account.
122 Id.
123 Id.
124 See Buckholtz, 977 S.W.2d at 25.
125 Id. at 26.
126 Id.
Buchholtz sued in the Fayette Circuit Court, asserting that the oral agreement reached with Dean Drake—in which Drake informed Buchholtz that he could do private consulting work, provided such work did not interfere with his UK duties—removed him from the status of an at-will employee. After allowing Buchholtz's wrongful discharge claim to proceed to trial, the court directed a verdict in favor of UK, and Buchholtz appealed.

On appeal, the court did not dispute the existence of the oral modification regarding Buchholtz's employment contract, but found, as did the trial court, that Buchholtz had acted beyond the scope of the oral agreement, rendering him terminable at will. Under the agreement with Dean Drake, Buchholtz was not to allow private consulting work to interfere with his UK duties, but Buchholtz had persistently removed machinists from UK jobs and assigned them to his private work. Moreover, the oral agreement did not contemplate the use of university personnel in Buchholtz's private work. The court, therefore, held that Buchholtz had not acted within the terms of the oral modification and, therefore, he was terminable at will.

In Mayo v. Owen Healthcare, Inc., Stephen Mayo filed suit against Owen Healthcare, Inc. (Owen) in the United States District Court for the Eastern District of Kentucky, claiming that Owen had breached an oral contract of employment. Mayo had been a pharmacist with King's Daughters' Hospital (KDH) when Owen signed an agreement with KDH, which, in effect, allowed Owen to take over the pharmacy department of KDH. After Owen's director of recruitment, Tom Smith, held a meeting of all KDH pharmacy employees to inform them that they would be offered employment with the pharmacy, Mayo signed a letter of employment with Owen. Although Mayo received superb evaluations for approximately eleven years, his supervisor began receiving complaints about Mayo in 1995. In response, the situation was investigated, and Mayo was eventually terminated. Mayo filed suit, alleging that the termination violated an oral employment contract. The district court granted Owen's motion for summary judgment, and Mayo appealed.

The Sixth Circuit Court of Appeals, applying Kentucky law, affirmed the district court's ruling. Under Hammond and Buchholtz, Mayo claimed that there was a genuine issue of material fact as to whether there was an oral

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127 Id.
128 Id.
129 Id.
130 See Buckholtz, 977 S.W. 2d at 26.
131 Id. at 27.
133 See id.
134 Id. Mayo's supervisor claimed that he acted belligerently, hung up on customers, threatened to slash co-workers' tires, made inappropriate comments about his wife, displayed pornography on the computer, threatened to falsify co-workers' reports, and accessed other employees' files. Id.
135 Id.
136 Id.
137 756 S.W.2d 152 (Ky. Ct. App. 1988).
modification to his employment status. Specifically, Mayo claimed that Owen’s director of recruitment, Tom Smith, assured him that he would receive the “best benefits; that he would be covered by both the KDH and the Owen policy books, whichever was better; and that he would have a job at the pharmacy as long as Owen had the contract to run it.” While conceding that the employment-at-will doctrine may be modified by an oral contract, the court, based upon Kentucky’s watershed decision in Shah v. American Synthetic Rubber Corp., declared that Mayo had the burden of proving the existence of either (1) an offer of employment for a definite term, or (2) an offer of employment for an indefinite period of time with a covenant not to terminate without cause. The court concluded that Mayo had proved neither. First, Mayo admitted that he was never offered employment for a definite period of time. Second, during the discussion between Mayo and Smith regarding benefits, there was no evidence that a termination-for-cause restriction was included as a benefit.

5. Fraud, Misrepresentation, And Estoppel

In United Parcel Service Co. v. Rickert, the plaintiff, John Rickert, sued United Parcel Service Co. (UPS), alleging damages based on fraud and promissory estoppel. UPS, pursuant to a plan in which—over a sixteen-month transition period—it would establish its own airline, expressed its desire to hire pilots who remained throughout that period with its contract carriers. Orion Air, a contract carrier for UPS, employed Rickert. After the transition by UPS was completed, Orion Air ceased doing business, and Rickert was not hired by UPS. Rickert thereafter sued UPS in Jefferson County Circuit Court, alleging damages flowing from fraud and promissory estoppel. Rickert claimed that, during a meeting which he and other Orion pilots attended, an unnamed UPS management representative had guaranteed employment with UPS to those pilots who stayed with Orion throughout the sixteen-month transition period. The jury awarded Rickert $425,160 in lost wages, $321,356 in future lost wages, and $1 million in punitive damages. The Court of Appeals affirmed the judgment, and the Kentucky Supreme Court granted discretionary review.

UPS advanced two primary arguments in support of its position: (1) Rickert had failed to prove fraud by clear and convincing evidence because he was unable to identify the identity and authority of the alleged corporate

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140 Id. at *2.
141 655 S.W.2d 489 (Ky. 1983).
143 Id. at *2.
144 Id.
145 Id.
146 996 S.W.2d 464 (Ky. 1999).
147 See id.
148 Id.
149 Id. at 468.
representative who allegedly made the fraudulent misrepresentation; and (2) Rickert could not recover on a claim of fraud or promissory estoppel where his failure to act was not a proximate result of the alleged guarantee of employment.\textsuperscript{150}

The court began by delineating the six elements of fraud that must be proven by clear and convincing evidence: (1) material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon; and (6) causing injury.\textsuperscript{151} The court found that Rickert had presented sufficient evidence to prove each of the six elements by clear and convincing evidence.\textsuperscript{152} First, even though Rickert did not identify the individual who made the representation at the meeting, he did present evidence that a regional coordinator for UPS, who addressed the Orion employees at the meeting, made the representation of employment.\textsuperscript{153}

As for the second and third elements, while Rickert was unable to prove that UPS did not intend to hire him at the time of the alleged misrepresentation, he was able to prove that, at the time the statement was made, UPS did not intend to hire all Orion pilots.\textsuperscript{154} According to the court, willfully failing to disclose the whole truth, as well as intentionally asserting false information, is a ground for fraud.\textsuperscript{155} Therefore, since UPS intentionally failed to disclose all of the material details of its hiring plan, there was no requirement for Rickert to prove that UPS did not intend to specifically hire him.\textsuperscript{156}

As for the fourth and fifth elements, the court pointed out the general rule that, in Kentucky, "a claimant may establish detrimental reliance in a fraud action when he acts or fails to act due to fraudulent misrepresentations."\textsuperscript{157} Rickert satisfied these elements by introducing evidence not only indicating that the underlying motive for UPS's promise of employment was to induce him to fly its planes during the transition period, but also that, in reliance on the representation by UPS, he had not sought other employment opportunities during the sixteen-month transition period.\textsuperscript{158} Accordingly, since Rickert had proven fraud by clear and convincing evidence, the court found that the jury had properly awarded Rickert punitive damages, as well as damages for lost wages.\textsuperscript{159}

As for Rickert's cause of action based on promissory estoppel, the court found that the evidence unequivocally indicated that, with the intent to induce

\textsuperscript{150} Id.
\textsuperscript{151} Id. See also Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. Ct. App. 1978).
\textsuperscript{152} See Rickert, 996 S.W.2d at 468.
\textsuperscript{153} Id. This was corroborated by evidence indicating that (1) Rickert had subsequent communications with UPS in which the employment agreement was discussed; (2) Rickert had taken detailed notes during the meeting which highlighted the specifics of the employment agreement; and (3) other witnesses heard the UPS representative make the same promise. Id.
\textsuperscript{154} Id. at 469.
\textsuperscript{155} Id. See also Chamberlain v. National Life & Accident Ins. Co., 76 S.W.2d 628, 631 (Ky. 1934); RESTATEMENT (SECOND) OF TORTS § 529 (1977) (indicating that a partial truth can be fraudulent if it is materially misleading).
\textsuperscript{156} See Rickert, 996 S.W.2d at 469.
\textsuperscript{157} Id. See also Sanford Constr. Co. v. S & H Contractors, Inc., 443 S.W.2d 227, 232 (Ky. 1969).
\textsuperscript{158} See Rickert, 996 S.W.2d at 469.
\textsuperscript{159} Id.
either action or forbearance on the part of Rickert, a promise of employment had been made by UPS to Rickert. In reliance on the promise, Rickert remained with Orion, foregoing other employment opportunities. Since Rickert had proven all of the elements of fraud by clear and convincing evidence, this was sufficient to uphold his promissory estoppel claim.

In Wymer v. JH Properties, Inc., Linda Wymer, who worked at Jewish Hospital as an operating room technician, was kicked by a patient who was coming out of anesthesia, resulting in an injury to Wymer's shoulder. Subsequently, while undergoing physical therapy, Wymer alleged that the physical therapist, who also was employed by Jewish Hospital, tore the deltoid muscle in Wymer's shoulder. Upon returning to work to perform clerical duties and odd jobs, Wymer filed both a workers' compensation claim and a negligence claim against Jewish Hospital. Thereafter, Wymer was informed by Jewish Hospital's director of human resources that Wymer had eight days to find a permanent job at Jewish Hospital or her employment would be terminated. Though a meeting was scheduled between Wymer and a human resources director, the director refused to meet with Wymer because Wymer was accompanied by her attorney. As a result, Wymer did not obtain a permanent job with Jewish Hospital, and she was terminated. Wymer then brought an action against JH Properties, Inc.—a Kentucky Corporation doing business as Jewish Hospital Shelbyville—in the Shelby County Circuit Court, alleging damages from fraud and promissory estoppel. The trial court granted summary judgment for Jewish Hospital, and Wymer appealed.

Wymer's fraud claim was based on the allegation that, despite the fact that she had been promised a job as a pre-admissions clerk, Jewish Hospital never intended to hire her for that position. As in Rickert, the court set forth the six elements that must be shown by clear and convincing evidence in order to succeed on a fraud claim: (1) a material representation; (2) which is false; (3) which is known to be false or made recklessly; (4) was made with inducement to be acted upon; (5) the plaintiff acted in reliance thereon; and (6) the plaintiff was...
injured as a consequence of relying on the materially false misrepresentation.\textsuperscript{173} The court concluded that Wymer had not established the six required elements, since she had presented no evidence indicating that she relied on the promise or that the alleged misrepresentation caused her damage.\textsuperscript{174}

In Wymer's promissory estoppel claim, she asserted that, though she had been promised a pre-admissions position with Jewish Hospital, such a promise had been breached.\textsuperscript{175} However, as the court pointed out, estoppel "is not founded upon a legal duty and a breach thereof; but rather, it is based upon a mere promise and reliance on that promise."\textsuperscript{176} Promissory estoppel requires that the plaintiff establish the following five elements:

1. Conduct, including acts, language and silence, amounting to a representation or concealment of material facts;
2. The estopped party was aware of these facts;
3. These facts were unknown to the other party;
4. The estopped party must act with the intention or expectation that its conduct will be acted upon; and
5. The other party in fact relied on this conduct to her detriment.\textsuperscript{177}

The court held that Wymer had not established the fifth element, since there was no evidence that she had relied on the promise.\textsuperscript{178} The appellate court, therefore, affirmed the circuit court's grant of summary judgment in favor of Jewish Hospital.

6. Obligation Of Good Faith And Fair Dealing

Kentucky courts have declined to imply a duty of good faith and fair dealing into the at-will employment relationship. In \textit{Wyant v. SCM Corp.},\textsuperscript{179} Phillip Wyant sought to recover against his former employer, SCM Corporation, on the basis of bad faith. Wyant, a branch manager of SCM's retail outlet in Lexington, Kentucky for seventeen years, claimed that he was terminated for "championing a subordinate's right to receive overtime pursuant to an unwritten agreement with [SCM]."\textsuperscript{180} While conceding that his employment relationship with SCM was terminable at-will, Wyant urged the Fayette Circuit Court to impose "a duty to discharge in good faith" upon SCM.\textsuperscript{181} However, the trial court granted SCM's motion for a directed verdict.

On appeal, Wyant argued that, because he had worked for seventeen-years with SCM, such a tenure imposed an implied duty of good faith upon his employer.\textsuperscript{182} In affirming the trial court's decision, the court declined to impose

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\textsuperscript{173} Wymer, 1999 WL 731591, at *8.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. (citing McCarthy v. Louisville Cartage Co., 796 S.W.2d 10, 12 (Ky. App. 1990)).
\textsuperscript{178} See Wymer, 1999 WL 731591, at *8.
\textsuperscript{179} 692 S.W.2d 814 (Ky. Ct. App. 1985).
\textsuperscript{180} Id. at 815.
\textsuperscript{181} See id.
\textsuperscript{182} Id.
such an implied duty upon SCM, reasoning that terminable at-will employment in Kentucky "may be ended at any time, with or without cause." 183

7. Negligent Hiring, Retention, And Supervision Of Employees

As far back as 1908, Kentucky courts have adhered to the following general rule:

The master must exercise ordinary care in the selection of his servants and if he fails to exercise such care, and one of the servants is injured by the incapacity of another servant, the master is liable, but the incapacity of the fellow servant must relate to the duties required of him by the master. 184

However, later cases in Kentucky suggested that, in situations where an employer was negligent in hiring an incompetent or dangerous employee, the employer could not be liable based on such negligence when the employee injured a third person. An example is the 1947 case of Central Trucking Sys., Inc. v. Moore. 185

In Oakley v. Flor-Shin, Inc., Holly Oakley, who was working as a part-time employee at a K-Mart department store in Versailles, Kentucky, was sexually assaulted by William Bayes, an employee of Flor-Shin, Inc., a company which had a contract with K-Mart to maintain its floors. 186 Oakley sued Flor-Shin, seeking damages for its negligence in hiring Bayes, a person she alleged was "incompetent and unfit to perform in the capacity he was hired because of his malicious, dangerous, and violent nature." 187 Woodford County Circuit Court, relying on Central Truckaway, granted Flor-Shin's motion for summary judgment, holding that, because Bayes' alleged acts did not result in an injury to a fellow servant (but only to a third party), Flor-Shin was not liable for negligent hiring, retention, or supervision. 188

On appeal, Flor-Shin maintained that, in Kentucky, an employer can never be liable for negligent hiring, retention, or supervision, when the harm is to a third party. 189 Oakley argued that Flor-Shin knew, or should have known, that Bayes was unfit for the position of employment which he held, and that his retention in that job created an unreasonable risk of harm. 190

In particular, Oakley relied on the following evidence: (1) Bayes' criminal record, prior to being hired by Flor-Shin, included convictions for burglary, theft, and bail-jumping; (2) Bayes had been arrested for criminal attempt to commit rape and for carrying a concealed deadly weapon; (3) Flor-Shin had actual

183 Id.
184 Ballard's Adm'x v. Louisville & N.R. Co., 110 S.W. 296, 297 (Ky. 1908).
185 201 S.W.2d 725, 728 (Ky. 1947).
186 964 S.W.2d 438 (Ky. Ct. App. 1998).
187 See id.
188 Id. at 438-39.
189 201 S.W.2d at 725 (Ky. 1947).
190 Oakley, 964 S.W.2d at 439-40.
191 Id. at 439.
192 Id. at 442.
knowledge of Bayes' criminal history, or should have known of such criminal history had it conducted a criminal background check pursuant to its contract with K-Mart; and (4) Flor-Shin knew that Bayes would likely be inside the K-Mart store with a single K-Mart employee.\textsuperscript{193}

The court rejected Flor-Shin's reliance on \textit{Central Truckaway}, finding that it neither expressly addressed nor settled the issue regarding the viability of the tort of negligent hiring.\textsuperscript{194} In reaching the conclusion that Kentucky did recognize a tort of negligent hiring based on injuries to third persons, the court first analyzed a line of cases affirming the proposition that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other person."\textsuperscript{195} Second, the court looked to other jurisdictions, finding that the tort of negligent hiring is generally recognized.\textsuperscript{196} Finally, the court relied on the Restatement (Second) of Agency § 213 (1958), which states: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[]."\textsuperscript{197} Based on the previously cited authorities, the court concluded that Kentucky does recognize a tort for negligent hiring, retention, and supervision.\textsuperscript{198} The court, therefore, reversed and remanded the trial court's ruling, holding that in order to succeed on a claim of negligent hiring, the plaintiff must prove that (1) "[the employee] was unfit for the job for which he was employed, and (2) . . . his placement or retention in that job created an unreasonable risk of harm to [the plaintiff]."\textsuperscript{199}

In \textit{Roman Catholic Diocese of Covington v. Secter},\textsuperscript{200} John Secter attended Covington Latin School (CLS), which was operated by the Roman Catholic Diocese of Covington (the Diocese).\textsuperscript{201} On several occasions, Secter was touched in a "sexually and inappropriate manner" by Earl Bierman, a high school teacher.

\begin{footnotesize}
\footnotetext[193]{\textit{id}.}
\footnotetext[194]{\textit{id}. at 441.}
\footnotetext[195]{Waldon v. Housing Authority of Paducah, 854 S.W.2d 777, 778 (Ky. Ct. App. 1991); Grayson Fraternal Order of Eagles, Inc. v. Claywell, 736 S.W.2d 328, 332 (Ky. 1987); M & T Chemicals, Inc. v. Westrick, 525 S.W.2d 740, 741 (Ky. 1974).}
\footnotetext[197]{Oakley, 964 S.W.2d at 442 (citing \textit{RESTATEMENT (SECOND) OF AGENCY} § 213 (1958)).}
\footnotetext[198]{See \textit{id}.}
\footnotetext[199]{\textit{Id}.}
\footnotetext[200]{966 S.W.2d 286 (Ky. Ct. App. 1998).}
\footnotetext[201]{See \textit{id}.}
\end{footnotesize}
and guidance counselor at CLS. Though the last incident occurred in July 1976 (roughly six months before Secter turned eighteen), Secter did not disclose the incidents to anyone until 1992. Due to television reports in 1992, Secter learned that Bierman had sexually abused other students as well. Secter sued the Diocese in Kenton Circuit Court, seeking damages for the negligent hiring, retention, and supervision of Bierman. The diocese was ordered, during the discovery phase of the trial, to produce Bierman's "Canon 489" files, which revealed that the diocese had received reports that Bierman had sexually abused students prior to Secter's attendance at CLS. No disciplinary action had been taken against Bierman, nor were the incidents disclosed to students, parents, or state authorities. Ultimately, the jury awarded Secter $50,000 in compensatory damages and $700,000 in punitive damages; the jury also apportioned fault, placing seventy-five percent of the fault on the diocese and twenty-five percent on Bierman. The diocese appealed.

While Secter's claim was based on personal injury and, therefore, subject to the one-year statute of limitations, his action was brought seventeen years after the last incident with Bierman. On appeal, the diocese argued that the trial court incorrectly allowed the jury to determine that the statute of limitations was tolled under KRS § 413.190(2), which provides:

When a cause of action... accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.

Secter argued that, because it not only failed to report Bierman's sexual abuse, but also concealed such information in secret files, the diocese should have been estopped from relying on the statute of limitations. The diocese argued that concealment alone was insufficient to toll the statute of limitations, and that, in order to toll the statute of limitations, the concealment must "in point of fact" obstruct the plaintiff from instituting suit during the limitations period. The court rejected the diocese's strict interpretation of the statute, finding that the statute of limitations can be tolled whenever a defendant conceals information

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202 Id.
203 Id.
204 Id. at 287. Bierman was later convicted of twenty-eight counts involving the sexual abuse of minors. Id.
205 Id.
206 See Secter, 966 S.W.2d at 287-88.
207 Id.
208 Id.
209 KY. REV. STAT. ANN. § 413.140(1)(a) (Banks-Baldwin 2000).
210 See Secter, 966 S.W.2d at 288.
211 Id. at 290.
212 KY. REV. STAT. ANN. § 413.190(2) (Banks-Baldwin 2000).
213 See Secter, 966 S.W.2d at 290.
214 Id.
that obstructs the plaintiff's ability to institute a cause of action. While the
diocese had knowledge of Bierman's history of sexual abuse, rather than taking
disciplinary action or notifying authorities, it kept the information concealed.
The court concluded that Secter, who did not learn of the diocese's concealment
until 1992, neither knew nor had reason to know that he had a potential cause
of action until that time. Therefore, the trial court correctly tolled the statue of
limitations.

Secter also argued that, since apportionment of fault between negligent and
intentional tortfeasors was not required, the diocese and Bierman should have
been held jointly and severally liable for the entire damages. However, the
court pointed out that the adoption of comparative fault "has established that
liability among joint tortfeasors in negligence cases is no longer joint and several
but is several only." Likewise, the court declined to recognize a distinction
between negligent and intentional tortfeasors.

In Stalbosky v. Belew, William Belew, who worked for Three Rivers
Trucking Company (Three Rivers), picked up Myra Stalbosky, who was stranded
due to automobile failure, and raped and murdered her in the cab of his truck.
The administrator of Myra Stalbosky's estate, Michael Stalbosky, brought an
action in the United States District Court for the Eastern District of Kentucky
against Three Rivers for negligently hiring and retaining Belew. The district
court granted Three River's motion for summary judgment, and Stalbosky
appealed.

Belew had an extensive criminal history. In 1991, he had been convicted
of arson and sentenced to three years in prison. Later in 1991, a former
girlfriend of Belew, Patricia Buchanan, alleged that he had struck her, tied her
feet, and pulled her out of the house by her hair. In 1995, Belew entered the
home of another former girlfriend, placed a gun to her head, and attempted to
rape her; after being arrested, Belew escaped, but was recaptured and charged
with aggravated assault and escape. On April 27, 1995, the day after his

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215 Id.
216 Id.
217 Id.
218 Id.
219 See Secter, 966 S.W.2d at 291.
220 Id. (citing Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 27 (Ky. 1990)).
221 See Secter, 966 S.W.2d at 291.
222 205 F.3d 890 (6th Cir. 2000).
223 See id. at 892.
224 Id.
225 Id.
226 Id.
227 Id. Belew was released on probation after serving ninety-days. Id.
228 See Stalbosky, 205 F.3d at 892. Though Buchanan swore out a complaint describing the events,
it was later dismissed. Id.
229 Id. On April 26, 1995, Belew was sentenced to eleven months and twenty-nine days of
incarceration, the majority of which was suspended. Id.
sentencing for aggravated assault and escape, Belew began a hauling assignment for Three Rivers, during which the rape and murder of Stalbosky occurred.230

Before hiring Belew as a full-time truck driver in 1994, Three Rivers consulted Belew's previous employer, analyzed his driving record, and conducted drug testing.231 Though Belew had been convicted of arson in 1991, on his application for employment with Three Rivers, he denied ever being convicted of a felony.232

The Sixth Circuit Court of Appeals, applying Kentucky law and relying on Kentucky's earlier decision in Oakley,233 first noted the two elements for a cause of action based on negligent hiring and retention: "(1) the employer knew or reasonably should have known that the employee was unfit for the job for which he was employed, and (2) the employee's placement or retention at that job created an unreasonable risk of harm to the plaintiff."234 In support of the first element of the test, Stalbosky argued that the district court erroneously excluded, as inadmissible hearsay, three affidavits which demonstrated Three River's knowledge of Belew's violent history.235

After reviewing the three affidavits, the court agreed with the district court that two of the affidavits were inadmissible hearsay.236 However, the court disagreed with the district court's conclusion that the third affidavit, sworn out by Glenn Boggs, a detective with the Kentucky State Police, constituted inadmissible hearsay.237 In the affidavit, Boggs stated that an owner of Three Rivers, Sonny Crutcher, told him the following:

I am ashamed at what happened. This is what happens when you try to give someone a chance. [Belew's] dad told me that [Belew] had served some time in prison and had been in quite a bit of trouble over fighting with his former girl-friends. [Belew's] dad said [Belew] was trying to straighten up, so I gave him a chance.238

Additionally, the affidavit quoted Crutcher admitting that, during a conversation with Belew's father, he had been informed that Belew had spent time in a behavioral health hospital at a younger age due to drug addiction and an uncontrollable temper.239 Stalbosky argued that, because the affidavit contained

230 Id.
231 Id.
232 Id.
233 964 S.W.2d 438 (Ky. Ct. App. 1998).
234 Stalbosky, 205 F.3d at 894.
235 See id. The first affidavit, by Phillip Blakeley, a private investigator hired by Stalbosky, stated that Belew admitted that the owners of Three Rivers knew of his criminal history, but told him not to list it on his application; the Court of Appeals ruled that the statements in the affidavit constituted inadmissible hearsay. Id. The second affidavit, by James Noteworthy, a former driver for Three Rivers, contained a statement by Noteworthy that "it was common knowledge at the company that [Belew's] girlfriend had him arrested and put in jail." Id. The court also upheld the district court's ruling that the statement constituted inadmissible hearsay. Id. at 895. The third affidavit, by Glenn Boggs, a detective with the Kentucky State Police, is discussed above.
236 Id. at 894-95.
237 Id. at 895.
238 Id.
239 Id.
statements made by Crutcher, a party-opponent, it was admissible under Federal Rule of Evidence section 801(d)(2)(D), which provides:

(D) a statement is not hearsay if...(2) the statement is offered against a party and is...(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]240

The court ultimately agreed with Stalbosky, finding that the Bogg's recollections of Crutcher's comments were not hearsay and, therefore, were admissible as an admission of a party-opponent.241 However, the court also found that the district court's error was not grounds for reversal.242 In essence, according to the court, Bogg's affidavit demonstrated that, when Three Rivers hired Bewel in 1994, the company may have known that (1) Belew had been convicted of arson in 1991, (2) assault in 1991, and (3) at a younger age, he had been placed in a behavioral health hospital.243 Such evidence, concluded the court, was insufficient to satisfy the first element of the test—that Three Rivers knew or should have known that Belew was unfit for his job as a truck driver.244

Even if Stalbosky had satisfied the first element of the offense, the court pointed out that he would not have established the second element—that Belew's employment as a truck driver posed an unreasonable risk of harm to the plaintiff.245 Distinguishing the facts in Oakley, which involved a situation where an employee with an extensive criminal history, including rape, was placed inside a store alone with a female employee,246 the court reasoned that Belew's employment as a truck driver did not grant him "supervisory power over or special access to others," notably because picking up hitchhikers violated Three River's express policy.247 The court affirmed the district court's grant of summary judgment in favor of Three Rivers.

In Turner v. Pendennis Club,248 Malevinnie Turner brought an action in the Jefferson Circuit Court against her employer, The Pendennis Club, alleging damages from negligent training and supervision. The trial court, concluding that Kentucky did not recognize a tort based on negligent training and supervision, dismissed Turner's claim.249 Though the underlying facts in support of Turner's claim are not discussed in the opinion, the thrust of Turner's argument on appeal was that the trial court erred in dismissing her claim on the ground that Kentucky had not yet recognized a tort of negligent training and supervision.250 Citing two Kentucky decisions,251

241 See Stalbosky, 205 F.3d at 895.
242 Id.
243 Id. at 895-96.
244 Id. at 896.
245 Id.
246 See Oakley, 964 S.W.2d at 442.
247 Stalbosky, 205 F.3d at 896.
249 See id. at 121.
250 Id.
the appellate court agreed with Turner, holding that Kentucky had, in fact, acknowledged claims based on negligent training and supervision. Though the court withheld judgment as to whether she had stated a viable claim, the court reversed and remanded the trial court’s dismissal of Turner’s claim for negligent training and supervision.

In *Pennington v. Dollar Tree Stores, Inc.*, the plaintiff, Linda Pennington, along with three young children, had been shopping at Dollar Tree Stores, Inc. (Dollar Tree), and was stopped by the store’s manager as she attempted to leave. After asking to view the items in her bags, the manager alleged that Pennington had not paid for certain toys and candy. Pennington paid for her son’s toy but refused to pay for the candy. After Pennington left the store, the store manager summoned the police, and Pennington was arrested for petty theft and spent the night in jail. At a subsequent hearing, in exchange for all charges against her being dropped, Pennington stipulated that probable cause existed for the stop and subsequent charges. Pennington thereafter filed a complaint against Dollar Tree alleging negligent hiring.

Citing the familiar two-part test, the court noted that, in order for Pennington to succeed on her claim, she had to prove that (1) the Dollar Tree “knew, or reasonably should have known,” that the store manager was “unfit for the job for which [she] was employed,” and (2) that her position as a store manager “created an unreasonable risk of harm” to the plaintiff. The court concluded that not only had Pennington failed to produce any evidence that the store manager was incompetent, but she had also stipulated that the store manager had probable cause to notify the police. Accordingly, the court granted the Dollar Tree’s motion for summary judgment.

8. *Intentional Infliction Of Emotional Distress*

Kentucky first recognized the tort of intentional infliction of emotional distress in 1984. In acknowledging the tort, the Kentucky Supreme Court held

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252 See Turner, 19 S.W.3d at 121.

253 *Id.*


255 See *id.* at 712.

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.*

260 See *Pennington*, 104 F. Supp.2d at 712.

261 *Id.* at 715 (citing Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 442 (Ky. Ct. App. 1998)).

262 See *Pennington*, 104 F. Supp. 2d at 715.

263 *Id.*


265 See Craft v. Rice, 671 S.W.2d 247, 250 (Ky. 1984). Intentional infliction of emotional distress is also known as the tort of outrage in Kentucky.
that a plaintiff may have a cause of action, regardless of whether she suffers any
bodily injury, from intentional and unlawful interference with her rights.\textsuperscript{266} The
Court expressly adopted the Restatement (Second) of Torts, which provides:
"One who by extreme and outrageous conduct intentionally or recklessly causes
severe emotional distress to another is subject to liability for such emotional
distress, and if bodily harm to the other results from it, for such bodily harm."\textsuperscript{267}
The plaintiff, in order to successfully recover, must prove: (1) the wrongdoer
acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3)
there is a causal connection between the conduct and the emotional distress; and
(4) the emotional distress is severe.\textsuperscript{268}

In \textit{Kroger Co., v. Willgruber,}\textsuperscript{269} Andrew Willgruber had been employed by
the Kroger Company (Kroger) for thirty-two years.\textsuperscript{270} The dispute arose when a
new marketing manager ordered Willgruber to contact competitors and obtain
their price lists for the purpose of setting prices.\textsuperscript{271} Though Willgruber initially
refused, the plant manager ordered him to comply, and Willgruber set the prices
as ordered.\textsuperscript{272} Subsequently, while attending a luncheon with the plant manager
and one of Kroger's senior personnel officers, Wayne Neal, Willgruber was
presented with a resignation letter and severance package.\textsuperscript{273} The severance
package was contingent, however, on Willgruber signing a release, which
discharged Kroger from all liability concerning Willgruber's separation from the
company.\textsuperscript{274} In addition, Willgruber was assured that, if he signed the release, he
would have a job as assistant sales manager at Anderson Bakery, located in South
Carolina.\textsuperscript{275} Ultimately, Willgruber was informed that if he did not resign and
sign the release, he would be terminated.\textsuperscript{276}

Although Willgruber made no immediate decision, three-days later, with
friends and co-workers present, he was forced to clean out his desk.\textsuperscript{277}
Thereafter, Willgruber called Neal, informed him that he was "mighty sick," and
asked if the job offer for employment in South Carolina was still available.\textsuperscript{278}
Neal thereupon arranged for Willgruber to fly to South Carolina in order to meet
Jack Rosenberg, the Anderson plant manager.\textsuperscript{279} Rosenberg would later testify
that not only was he solely in charge of hiring, but he also had not authorized

\textsuperscript{266} \textit{Id.} at 249.
\textsuperscript{267} \textit{Id.} at 251 (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 46(1)).
\textsuperscript{268} \textit{See Craft}, 671 S.W.2d at 250 (relying on two cases from Virginia to establish the elements:
S.E.2d 145 (Va. 1974)).
\textsuperscript{269} 920 S.W.2d 61 (Ky. 1996).
\textsuperscript{270} \textit{See id.}
\textsuperscript{271} \textit{Id.}
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{See Kroger Co.,} 920 S.W.2d at 63.
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.}
Neal to make a job offer to Willgruber. Upon returning home from South Carolina, Willgruber experienced a “dramatic, emotional breakdown.” Concerned for husband’s health, Mrs. Willgruber telephoned Neal, who insisted that Willgruber needed to “sign the papers.” When Willgruber subsequently filed for disability benefits with his insurance carrier, Neal attempted to persuade the carrier to deny his benefits; however, the carrier determined that it was obligated to pay the benefits. Willgruber sued Kroger in Warren Circuit Court, seeking damages for intentional infliction of emotional distress; after judgment was entered for Willgruber by the trial court and affirmed by the Court of Appeals, discretionary review was granted by the Kentucky Supreme Court.

The Court began by listing the four elements that must be met in order for a plaintiff to prevail on a claim of intentional infliction of emotional distress: (1) the wrongdoer’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality, (3) there must be a causal connection between the wrongdoer’s conduct and the emotional distress, and (4) the emotional distress must be severe. Reasoning that its conduct did not offend generally accepted standards of decency and morality, Kroger’s primary argument was that the evidence was insufficient to support the second element. Willgruber, on the other hand, argued that Kroger purposely attempted to coerce him into signing the release documents in order to exonerate Kroger from liability.

Relying on the Restatement (Second) of Torts, the court reasoned that extreme and outrageous conduct “may arise from the actor’s knowledge that the other party is peculiarly susceptible to emotional distress, by reasons of some

\[280\] Id.
\[281\] See Kroger Co., 920 S.W.2d at 63. A psychotherapist diagnosed Willgruber as suffering from severe, disabling depression. Id.
\[282\] Id.
\[283\] Id.
\[284\] Id. at 65 (citing Craft v. Rice, 671 S.W.2d 247, 249 (Ky. 1984)).
\[285\] See Kroger Co., 920 S.W.2d at 65.
\[286\] Id. at 66. The Court summarized Willgruber’s evidence as follows:

In order to induce Willgruber to sign a full release, Kroger repeatedly misrepresented to Willgruber that he would be eligible for the position of assistant sales manager at the Anderson Bakery, knowing full well that no such position was available...[and Kroger] proceeded with sending Willgruber to Anderson, South Carolina, fully cognizant that no job would materialize. When Willgruber returned home, he suffered a complete mental breakdown. This was brought to Neal’s attention by Mrs. Willgruber...Neal pressured Mrs. Willgruber to have her husband ‘sign the papers.’ The next morning, Neal telephoned the Anderson, South Carolina, plant and falsely stated that Willgruber had no interest in the job. As a result of Kroger’s actions, Willgruber experienced a real and disabling depression. His psychotherapist recommended that he be placed on total disability. Realizing Willgruber was without income, Neal had conversations with the disability insurance company’s representatives calculated to wrongfully defeat or delay the payment of disability benefits to which Willgruber was entitled...Neal’s plan, to delay the payment of disability benefits, had its desired effect of causing Willgruber further anguish. In fact, this anguish was so severe that the disability insurance company’s own examining physician found it medically necessary to engage Willgruber in a non-suicide pact.

Id.
physical or mental condition of peculiarity." Though Kroger was certainly cognizant of Willgruber’s emotional status, it continued to coerce Willgruber into signing the release. Such conduct, the Court held, “constitutes the very essence of the tort of outrage.” The Court affirmed the decision of the Court of Appeals, awarding Willgruber $70,000 for the intentional infliction of emotional distress.

In Brewer v. Hillard, Kenneth Hillard worked as a local deliveryman for Consolidated Freightways Corporation (CF). Jeff Brewer, who was also employed by CF, worked as a dispatcher-supervisor. Though there was initially no problem between Hillard and Brewer, after several months, Brewer began calling Hillard sexually explicit names: Brewer would grab Hillard’s buttocks and comment, “why don’t you give me some of that ass;” and Brewer would rub his crotch and make requests to Hillard for oral and anal sex. Hillard was subsequently hospitalized for two to three days for heart papilations. After this brief hospitalization, Hillard returned to work, and Brewer’s conduct continued. Thereafter, Hillard visited Dr. Santa-Teresa, who diagnosed Hillard with “severe depression secondary to job stress.” Hillard later brought an action in the Fayette County Circuit Court against Brewer, seeking damages for intentional infliction of emotional distress. The trial court found in favor of Hillard, and Brewer appealed.

The court first set forth the four-part test that a plaintiff must satisfy in order to recover for intentional infliction of emotional distress: (1) the plaintiff must show that the defendant’s conduct was intentional or reckless, (2) the conduct must be so outrageous and intolerable so as to offend generally accepted standards of morality and decency, (3) a causal connection must exist between the conduct complained of and the distress suffered, and (4) the resulting emotional distress must be severe. Brewer’s chief contention was that, since the evidence was insufficient to establish each of the elements, he was entitled to summary judgment. As for the first element, Brewer argued that he only intended to add humor to the workplace. However, the court rejected Brewer’s argument, finding that if not intentional, his conduct was certainly reckless.

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287 Id. at 67 (citing Restatement (Second) Of Torts § 46 cmt. f (1977)).
288 Kroger Co., 920 S.W.2d at 67.
289 See id.
291 See id.
292 Id.
293 Id. at 4.
294 Id. at 5. Dr. Gus Bynum testified that Hillard’s problems were likely caused by high caffeine intake and stress. Id.
295 Id.
296 See Hillard, 15 S.W.3d at 5.
297 Id. at 6 (citing Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d 1, 2-3 (Ky. 1990)).
298 See Hillard, 15 S.W.3d at 6.
299 Id.
300 Id.
Second, considering Brewer’s lewd acts and name calling, as well as his unsolicited and unwanted requests for homosexual sex, the court had no problem finding sufficient evidence that Brewer’s conduct was outrageous and intolerable.\textsuperscript{301} The court described the case as “one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”\textsuperscript{302} Third, since both of the doctors who treated Hillard specifically noted his complaints of problems at work, diagnosed him with problems relating to anxiety and stress, and prescribed medication for such problems, the court found that Hillard had presented sufficient evidence regarding the causal connection between Brewer’s conduct and Hillard’s emotional distress, and the severity thereof.\textsuperscript{303}

Relying on \textit{Rigazio v. Archdiocese of Louisville},\textsuperscript{304} Brewer argued that the tort of intentional infliction of emotional distress was not available to Hillard, since such a cause of action is merely a gap-filler, which is not available when traditional torts, such as assault and battery, afford a remedy.\textsuperscript{305} While the court agreed that the tort of intentional infliction of emotional distress—which provides a remedy when other torts are inadequate—acts as a gap-filler, it also pointed out that, when conduct is intended solely to cause extreme emotional disturbance to the plaintiff, the tort of intentional infliction of emotional distress provides the appropriate cause of action.\textsuperscript{306} Although battery requires an unwanted touching, and assault requires the threat of touching, the tort of intentional infliction of emotional distress only requires an intent to cause extreme emotional distress to the plaintiff.\textsuperscript{307} Finding sufficient evidence that Brewer’s intent was to intimidate Hillard, rather than to simply touch or threaten him, the court held that the cause of action of intentional infliction of emotional distress was appropriate.\textsuperscript{308}

In \textit{Wymer v. JH Properties, Inc.},\textsuperscript{309} Linda Wymer, who worked at Jewish Hospital as an operating room technician, was kicked by a patient who was coming out of anesthesia, resulting in an injury to Wymer’s shoulder.\textsuperscript{310} Wymer thereafter filed both a worker’s compensation claim and a negligence claim.

\textsuperscript{301} \textit{Id.} at 6-7.

\textsuperscript{302} \textit{Id.} at 7 (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 46 cmnt. d (1965)).

\textsuperscript{303} \textit{See Hillard,} 15 S.W.3d at 7.

\textsuperscript{304} 853 S.W.2d 295 (Ky. Ct. App. 1993).

\textsuperscript{305} \textit{See Hillard,} 15 S.W.3d at 7.

\textsuperscript{306} \textit{Id.}

\textsuperscript{307} \textit{Id.}

\textsuperscript{308} \textit{Id.}


\textsuperscript{310} \textit{See id.}
against Jewish Hospital. Subsequently, Wymer was informed by Jewish Hospital’s director of human resources that Wymer had eight days to find a permanent job at Jewish Hospital or her employment would be terminated. Though a meeting was scheduled between Wymer and a human resources director, the director refused to meet with Wymer because Wymer was accompanied by her attorney. As a result, Wymer was unable to obtain a permanent job with Jewish Hospital, and was terminated. Wymer then brought an action in the Shelby County Circuit Court against JH Properties, Inc.—a Kentucky Corporation doing business as Jewish Hospital Shelbyville (Jewish)—as well as several director and supervisors employed by Jewish, seeking damages for intentional infliction of emotional distress. The trial court granted summary judgment in favor of JH Properties, Inc.

On appeal, citing the Restatement (Second) of Torts, the court defined the tort as “the intentional or reckless causation of severe emotional distress by outrageous, extreme and intolerable conduct by the defendant upon the plaintiff.” Noting that even gross negligence on the part of the defendant is insufficient to satisfy the tort, the court asserted that the defendant’s conduct must be “outrageous in character . . . extreme in degree . . . and beyond all bounds of decency.” Based on the foregoing standards, the court held that the mere act of terminating Wymer did not satisfy the element of “outrageous conduct.” Additionally, the court noted that there was no evidence that JH Properties, Inc., acted either intentionally or recklessly, nor was there evidence that Wymer suffered severe emotional distress. Consequently, the court affirmed the trial court’s dismissal of Wymer’s claim of intentional infliction of emotional distress.

In Pennington v. Dollar Tree Stores, Inc., the plaintiff, Linda Pennington, who had been arrested for petty theft after leaving a Dollar Tree Store, Inc. (Dollar Tree), filed a complaint in the United States District Court for the Eastern District of Kentucky against Dollar Tree, alleging damages based on intentional infliction of emotional distress. In exchange for having the criminal charges against her dropped, Pennington stipulated that probable cause existed for the stop and subsequent charges. The court ruled against Pennington on her claim of intentional infliction of emotional distress, finding that her stipulation in

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311 Id. at *2.
312 Id.
313 Id.
314 See Wymer, 1999 WL 731591, at *1.
315 Id. at *1.
316 Id.
317 Id. at 6 (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).
318 Wymer, 1999 WL 731591, at *6 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).
320 See id.
322 See id. at 712.
323 Id.
regard to probable cause clearly undermined her argument that Dollar Tree acted outrageously or recklessly.\textsuperscript{324}

9. Defamation\textsuperscript{325}

In Kentucky, defamation consists of two distinct torts, libel and slander,\textsuperscript{326} both of which require the following elements: (1) a false and defamatory statement; (2) about the plaintiff; (3) communicated to a third person recklessly or negligently; (4) which results in injury to the plaintiff’s reputation; (5) that is made without privilege.\textsuperscript{327}

In \textit{Columbia Sussex Corp. v. Hay},\textsuperscript{328} the plaintiff, Laverne Hay, was working as a manager at the Best Western Hotel of Richwood, Kentucky, which was robbed on February 26, 1979.\textsuperscript{329} During the robbery, the perpetrator revealed knowledge of a unique alarm system, which could be activated by the lifting of certain bills from the cash register.\textsuperscript{330} William Yung, president of Columbia Sussex Corporation (Columbia Sussex), which owned and operated the Best Western Hotel of Richwood, believed that the robber, based on his or her knowledge of the alarm system, must have had inside information.\textsuperscript{331} As a result, Yung informed Hay that lie detector tests would be given to her and other employees.\textsuperscript{332} When Hay asked whether Yung believed that she or other employees were involved in the robbery, Yung responded, “[T]hat is exactly what I am saying, you will be surprised to find out which one did it;” during this incident, other employees were allegedly present.\textsuperscript{333} Also, David Diehl, general manager of Columbia Sussex, allegedly stated that he agreed with Yung that either Hay or one of her subordinates was involved in the robbery; Hay testified

\begin{thebibliography}{100}
\bibitem{fn:324} Id. at 715.
\bibitem{fn:325} See \textsc{David Elder}, \textit{Kentucky Tort Law: Defamation and the Right to Privacy} (1983); \textsc{David Elder}, \textit{Kentucky Defamation and Privacy Law – The Last Decade}, 23 N. Ky. L. Rev. 231 (1996); \textsc{David Elder}, \textit{Defamation: A Lawyer’s Guide} (West 1993); See also Bales and Hamilton supra note 264.
\bibitem{fn:326} Libel is a written defamatory statement, Smith v. Pure Oil Co., 128 S.W.2d 931, 932 (Ky. 1939), whereas slander is a spoken defamatory statement, Elkins v. Roberts, 242 S.W.2d 994 (Ky. 1951).
\bibitem{fn:327} See \textit{Columbia Sussex Corp. v. Hay}, 627 S.W.2d 270, 273 (Ky. Ct. App. 1981) ("Four elements are necessary to establish an action: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation."); see also William S. Haynes, Ky. Jur. § 8-2, 168 (Lawyers Co-op. 1988) ("[I]t is necessary to establish (a) a false and defamatory statement (b) concerning the plaintiff (c) was made to a third person (d) with fault or in a negligent manner (e) which was unprivileged and (f) which resulted, either directly or indirectly, in injury to the reputation of plaintiff."); accord \textsc{Restatement (Second) Of Torts} § 558 (1977) ("There must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."). Because this Restatement preceded the Supreme Court’s decision in \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749 (1985), fault probably is no longer an element of plaintiff’s claim in purely private cases.
\bibitem{fn:328} 627 S.W.2d 270 (Ky. Ct. App. 1981).
\bibitem{fn:329} See id.
\bibitem{fn:330} Id. at 272.
\bibitem{fn:331} Id.
\bibitem{fn:332} Id.
\bibitem{fn:333} Id.
\end{thebibliography}
that other employees were likewise present during this incident.\textsuperscript{334} Ultimately, polygraph examinations revealed no connection between Hay, or any other employee, and the robbery.\textsuperscript{335} Hay thereafter brought an action in Boone Circuit Court against Columbia Sussex, seeking damages for slander. The jury found in favor of Hay, and Columbia Sussex appealed.

On appeal, the court engaged in an elaborate analysis of the law of defamation, which began by listing the four elements necessary to establish a cause of action: "(1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation."\textsuperscript{336} From there, the court discussed the essential distinction between slander and slander per se.\textsuperscript{337} Whereas mere slander requires a showing of "special damages" in order to show an injury to the plaintiff's reputation, slander per se, based on the words themselves, is actionable without a showing of special damages.\textsuperscript{338} Based on the imputations that Hay was involved in a criminal offense, the court found sufficient evidence that the defendant's words were slanderous per se.\textsuperscript{339}

Next, in determining whether Hay had standing to pursue a defamation claim, the court analyzed whether she had been sufficiently identified by the defendant's words.\textsuperscript{340} As a general rule, when defamatory statements are directed at a class of individuals, the plaintiff must prove that she was personally defamed.\textsuperscript{341} However, when a statement defames all members of a relatively small or restricted group, any member of such group has standing to sue.\textsuperscript{342} Based on the comparatively small group of employees of which Hay was a member, as well as the fact that the defendants' statements were directed at the group as a whole, the court found that Hay had presented sufficient evidence to allow her standing to assert her claim of defamation.\textsuperscript{343}

Lastly, Columbia Sussex contended that, since a qualified privilege attached to matters within the employment relationship, the trial court erred in failing to instruct the jury on such a defense.\textsuperscript{344} Hay, on the other hand, argued that the trial court's instruction to the jury clearly incorporated any benefit that would have been derived from an instruction on the defense of privilege.\textsuperscript{345} The court agreed

\textsuperscript{334} See Columbia Sussex Corp., 627 S.W.2d at 273.
\textsuperscript{335} Id.
\textsuperscript{336} Id.
\textsuperscript{337} Id. at 274.
\textsuperscript{338} Id. In terms of slander per se, the words "must tend to expose the plaintiff to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right-thinking people and to deprive him of their friendship, intercourse and society. But it is not necessary that the words imply a crime or impute a violation of laws, or involve moral turpitude or immoral conduct." Id. (citing Digest Publ'g Co. v. Perry Publ'g Co., 284 S.W.2d 832, 834 (Ky. 1955)).
\textsuperscript{339} See Columbia Sussex Corp., 627 S.W.2d at 274.
\textsuperscript{340} Id.
\textsuperscript{341} Id. (citing Louisville Times v. Stivers, 68 S.W.2d 411, 412 (Ky. 1934)).
\textsuperscript{342} See Columbia Sussex Corp., 627 S.W.2d at 274-275 (citing Louisville Times v. Stivers, 68 S.W.2d 411, 412 (Ky. 1934)).
\textsuperscript{343} See Columbia Sussex Corp., 627 S.W.2d at 275.
\textsuperscript{344} Id.
\textsuperscript{345} Id. The trial court's instruction to the jury was as follows:

If you believe from the evidence that on the occasions (sic) referred to in the evidence the
that a qualified privilege did exist. As the privilege was qualified, rather than absolute, the court emphasized three restrictions: (1) any defamatory statements on the part of the defendant must have related exclusively to their investigation of the robbery; (2) the statements could not be over-publicized; and (3) the statements could not be published with malice. Next, in terms of the trial court’s instruction to the jury, the court found that it clearly did not include the defense of privilege. While the trial court’s instruction did encompass questions as to whether Columbia Sussex had acted prudently and confidentially, it did not provide the jury with the opportunity to determine whether the defendants’ statements, even if negligently published, had been overly publicized or made with malice. As a consequence, the court reversed and remanded for a new trial.

In Wyant v. SCM Corp., Phillip Wyant worked as a branch manager of SCM Corporation’s (SCM) retail outlet in Lexington, Kentucky. After Wyant was terminated, he brought an action in the Fayette County Circuit Court against SCM, alleging damages based on defamation. Wyant’s defamation claim was based on an internal report by SCM’s credit manager, which stated that Wyant dominated his store through “intimidation, sarcasm, and fear.” The trial court granted SCM’s motion for directed verdict, and Wyant appealed.

On appeal, the court pointed out two substantial deficiencies of Wyant’s defamation claim. First, Wyant produced no evidence indicating that SCM had ever published the statement to a third person. Second, being part of an internal document and a necessary means of communication within the workplace, the statement was protected by a qualified privilege; further, there

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If you do not so believe from the evidence, or if you believe from the evidence that the words and actions of the defendants, about which the plaintiff complains, were based upon facts detailed and prudently made in good faith and were spoken or done as confidentially as circumstances permitted, to aid in the detection of a crime, then the law is for the Defendants and you shall so find.

Id.

346 Id. The court’s finding that a qualified privilege existed rested on the following two facts: (1) a robbery had occurred at the defendants’ place of business; and (2) the robbery tended to indicate that one with inside knowledge was involved. Id.

347 Id. (citing Baker v. Clark, 218 S.W. 280 (Ky. 1920)).

348 See Columbia Sussex Corp., 627 S.W.2d at 276.

349 Id.


351 See id.

352 Id.

353 Id. at 815.

354 Id. at 816.

355 Id.
was no evidence, such as over-publication or malice, which would defeat the privilege.\(^{356}\) Accordingly, the court affirmed the directed verdict in favor of SCM.

In *Matthews v. Holland*,\(^{357}\) Mary Ann Matthews had been employed as a principal of the Morganfield Elementary School under a limited contract.\(^{358}\) After learning that her contract would not be renewed for the following year, Matthews asked David Holland, Superintendent of Union County public schools, to advise her as to the reasons for the nonrenewal of her contract.\(^{359}\) In response, Holland sent Matthews a letter, as well as several written complaints, which were comprised of evaluations of her performances as a principal.\(^{360}\) Because these documents also were provided to the Professional Standards Board, Matthews sued Holland in the Franklin County Circuit Court, alleging damages based on defamation.\(^{361}\) The trial court dismissed Matthews complaint, and she appealed.

On appeal, Holland argued that, pursuant to KRS § 161.120(2), he was required to provide the information to the Professional Standards Board.\(^{362}\) The statutory provision at issue provides:

(a) The superintendent of each local school district shall report in writing to the Education Professional Standards Board the name, Social Security number, position name, and position code of any certified school employee in his district whose contract is terminated or not renewed, for cause[.]

(b) The district superintendent shall inform the Education Professional Standards Board in writing of the full facts and circumstances leading to the contract termination or nonrenewal.\(^{363}\)

Matthews argued that, since KRS § 161.120(2)(b) and 161.120(a) have to be read together, the superintendent was only permitted to forward information to the Professional Standards Board regarding employees who had been terminated “for cause.”\(^{364}\)

The court affirmed the dismissal of Matthew’s complaint for two reasons.\(^{365}\) First, though the court agreed that the two sections of the statutory provision must be read together, it rejected Matthew’s interpretation of the statute, which would effectively prevent the Professional Standards Board from acquiring necessary information about an entire class of employees.\(^{366}\) Second, the court found that Holland, acting as a public official pursuant to a statute, was entitled
to an absolute privilege from defamation, regardless of whether the information provided to the Professional Standards Board was false.\textsuperscript{367} 

In \textit{Buchholtz v. Dugan},\textsuperscript{368} Wolfgang Buchholtz initiated an action in Fayette Circuit Court against the University of Kentucky (UK) and various university directors, seeking damages based on allegedly defamatory statements made by UK.\textsuperscript{369} In 1968, Buchholtz was hired by Robert Drake, Dean of the College of Engineering, as manager of the UK College of Engineering Machine Shop.\textsuperscript{370} Drake informed Buchholtz that he was permitted to conduct private consulting work, up to one day per week, as long as such private consulting did not impede on his UK duties or compete with local machine shops.\textsuperscript{371} Over the next several years, Buchholtz undertook various private jobs, using the machine shop and shop materials, as well as other machinists under his supervision to assist him in his private consulting work.\textsuperscript{372} Buchholtz likewise did not reimburse UK for the use of the shop machines, scrap materials, or the machinists' work.\textsuperscript{373} Subsequently, John Carrico, an employee in the Office of Management and Organization, conducted an internal audit, the results of which led to the termination of Buchholtz.\textsuperscript{374} The trial court dismissed Buchholtz's defamation claim, and Buchholtz appealed.\textsuperscript{375} 

On appeal, Buchholtz argued that the trial court erroneously granted UK's summary judgment motion on the issue of defamation.\textsuperscript{376} In particular, Buchholtz contended that a report prepared by UK's auditor, Carrico, was defamatory \textit{per se}.\textsuperscript{377} The auditor's report was as follows:

\begin{quote}
It appears, based upon testing and review of our records, observations, and interviews with various personnel and officials, that the Manager of the Machine Shop had machinists perform work for [his private consulting projects] with University resources and on University time for which he personally received payment.
\end{quote}

It appears the Machine Shop Manager is in violation of University Personnel Policy and Procedure 18.0 and K.R.S. 514.030, 514.070 and 517.110

\textsuperscript{367} \textit{Id}.
\textsuperscript{368} \textit{Id}.
\textsuperscript{369} \textit{Id}.
\textsuperscript{369} \textit{Id}.
\textsuperscript{370} \textit{Id}.
\textsuperscript{371} \textit{Id}.
\textsuperscript{372} \textit{Id}.
\textsuperscript{373} \textit{Id}.
\textsuperscript{374} \textit{Id}.
\textsuperscript{375} \textit{Id}.
\textsuperscript{376} \textit{Id}.
\textsuperscript{377} \textit{Id}.
regarding theft and misapplication of property. 378

The court began by noting that truth is an absolute defense to libel. 379 As such, the first statement was not defamatory, since Buchholtz conceded that he had used university machinists for his personal work. 380 As for the second statement, which claimed that Buchholtz may have been in violation of university policy as well as several criminal statutes, the court relied on Yancey v. Hamilton 381 which held: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." 382

Based on the previously cited rule, the court found that Carrico’s opinion did not imply the allegation of an undisclosed defamatory fact upon which the opinion was based; instead, the body of Carrico’s report was comprised of his detailed findings, which provided a basis for his conclusions and recommendations. 383 Consequently, the court affirmed the trial court’s summary judgment in favor of UK, ruling that the report was “pure opinion” and, therefore, entitled to an absolute privilege. 384

In Landrum v. Braun, 385 Robert Landrum was employed as a visiting professor at Kentucky State University. 386 When Landrum sought to become a tenured professor, he and Thomas Braun, acting Vice President of Academic Affairs, began exchanging hostile memoranda with one another. 387 In response to a memorandum written by Landrum, Braun wrote the following memorandum, which was sent to Landrum, as well as the Dean of the School of Business and the President of the university:

Someone has written an insulting and incoherent memorandum to me and signed your name to it. The memo misquotes me and whoever wrote it had the poor taste to discuss your personal business and try to use it as a reason for your employment. I am sending a copy to you so that you can pursue the matter of who forged your name as it is not your signature. Quite frankly, Robert, you have tried my patience and succeeded in reaching the limit. Your continued attacks upon my character, integrity, and judgment have led me to the conclusion that I cannot and will not recommend that you be appointed to a faculty position for 1991/92. I am putting you on notice that I will not entertain nor respond to any further correspondence from you on this matter. 388

378 Buchholtz, 977 S.W.2d at 27.
379 See id.
380 Id.
381 786 S.W.2d 854, 857 (Ky. 1989).
382 Buchholtz, 977 S.W.2d at 28 (citing Yancey v. Hamilton, 786 S.W.2d 854, 857 (Ky. 1989)).
383 See Buchholtz, 977 S.W.2d at 28.
384 Id.
385 978 S.W.2d 756 (Ky. Ct. App. 1998).
386 See id. at 757.
387 Id.
388 Landrum, 978 S.W.2d at 757.
Alleging that Braun's memorandum injured his reputation and future employment, Landrum sued in Franklin Circuit Court. The trial court granted Braun's motion to dismiss, finding that a qualified privilege applied to communications between employees in their place of employment.

On appeal, Landrum argued that the jury, rather than the trial judge, should have determined whether the memorandum constituted a "necessary communication" within the workforce. The court rejected Landrum's contention, holding that the question of "privilege is a matter of law for the court's determination." Accordingly, the court affirmed the dismissal of Landrum's complaint.

10. Drug Testing

In Smith v. Kentucky Unemployment Insurance Commission, Avalee Smith, who was employed by Fruit of the Loom, was required to submit to a drug test based on information that she allegedly used drugs during work hours. In order to comply with the employer's drug testing policy, Smith was required to sign a "Release of Liability," which stated: "In order to insure the accuracy of the testing procedure, I list below all drugs, whether prescription or not, that I have taken in the last two weeks." Though Smith later admitted that she had smoked marijuana the previous weekend, she did not list marijuana on the Release of Liability form. As a result, Smith was terminated based on the fact that the test was positive for marijuana, as well as the fact that she failed to honestly complete the form. Smith sought to receive unemployment benefits, which were denied by the Kentucky Unemployment Insurance Commission. After appealing to Russell County Circuit Court, Smith's claim was again denied, and she appealed.

Relying on KRS § 341.370(6), which asserts that only knowing violations will result in disqualification from receiving benefits, Smith argued that the employer's drug-testing policy had not been presented to her. However, the court rejected Smith's argument, finding that there was sufficient evidence, including the fact that Smith had signed a drug-free pledge card, to indicate that

389 Id. at 756.
390 Id. at 757.
391 Id.
392 Id.
393 Id.
394 See Bales and Hamilton, supra note 264.
396 See id. at 363.
397 Id.
398 Id.
399 Id.
400 Id.
401 See Smith, 906 S.W.2d at 363.
402 Ky. REV. STAT. ANN. § 341.370(6) (Banks-Baldwin 2000).
403 See Smith, 906 S.W.2d at 364.
Smith had knowledge of the employer's intention to maintain a drug-free workforce.404 As such, Smith's use of drugs constituted a knowing violation of KRS § 341.370(6).405

In addition, Smith contended that, since the drug policy was not properly published, her failure to honestly complete the release form could not be considered an independent ground for disqualification.406 The court likewise rejected this argument, holding that regardless of whether the drug policy was published, an employer has a rightful expectation that employees will truthfully respond to all inquiries.407 Consequently, the court affirmed the decision in favor of the Kentucky Unemployment Insurance Commission.408

In Cornette v. Commonwealth,409 Betty Cornette and other school bus drivers filed a declaratory judgment action questioning the constitutionality of mandatory drug testing of public school bus drivers.410 The defendants moved for summary judgment, which was granted.411

On appeal, the court found that drug and alcohol tests conducted by public-sector employers are recognized as searches under the Fourth Amendment, but only those searches that are unreasonable are proscribed.412 The court balanced the government's interest in ensuring the safety of school children against the privacy interests of public employee bus drivers.413 In such circumstances, the court found that the public employer has a need to discover hidden drug or alcohol use, and such interests are sufficiently compelling to justify the intrusion of privacy of the individual employee resulting from conducting the drug test.414 Accordingly, the court upheld the constitutionality of the drug testing.415

B. Statutory Claims

1. Workers' Compensation Retaliation

Kentucky Revised Statute § 342.197(1) prohibits an employer from retaliating against an employee who pursues a claim for workers' compensation. The statute provides that "(1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and

404 Id.
405 Id.
406 Id.
407 Id.
408 Id.
410 See id. at 504. The suit was against the Commonwealth of Kentucky, Kentucky Department of Education, State Board for Elementary and Secondary Education; Thomas C. Boysen, Commissioner; Board of Education of Jefferson County, Kentucky; Donald W. Ingwerson, and John Wilhoit. Id. at 502.
411 Id. at 505.
412 Id. at 508.
413 Id.
414 Id.
415 See Cornette, 899 S.W.2d at 508.
pursuing a lawful claim under this chapter." This provision codifies the holding of *Firestone Textile Co. v. Meadows*, in which the Kentucky Supreme Court, prior to the enactment of § 342.197(1), held that the Kentucky Workers' Compensation statute implied a tort action for retaliation.

A plaintiff, to prove workers' compensation retaliation, must show three things. First, she must show that she engaged in statutorily protected activity. She need not show that she has actually filed a formal claim for workers' compensation; it is sufficient that she intended to file a workers' compensation claim.

Second, the plaintiff must show that she was discharged. While there is no published Kentucky decision on point, it is probable, based on the language of § 342.197(1), that Kentucky courts would recognize a cause of action for a lesser adverse employment action such as a demotion.

Third, the plaintiff must show a causal connection between the protected activity and the adverse employment action. The Kentucky Supreme Court, in *First Property Management Corp. v. Zarebidaki*, held that the proper standard for causation is whether the impermissible reason for the adverse employment action "was a substantial and motivating factor." Thus, an employer may not escape liability merely by showing that the same adverse employment action would have been taken anyway.

The plaintiff can show the requisite causal connection in a variety of ways. For example, in *Willoughby v. Gencorp, Inc.*, the Kentucky Court of Appeals reversed a directed verdict for the employer where the employee had testified that the employer acted with hostility when the plaintiff presented a doctor's statement restricting his work-related activities due to a work-related injury, and the employer had fired the employee a week later. The *Willoughby* Court also held admissible the testimony of two workers who alleged that the employer had harassed them after they had suffered work-related injuries and sought benefits.

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417 666 S.W.2d 730 (Ky. 1983).
418 See id. at 733.
419 Id. at 733-34.
420 For cases listing the three elements of plaintiff's *prima facie* case, see *Lamb v. Bell County Coal Corp.*, 188 F.3d 508 (table), 1999 WL 717976 (6th Cir. Sept. 9, 1999); *Willoughby v. Gencorp, Inc.*, 809 S.W.2d 858, 861 (Ky. Ct. App. 1990).
421 See, e.g., *Lamb*, 1999 WL 717976 at *6 (plaintiff must show that "(1) the employee pursued a workers' compensation claim.").
422 See *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 189 (Ky. 1993).
423 Id. at 189.
424 See *Willoughby*, 809 S.W.2d at 861.
425 867 S.W.2d 185 (Ky. 1993).
426 Id. at 188.
427 See id.
428 809 S.W.2d 858.
429 See *Willoughby*, 809 S.W.2d at 862.
the Court noted that they were employed in the same plant and under the same management as the plaintiff.\footnote{See id. at 631.}

A plaintiff's personal beliefs or conclusions that there was a causal connection between the protected activity and the adverse employment action are insufficient to prove a claim of workers' compensation retaliation.\footnote{See id. at 632.} Similarly, if the employer can show that the plaintiff was discharged as a result of a neutral absence control policy, that will not qualify as a causal connection. For example, in \textit{Daniels v. R.E. Michel Co., Inc.},\footnote{White, 1997 WL 437092 at *2; Willoughby, 809 S.W.2d at 860; Bednarek v. United Food \\& Comm'1 Workers Int'l Union, Local Union 227, 780 S.W.2d 630 (Ky. Ct. App. 1989).} the Employee Handbook provided that an employee absent from work for more than a month for any reason must reapply to return to work.\footnote{See Richard A. Bales, \textit{The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution}, 77 BOSTON U. L. REV. 687, 712 (1997).} The United States District Court for the Eastern District of Kentucky held that because that policy applied to absences other than absences caused by work-related accidents (such as illness or military service), the policy did not discriminate on the basis of the pursuit of workers' compensation benefits.\footnote{No. 1998-CA-002052-MR, 2000 WL 331769 (Ky. Ct. App. Mar. 31, 2000).}

Some employers have argued that, when an employee is covered by a collective bargaining agreement, any claim she brings for workers' compensation retaliation is preempted by Section 301 of the Labor Management Relations Act.\footnote{See id. at *1.} Kentucky courts, and the federal courts applying Kentucky law, have uniformly rejected this argument.\footnote{Id. at 632.} This is consistent with the approach taken in other jurisdictions.\footnote{29 U.S.C. § 186(e).}

Recent decisions are consistent with the framework discussed above. In \textit{Noel v. Elk Brand Mfg. Co.},\footnote{Id.} Hilda Noel, a seamstress, was a twenty-year employee of Elk Brand.\footnote{Id.} She developed carpal tunnel syndrome, for which she filed a workers' compensation claim.\footnote{941 F. Supp. 629 (E.D. Ky. 1996).} Approximately thirty days after an evidentiary hearing on her claim, she, along with twenty-nine other employees, was laid off.\footnote{See id. at 63 1.} Twenty of these employees were laid off with the expectation of recall; Noel and nine others were laid off with a lesser expectation of recall.\footnote{Id. at 632.}

Noel sued Elk Brand in the Trigg County Circuit Court, alleging, among other things, workers' compensation retaliation. Elk Brand moved for summary

\begin{enumerate}
\item \footnote{See White v. General Elec. Co., 121 F.3d 710 (table), 1997 WL 437092 at *3 (6th Cir. Sept. 9, 1997); see also Lamb v. Bell County Coal Corp., 188 F.3d 508 (table), 1999 WL 717976 at *6 (6th Cir. 1999) (affirming grant of summary judgment on behalf of employer where the uncontradicted summary judgment evidence showed that the employer was motivated by the plaintiff's poor work performance rather than the plaintiff's pursuit of a workers' compensation claim).}
\item \footnote{941 F. Supp. 629 (E.D. Ky. 1996).}
\item \footnote{Id. at 631.}
\item \footnote{Id. at 632.}
\item \footnote{29 U.S.C. § 186(e).}
\item \footnote{White, 1997 WL 437092 at *2; Willoughby, 809 S.W.2d at 860; Bednarek v. United Food \\& Comm'1 Workers Int'l Union, Local Union 227, 780 S.W.2d 630 (Ky. Ct. App. 1989).}
\item \footnote{See Richard A. Bales, \textit{The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution}, 77 BOSTON U. L. REV. 687, 712 (1997).}
\item \footnote{See id. at *1.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\end{enumerate}
judgment, arguing that evidence that Noel had the lowest production average of any employee at its plant, and that this was the criterion Elk Brand had used in its layoff decision, demonstrated the lack of a causal connection between Noel’s layoff and her pursuit of a workers’ compensation claim. The trial court agreed, and granted Elk Brand’s motion for summary judgment. The Kentucky Court of Appeals affirmed, finding that “the circuit court correctly determined that the evidence of record, viewed in the light most favorable to Noel, does not support her claim.”

In Pike County Coal Corp. v. Ratliff, the plaintiff was J.C. Ratliff, the owner of Ratliff Construction. Ratliff had contracted with Pike County Coal to haul coal in Ratliff’s trucks. James Smith, one of Ratliff’s employees, injured his back while loading coal at one of Pike County Coal mines. Smith filed a workers’ compensation claim against a subsidiary of Pike County Coal instead of against Ratliff. Pike County Coal asked Ratliff to get Pike County Coal dismissed from the suit and to substitute Ratliff. Ratliff stonewalled. Meanwhile, Pike County Coal canceled the coal hauling contract, claiming that Ratliff had failed to provide proof that he had purchased workers’ compensation coverage and liability coverage on his coal trucks.

Ratliff sued Pike County Coal in the Trigg County Circuit Court, alleging a violation of KRS § 342.197(1). Ratliff claimed that the Pike County Coal’s proffered reasons for the cancellation of the hauling contract were pretextual, and that the real reason for the cancellation was his failure to harass Smith and to persuade him to drop his workers’ compensation claim. Pike County Coal moved for summary judgment, arguing that the workers’ compensation retaliation provision was not intended to protect an employer who was trying to shift the cost of its employee’s workplace injury to a general contractor. Ratliff countered that he was protected by the language of § 342.197(3), which provides that “[a]ny individual injured by any act in violation of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court . . .” The trial court agreed with Ratliff, and denied the summary judgment motion. After trial, a jury awarded Ratliff damages representing lost profits of $46,964, and the

443 See Noel, 2000 WL 331769, at *1, *3.
444 Noel, 1999 WL 331769, at *1, *3.
445 Id. at *3.
447 See id. at *1.
448 Id.
449 Id.
450 Id.
451 Id.
452 See Ratliff, 2000 WL 266699, at *1.
453 Id.
454 Id. at *2.
455 Id. at *3.
456 KRS § 342.197(3) (emphasis added).
457 Ratliff, 2000 WL 266699 at *3.
trial court awarded Ratliff's attorneys a fee of $32,745.45. Pike County Coal appealed.

The Kentucky Court of Appeals reversed, and remanded for dismissal of the complaint. The court agreed with the trial court that the "any individual" language of § 342.197(3) extended § 342.197(1) protection beyond an injured employee:

We can envision many situations in which an individual other than the injured employee, such as a co-worker, might be subjected to retaliation by the employer in an effort to impede the injured worker's pursuit of a workers' compensation claim. Clearly, to insure the integrity of the underlying policies of the statute, we would not hesitate to construe the "any individual" language to encompass any person who sought to protect his own rights to pursue a workers' compensation claim as well as any person who acted in support of another's pursuit of those rights and who suffered reprisals from the employer of the injured employee. However, the court held that the language of § 342.197(3) does not provide a cause of action to an employer "against a business with whom it has contracted, but which has no responsibility for the payment of workers' compensation benefits."

Because of the unique facts of Ratliff, the formal holding of the case probably is less significant than the discussion of the "any individual" language of § 342.197(3). Ratliff is the first case in which a Kentucky court has indicated that § 342.197(1) protection extends beyond an injured employee to persons who act on behalf on an injured employee. Though this language is dicta, it nonetheless represents a significant extension of the protection afforded by § 342.197(1).

2. Kentucky Whistle-Blower Statute

Kentucky Revised Statute (KRS) § 61.102(1) prohibits any reprisal by an employer against an employee who in good faith discloses to a governmental entity "any facts or information relative to an actual or suspected violation of any law." Section 61.102(2) prohibits any reprisal by an employer against an employee who supports another employee who makes a § 61.102(1) disclosure. Section 61.103(2) provides that an employee alleging a violation of § 61.102(1) or (2) may bring a civil action for injunctive relief or punitive damages or both.

458 Id. at *2.
459 Id. at *4.
460 Id. at *3.
461 Id. at *3.
462 See KY. REV. STAT. ANN. § 61.102(1) (Banks-Baldwin 2000). The Kentucky Supreme Court has held that this statute does not protect from discharge an employee who sues her employer for negligence. Boykins v. Housing Auth. of Louisville, 842 S.W.2d 527, 529 (Ky. 1992).
463 See KY. REV. STAT. ANN. § 61.102(2) (Banks-Baldwin 2000).
464 See KY. REV. STAT. ANN. § 61.103(2) (Banks-Baldwin 2000); see also KRS § 61.990(4) (stating that the Court "shall order, as it considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, exemplary or punitive
"Commonwealth v. Vinson" contains the Kentucky Supreme Court's most recent discussion of the Kentucky whistle-blower statute. This case involved two employees of the Kentucky Department of Agriculture who were demoted, without loss of pay or benefits, from pesticide inspector supervisors to pesticide inspectors. They sued the Department of Agriculture under the whistle-blower statute for an injunction requiring appointment to their previous positions and for punitive damages. The Franklin Circuit Court, apparently unsure whether the statute required a jury trial, impaneled an "advisory" jury. The trial judge adopted the jury verdict for the employees and awarded injunctive relief and $1 million in punitive damages. The Department of Agriculture appealed to the Court of Appeals, which affirmed.

The Department of Agriculture on appeal to the Kentucky Supreme Court, urged reversal on four grounds. First, the Department argued that the whistle-blower statute was unconstitutionally vague. The Court, in an opinion authored by Justice Donald C. Wintersheimer, rejected this argument, finding that the statute "does not fail to provide persons with adequate notice as to what conduct is prohibited, nor does it require a person of common intelligence to guess as to its meaning."

Second, the Department argued that the employees were not entitled to punitive damages absent an award of compensatory damages. The Court disagreed, holding that the disjunctive language of the statute indicated the General Assembly's intent that an award of compensatory damages not be a prerequisite for an award of punitive damages. The Court also held that the award of equitable relief would support the award of punitive damages.

Third, the Department of Agriculture argued that the employees were not entitled to a jury trial, and that the trial court erred by impaneling a jury. The Court, noting statutory silence regarding the right to a jury trial under the whistle-blower statute, held that plaintiffs suing under the statute are entitled to a jury trial. The Court also held that the trial court's use of an advisory jury had created only "harmless and nonprejudicial" error since the court for all practical purposes had treated the case like a regular jury trial.

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465 30 S.W.3d 162 (Ky. 2000).
466 See id. at 163-64.
467 Id. at 164. The court's opinion does not explain the factual basis of their complaint under the statute.
468 Id.
469 Id. at 163-64.
470 Id. at 164.
471 See Vinson, 30 S.W.3d at 164-65.
472 Id. at 164.
473 Id. at 165-67.
474 Id. at 165.
475 Id. at 166.
476 Id. at 167-68.
477 See Vinson, 30 S.W.3d at 167-68.
478 Id. at 167.
Fourth, the Department argued that the trial court improperly had determined liability using the amended version of the whistle-blower statute, rather than using the original version of the statute which was in effect at the time the employees were demoted. The Court agreed. The 1993 amendments to the statute were very favorable to employees. Under the original version, an employee had to prove that the report or threat to report a suspected violation of the law was a "direct cause" of the employer's reprisal, and this had to be proven by clear and convincing evidence. The 1993 amendments, however, reduced the evidence required to show causation; now, the employee need only prove that the report or threat to report was a "contributing factor" in the reprisal, and this must be shown by a preponderance of the evidence. Thus, the amendments shifted to the employer "an affirmative burden of proving by clear and convincing evidence that the report was not a material factor in the personnel action."

The Court held that the 1993 amendments imposed a change in substantive law, and "provide[d] for new legal consequences as a result of certain types of employer conduct which did not have any legal significance prior to amendment . . . ." The Court held that the amendments should not be imposed on the Department of Agriculture retroactively. On this basis, the Court reversed the judgment and remanded the case for a new trial under the original version of the statute.

3. Kentucky Civil Rights Act

The Kentucky Civil Rights Act (KCRA) is the state analog of Title VII of the Civil Rights Act of 1964. Like Title VII, the KCRA prohibits discrimination on the basis of race, sex, and other similar criteria. The administrative provisions of the two statutes, however, are very different. Under Title VII, an aggrieved individual must, as a prerequisite to filing suit, exhaust her administrative remedies by filing and pursuing a charge of discrimination with either the federal Equal Employment Opportunity Commission (EEOC) or the equivalent state or local human rights agency. Under the KCRA, however, an aggrieved individual may either file an administrative charge or file a civil action in circuit court. If an aggrieved individual chooses the former, then she

479 Id. at 168-170.
480 Id. at 169.
481 Id.
482 Vinson, 30 S.W.3d at 169.
483 Id.
484 See id. at 170.
485 Id.
486 Embodied in Chapter 344 of the Kentucky Revised Statutes.
490 See KRS §§ 344.200--270, 344.450 (Banks-Baldwin 2000).
cannot simultaneously pursue the latter. Until recently, however, it was relatively common for an individual to file an administrative charge, withdraw that charge prior to the agency’s final determination, and then file a civil suit in circuit court.

From the employee’s perspective, there are several advantages to turning to the Kentucky Commission on Human Rights (KCHR) before turning to the courts. The KCHR will investigate the charge of discrimination, and often will engage in formal discovery. If the KCHR finds reason to believe that discrimination occurred, it will represent the employee in administrative proceedings designed to provide redress. Perhaps most importantly, there is the possibility that the KCHR will help the employee and employer settle the case short of adversarial litigation.

Consistent with this approach of encouraging initial recourse to the KCHR, the Kentucky Court of Appeals, in the 1984 decision of Canamore v. Tube Turns Division of Chemetron Corp., 491 held that the filing of a charge with the EEOC, and the EEOC’s subsequent referral of the charge to the KCHR, did not preclude an aggrieved individual from filing a subsequent civil suit, so long as neither agency had reached a final determination on the merits of the charge. 492 James Canamore filed a charge of race discrimination with the EEOC. 493 The EEOC referred the charge to the KCHR, which took no action on the charge. 494 The EEOC, without conducting a formal investigation or making a formal finding, issued Canamore a right-to-sue letter 495 which gave him, under Title VII, the right to file suit. 496

Canamore sued his former employer, Tube Turns, in Jefferson Circuit Court. 497 Tube Turns filed a motion to dismiss, arguing that once Canamore had filed an administrative charge and that charge had been referred to the KCHR, Canamore was prohibited from filing a civil action based on the same factual allegations. 498 Tube Turns’ argument was based on KRS § 344.270, which at the time provided that “[a] final determination of a claim alleging an unlawful practice under [the KCRA] shall exclude any other action or proceeding brought by the same person based on the same grievance.” 499

The Circuit Court agreed and dismissed the case. 500 Canamore appealed. The Court of Appeals agreed with Tube Turns that if the EEOC or KCHR had made a final determination on Canamore’s discrimination charge, then Canamore would be prohibited by KRS § 344.270 from filing a subsequent civil suit on the

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491 676 S.W.2d 800 (Ky. Ct. App. 1984).
492 See id. at 804.
493 Id. at 802.
494 Id.
495 Id.
497 See Canamore, 676 S.W.2d at 802.
498 Id. at 803.
499 KY. REV. STAT. ANN. § 344.270 (Banks-Baldwin 1984).
500 See Canamore, 676 S.W.2d at 802-03.
same facts. However, the Court held that neither the EEOC's issuance of a right-to-sue letter, nor the KCHR's apparent inaction on the case, constituted a "final determination" sufficient to trigger KRS § 344.270. Therefore, the Court held, Canamore could proceed with his civil suit. "[T]o hold otherwise," explained the Court, "might well deny Canamore his only opportunity for a hearing on the merits of his charge." 503

The Canamore holding, then, is that when an aggrieved individual files a charge with an administrative agency and that agency does not make a final determination on the merits of the charge, the plaintiff may subsequently file a civil suit based on the same underlying facts. In dicta, however, the Court seemed to go a step farther, stating:

To permit a claimant to have the benefit of a separate civil action based on identical facts after he or she has instituted administrative action under KRS 344.200 followed by judicial review pursuant to KRS 344.240 would, in fact, be tantamount to giving one claimant two bites of the apple. 504

The "has instituted" language could be interpreted as an indication that once a plaintiff has filed an administrative charge, she cannot withdraw it in favor of a civil suit, but instead must wait until the agency relinquishes its authority over the charge; at that point, she would be permitted to sue if and only if the agency had not made a "final determination" on the merits.

The difference between the holding and the dicta is the point in time at which the choice of an administrative remedy precludes a subsequent civil suit. The holding of Canamore and the statutory language of § 344.270 indicate that this does not occur until the agency has made a final determination, meaning that an individual could file an administrative charge and later withdraw it in favor of a civil suit. The "has instituted" dicta, however, implies that the choice of an administrative remedy becomes irrevocable as soon as a valid charge is filed with the KCHR.

Less than two years after Canamore, the Kentucky Supreme Court decided Clifton v. Midway College. 505 Clifton is virtually identical to Canamore in its posture, holding, and dicta. Elizabeth Clifton filed a charge with the EEOC alleging that Midway College had discriminated against her on the basis of sex. 506 The EEOC referred the charge to the KCHR, which took no action other than referring the charge back to the EEOC. 507 The EEOC issued a right-to-sue letter, after which Clifton filed suit in Woodford Circuit Court. 508 Midway College moved for summary judgment, arguing that the EEOC's right-to-sue letter constituted a final determination under KRS § 344.270. 509 The Circuit Court

501 Id. at 803-04.
502 Id. at 804.
503 Id.
504 Id. at 803-04 (emphasis added).
505 702 S.W.2d 835 (Ky. 1986).
506 See id. at 836.
507 Id.
508 Id.
509 Id.
The Kentucky Supreme Court, citing Canamore, held that "an individual who has charges of discrimination referred by the federal agency to the state agency, but without an order issued by the Kentucky agency, is not precluded" from filing a subsequent civil suit. The "without an order" language seemed to underscore that, consistent with the language of § 344.270, an agency charge would only bar a subsequent civil suit once the agency had made a final determination on the merits of the charge. However, as in Canamore, the Clifton Court went farther afield in dicta:

The argument that Clifton was barred by her decision to elect certain remedies is without merit. The charge of discrimination filed with the federal agency was completed on a standard form. The form included a typed addition of Kentucky Commission on Human Rights near the top. The signature of Elizabeth Clifton on the charge of discrimination form filed with the federal agency which was subsequently deferred to the Kentucky bureau did not transform that document into [a] written, sworn complaint before the Kentucky Commission on Human Rights.

This temporal focus of this "sworn complaint" language is very different from the "final determination" language of § 344.270 and the "without an order" language the Clifton Court had used in a preceding paragraph. This dicta, like the dicta in Canamore, could be interpreted to mean that a civil suit is barred from the moment a valid complaint is filed with the KCHR, as opposed to being barred only upon the KCHR’s final determination of the merits of the charge.

Vaezkoroni v. Domino’s Pizza, Inc., is a third case containing an unexceptional holding but very troubling dicta. In this 1995 Kentucky Supreme Court case, Ahmad Vaezkoroni filed three charges of national origin discrimination and retaliation with the Lexington-Fayette Urban County Human Rights Commission (Fayette County Commission). The Fayette County Commission investigated the charges and dismissed each with a finding of "no probable cause." Vaezkoroni filed suit in Fayette Circuit Court, alleging facts identical to those in his charges. Domino’s Pizza, Vaezkoroni’s prior employer, moved for summary judgment, arguing that the "no probable cause" determination constituted a final decision on the merits and therefore barred a subsequent suit. The circuit court agreed and dismissed the suit; the Court of Appeals affirmed.
The issue before the Kentucky Supreme Court was whether the Fayette County Commission was the legal equivalent of the KCHR. Vaezkoroni apparently argued that it was not, and that the language of KRS § 344.270, providing that “final determination” of a claim by the KCHR would preclude a subsequent civil suit, would not apply to actions taken by the Fayette County Commission. The Supreme Court disagreed, holding that local commissions and the KCHR “must be treated as one and the same.” In dicta, however, the Court stated:

[W]e hold that KRS Chapter 344 authorizes alternative avenues of relief, one administrative and one judicial. The administrative avenue also includes alternatives; the individual may bring a complaint of discrimination before either the Ky. Commission or the local commission. Once any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion.

Like the dicta in Canamore and Clifton, this dicta implied that a choice between administrative and civil relief is irrevocably made at the time a valid administrative charge is filed, instead of only upon the KCHR’s final determination of the merits of the charge.

After Vaezkoroni, many defense attorneys began filing motions to dismiss in cases where a litigant had filed a claim with a state or local agency, even though a final determination had not been reached by the agency. As a result of the confusion, the Kentucky Legislature amended KRS § 344.270 in 1996. The provision now reads:

A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS chapter 13B by the same person based on the same grievance.

Similarly, the administrative regulations governing administrative proceedings of the KCHR permits the withdrawal of an administrative charge without prejudice:

Withdrawal of complaint. A complainant may withdraw the complaint, or any part of the complaint, without prejudice if the complainant: (a) Files a written request stating the reasons for withdrawal; and (b) Written consent is obtained from the: (1) Executive director, if the request is made before the issuance of a notice of hearing; or (2) Chairperson of the commission or presiding officer, if the request is made after the issuance of a notice of hearing.

Moreover, a former Compliance Director and Staff Attorney for the Kentucky Commission on Human Rights has rejected the idea that Vaezkoroni stands for the proposition that filing with a state or local agency constitutes an

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519 See Vaezkoroni, 914 S.W.2d at 342-43.
520 Id. at 342.
521 Id. at 343 (emphasis added).
522 KY. REV. STAT. ANN. § 344.270 (Banks-Baldwin 2000)(emphasis added).
election of remedies. After quoting the "alternative avenues of relief" paragraph quoted above, he stated:

A literal reading of this language would suggest that once a complaint is filed, it would be impossible for a plaintiff to bring a lawsuit in Circuit Court. However, Courts who have been asked to embrace this conclusion have been unwilling to find such a bar in this language. Instead, Courts who have considered this procedural argument have been unwilling to place this bar in front of a lawsuit in situations where the case has not been adjudicated on the merits or an Order of Dismissal entered. Additionally, the legislature in 1996 amended Section 270 to clarify the point at which the election would bar further action in an alternate forum. The pertinent language now reads, "A final determination by state court or a final order of the Commission . . . shall exclude any other administrative action or proceeding . . . by the same person based on the same grievance." This modification and the Commission's regulations which set forth a procedure for withdraw prior to a final ruling on the complaint, provide a prospective plaintiff the opportunity to disengage the state's administrative machinery and proceed to court under KRS 344.450. However, the complaint must be written before a "final order of the Commission is issued."\(^{524}\)

Nonetheless, in Founder v. Cabinet for Human Resources,\(^ {525}\) the Kentucky Court of Appeals held that an aggrieved individual who had filed a claim with the KCHR, but then had withdrawn it before final determination, was barred from seeking a judicial remedy. Howard Founder filed race discrimination charges with the EEOC and the KCHR.\(^ {526}\) The EEOC issued a right-to-sue letter, and Founder withdrew the KCHR charge before the agency had reached a final determination.\(^ {527}\) He then filed suit in Franklin Circuit Court.\(^ {528}\) His employer moved for summary judgment based on election of remedies. The court granted the motion and Founder appealed.\(^ {529}\)

The Kentucky Court of Appeals affirmed. Quoting the "alternative avenues of relief" dicta from Vaezkoroni, the Founder Court stated:

Founder argues that the case at hand is different from Vaezkoroni by the fact that he abandoned his claim before the Commission by withdrawing it before the Commission had made a ruling thereon. Although Vaezkoroni does not explicitly address this situation, we believe that to follow its holding to its logical conclusion, Founder's circuit court claim must be barred since he had already filed the administrative complaint. From our reading of the language in KRS 344.270 and Vaezkoroni, once a complaint is filed with the Commission, a subsequent action in circuit court based on the same civil rights

\(^{524}\) Thomas Ebendorf, Federal and State Discrimination Claims: Successfully Navigating the Administrative Process 7 (Feb. 26, 1999) (paper delivered at Kentucky Academy of Trial Attorneys seminar).

\(^{525}\) 23 S.W.3d 221 (1999).

\(^{526}\) See id. at 222.

\(^{527}\) Id.

\(^{528}\) Id.

\(^{529}\) Id.
violation(s) is barred. 530

Similarly, the *Founder* Court, after quoting the "written sworn complaint" *dicta* of *Clifton*, stated:

Although there was some additional language in *Clifton* suggesting that whether a separate civil action is barred is dependent upon whether there has been a final determination by the Commission, the Court's ruling was clearly based on the fact that no sworn complaint had been filed with the Commission. 531

Thus, *Founder* stands for the proposition that once an aggrieved individual has filed an administrative charge with the KCHR, she is forever barred from seeking judicial relief for the same claim, even if she withdraws her charge before the KCHR has taken any action.

*Founder* creates three problems. First, it is contrary to the plain language of KRS § 344.270. *Founder* also is inconsistent with the holdings, though not the *dicta*, of prior Kentucky Supreme Court and Court of Appeals decisions.

Second, *Founder* frustrates the legislature's intent in creating an administrative apparatus for resolving employment discrimination claims. Since the KCHR was modeled on the EEOC, it can reasonably be assumed that the Kentucky Legislature's intent in creating the KCHR was similar to Congress' intent in creating the EEOC. With regard to the latter, the legislative history makes very clear that the intention of creating an administrative agency to oversee employment discrimination complaints was the hope that the agency could resolve complaints "through conciliation and persuasion." 532 However, there was no expectation that all allegations of discrimination would be settled this way, so the statute permitted aggrieved individuals to sue the employer on their own behalf. 533

This goal of settling cases administratively is frustrated by the *Founder* holding. Prior to *Founder*, an aggrieved individual had every reason to file with the KCHR, because the KCHR might conciliate the case to the benefit all parties. Certainly, prior to *Founder*, there was no *disadvantage* to filing a KCHR charge, because the aggrieved individual could always withdraw the charge and file her case in circuit court. After *Founder*, however, a well-informed aggrieved individual who wants to retain the right to pursue her claim in court will never file a charge with the KCHR, since this will forever bar a circuit court action. Instead, she will proceed perhaps to the EEOC, but more likely directly to circuit court. The practical effect of the *Founder* holding will be, in many if not most cases, to cut the KCHR out of the process; to deprive the KCHR of its statutory responsibility to attempt to mediate and conciliate employment discrimination charges. Many plaintiff's attorneys already are counseling their clients not to file charges with the KCHR; the KCHR itself warns prospective claimants that once

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530 Id. at 223.
531 *Founder*, 23 S.W.3d at 224.
533 *Bales*, *supra* note 488, at 6.
a "complaint is filed with the Commission, a subsequent action in a Kentucky Circuit Court based upon the same civil rights violation(s) may be barred." 534

The third problem with Founder is that it applies retroactively. In Founder, the Court of Appeals held that:

_Clifton_ foreshadowed the ruling in _Vaezkoroni_ and should at least have put Founder on notice that it was possible that the filing of the complaint with the Commission would bar a separate action in circuit court. Thus, it was not error for the court to retroactively apply _Vaezkoroni_. 535

The effect is to leave Howard Founder, and every other potential claimant who had filed an administrative charge but later had withdrawn it in favor of a circuit court suit, with no remedy at all. Because the statute of limitations on KCRA civil actions is five years, the retroactive application of Founder probably affects hundreds of people. In other words, hundreds of possible discrimination victims, who reasonably relied on the holdings of _Canamore_, _Clifton_, and _Vaezkoroni_, are left without a remedy because the _dicta_ of these opinions put them on notice of what was to come in Founder.

III. TRADE SECRETS, NONCOMPETE AGREEMENTS, AND THE EMPLOYEE’S DUTY OF LOYALTY

A. Trade Secrets 536

Kentucky has adopted, with minor modifications, the Uniform Trade Secrets Act. 537 The Kentucky version begins at KRS § 356.880 538 A trade secret consists of economically valuable information that is not readily available to the public or to competitors. 539 Although Kentucky courts have not considered the scope of a trade secret under the statute, decisions from other states have defined trade secrets to include customer lists, software systems, and pricing information. 540

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534 The KCHR’s “Founder Notice” provides:

The Kentucky Civil Rights Act allows a victim of discrimination to file a complaint of discrimination with either the Kentucky Commission on Human Rights or a Kentucky Circuit Court. Please be advised that once the enclosed complaint is filed with the Commission, a subsequent action in a Kentucky Circuit Court based upon the same civil rights violation(s) may be barred. _Founder v. Cabinet for Human Resources, et al.,_ Ky. App., 23 S.W.3d 221 (1999).

Should you have any questions regarding your ability to pursue a complaint in a Kentucky Circuit Court we urge you to consult with an attorney before returning your complaint to the Commission for filing.

535 Founder, 23 S.W.3d at 224.


538 KY. REV. STAT. ANN. § 365.880-990 (Banks-Baldwin 2000).

539 See id. at § 365.880(4).

540 See McClelland & Forgy, _supra_ note 536, at 231, and cases cited therein.
The Trade Secrets Act prohibits the misappropriation of a trade secret. Misappropriation refers to the acquisition, disclosure, or use of a trade secret through "improper means." Improper means includes "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage . . . ." A misappropriation also occurs when a person uses or discloses a trade secret and that person knew or should have known that the trade secret had been obtained by improper means. Reverse engineering is not prohibited so long as the product was acquired by "fair and honest means."

B. Noncompete Agreements

Kentucky courts are relatively deferential toward noncompete agreements. These agreements will be enforced so long as the restrictions imposed by the agreements are reasonable both temporally and geographically. The reasonableness of the time restriction depends in part on the employee’s length of tenure; courts have consistently upheld restrictions of one to two years. The reasonableness of the geographic restrictions depends on the geographic reach of the employer’s business, the nature of the employer’s business, and whether the geographical area is rural or urban. If the court finds a restriction unreasonable, the court may reform the noncompete agreement before ordering enforcement. For example, in Hammons v. Big Sandy Claims Service, the

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541 KY. REV. STAT. ANN. § 365.880 (Banks-Baldwin 2000).
542 Id. at § 365.880(2).
543 Id. at § 365.880(1).
544 Id. at § 365.880(2)(b).
546 See generally McClelland & Forgy, supra note 536, at 233-37.
547 See Central Adjustment Bureau, Inc. v. Ingram Assoc., 622 S.W.2d 681, 685-86 (Ky. Ct. App. 1981) (noting that the only protection for highly specialized businesses against employees resigning and taking their clients away are noncompete clauses); Lareau v. O’Nan, 355 S.W.2d 679, 681 (Ky. 1962) (“The policy of this state is to enforce [noncompete clauses] unless very serious inequities would result.”); Borg-Warner Protective Services, Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501 (E.D. Ky. 1996) (noting that “the more modern cases, including those in Kentucky, place more emphasis on the employer’s investment in the employee and have evolved an approach balancing the importance of that factor against the hardship to the employee and the public interest”).
548 See, e.g., Hall v. Willard & Woolsey, P.S.C., 471 S.W.2d 316 (Ky. 1971).
549 Id. at 317-18.
550 See, e.g., Higdon Food Serv., Inc. v. Walker, 641 S.W.2d 750 (Ky. 1982 (one year); Louisville Cycle & Supply Co., Inc. v. Baach, 535 S.W.2d 230 (Ky. 1976 (eighteen months); Central Adjustment Bureau, Inc. v. Ingram Assocs., Inc., 622 S.W.2d 681 (Ky. Ct. App. 1981) (two years); Hammons v. Big Sandy Claims Serv., Inc., 567 S.W.2d 313 (Ky. Ct. App. 1978) (one year). See also Hodges v. Todd, 698 S.W.2d 317 (Ky. Ct. App. 1985) (enforcing a five-year restriction related to the sale of a business).
552 Hammons, 567 S.W.2d at 315 (“An insurance adjusting office must depend on a large surrounding area in which to sustain itself in business.”).
553 See, e.g., Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971) (while in some instances a restriction to one county may be unreasonable, a restriction to five small rural counties was reasonable).
original agreement restricted the employee from competing "within a radius of 200 miles of any territory being serviced by the Employer at the time of Employee's termination . . . ." The trial court reformed the agreement by issuing an injunction prohibiting competition within a 200 mile radius of the office at which the employee had worked.556

A noncompete agreement must be supported by consideration.557 In Kentucky, however, the employer has a relatively light burden of showing such consideration. For a new employee, the employer's offer of employment is sufficient consideration.558 For existing employees, continued employment is sufficient consideration.559

Historically, Kentucky courts have been more inclined to enforce noncompete agreements against highly trained or professional employees.560 This is because these employees are likely to have a better opportunity to find alternative employment, because the employer is likely to have invested heavily in these employees and disclosed trade secrets to these employees, and because these employees have more bargaining power and therefore are in a better position to negotiate reasonable noncompete clauses. However, as Judge William Bertelsman has noted, this tendency has changed. After a scholarly review of both Kentucky cases and the academic literature, Judge Bertelsman noted that today, noncompete agreements are equally likely to be enforced against lower-level employees.561 This is particularly true when a policy argument can be made for enforcement of such an agreement, such as when the client of a personnel placement company attempts to "poach" employees that the placement company has hired, trained, and placed at the client's business.562

The most recent case construing Kentucky noncompete law is the Sixth Circuit decision of Managed Health Care Associates, Inc. v. Kethan.563 In that case, Ronald Kethan was employed by MedEcon as a salesperson.564 When he began his employment, he signed a two-year agreement that he would not "engage in any of the kinds of business activities in which [MedEcon] ... is now

555 Id. at 314.
556 See id. at 314-15; see also Hodges, 698 S.W.2d 317 (reforming agreement that was silent regarding the geographic restriction).
557 See, e.g., Louisville Cycle, 535 S.W.2d at 234.
558 See Stiles v. Reda, 228 S.W.2d 455, 456 (Ky. 1950); see also Louisville Cycle, 535 S.W.2d at 234 (an employment contract for a term of years constitutes adequate consideration to support a noncompete clause in that contract).
559 See Ingram, 622 S.W.2d 681; see also Higdon, 641 S.W.2d at 751 (the "rehiring" of an employee under a contract that imposed a good-faith limitation on the employer's ability to fire the employee constitutes adequate consideration to support a noncompete clause in that contract).
560 See Lareau v. O'Nan, 355 S.W.2d 679, 680 (Ky. 1962); McClelland & Forgy, supra note 534, at 234-35.
562 Judge Bertelsman calls this "disintermediation," by which he means "to cut out the middleman." Id.
563 209 F.3d 923 (6th Cir. 2000).
564 Id. at 926.
engaged" within certain specified states. 565 While employed by MedEcon, Kethan worked extensively on the account of First Choice, which was one of MedEcon's clients. 566 MedEcon was purchased by MHA. 567 Shortly thereafter, Kethan resigned and went to work for First Choice, which in the interim had ceased doing business with MedEcon. 568 MHA brought suit to enforce Kethan's noncompete agreement with MedEcon. 569 The district court concluded that noncompete agreements were not assignable under Kentucky law, and that therefore MHA could not enforce Kethan's agreement with MedEcon. 570 The court also found that the assignment was a modification of the agreement. 571 Since the agreement specified that any modifications must be in writing, and no such writing existed, the court held that Kethan was no longer bound by the agreement. 572

The Sixth Circuit reversed. On the assignability issue, the court noted that the only Kentucky authority on point was the unpublished decisions of the Jefferson County Circuit Court and the Kentucky Court of Appeals in a case that was moot by the time it reached the Kentucky Supreme Court. 573 Both of the lower court decisions had held that noncompete agreements were assignable. 574 Based on these decisions, on similar holdings by courts in other jurisdictions, and on Kentucky courts' general reverence for noncompete agreements, the Sixth Circuit concluded that noncompete agreements are assignable under Kentucky law. 575

On the modification issue, the Sixth Circuit again noted the lack of Kentucky authority on point. 576 Adopting the reasoning of a Second Circuit case, 577 the court concluded that the terms of Kethan's employment were not modified by the assignment of his contract to MHA, and that the lack of a writing did not preclude enforcement of the noncompete clause. 578

C. Common Law Duty of Loyalty 579

Kentucky employees have a common law duty to act in the best interests of their employer. In the 1926 case of Hodge v. Kentucky River Coal Co., 580 the Kentucky Supreme Court stated:

565 Id.
566 Id.
567 Id.
568 Id.
569 See Kethan, 209 F.3d at 926.
570 Id. at 927.
571 Id.
572 Id.
573 Id. at 928-29 (citing Choate v. Koorsen Protective Servs., Inc., 929 S.W.2d 184 (Ky. 1996)).
574 Kethan, 209 F.3d at 928-29.
575 Id. at 928-930.
576 Id. at 927.
577 Id. at 927, citing Citibank, N.A. v. Tele/Resources, Inc., 724 F.2d 266, 268-69 (2d Cir. 1983).
578 Kethan, 209 F.3d at 927-28.
579 See generally McClelland & Forgy, supra note 536, at 237-40.
[E]veryone—whether designated agent, trustee, servant or what not—who is under contract or other legal obligation to represent or act for another in any particular business or for any valuable purpose must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it.

He may not use any information that he may have acquired by reason of his employment either for the purpose of acquiring property or doing any other act which is in opposition to his principal’s interest.

Kentucky courts have held that this duty of loyalty precludes an employee from acquiring for himself property that her employer had contracted to acquire, from soliciting business for her own company while still working for an employer in the same line of business, and copying his employer’s forms and documents for use by the competing company she is in the process of establishing.

In most states, the rule is that an employee may prepare to compete with her employer prior to resigning (by, for example, telling customers and employees that he plans to establish a competing company), but may not actively compete with her employer (by, for example, soliciting her employer’s customers or employees or submitting a competing bid). Kentucky law seems to go even farther, requiring an employee to resign her employment before beginning preparations to compete with her employer. However, it should be noted that the cases described above all involved high-level employees who had a fiduciary obligation to their employers; it is unclear under Kentucky law whether and to what extent the duty of loyalty extends to lower-level employees.

IV. CONCLUSION

Though the employment at will doctrine provides Kentucky employers with some flexibility and protection in terms of the hiring and firing of employees, recent Kentucky decisions suggest a definite willingness of the courts to recognize a plaintiff’s statutory and common law claims. Plaintiffs have many more avenues to pursue in order to seek redress from an employer today than employees had even ten years ago. To avoid liability, employers must be certain that managers and supervisors understand any potential legal ramifications of

580 287 S.W. 226 (Ky. 1926).
581 Id. at 227.
582 Id. at 226.
584 See Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166 (Ky. 1974); Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476 (Ky. 1991); see also DSG Corp. v. Anderson, 754 F.2d 678 (6th Cir. 1985) (employees violated Kentucky duty of loyalty when they used confidential information obtained through their employment to prepare a competing bid and establish a competing business while still employed).
586 See, e.g., Aero Drapery, 557 S.W.2d at 169; Covington & Lexington L.R. Co. v. Bowler’s Heirs, 72 Ky. 468, 489 (1872).
587 See McClelland & Forgy, supra note 536, at 239.
their act, including employer liability which might result from common law claims, statutory claims, and noncompete agreements.
KENTUCKY LAW SURVEY:  
STATE AND LOCAL GOVERNMENT

by Phillip M. Sparkes¹ and Jared Squires²

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¹ Phillip M. Sparkes is Director of the Local Government Law Center and Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. He is a graduate of Notre Dame Law School (L.L.M. 1997), DePaul University College of Law (J.D. 1980), and Rensselaer Polytechnic Institute (B.S. 1974). Before assuming his current post, he was in government service and concentrated his practice in state and local government law and administrative law. He is also the editor of Local Government Law News, a publication of the Chase Local Government Law Center.

² Jared Squires is a third-year student at Salmon P. Chase College of Law where he is a staff member of the Northern Kentucky Law Review. Additionally, he is a student intern to the Honorable William O. Bertelsman of the United States District Court for the Eastern District of Kentucky. Jared and his wife, equine veterinarian Jean Lamb, reside in Midway, Kentucky.
I. INTRODUCTION

It is impossible, within the constraints of an article such as this, to survey all the cases in the past two years affecting state and local government. Some topics, such as the law of schools and school districts or of civil rights, are deserving of separate treatment in their own right. Inclusion of such topics would extend this article beyond reasonable limits. Even after excluding those topics, the topics that remain are too numerous to permit covering them all. The topics chosen for this survey reflect areas of state and local government law that, in our judgment, received significant judicial attention or produced significant judicial developments, or both.

For the convenience of the reader, the case summaries that follow employ, to the extent practicable, a similar pattern—a brief distillation of the case, then a slightly longer exposition of the opinion. The article concludes with a commentary on developments in home rule, a topic that did not readily lend itself to treatment in the manner of the other chosen topics.

II. CASE SUMMARIES

A. Condemnation

_Heitzman v. Sanitation Dist. No. 1 of Campbell and Kenton Counties_, 26 S.W.3d 794 (Ky. Ct. App. 2000). In October 1995, two property owners sustained substantial property damage as a result of the backup of sanitary
sewage into their basements.\(^3\) The backup was caused by the collapse of a residential lateral sanitary line that ran from one of the property owners’ land to a larger combination trunk line.\(^4\) The installation of a new lateral line by the property owners and a new trunk line by the Sanitation District did not adequately solve the problem, and the property owners continued to have sewage backup problems.\(^5\) It was subsequently discovered that the collapsed lateral line serviced six additional “upstream” residences.\(^6\) While the new lateral pipe prevented the property owners’ personal sewage from flowing into their basements, it did not assuage the flow of sewage and storm water into their basements from their upstream neighbors.\(^7\) The property owners brought suit against the sanitation district and the city of Covington in Kenton Circuit Court seeking damages caused by the flooding.\(^8\) The court granted summary judgment in favor of both defendants, holding that the collapsed line “was the private property of the complaining parties.”\(^9\) The Court of Appeals affirmed.\(^10\)

The property owners contended, \textit{inter alia}, (1) that since the city maintained a storm drain that emptied into the collapsed lateral line, it was liable for damages to said line, and (2) that the city, by requesting the District to investigate the upstream drainage problem, had acknowledged the public use of the lateral line.\(^11\) However, \textit{City of Irvine v. Smith}\(^12\) is controlling on both points raised.\(^13\) When used for the purpose of diverting storm water, the city’s use of a private sewer line is not an appropriation, and the city bears no responsibility.\(^14\) It is logical to divert storm water through private lines rather than allow it to drain naturally onto abutting land.\(^15\) As to the second contention, the city’s willingness to reach an agreement with the owners by itself does not attach liability, nor does the fact that the city occasionally made repairs on sections of private sewers.\(^16\)

\textit{Kelly v. Thompson}, 983 S.W.2d 457 (Ky. 1998). As amended in 1980, Kentucky Revised Statute (KRS) § 416.670 gave condemnees and their successors in interest the right to repurchase property condemned by the state, at the same price paid by the state, provided the state had not begun development of the property within eight years of the taking.\(^17\) The Thompson estate brought suit
to regain the unused portion of condemned property it had formerly owned after the Transportation Cabinet negotiated a deal to sell the unused land to a non-successor in interest for a higher pro rata amount than the state paid the Thompsons in 1978. The Transportation Cabinet argued that KRS § 416.670 prevented its retroactive application to condemnation actions prior to 1980, the date of the amendment. A unanimous Kentucky Supreme Court disagreed.

The issue is properly the legislative intent behind the 1980 amendment, not retroactivity. KRS § 416.670 applies to condemnation actions both before and after 1980. In 1980, the Commonwealth simply provided a new right for condemnees and their successors in interest to repurchase condemned land. This legislative intention, not the condemnation itself, controls the framing and outcome of the issue. Thus, there is a statutory right of redemption here as long as the parties meet the statutory prerequisites.

*Henn v. City of Highland Heights, 69 F. Supp. 2d 908 (E.D. Ky. 1999).* Residents of an area designated by the city as a redevelopment district claimed that their properties had been subjected to reverse condemnation and that the redevelopment designation denied them due process because that decision was arbitrary. The reverse condemnation claim was held to be without merit, because the plaintiffs failed to exhaust administrative remedies and had not been deprived of all use of their land. However, the city's determination to redevelop the area was not supported by the substantial evidence needed to make essential statutory findings. The city failed to meet all essential provisions of KRS § 99.370, which details the methods of pursuing the acquisition and clearance of blighted areas. Therefore, the city's decision was arbitrary, capricious, and void.

In order for the city to properly adopt a development plan, KRS § 99.370(6)(a) requires the following findings by the city council: (1) the area is a blighted area; (2) there exists a shortage of housing of sound standards; (3) there is or will be an increased need for housing; and (4) the spread of crime and disease (caused by housing shortage and blight conditions) is such that the area constitutes a menace to society. The statute "was an inappropriate vehicle to

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18 See *Kelly*, 983 S.W.2d at 458.
19 Id.
20 Id. at 459.
21 Id. at 458.
22 Id. at 459.
23 See *Kelly*, 983 S.W.2d at 458 (citing KY. REV. STAT. ANN. § 416.670 (Banks-Baldwin 1999)).
24 Id. at 459.
25 Id.
27 Id.
28 Id.
29 Id. at 913.
30 Id. at 914.
31 Id. at 912.
accomplish the city’s goals for this area” because the redevelopment statute was “intended for a heavily populated urban area plagued with high crime, disease and poverty conditions.” The area in question was sparsely populated and was not a high crime area. Therefore, the council’s decision was not supported by substantial evidence for the required statutory findings.

Coleman v. City of Pikeville, 994 S.W.2d 524 (Ky. Ct. App. 1999). In 1984, the Pikeville Urban Renewal and Community Development Agency (PURDA) sent an offer letter to Ms. Ola Goff, signaling its desire to purchase a 1.348-acre tract of her land as part of the Riverfill Development Plan. The letter threatened a condemnation action if Ms. Goff refused to sell. Ms. Goff sold the tract to PURDA, which placed sixty-six thousand cubic yards of fill on the property. In 1990, PURDA was dissolved and all PURDA-owned property was deeded to the city. When requested, the city refused to allow appellants to repurchase acreage at the 1984 sale price and appellants filed suit under KRS § 416.670(1). This statute gives condemnees the right to repurchase the land from the condemnor at the same price if development of the land is not begun within an eight-year period. The trial court held for the city. It found that the dumping of fill on the land constituted the beginning of development, which ended the right to redeem the condemned property. In any event, the statute did not apply, because the land was sold by mutual agreement and not condemned. The Court of Appeals affirmed.

The trial court’s determination that development had begun was not clearly erroneous. In addition, the fact that PURDA was dissolved and the project abandoned is irrelevant. There is no authority that holds that the statute (assuming it ever applied) grants a right to repurchase condemned land if the land development is subsequently abandoned after it has begun. No authority supported the conclusion that KRS § 416.670(1) should apply because the land was sold under the threat of condemnation. The trial court correctly determined

32 See Henn, 69 F. Supp. 2d at 914.
33 Id.
34 Id.
35 Id.
37 Id. at 525.
38 Id.
39 Id.
40 Id.
41 Id. (citing KY. REV. STAT. ANN. § 416.670(1) (Banks-Baldwin 1999)); see also Kelly v. Thompson, 983 S.W.2d 457 (Ky. 1998).
42 Coleman, 994 S.W.2d at 526.
43 Id. at 525.
44 Id. at 526.
45 Id.
46 Id.
47 Id.
48 Coleman, 994 S.W.2d at 526.
49 Id.
that the statute does not apply when the land is sold by agreement and not condemned.\textsuperscript{50}

B. Economic Development

\textit{Dannheiser v. City of Henderson, 4 S.W.3d 542 (Ky. 1999).} The city of Henderson purchased 580 acres of land at $1,500 an acre and developed it as an industrial park, using tax monies to add streets and install utilities.\textsuperscript{51} The city then sold parcels for as little as the original purchase price of $1,500 per acre, without utilizing the Local Industrial Development Authority Act, codified in KRS §§ 154.50-301 to 346.\textsuperscript{52} John Dannheiser, a developer of two competing industrial parks, estimated that the fair market value of land in his industrial parks was $15,000 per acre. He sued in circuit court seeking damages, a declaratory judgment, and injunctive relief.\textsuperscript{53} The Kentucky Supreme Court, by a four-to-three vote, affirmed the grant of summary judgment in favor of the city of Henderson.\textsuperscript{54}

Dannheiser made three contentions.\textsuperscript{55} First, Dannheiser argued that § 3 and § 179 of the Kentucky Constitution prohibited the sale of municipal property to private parties at less than the fair market value.\textsuperscript{56} Section 179 of the Kentucky Constitution prohibits a local government from loaning its credit to a private corporation.\textsuperscript{57} Section 3, the emolument clause, prevents the grant of emoluments or privileges to any man or set of men.\textsuperscript{58} \textit{Hayes v. State Property and Buildings Comm.},\textsuperscript{59} a case that held constitutional the offering of an enticing financial incentive plan to Toyota Motor Company to build a car manufacturing facility in Georgetown, Kentucky, is controlling on this point.\textsuperscript{60} So long as public money is used to effectuate a valid public purpose, the Kentucky Constitution is not violated.\textsuperscript{61} Kentucky courts have consistently authorized undertakings that promote economic welfare and stimulate industry.\textsuperscript{62} Although an outright gift could be prohibited by § 3 and § 179, incentives offered in furtherance of a valid public purpose are not prevented.\textsuperscript{63} The development of the industrial park was not a lending of credit.\textsuperscript{64} The city is not loaning money, guaranteeing repayment

\textsuperscript{50} Id.
\textsuperscript{51} See Dannheiser v. City of Henderson, 4 S.W.3d 542, 543-44 (Ky. 1999).
\textsuperscript{52} Id. at 544.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 549.
\textsuperscript{55} Id. at 543.
\textsuperscript{56} Id.
\textsuperscript{57} See Dannheiser, 4 S.W.3d at 544.
\textsuperscript{58} Id.
\textsuperscript{59} 731 S.W.2d 797 (Ky. 1987).
\textsuperscript{60} Dannheiser, 4 S.W.3d at 545.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 548.
on a loan, or issuing bonds.\textsuperscript{65} "Rather the city has bought and paid for land and is selling it without any involvement concerning the method of financing by the purchaser."\textsuperscript{66} The city's development of the industrial park was valid because its purpose was to enhance economic activity.\textsuperscript{67}

Next, Dannheiser claimed that economic development and unemployment relief is valid only if a project has statewide benefits.\textsuperscript{68} The court disagreed, stating:

\textquote[\textsuperscript{69}]{[t]he public purpose that provided constitutional validity in the Hayes case is identical to the public purpose in the City of Henderson case. The only difference is that the Hayes case applied to a very large project that had obvious state-wide implication, the Henderson case applies to local activities.\textsuperscript{69}}

Hayes noted that whenever new business comes to Kentucky, or stays in Kentucky, the entire state benefits indirectly.\textsuperscript{70}

Finally, Dannheiser argued the city's development activities were limited by KRS §§ 154.50-301 to 154.50-346, the Local Industrial Development Authority Act.\textsuperscript{71} He claimed that this statute is a comprehensive scheme that preempts legislation on the same general subject by the city.\textsuperscript{72} However, under Kentucky's "home rule statute," (for cities) KRS § 82.082, a city needs no statutory approval to act unless to do so would conflict with a statute mandating otherwise.\textsuperscript{73} The word "may" in the Act clearly shows that the city is not required to act according to its provisions.\textsuperscript{74} The Act itself might be comprehensive, but it does not monopolize the field of economic development or dictate an exclusive method to achieve such development.\textsuperscript{75} The city simply chose an alternative complementary means to the Act.\textsuperscript{76}

\textbf{C. Finance}

\textit{Concerned Citizens for Pike County v. County of Pike ex rel. Damron, 984 S.W.2d 102 (Ky. Ct. App. 1998).} In November 1996, the Pike County Fiscal Court voted unanimously to expend $116,000 in county funds for the purchase of vehicles for their use.\textsuperscript{77} A citizens group (Concerned Citizens) brought an action in Pike Circuit Court alleging that the magistrates acted arbitrarily and without

\begin{footnotesize}
\textsuperscript{65} Id.
\textsuperscript{66} Danheiser, 4 S.W.3d at 548.
\textsuperscript{67} Id. at 545.
\textsuperscript{68} Id. at 545.
\textsuperscript{69} Id. at 546.
\textsuperscript{70} Id. at 547.
\textsuperscript{71} Id. at 548.
\textsuperscript{72} Danheiser, 4 S.W.3d at 548.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 549.
\textsuperscript{76} Id.
\textsuperscript{77} See Concerned Citizens for Pike County v. County of Pike ex rel. Damron, 984 S.W.2d 102 (Ky. Ct. App. 1998).}
\end{footnotesize}
any basis in law when they decided to purchase the vehicles. Concerned Citizens requested a temporary and permanent injunction to prohibit the vehicle purchase. The trial court held that the magistrates had the statutory power to make the purchase. The Court of Appeals affirmed.

KRS § 67.080 vs. § 82.082 grants a fiscal court the power to appropriate county funds for lawful purposes and to investigate all activities of county government. KRS § 67.083, known as the “home rule statute” (for counties), says that the fiscal court “shall have the power to carry out governmental functions necessary for the operation of the county.” The statute provides fiscal courts with broad latitude to conduct the business of the county so long as the power at issue has not been specifically restricted by the legislature. Several Kentucky cases have construed this power liberally. Phipps v. Commonwealth held that a county could contract with a private company to provide jail services because there was no express or implied statutory limitation on this power anywhere else in the Kentucky statutes. Casey County Fiscal Court v. Burke held that Casey County could impose an occupational tax despite the fact that only larger counties were given the express statutory power to do so. Because there was no statutory authority to the contrary, the actions of the Pike County Fiscal Court were valid under KRS §§ 67.080 and 67.083.

Gurnee v. Lexington-Fayette Urban County Government, 6 S.W.3d 852 (Ky. Ct. App. 1999). In 1974 Kentucky enacted KRS § 67A.520, the statute governing obligatory payments by urban-county governments into police and firefighter pension funds. The responsibility for the fund was vested in a Board of Trustees, the membership of which consisted of urban-county employees and officials. It is the Board’s responsibility to set a salary percentage rate that the urban-county government is required to contribute. Should the Board fail to set a rate, the urban-county government would have to contribute the minimum rate set by the legislature. The Lexington-Fayette Urban-County Government (LFUCG) contributed an annual amount using the minimum 17% rate determined

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78 Id.
79 Id.
80 Id.
81 Id. at 103.
82 Id.
83 See Concerned Citizens, 984 S.W.2d at 103 (citing KY. REV. STAT. ANN. § 67.083(3) (Banks-Baldwin 1999)).
84 Concerned Citizens, 984 S.W.2d at 103.
85 Id.
86 Id. (citing Phipps v. Commonwealth, 933 S.W.2d 825, 827 (Ky. Ct. App. 1996)).
87 Id. (citing Casey County Fiscal Court v. Burke, 743 S.W.2d 26, 28 (Ky. 1988)).
88 Concerned Citizens, 984 S.W.2d at 103.
90 Id.
91 Id.
92 Id.
by the legislature in KRS § 67A.520(3). In 1992, LFUCG police officers filed suit under KRS § 67A.520, alleging that LFUCG had failed to contribute the required annual amounts to the fund. LFUCG denied the allegation and alternatively alleged that the statute was so vague and overbroad as to be unconstitutional. It asked the circuit court to declare the statute void and unenforceable. The circuit court held that the statute was not unconstitutional, even if it was poorly drafted and “difficult to read if read literally.” LFUCG complied with the statute because the Board had not set the rate needed to determine the amount due for contribution. The Court of Appeals affirmed.

The fact that a literal reading of a statute is nonsensical does not make it unconstitutional “if those who are affected by the statute can reasonably understand what the statute requires of them.” The legislature intended the pension fund to be adequately funded, and statutory construction requires that the literal import of the words of a statute are trumped by the manifest intent of the legislature. The plain meaning of the statute says that the Board is the entity that must establish, after consideration of actuarial determinations, the salary percentage rate LFUCG must contribute. The appropriate remedy for the policemen is to convince the Board to set a higher rate or to lobby the legislature to increase the minimum rate.

*Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553 (Ky. Ct. App. 1998). Former county attorney John Elfers petitioned the court to declare his personal right to certain funds accumulated through the child support collection activities (pursuant to the Child Support Enforcement Program of the Social Security Act) of his office during his tenure. The circuit court granted summary judgment for Elfers, stating that he had earned the money in good faith. In affirming the lower court, the Court of Appeals addressed only the issue of whether the lower court erred in its determination that Elfers was empowered, by virtue of a 1983 Kenton County resolution authorizing incentive payments to the county attorney, to keep for himself the “poundage” generated. The poundage equaled 3% of all support paid.

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93 Id. at 855.
94 Id. at 854.
95 See Gurnee, 6 S.W.3d at 854-55.
96 Id. at 855.
97 Id. at 855.
98 Id. at 855-56.
99 Id. at 858.
100 Id. at 856.
101 See Gurnee, 6 S.W.3d at 856-57.
102 Id. at 857.
103 Id.
104 See Kenton County Fiscal Court v. Elfers, 981 S.W.2d 553, 555 (Ky. Ct. App. 1998).
105 Id. at 556.
106 Id. at 557-58.
107 Id. at 555.
When ascertaining the legislative intent of the Kenton County Fiscal Court when it adopted the resolution, it is appropriate to consider contemporaneous facts that illuminate that intent.Elfers performed services that were beyond those normally required of the county attorney. He was at all times under contract with the Kentucky Department for Social Insurance to perform this work, and Elfers was personally liable for the costs of running the collection program that were not reimbursable. Consequently, he was entitled to the money as a result of a valid contract with the Department and the Kenton County resolution.

Polston v. King, 965 S.W.2d 143 (Ky. 1998). Clinton County Fiscal Court magistrates voted to increase their salary from $249 to $800 per month. Judge-Executive King filed a declaratory judgment action to have the increase declared null and void under, inter alia, KRS § 64.530. The magistrates counterclaimed, arguing that King did not have the authority to unilaterally terminate their $300 monthly expense allowance. KRS § 64.530(6) says in pertinent part that fiscal court magistrate salaries cannot exceed the statutory maximum under KRS § 64.527, which prescribes that elected officials are entitled to annual increases or decreases in salary based on the movement of the consumer price index. The trial court ruled that the salary increases were null and void. It also held, however, that King did not have the authority to unilaterally terminate the monthly expense allowance. The Court of Appeals affirmed.

The salary increase voted by the Fiscal Court greatly exceeded the annual adjustment permitted by law and, therefore, the Fiscal Court was without authority to do so. However, King had no power to unilaterally terminate the monthly expense allowance. King had argued that, under KRS § 64.530(6), a magistrate was barred from receiving the monthly expense allowance unless the magistrate performed statutorily required committee work. Although committee work was required of the magistrates, King acted improperly by withholding the allowances. The proper remedy, should a magistrate fail to

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108 Id. at 558.
109 Id. at 559.
110 See Kenton County Fiscal Court, 981 S.W.2d at 558-59.
111 Id.
112 See Polston v. King, 965 S.W.2d 143 (Ky. 1998).
113 Id. at 144.
114 Id.
115 Id.
116 Id. at 144-45.
117 Id. at 144.
118 See Polston, 965 S.W.2d at 144.
119 Id. at 146.
120 Id. at 145.
121 Id.
122 Id.
123 Id.
perform committee work, is to bring an action to recover the funds previously paid.\textsuperscript{124}

\textit{Wallace v. King}, 973 S.W.2d 485 (Ky. Ct. App. 1998). In May 1993, the Clinton County Fiscal Court voted to reduce the salary of the county jailer from $26,000 to $15,000.\textsuperscript{125} Steve Wallace was elected jailer of Clinton County in November 1993 and took office in January of 1994.\textsuperscript{126} In February 1994, the Fiscal Court reinstated the $26,600 salary.\textsuperscript{127} In October of that year, however, the Fiscal Court reduced the salary to $12,000 in response to the closing of the county jail.\textsuperscript{128} Wallace then filed a complaint stating he was entitled to the $26,600 salary.\textsuperscript{129} KRS § 414.245(4), which specifically addresses jailer salaries, takes precedence over the more general and older provisions of KRS § 64.530, which grants the fiscal court the power to set the salaries of certain county officers and employees.\textsuperscript{130} KRS § 414.245 states that the jailer receives a salary from the county jail operation budget.\textsuperscript{131} Other Kentucky statutory provisions require the county to submit its budget by June 1, a date following the reduction of salary from $26,000 to $15,000 on May 27, 1993.\textsuperscript{132} Therefore, the lower court ruled Wallace was only entitled to a $15,000 salary.\textsuperscript{133} The Court of Appeals reversed.\textsuperscript{134}

The jail was not eliminated until after Wallace’s term of office had begun.\textsuperscript{135} Therefore, the fiscal court was not entitled to lower his salary.\textsuperscript{136} KRS § 441.245(5), when read in conjunction with § 161 of the Kentucky Constitution (forbidding a change in compensation during the term of office of an elected county official), prevented the fiscal court from doing this.\textsuperscript{137} This is true even if the jailer’s duties were lessened by the closing of the jail.\textsuperscript{138} The $12,000 figure would be a valid salary beginning in the term of the next jailer.\textsuperscript{139}

\textit{Neal v. Fiscal Court, Jefferson County}, 986 S.W.2d 907 (Ky. 1999). Jefferson County had a policy of providing public funds to pay for the transportation of private school students.\textsuperscript{140} These subsidies were paid directly to

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Polston}, 965 S.W.2d at 145-46 .
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Wallace}, 973 S.W.2d at 486.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Wallace}, 973 S.W.2d at 487.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item See \textit{Neal v. Fiscal Court, Jefferson County}, 986 S.W.2d 907, 908 (Ky. 1999).
\end{enumerate}
\end{footnotesize}
the private school. The constitutionality of this policy was successfully challenged in \textit{Fiscal Court of Jefferson County v. Brady}. Specifically, the court held that §5 and §189 of the Kentucky Constitution were violated. In response to this decision, the Jefferson County Fiscal Court enacted Resolution 34 on June 27, 1995. Under this resolution, monies for the transportation of private school students were paid directly to the contracting bus companies instead of the private schools. The Jefferson County Court upheld Resolution 34. The Kentucky Supreme Court affirmed, holding that: (1) the new policy was in accordance with KRS §158.115(2); (2) the benefit went directly toward the safety and welfare of school children; and (3) no Kentucky statute or case commanded that public and non-public school transportation subsidies must be allocated evenly.

KRS §158.115 allows counties to pay for transportation of school students from general funds (i.e., not through money raised from educational taxes). The constitutionality of the statute was upheld as a valid "exercise of police power for the protection of children against the inclemency of weather and from the hazards of present day highway traffic." Appellants had argued that the government has no power, under §§3, 5, 171, 184 and 189 of the Kentucky Constitution, to "assist religious institutions." However, the fact that the bus contracting companies received transportation subsidy payments directly is compatible with KRS §158.115(2). Also, benefits provided by Resolution 34 inure to the child (i.e. his or her safety and welfare) and not to the coffers of private schools. And unlike the policy enacted under \textit{Brady}, a tuition ceiling is no longer a prerequisite to subsidy eligibility. This is a key difference, because a private school can no longer manipulate tuition to receive the subsidy. Children are the clear beneficiaries of the resolution, and any incidental benefit to a private school does not make it illegal or unconstitutional. Finally, no Kentucky statute or case requires that subsidies be allocated evenly between

\begin{itemize}
    \item\textsuperscript{141} \textit{Id.} at 909.
    \item\textsuperscript{142} \textit{Id.} at 908-09 (citing Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681 (Ky. 1942)).
    \item\textsuperscript{143} \textit{Id.} at 909 (citing Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681, 687 (Ky. 1942)).
    \item\textsuperscript{144} \textit{Neal}, 986 S.W.2d at 910.
    \item\textsuperscript{145} \textit{Id.}
    \item\textsuperscript{146} \textit{Id.}
    \item\textsuperscript{147} \textit{Id.} at 911.
    \item\textsuperscript{148} \textit{Id.}
    \item\textsuperscript{149} \textit{Id.} at 912.
    \item\textsuperscript{150} \textit{Neal}, 986 S.W.2d at 908.
    \item\textsuperscript{151} \textit{Id.} (quoting Nichols v. Henry, 191 S.W.2d 930, 932 (Ky. 1945)).
    \item\textsuperscript{152} \textit{Neal}, 986 S.W.2d at 910.
    \item\textsuperscript{153} \textit{Id.} at 911.
    \item\textsuperscript{154} \textit{Id.}
    \item\textsuperscript{155} \textit{Id.}
    \item\textsuperscript{156} \textit{Id.}
    \item\textsuperscript{157} \textit{Id.} at 912.
\end{itemize}
public and non-public school students, or that they include all children.\textsuperscript{158} KRS § 158.115 gives the Fiscal Court the power to provide for “all students it deems necessary” to be in need of safer transportation.\textsuperscript{159}

\textbf{D. Taxation}

\textit{Children’s Psychiatric Hosp. of Northern Kentucky, Inc. v. Revenue Cabinet}, 989 S.W.2d 583 (Ky. 1999). Seventeen hospital corporations and the Kentucky Hospital Association challenged the constitutionality of the hospital provider tax enacted by the legislature in 1993.\textsuperscript{160} This 2.5\% tax was enacted in response to the public demand for health care reform.\textsuperscript{161} The Franklin Circuit Court granted summary judgment for the Commonwealth.\textsuperscript{162} The Court of Appeals, at the urging of the hospitals, granted a transfer to the Kentucky Supreme Court for its consideration of the constitutional issues raised on appeal.\textsuperscript{163} The Supreme Court affirmed.\textsuperscript{164}

The appellants made four constitutional challenges to HB 1 and HB 250 (the legislative acts that created the hospital provider tax): (1) the tax violated § 170 of the Kentucky Constitution, (2) the tax constituted “special legislation” and violated § 59 of the Kentucky Constitution, (3) the tax violated the due process and equal protection clauses of the Kentucky and Federal Constitutions, and (4) the title of the HB 250 was misleading and violated § 51 of the Kentucky Constitution.\textsuperscript{165} As to the first argument, the court looked to the history of the Kentucky constitutional debates in 1890 and held that the tax exemptions listed in § 170 of the Kentucky Constitution applied only to certain types of real property used for public purposes.\textsuperscript{166} Additionally, exemptions from taxation are disfavored in the law and must be strictly construed against the finding of an exemption.\textsuperscript{167} HB 250 was not special legislation because it called for a broad-based, uniform, and federally compliant provider tax.\textsuperscript{168} Also, it would be bad public policy to tax doctors and not hospitals.\textsuperscript{169} As to the appellants’ third point, the Kentucky legislature did not run afoul of the equal protection or due process clauses because it reasonably concluded that the hospital tax promoted a legitimate state purpose.\textsuperscript{170} Therefore, the legislature’s determination of this tax

\textsuperscript{158} Neal, 986 S.W.2d at 912.
\textsuperscript{159} Id.
\textsuperscript{160} See Children’s Psychiatric Hosp. of Northern Kentucky, Inc. v. Revenue Cabinet, Com. of Kentucky, 989 S.W.2d 583, 584-85 (Ky. 1999).
\textsuperscript{161} Id. at 585.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 588.
\textsuperscript{165} Id. at 585-88.
\textsuperscript{166} See Children’s Psychiatric Hosp., 989 S.W.2d at 585-86.
\textsuperscript{167} Id. at 586.
\textsuperscript{168} Id. at 586-87.
\textsuperscript{169} Id. at 587.
\textsuperscript{170} Id.
classification easily satisfied the rational basis standard.  Also, federal law did not require the legislature to set a uniform tax rate as between doctors and hospitals, only that all inpatient hospital providers be treated uniformly. Finally, the title of HB 250, “An Act relating to health care reform and providing funding therefor,” provided fair and reasonable notice to anyone who read and understood English, and therefore did not violate the one subject per law requirement of § 51 of the Kentucky Constitution.

Inland Container Corp. v. Mason County, 6 S.W.3d 374 (Ky. 1999). Inland Container opened a new manufacturing plant in Maysville in 1992. It was required to pay both local and state utility taxes, subject to a cap of 3% of the cost of production under either tax. As Inland Container was a company new to the state, it was not allowed to use the direct pay authorization option. This option allows a company to pay taxes directly to the taxing authority as well as to claim a tax exemption on estimated energy use above the 3% of production cost cap. It was the administrative practice of the state to require a new company to establish a one year track record of actual energy costs before the state would grant the company the authority to use the direct pay option. The only other payment option available to Inland was the utility payment method. Under this method the utility provider simply added the tax to Inland’s utility bill, and then submitted these collections to the respective taxing authorities. However, under this method, Inland was unable to claim any exemption at the time of payment for any estimated use above the cap. Inland was later granted the authority to use the direct pay option and requested both the state and the Mason County Board of Education (the recipient of the local utility tax) to refund the amounts previously paid in excess of the cap. While the state granted the refund, the Board claimed it had already budgeted all of its tax receipts and refused to refund Inland the $510,038.31 it had paid in excess of the cap. In defense of its actions, the Board claimed that, because the utility provider collected the tax, the Board had no knowledge of an overpayment. It also said that there was no statutory authority requiring it to issue a refund. Therefore,
the issue became whether a taxpayer was entitled to a refund of excess taxes paid where no statutory authorization for a refund existed. The Board, Inland sought a refund or credit for the excess taxes paid. The Board subsequently filed a third-party suit against the utility provider and the Revenue Cabinet. The Board wanted indemnification in case it was ordered to pay the refund or grant a credit. The Kentucky Supreme Court held that the local tax was both involuntary and invalid and ordered the Board to reimburse or credit Inland.

The local tax was invalid because it provided no regulatory scheme for the refund of excess payments during the time period a company is ineligible for the direct pay option. It was involuntary because the nonpayment of taxes would subject a manufacturer to mandatory sanctions under Kentucky law. A school system has a need to maintain financial integrity, but the Board cannot "exploit a procedural loophole" to reap a financial windfall at a taxpayer's expense. As to the Board's claim for indemnification, the court held that the Revenue Cabinet could not be held liable, because it simply acted truthfully when it informed Inland that the direct pay option could not be obtained until the company had one year of operating experience.

Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co., 983 S.W.2d 493 (Ky. 1998). In 1994, pursuant to KRS § 278.183, Kentucky Utilities applied to the Public Service Commission for an environmental surcharge. The application requested the authority to increase rates for approximately 430,000 customers in 77 Kentucky counties. Based on its declared policy of fostering the use of Kentucky coal by Kentucky electric utilities, the General Assembly enacted KRS § 278.183, the environmental surcharge statute, which became effective on January 1, 1993. The statute allowed electric utilities to recover from consumers the costs of complying with the Federal Clean Air Act as well as other state and local environmental regulations applicable to coal combustion wastes. The intent of the legislature was to encourage the use of high sulfur coal, the kind of coal mined in Eastern Kentucky, by requiring consumers to pay for the purchase of high sulfur cleaning scrubbers and related equipment.
surcharge method gives utilities an alternative to a general rate increase request. Utility customers made several constitutional objections to the tax. The Supreme Court held in favor of the utility companies, but said the surcharge could not be used to recoup costs prior to the effective date of the statute.

Utility customers were not denied due process. Public notice was given, and the Kentucky legislature satisfied the rational basis test because the surcharge statute was rationally related to the legitimate and important government interest in securing a sound Kentucky economy. The failure of the Public Service Commission to hold a separate hearing on the financial condition of the surcharge-applying utility was not required under constitutional or statutory authority despite the fact that a separate hearing would be necessary if the utility were applying for a general rate increase. Hearings for fuel adjustment expenses have been judicially approved in other jurisdictions, thus implying the validity of a surcharge specific hearing. Neither does the statute constitute special legislation in violation of § 59 of the Kentucky Constitution, which requires distinctive and natural reasons for any classification. The statute applies uniformly to all electric utilities, and no one utility is singled out for special treatment. However, the court held that retroactive application of the statute would not be allowed due to the fundamental principle against retroactivity in statutory construction. The wording of the statute clearly demonstrates that the statute is prospective. To grant a retroactive application would be to give utilities a financial windfall, allowing a recovery of costs previously accounted for in annual reports and regulatory filings. Also, since the statute creates new rights and duties, it is not remedial in nature (i.e., its purpose is not to repair past wrongs). Therefore, it only applies to a utility’s future obligation to comply with new environmental laws.

Maxim Machine Co., Inc. v. City of Shepherdsville, 17 S.W.3d 890 (Ky. 2000). In 1990 the city of Shepherdsville adopted Ordinance 1990-212, which imposed an occupational license tax on any trade or business within the city. After the ordinance was declared void in 1995 for procedural infirmities, several
plaintiffs brought an action for tax refunds for the years 1990-94. The Kentucky Supreme Court granted discretionary review in order to address the sole question of which statute of limitations period applied to the action. The Court of Appeals concluded that KRS § 134.590(3), "Refund of ad valorem taxes or taxes held unconstitutional," and its two-year statute of limitations applied. Kentucky's highest court reversed, stating that the voided ordinance was neither an ad valorem tax nor unconstitutional and that a five-year statute of limitations applied.

Section 181 of the Kentucky Constitution recognizes a distinction between ad valorem and business license taxes. Also, the ordinance was declared void because it was improperly enacted and was never held unconstitutional. Therefore, the Court of Appeals improperly applied KRS § 134.590. Although no statutory provision governed the refund of an occupational tax, the appellants were entitled to a refund under the common law because the tax was invalid and paid involuntarily. The tax was paid involuntarily because non-payment would result in mandatory sanctions. Therefore, the Kentucky Supreme Court held that the five-year limitations period of either KRS § 413.120(5), addressing claims for damages resulting from the wrongful withholding of personal property, or KRS § 413.120(7), addressing injuries not arising under contract or not otherwise enumerated in the provision, applied to the action. Consequently, the appellants were entitled to proceed, on remand to the Bullit Circuit Court, with their suit.

Owens-Illinois Labels, Inc. v. Commonwealth of Kentucky, 27 S.W.3d 798 (Ky. Ct. App. 2000). In this consolidated case, Industrial Revenue Bonds (IRB's) were issued by the municipality and used to fund the acquisition and construction of land and industrial buildings for the appellant companies. IRB's are used to attract businesses to a locality because they offer certain property tax exemptions to private leasehold interests in industrial buildings owned and financed by a government entity. After the bonds were repaid and retired, the companies were sent regular tax bills which were paid in full. The companies subsequently requested a tax refund because they felt they were

17 Id.
18 Id. at 892.
19 Id.
20 Id.
21 Id.
22 See Maximum Machine Co., Inc., 17 S.W.3d at 892.
23 Id.
24 Id. at 892-93.
25 Id. at 892.
26 Id. at 893.
27 Id.
29 Id.
30 Id.
entitled to continuing favorable tax treatment. The Revenue Cabinet denied these requests. The companies appealed to the Board of Tax Appeals, which held against the companies. In rendering its decision, the Board heeded the decision of the Franklin Circuit Court in a similar case. That case, *Revenue Cabinet v. American Greetings Corp.*, held that "[o]nce the debt is paid off, the collateral is no longer financed," and thus the company was no longer entitled to a favorable tax status. The Court of Appeals affirmed, holding that any ambiguity in a tax exemption statute must be strictly construed against the beneficiaries.

The companies felt they were entitled to favorable tax treatment as long as the IRB-financed property they lease is owned by the city. They argued the word "financed" should not be limited to currently debt-encumbered real property. They further claimed that: 1) the word referred only to the source of money used for construction; and 2) the repayment of the debt was irrelevant to the word's meaning. The Revenue Cabinet responded that the plain meaning of the word indicates "that financial obligations must be outstanding." The court said that both interpretations were equally reasonable, and as such, the meaning of the word "financed" was ambiguous. The court then engaged in a substantial discussion of the intent of the legislature in enacting KRS § 132.020(1) and KRS § 132.200(8), the statutes creating property tax incentives. Despite a detailed analysis, the court could not determine a legislative intent favoring one side or another. The court noted a significant distinction in the rule of statutory construction between tax statutes and tax exemption statutes. While tax statutes are to be strictly construed to the taxpayer's benefit, the opposite is true for beneficiaries of tax exemption statutes. Consequently, the ambiguity of the word "financed" must be construed in favor of the taxing authority.

231 Id.

232 Id. at 801.

233 Id.

234 See *Owens-Illinois Labels, Inc.*, 27 S.W.3d at 801.

235 Id.

236 Id. at 805.

237 Id. at 802.

238 Id.

239 Id.

240 See *Owens-Illinois Labels, Inc.*, 27 S.W.3d at 802.

241 Id. at 803.

242 Id. at 801.

243 Id.

244 Id.

245 Id.

246 See *Owens-Illinois Labels, Inc.*, 27 S.W.3d at 805.
E. Zoning

Board of Adjustments, Bourbon County v. Brown, 969 S.W.2d 214 (Ky. Ct. App. 1998). The Bourbon County Board of Adjustment ruled that the appellee’s auction house constituted an illegal non-conforming use.²⁴⁷ The auction house was located on land zoned B-2 under the Bourbon County Zoning Ordinance.²⁴⁸ Under this classification, auction activities were prohibited.²⁴⁹ This zoning classification was in-place prior to the auction house commencing business operations.²⁵⁰ However, KRS § 100.253(2) and KRS § 100.253(3) allow a use to be deemed a legal, nonconforming one if the use has been in continuous operation for 10 years and has not been the subject of any adverse order during that time.²⁵¹ The auction house began business in 1979 and has continued uninterrupted ever since.²⁵² The house owners did, however, make some physical alterations to the property in 1988, namely, enclosing the porch and adding a bathroom.²⁵³ The number of auctions also increased from two to three per week.²⁵⁴ The Board determined that the property alterations in 1988 substantially enlarged the premises, and constituted an impermissible expansion of a nonconforming use under KRS § 100.253(2).²⁵⁵ Hence, the Board determined the owners had abandoned the previously legal nonconforming use, and were presently operating an illegal nonconforming use.²⁵⁶ The Bourbon Circuit Court rejected the Board’s findings, holding as a matter of law that the Board erred when it concluded that an increase in auction activity and renovations to the porch violated the statutory prohibition against impermissible expansion of a nonconforming use.²⁵⁷ The Court of Appeals affirmed, rejecting the Board’s argument that the circuit court erred by substituting its own judgment for that of the Board.²⁵⁸ The Board did not offer any authority to support its conclusion, nor did it address any of the authorities cited by the circuit court.²⁵⁹ The Kentucky Supreme Court case of A. L. Carrithers & Sons v. City of Louisville held that the structural alterations that are intended to be prohibited by zoning regulations were those which converted an old building into a “substantially different

²⁴⁸ Id.
²⁴⁹ Id. at 215.
²⁵⁰ Id.
²⁵¹ Id.
²⁵² Id.
²⁵³ See Board of Adjustments, 969 S.W.2d at 215.
²⁵⁴ Id.
²⁵⁵ Id.
²⁵⁶ Id.
²⁵⁷ Id.
²⁵⁸ Id. at 215-16.
²⁵⁹ See Board of Adjustments, 969 S.W.2d at 216.
structure." The Board did not demonstrate this in the case *sub judice* and therefore, erred as a matter of law since it acted arbitrarily.261

Davis v. Bd. Of Comm’rs of City of Danville, 995 S.W.2d 404 (Ky. Ct. App. 1999). In March 1995, Mitchell Clark submitted a request to the Danville/Boyle County Planning Commission to rezone 47 acres he owned from an agricultural classification to a commercial one.262 The planning commission voted to deny this request.263 The matter was then forwarded to the Board of Commissioners for a final vote264 (Kentucky law requires a zone change to be approved by the local legislative body).265 The Board did not accept the planning commission’s recommendation, and voted to approve the zone change.266 The Boyle Circuit Court affirmed this decision.267 On appeal, the court reversed the circuit court, holding that because Clark did not submit a proper conceptual plan with his zone change request, he did not comply with the Danville ordinance.268

Under KRS § 100.203, the adoption of a zoning law is optional in Kentucky.269 While most Kentucky cities and counties have thus far chosen not to enact zoning regulations, those that have are bound to follow the requirements thereof.270 The Danville ordinance required the submission of a conceptual plan, which analyzes the impact of the zone change on the community.271 This plan must address such issues as natural resource conservation, safe vehicle and pedestrian traffic flow, compatibility with other uses or projected uses in the area, adequate drainage, and conformance to the overall comprehensive plan.272 Clark’s submission of a surveyor’s drawing did not satisfy this requirement.273 The circuit court erred when it held that a conceptual plan was not required under Kentucky law because Danville had adopted a zoning ordinance, and the submission of a conceptual plan is a component thereunder.274 The fact that the Board noted in its findings that Wal-Mart and other commercial properties were located across the street did not change this fundamental requirement.275

Fritz v. Lexington-Fayette Urban County Government, 986 S.W.2d 456 (Ky. Ct. App. 1998). In 1995, Fritz and his fellow appellants submitted a re-zoning request to change the use classification of ten acres they owned from single

260 *Id.* (quoting A. L. Carrithers & Sons v. City of Louisville, 63 S.W.2d 493, 497 (Ky. 1933)).
261 *Board of Adjustments*, 969 S.W.2d at 216.
262 See *Davis v. Board of Comm’rs of the City of Danville*, 995 S.W.2d 404, 405 (Ky. Ct. App. 1999).
263 *Id.*
264 *Id.*
265 See KY. REV. STAT. ANN. § 100.211(1) (Banks-Baldwin 1999).
266 *Davis*, 995 S.W.2d at 405.
267 *Id.*
268 *Id.* at 406-07.
269 *Id.* at 406.
270 *Id.* at 406-07.
271 *Id.* at 406.
272 *Davis*, 995 S.W.2d at 405.
273 *Id.* at 405-06.
274 *Id.* at 406-07.
275 *Id.* at 406.
family residential to planned shopping center.276 The land in question was located on Nicholasville Road, a major traffic artery in Lexington.277 The property was surrounded on three sides by either residential or agricultural use zoning classifications, but was directly across the road from a shopping mall.278 The comprehensive plan called for commercial development on the mall side, but only for residential uses on the opposite side of the road.279 The Planning Commission voted unanimously to reject the proposal, finding it was not in agreement with the comprehensive plan.280 Likewise, the Lexington-Fayette Urban County Government (LFUCG) unanimously rejected the zone change request.281 The circuit court affirmed this finding.282 In the Court of Appeals, appellants contended that the urban-county government’s refusal to rezone was arbitrary, that the expansion of the Fayette Mall constituted a “major unanticipated change” to the comprehensive plan, and that the failure of the government to update the comprehensive plan in a timely fashion violated Kentucky zoning law.283 Also, they requested the land in question be rezoned based on the record.284 The Court of Appeals rejected these arguments and affirmed.285

The Kentucky Supreme Court held in Louisville v. McDonald286 that a property owner must show a compelling need in order to be entitled to a zone change.287 In addition, KRS § 100.213, the provision covering zone changes, requires the property owner to show that the proposed zoning classification is appropriate.288 All zoning decisions must follow the comprehensive plan, which guides, under the auspices of KRS § 100.193, the development of public and private land in the most appropriate manner.289 The appropriate standard of judicial review of administrative decisions is whether the decision was unsupported by substantial evidence.290

In holding against the landowners, the court found that the comprehensive plan’s high-density residential classification for the east side of Nicholasville Road was not inappropriate. Therefore, it was not arbitrary.291 As to the

277 Id.
278 Id.
279 Id. at 457-58.
280 Id. at 458.
281 Id.
282 See Fritz, 986 S.W.2d at 458.
283 Id.
284 Id.
285 Id. at 460.
286 470 S.W.2d 173, 179 (Ky. 1971).
287 Fritz, 986 S.W.2d at 458.
288 Id.
289 Id. at 459.
290 Id. at 458-59.
291 Id. at 459.

appellant's second point, the court noted that a "major unanticipated change" is a relative concept.292

To the appellants directly across Nicholasville Road, the new McAlpions store is surely a major local change. However, it does not necessarily follow that it would totally wipe out the commercial corridor concept or the use of Nicholasville Road as the dividing line between the commercial property on the west and the residential property on the east.293

The Planning Commission and LFUCG both held public meetings on the issue, during which conflicting evidence was presented.294 Neither showed that the unanticipated mall expansion substantially altered the character of the area.295

The failure of LFUCG to update the comprehensive plan in a timely manner did not render decisions relied thereon void.296 KRS § 100.197(2) addresses the consequences for a failure to update the comprehensive plan every five years.297 It gives any property owner in the planning unit the right to bring suit in circuit court.298 The circuit court will then order the plan to be updated within a certain time period.299 The comprehensive plan cannot be declared invalid unless the planning commission fails to comply with this court order.300 This procedure is the exclusive remedy, and the appellants have not followed it.301 Finally, the court rejected the appellant's last argument that after a review of the record, the court would be forced to conclude that the property could only be classified as a planned shopping mall.302 The appellants have not shown a compelling need for the zone change.303 The fact that a commercial use of land is more profitable does not mean that the use rises to the level of a compelling need.304

The Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Co., Inc, 969 S.W.2d 691 (Ky. 1998). In July 1993, the Louisville and Jefferson County Planning Commission voted against a zone change request from Albert Oil.305 At that meeting, appellant Evangelical Lutheran voiced its opposition to the proposal.306 In November of that year, some 116 days after the Planning Commission's vote, the Prospect City Council voted to reverse the planning

292 Id.
293 Fritz, 986 S.W.2d at 459.
294 Id.
295 Id.
296 Id. at 460.
297 Id. at 459.
298 Id.
299 Fritz, 986 S.W.2d at 459.
300 Id. at 459-60.
301 Id. at 460.
302 Id.
303 Id.
304 Id.
305 See The Evangelical Lutheran Good Samaritan Society, Inc., v. Albert Oil Co., 969 S.W.2d 691, 693 (Ky. 1998).
306 Id. at 693.
The circuit court determined the City Council had violated KRS § 100.211, which states that a local government has a ninety-day time limit to overturn the Board’s ruling. The Court of Appeals reversed, holding that the ninety-day period was not mandatory. The Kentucky Supreme Court held the Court of Appeals erred when it relied on *Ratliff v. Phillips* to hold that the 90-day time limit was directory and not mandatory.

The Supreme Court distinguished the case *sub judice* from *Ratliff* on the basis of the absence of any language addressing the failure to act in the statutory provision in question in *Ratliff*. The provisions at issue in this case, KRS §§ 100.211(1) and 100.211(7), specifically state that a majority vote of the fiscal court or legislative body is needed to override a planning commission recommendation, and that the fiscal court or legislative body must take action within ninety days of the planning commission’s recommendation. Ignoring the 90-day requirement would allow a local legislative body to delay voting on a board recommendation and perhaps ultimately prevent any recommended zoning. Local legislative bodies must follow the planning system set out in Chapter 100 of the Kentucky Revised Statutes if they are to exercise any authority to zone.

If the local legislative body does not follow the procedural requirements of Kentucky zoning law, it then forfeits the right to act.

*Spainhoward v. Henderson County Board of Zoning Adjustment*, 7 S.W.3d 396 (Ky. Ct. App. 1999). Spainhoward submitted an application to the City of Henderson for approval to operate a recycling center. The code administrator for the city determined that a recycling business was a retail business under the Henderson Zoning Ordinance, a permitted use in the general business district. A nearby property owner appealed the decision to the Henderson County Board of Adjustment. The Board reversed the administrator’s decision, finding that recycling was an inappropriate use. However, the Board said, if Spainhoward sought a conditional use permit, he could continue to operate until the next board meeting. Spainhoward refused and brought suit in Henderson Circuit Court,

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307 *Id.*
308 *Id.*
309 *Id.* at 692.
311 See *The Evangelical Lutheran Good Samaritan Society, Inc.*, 969 S.W.2d at 693.
312 *Id.*
313 *Id.* at 692.
314 *Id.* at 693.
315 *Id.* at 693-94.
317 *Id.*
318 *Id.*
319 *Id.*
320 *Id.*
which dismissed the action for failure to exhaust administrative remedies.\textsuperscript{321} The Court of Appeals held that the Board’s determination that the recycling use was inappropriate constituted final agency action, and therefore, was subject to judicial review.\textsuperscript{322}

The fact that the Board gave the appellant the option to continue operating temporarily under a conditional use permit did not affect the finality of the Board’s vote.\textsuperscript{323} The issuance of a conditional use permit would not impact the Board’s decision that the recycling center is a non-permitted use.\textsuperscript{324} Also, a conditional use permit is restrictive in nature; it imposes additional requirements that would not be needed if the use were permitted.\textsuperscript{325} Since the issue before the Board was whether the recycling center was a permitted use, its determination that it was not constituted final agency action.\textsuperscript{326}

\textbf{McCollum v. City of Berea, 2000 WL 462627 (Ky. Ct. App. 2000).} Anna and John McCollum owned a lot in Berea that was zoned R-3, a classification that only allows for single and multi-family residences.\textsuperscript{327} They purchased a doublewide manufactured home, which they intended to place on the lot,\textsuperscript{328} and applied to the City of Berea Planning and Zoning Administrator for approval.\textsuperscript{329} This request was denied because the manufactured home came within the zoning code of a mobile home, which was not recognized in the R-3 classification.\textsuperscript{330} The Zoning Administrator ruled that under § 81.308 of the Berea Zoning Ordinance, all mobile homes within city limits must be placed only in mobile home parks.\textsuperscript{331} The Berea Board of Adjustment upheld the Zoning Administrator’s ruling.\textsuperscript{332} The McCollums filed suit against the city and Board, claiming \textit{inter alia}, that the Berea Zoning Code was an “attempt to regulate in excess of the power granted by the General Assembly.”\textsuperscript{333} The circuit court granted summary judgment for the defendants.\textsuperscript{334} The Kentucky Court of Appeals affirmed the decision, holding that the city validly exercised the police power granted to it by the General Assembly.\textsuperscript{335}

Under Kentucky law, a city enjoys no police power of its own.\textsuperscript{336} The legislature must delegate that power.\textsuperscript{337} The power to establish zoning

\begin{itemize}
\item \textsuperscript{321} Id. at 398.
\item \textsuperscript{322} See Spainhoward, 7 S.W.3d at 399.
\item \textsuperscript{323} Id.
\item \textsuperscript{324} Id. at 400.
\item \textsuperscript{325} Id. at 399.
\item \textsuperscript{326} Id. at 400.
\item \textsuperscript{328} Id.
\item \textsuperscript{329} Id.
\item \textsuperscript{330} Id.
\item \textsuperscript{331} Id.
\item \textsuperscript{332} Id.
\item \textsuperscript{333} See McCollum, 2000 WL 462627, at *1.
\item \textsuperscript{334} Id. at *2.
\item \textsuperscript{335} Id. at *5.
\item \textsuperscript{336} Id. at *2.
\end{itemize}
classifications is an example of this delegation. In order to be valid, the police power must be used to promote the health, safety, and welfare of the citizenry. The question of whether zoning ordinances can be used to protect the property values of a neighborhood is a question of first impression in Kentucky. In Schloemer v. City of Louisville, Kentucky's highest court held that the erection of a gasoline filing station in a residential neighborhood would decrease the value of residential property in the neighborhood, which would subsequently hurt the city's tax base. Therefore, it directly affected the public welfare of the city.

The Court of Appeals also surveyed other jurisdictions. In Colorado Manufactured Hous. Ass'n v. City of Salida, the court "found that it was the responsibility of local governments to address 'perceived needs relating to government functions, e.g. stability within the community and property values.'" In Texas Manufactured Hous. Ass'n v. City of Nederland, the court upheld the city restriction on mobile home use to mobile home parks.

When the validity of a zoning ordinance is challenged, the plaintiffs have the high burden of proof to show the ordinance is unreasonable. If reasonable minds can differ as to reasonableness, the ordinance must be upheld, and must be considered a valid exercise of police power. The appellants have not met this burden, and as such, the decision of the Zoning Administrator and the Board must be upheld. The city has properly exercised police power in order to protect the values of neighboring properties.

F. Tort Liability

Angel v. Harlan County Bd. Of Education, 14 S.W.3d 559 (Ky. Ct. App. 2000). Norma Jean Angel was injured when she fell into an uncovered manhole at a Harlan County elementary school. She sued the Board of Education and the Harlan County Fiscal Court for their alleged negligence in failing to properly secure the manhole cover. The lower court dismissed the case based on the doctrine of sovereign immunity. On appeal, Angel challenged the applicability of sovereign immunity.

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337 Id.
338 Id.
340 Id. at *4.
341 Id. at *3 (citing Schloemer v. City of Louisville, 182 S.W.2d 782 (Ky. 1944) (internal citations omitted)).
343 McCollum, 2000 WL 462627 at *4-5 (citing Texas Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996)).
344 McCollum, 2000 WL 462627 at *4-5.
345 Id. at *3.
346 Id.
347 Id. at *5.
348 Id.
350 Id.
351 Id.
of the doctrine and alternatively argued that the Board's participation in an insurance trust constituted a waiver of the sovereign immunity defense. The Court of Appeals affirmed.

It is the domain of the courts to determine if a public entity has protection based on the principle of sovereign immunity, which is enumerated in § 231 of the Kentucky Constitution. The Kentucky Supreme Court has held that this doctrine extends to both school boards and fiscal courts. The Board did not waive its sovereign immunity defense by participating in an insurance trust (i.e. indemnity fund), even if such participation was an unnecessary expenditure. If immunity exists, it is not lost or waived simply by the purchase of insurance.

Department of Corrections v. Furr, 23 S.W.3d 615 (Ky. 2000). Dorsey Furr, a former corrections officer, filed suit against the Department of Corrections alleging gender discrimination, sexual harassment, and retaliation. The retaliatory claim was allegedly in violation of the Kentucky Civil Rights Act. The court granted summary judgment on the retaliation claim, holding that there was no evidence of adverse action directed toward Furr. On the other claims, a jury found in favor of the Department. The Court of Appeals held that the defense of sovereign immunity, which was raised for the first time by the Department at the appellate stage, did not bar Furr's claim. It subsequently reversed the grant of summary judgment. However, the Court of Appeals also affirmed the jury's verdict in favor of the Department on the sexual harassment and gender discrimination claims. The Kentucky Supreme Court granted review to determine if the General Assembly waived sovereign immunity for actions brought pursuant to the KRS Chapter 344, the Kentucky Civil Rights Act.

The court noted that one of the purposes of the Act is to safeguard all individuals against discrimination. This statutory promise, made to the people of Kentucky by the General Assembly, would indeed be a hollow one if the prohibition against discrimination could not be applied against the state. "To immunize the Commonwealth from the application of the Kentucky Civil Rights..."
Act frustrates the Act’s purpose and intent, deprives many of its citizens of its protection, and renders meaningless its pledge to safeguard all individuals from discrimination. Such a construction is neither tenable nor tolerable.\(^{368}\)

The Department argued that the General Assembly intended the sovereign immunity doctrine to apply to the Act because KRS § 344.050 provides neither a direct nor an implied cause of action against the Commonwealth.\(^{369}\) The court noted that KRS § 344.050 is “completely silent against whom a cause of action may be brought.”\(^{370}\) The statute simply provides a remedy for “any act in violation” of the Act.\(^{371}\) Therefore, a cause of action may be brought against the party responsible for violating the Act.\(^{372}\) The statutory definition of “employer” under the Act includes a “person.”\(^{373}\) The court held the state is a person by overwhelming implication.\(^{374}\) Therefore, the Act provides a cause of action against the state for violations thereof.\(^{375}\)

\textit{City of Louisville v. Silcox}, 977 S.W.2d 254 (Ky. Ct. App. 1998). In June 1994, Laydell Silcox drove in the Garretsville Picnic Area entrance to the Louisville Otter Creek Park.\(^{376}\) A two-dollar entrance fee per car was charged only at this entrance to the park.\(^{377}\) In addition, bicyclists and pedestrians were not charged an entrance fee of any kind.\(^{378}\) Silcox sustained a severe foot injury when he jumped into the creek’s murky waters off a five-foot embankment.\(^{379}\) He could not see the log he jumped onto because the muddied waters obscured objects therein.\(^{380}\) Silcox sued the city for the injuries he sustained and received a trial court judgment in excess of $18,000.\(^{381}\) The Court of Appeals reversed, holding that KRS § 411.190, the Recreational Use Statute, rendered the city immune to the damages action.\(^{382}\)

The Recreational Use Statute was enacted to encourage landowners to make their land and water available for recreational purposes by limiting their liability.\(^{383}\) Unless specifically exempted, the statute holds that a landowner owes no duty of care to keep the land safe for recreational purposes or to warn others about dangerous conditions thereon.\(^{384}\) However, KRS § 411.190(6)(b) states

\begin{footnotesize}
\footnotesize{368 Id.}
\footnotesize{369 Id.}
\footnotesize{370 See Department of Corrections, 23 S.W.3d at 617.}
\footnotesize{371 Id.}
\footnotesize{372 Id.}
\footnotesize{373 Id.}
\footnotesize{374 Id.}
\footnotesize{375 Id.}
\footnotesize{376 See City of Louisville v. Silcox, 977 S.W.2d 254, 255 (Ky. Ct. App. 1998).}
\footnotesize{377 Id.}
\footnotesize{378 Id.}
\footnotesize{379 Id.}
\footnotesize{380 Id.}
\footnotesize{381 Id.}
\footnotesize{382 See City of Louisville, 977 S.W.2d at 257.}
\footnotesize{383 Id. at 255.}
\footnotesize{384 Id. at 255-56.}
\end{footnotesize}
that liability is not limited in any way should the landowner "charge" people to enter the land for recreational purposes.\textsuperscript{385} KRS § 411.190(1)(d) defines "charge" as "the admission price or fee asked in return for invitation or permission to enter upon the land."\textsuperscript{386} Therefore, the primary issue on appeal was whether the two-dollar entrance fee at the Garretsville entrance to the park was a charge as defined in KRS § 411.190(6)(b).\textsuperscript{387}

There is no Kentucky case directly on point, but several states, including Georgia (which has a very similar recreational use statute to Kentucky), have held immunity applicable under similar circumstances.\textsuperscript{388} The Georgia case involved an individual who sustained a foot injury while stepping off a footbridge in a state park.\textsuperscript{389} A one-dollar fee was charged per car, but not for people that came to the park by foot, boat, or airplane.\textsuperscript{390} The Georgia court held that the one-dollar fee was for parking only, was not an admission fee, and did not displace the state’s immunity.\textsuperscript{391} In order to affect immunity, it would have to be established that the fee was "imposed in return for recreational use of the land."\textsuperscript{392} The Kentucky Court of Appeals agreed with this interpretation.\textsuperscript{393} "As the fee was paid to park in that particular lot only and was clearly not paid in exchange for permission to enter the park and enjoy its facilities, the city was immune from liability under KRS § 411.190."\textsuperscript{394}

Kentucky administrative regulations dealing with swimming facilities do not effectively repeal (or supersede) the city’s recreational use immunity.\textsuperscript{395} The city’s removal of gravel to clear an intake valve in the creek does not mean that administrative regulations pertaining to swimming facilities apply because gravel removal did not modify or improve the creek for the purpose of swimming.\textsuperscript{396} Therefore, immunity for the city remained intact.\textsuperscript{397}

\textbf{McBride v. Maynard, 1999 WL 16661} (6th Cir. 1999). Kentucky State Police Officer David Maynard arrested Robert Joseph and Katherine McBride, a certified EMT and paramedic, respectively, for the crime of "improperly delivering a dead body to a hospital instead of a morgue."\textsuperscript{398} McBride and Joseph brought a 42 U.S.C. § 1983 action against Maynard, claiming their Fourth Amendment rights were violated.\textsuperscript{399} The plaintiffs also sued Maynard and Roger

\textsuperscript{385} Id. at 256.
\textsuperscript{386} Id. quoting Ky. REV. STAT. ANN. § 411.190(1)(d) (Banks-Baldwin 2000).
\textsuperscript{387} \textit{City of Louisville}, 977 S.W.2d at 256.
\textsuperscript{388} See id.
\textsuperscript{389} Id.
\textsuperscript{390} Id.
\textsuperscript{391} Id.
\textsuperscript{392} Id.
\textsuperscript{393} See \textit{City of Louisville}, 977 S.W.2d at 257.
\textsuperscript{394} Id.
\textsuperscript{395} Id. at 258.
\textsuperscript{396} Id.
\textsuperscript{397} Id.
\textsuperscript{399} Id.
Nelson, the Floyd County Coroner whom Maynard consulted prior to making the arrest, on a conspiracy claim. The district court granted summary judgment for both defendants on all claims and held that Maynard was entitled to qualified immunity. The Sixth Circuit Court of Appeals affirmed the holding as to the conspiracy claim, but reversed as to Maynard’s qualified immunity.

Qualified immunity shields police officers from suits for damages under certain circumstances. In order for this immunity to attach, the police officer must have reasonably believed that the arrest was lawful in light of clearly established law and the information possessed by the officer. Immunity is also provided to police officers who reasonably but mistakenly believe that probable cause for the arrest is present. For the purpose of establishing an officer’s right to qualified immunity, the focus is on “the objective legal reasonableness of the official’s actions in light of clearly established law.”

The district court listed several factors Maynard relied on when holding he was entitled to qualified immunity. Among other things, Maynard: (1) spoke to his supervisor before making the arrest; (2) had been informed that nurses on the scene had performed nine to ten minutes of unsuccessful CPR on the victim prior to the arrival of Joseph and McBride; (3) had been informed by another police officer that the victim was dead; (4) had been advised by Coroner Nelson that the victim of a gunshot would to the heart would die almost instantaneously; and (5) witnessed the ambulance crew dropping and then handcuffing the victim. However, the federal appellate court found that Officer Maynard ignored numerous facts that made it unreasonable for him to conclude that McBride and Joseph had committed an offense. These facts included the following: (1) no one (including Maynard) advised McBride that they thought the victim was dead; (2) no one (including Maynard) prevented McBride from rendering aid; (3) Maynard did not inform McBride that he had called the Coroner; (4) Maynard had no authority to pronounce the victim dead; (5) Maynard witnessed McBride attach three patches to the victim, which Maynard thought were used to “shock” the victim (i.e. jumpstart the victim’s heart); (6) McBride had superior medical training to Maynard; and (7) Maynard, as a certified EMT himself, knew the statutory duty of EMTs is “to provide basic life support techniques even if they personally believe the victim is dead.” In addition, Maynard arrested McBride and Joseph under a statute that covered the

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400 Id.
401 Id.
402 Id.
403 Id.
404 See McBride, 1999 WL 16661, at *1.
405 Id.
406 Id.
407 Id.
408 Id. at *1-2.
409 Id. at *2.
410 See McBride, 1999 WL 16661, at *2.
411 Id.
subject of "interference with conservation officers," which was clearly unconnected to the supposed crime of "tampering with evidence." Maynard acted unreasonably in arresting McBride and Joseph and, therefore, is not entitled to qualified immunity.

*Siding Sales, Inc. v. Warren County Water District,* 984 S.W.2d 490 (Ky. Ct. App. 1998). Lynn and Pamela Osborn leased some of their property in Bowling Green to Siding Sales, Inc., a vinyl siding and construction material supplier. In April 1992, the property was destroyed in a fire. The city subsequently issued a building permit for a replacement building, conditioned on a sufficient water supply (provided by the Water District) to protect the property. The city and the Water District split the cost of a project that, among other things, enlarged the water line servicing the property. This project took several months to complete during which time the city refused to issue an occupancy permit for the newly constructed building.

Prior to the project's completion, the Osbornes and their lessee Siding Sales, Inc. sued the city and the Water District for negligence. The plaintiffs specifically claimed that the defendants caused the building's destruction because the water pressure was insufficient to assist firefighters during the fire. The plaintiffs also set forth a takings claim against the defendants, which will not be addressed in this synopsis. The Warren County Circuit Court granted summary judgment on all claims for the defendants. The court based its holding on KRS § 65.2003, the Claims Against Local Government Act. On appeal, the Kentucky Court of Appeals affirmed.

The appellants unsuccessfully argued that the city was negligent because it: (1) failed to enforce local fire regulations; (2) issued a building permit when it knew the lot did not comply with fire protection standards; and (3) denied appellants an occupancy permit pending the water service expansion. These activities were regulatory and thus were actions protected by the Act's

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412 Id. at *3.
413 Id.
414 See *Siding Sales, Inc. v. Warren County Water District,* 984 S.W.2d 490, 491 (Ky. Ct. App. 1998).
415 Id.
416 Id.
417 Id.
418 Id.
419 Id.
420 See *Siding Sales, Inc.,* 984 S.W.2d at 491.
421 Id.
422 Id.
423 Id. at 491-92.
424 Id. at 495.
425 Id. at 492.
426 See *Siding Sales, Inc.,* 984 S.W.2d at 492.
exemptions for local governments. The court also distinguished between an affirmative act by the local government that causes property damage and a local government's failure to enforce safety regulations. Kentucky case law supports the application of immunity in the latter circumstances, which includes the case at bar. The city's decision not to issue an occupancy permit until a sufficient water supply existed demonstrated both regulatory and discretionary action, which are exempted from liability under KRS § 65.2003(3)(c).

The appellants also argued that the Water District was negligent because it: (1) approved the subdivision plat that created the lot in question; (2) failed to provide firefighters with an adequate water supply; and (3) failed to finish the water line improvement project in a timely fashion, thereby causing Siding Sales, Inc. to experience a delay in resumption of normal business operations. The court rejected this argument because the Water District is also a local government entitled to immunity. Also, the negligent delay claim of the appellants is essentially a challenge to the Water District's exercise of discretion in determining the best use of a limited resource. KRS § 65.2003(3)(d) extends immunity to the local government under these circumstances.

G. Preemption

City of Ashland v. Kentucky Alcoholic Beverage Control Board, 982 S.W.2d 210 (Ky. App. 1998). Ashland, Kentucky is a city of the second class. As such, it was eligible to apply KRS § 242.1292, "Limited sale precincts in cities of the second class," an alcoholic beverage control law. This statutory provision was enacted to help relieve economic distress in affected "dry" areas. Pursuant to KRS § 242.1292, the city of Ashland held elections in four areas suffering from economic hardship. All areas voted to become "wet." In February 1996, Ashland, Inc. (d/b/a SuperAmerica) applied for beer licenses at 2 locations within the wet area. These applications were denied by the city because there were no package licenses available in the areas where the stores were located (i.e., the city's self-imposed quota had been filled). Ashland, Inc. appealed to
the Kentucky Alcoholic Beverage Control Board, which held that the city "could not place a quota on the sale of malt beverages or prohibit the sale of beer from a grocery store or gasoline station." In making its determination, the Board determined that pursuant to KRS § 241.190, the city's power to regulate the traffic in alcoholic beverages was subject to the approval of the Commonwealth acting through the Department of Alcoholic Beverage Control. The Board also determined, among other things, that the city had not sought this approval from the Department. Subsequent to these findings, the Board ordered the city to issue the beer licenses. This decision was affirmed on appeal to the Franklin Circuit Court. The Court of Appeals upheld the circuit court, ruling "that any conflict between the city's ordinance and a specific statute must be resolved in favor of the statute."

The city argued that the circuit court erred when it determined that KRS § 242.1292(5) does not allow the city to set quotas on beer licenses. KRS § 242.1292(5) does allow for quotas on licenses for "package" and "by the drink" sales, but nowhere in any Kentucky statute is there a prohibition on licenses for the sale of malt beverages. Only KRS § 243.040(4) covers retail malt beverage licenses. The terms "package license" and "drink license" are interpreted in both statutory form and common parlance to mean "distilled spirits and wine." Nothing suggests that the General Assembly intended to broaden KRS § 242.1292(5) to include malt beverages.

The city unsuccessfully argued that the word "limited" in the title of KRS § 242.1292 (i.e. 'Limited sales precincts in cities of the second class) demonstrated that the legislature granted the power to the city to use discretion in licensing matters. However, the voters were "not asked to approve the 'limited sale' of alcoholic beverages." Instead, the ballot only asked if the voter was in favor of the sale of alcoholic beverages.

Grayson Rural Elec. Corp. v. City of Vanceburg, 4 S.W.3d 526 (Ky. 1999). From 1939 to 1993, the Vanceburg Utility Commission (VUC), a municipally owned electric utility, and Grayson Rural Electric Cooperative (Grayson) honored an unwritten boundary and agreed not to solicit customers

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442 Id.
443 Id.
444 Id.
445 Id.
446 Id.
447 See City of Ashland, 982 S.W.2d at 213.
448 Id.
449 Id. at 213-14.
450 Id. at 214.
451 Id.
452 Id.
453 See City of Ashland, 982 S.W.2d at 214.
454 Id.
455 Id.
from each other. However, this agreement ended in 1993 when a large industrial company expressed an interest in locating a plant in an area currently served by VUC but officially within the service territory of Grayson. The VUC, lacking the generating capacity to provide for the potential customer, assigned its rights to Kentucky Utilities. Grayson objected upon learning of this arrangement. In the subsequent lawsuit, both VUC and Grayson claimed a superior right to the potential customer. Prior to filing suit, VUC changed its name to the Electric Plant Board (EPB). The reason for this change was that under KRS § 96.570, plant boards can supply service “within and without the boundaries (i.e. both inside and outside the city limits)” of the city. Under the VUC, services could only be provided to city inhabitants. Both the trial and appellate courts held for the EPB. The Kentucky Supreme Court reversed, holding that (1) the legislature has never authorized exclusive service areas for municipally owned electric utilities and (2) a municipality may not compete for-profit with any rural electric cooperative corporation.

In 1972, the legislature enacted KRS § 278.018, the “territorial law.” This statute gave the Kentucky Public Service Commission (KPSC) the right to grant exclusive geographic territories to regulated utilities. The purpose of the legislation was to promote an orderly development of retail electric service and to protect KPSC-regulated facilities against competition from another KPSC-regulated facility. Because municipally owned electric utilities are creatures of statute, they have only those powers conferred by the legislature. “That is, a municipally-owned or municipally-financed electric utility has no exclusive service rights even within municipal boundaries in the absence of statutory authority.” Also, there has never been statutory authority for the assignment of service rights. The KPSC determined that the attempted assignment of rights between EPB and Kentucky Utilities was an invasion of Grayson’s certified

456 See Grayson Rural Elec. Corp. v. City of Vanceburg, 4 S.W.3d 526, 527 (Ky. 1999).
457 Id.
458 Id.
459 Id.
460 Id.
461 Id.
462 See Grayson Rural Elec. Corp., 4 S.W.3d at 527.
463 Id.
464 Id. at 528.
465 Id. at 527-28.
466 Id. at 528.
467 Id. at 530-31.
468 See Grayson Rural Elec. Corp., 4 S.W.3d at 528.
469 Id.
470 Id.
471 Id.
472 Id. (quoting City of Cold Spring v. Campbell Co. Water Dist., 334 S.W.2d 269 (Ky. 1960)).
473 See Grayson Rural Elec. Corp., 4 S.W.3d at 529.
If such an assignment were allowed, it would disrupt the legislature's control over electrical service distribution. The city operates its utility as an EPB under KRS § 96.550. While that allows the city to provide service outside of the city, it does not allow the city to enter into competition with Grayson. The authority conferred upon Vanceburg's EPB was not exercised before July 1, 1995 (the date of the corporate change from VUC to EPB), and at that point the territorial law had been in effect for 20 years. Grayson was the certified supplier to the disputed area. "The EPB came into existence with rights subordinate to those of Grayson to provide retail electric service in the entirety of its service area since the territorial certification to Grayson was pursuant to special legislation, which controls earlier, general legislation on the same subject." The legislature can establish the operating parameters of municipally-owned electric systems and as such, can restrict EPB from competing in the Grayson's territory. In fact, Grayson is required by statute to serve the entirety of its territory. By its creation the EPB entered into competition with Grayson. While Grayson is estopped from taking EPB's existing customers in Grayson's territory, it is entitled to any new customers therein.

H. Public Officers

Judicial Conduct Comm'n v. Woods, 25 S.W.3d 470 (Ky. 2000). On June 21, 2000, William R. Woods was removed from his position as District Court Judge for the Thirty-seventh Judicial District by the Kentucky Judicial Conduct Commission. The Commission decided to remove Woods because it determined that he had engaged in "judicial tyranny, including such behavior as displaying a handgun in court and verbally abusing citizens before the court." Woods did not appeal the Commission's decision, and that removal order is final. In July 2000, the Commission heard that Woods intended to run in November in the special election for his old position. The Commission then filed an original action in the Kentucky Supreme Court seeking to prevent Woods from entering the election. The court held that (1) section 110(2)(a) of the

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474 Id.
475 Id.
476 Id.
477 Id. at 530-31.
478 Id. at 531.
479 See Grayson Rural Elec. Corp., 4 S.W.3d at 531 (quoting Brown v. Hoblitzell, 307 S.W.2d 739 (Ky. 1957)).
480 Grayson Rural Elec. Corp., 4 S.W.3d at 531.
481 Id.
482 Id. at 531-32.
484 Id.
485 Id.
486 Id. at 471-72.
487 Id. at 472.
Kentucky Constitution empowers the court with jurisdiction to decide the matter, and (2) the removal must last at least as long as the remainder of the judge's current term. Woods argued unsuccessfully that the Commission lacked standing to bring its enforcement order before the state's highest court. The Kentucky Supreme Court, pursuant to § 110 of the Kentucky Constitution, has original jurisdiction "as may be required to exercise control of the Court of Justice." Usually, this power is exercised in appellate matters. However, under a unified court system, the Kentucky Constitution recognizes that the highest court of that system has the authority to exercise supervisory authority.

This court possesses the raw power to entertain any case which fits generally within the rubric of its constitutional authority. As Section 110(2)(a) of the Constitution contains a provision which grants the Supreme Court supervisory control of the Court of Justice, virtually any matter within that context would be subject to its jurisdiction.

In deciding for how long Woods should be removed, the Court relied on a Louisiana case that supported the idea that at a minimum, removal from judicial office should be at least for the remainder of the judicial term. Also, under § 121 of the Kentucky Constitution, removal is a more severe penalty than suspension. If the Commission chooses to suspend a judge, it could do so for a significant period of time without pay. Therefore, if removal is a more severe penalty than suspension, it would be absurd to allow Woods the opportunity to resume his judicial career immediately.

LaGrange City Council v. Hall Bros. Co. of Oldham County, Inc., 3 S.W.3d 765 (Ky. Ct. App. 1999). In 1995, Hall Brothers submitted a zone change application to the Oldham County Planning and Zoning Commission. That request, to change the zoning classification from industrial to residential, was voted on by the Commission on June 27, 1995. One member of the Commission, Forrest Hoffman, was also a member of the LaGrange City Council. Hoffman abstained from participating in the vote. The rest of the

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488 Id. at 472-73.
489 See Judicial Conduct Comm'n, 25 S.W.3d at 474.
490 Id. at 472.
491 Id.
492 Id.
493 Id. (quoting Abernathy v. Nicholson, 899 S.W.2d 85, 88 (Ky. 1995)).
494 Id. (citing In re Johnson, 689 So. 2d 1313, 1314 (La. 1997)).
495 Judicial Conduct Comm'n, 25 S.W.3d at 473.
496 Id.
497 Id. at 473-74.
499 Id. at 766.
500 Id.
Commission voted unanimously to approve the zone change application.\textsuperscript{503} On August 7, 1995, the City Council voted to overturn the Commission's recommendation, with Hoffman seconding the motion to overturn.\textsuperscript{504} The vote originally ended in a four to four tie, but the LaGrange mayor, pursuant to KRS § 83A.130(5), broke the tie and cast the deciding vote.\textsuperscript{505} Hall Brothers appealed the decision to the Oldham Circuit Court.\textsuperscript{506} That court found that Hoffman's participation on both the Commission and the City Counsel constituted a conflict of interest, and hence "rendered incompatible his simultaneous service in both offices."\textsuperscript{507} Because Hoffman's vote was improperly cast, the circuit court ruled that the Council did not attain the majority required by KRS § 100.211 to overturn the Commission.\textsuperscript{508} The Court of Appeals affirmed, holding that service in both offices simultaneously was statutorily\textsuperscript{509} and functionally incompatible.\textsuperscript{510}

KRS Chapter 100 allows the appointment of public officials to a planning commission, and the court found that there is no statutory provision against the appointment of city council members to a planning commission.\textsuperscript{511} However, the inquiry does not end there because the Kentucky Constitution prevents the same person from filling two incompatible offices at the same time.\textsuperscript{512} The public policy behind the incompatibility of office doctrine is that it is a public servant's duty to "discharge his or her duties uninfluenced by the duties and obligations of another office."\textsuperscript{513} Two types of incompatibility are recognized by Kentucky courts.\textsuperscript{514} The first kind is statutory or constitutional incompatibility.\textsuperscript{515} The scope of delineation of this form of incompatibility is found in § 165 of the Kentucky Constitution. KRS § 61.08 codifies the legislature's construction of § 165 of the Kentucky Constitution.\textsuperscript{516} Hoffman's occupancy of both offices violates KRS § 61.080(5)(g), which states that it would be incompatible for council members from fourth class cities to hold other public offices.\textsuperscript{517}

With functional or common-law incompatibility, the question is whether the functions of the two offices "are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest."\textsuperscript{518}

\textsuperscript{502} Id.
\textsuperscript{503} Id.
\textsuperscript{504} Id.
\textsuperscript{505} \textit{See LaGrange City Council}, 3 S.W.3d at 767.
\textsuperscript{506} Id.
\textsuperscript{507} Id.
\textsuperscript{508} Id. at 767-78.
\textsuperscript{509} Id. at 770.
\textsuperscript{510} Id. at 771.
\textsuperscript{511} \textit{See LaGrange City Council}, 3 S.W.3d at 768-69.
\textsuperscript{512} Id. at 769 (citing \textit{Rash v. Louisville & Jefferson County Metropolitan Sewer Dist.}, 217 S.W.2d 232, 236 (Ky. 1949)).
\textsuperscript{513} \textit{Lagrange City Council}, 3 S.W.3d at 770.
\textsuperscript{514} Id. at 769.
\textsuperscript{515} Id.
\textsuperscript{516} Id.
\textsuperscript{517} Id.
\textsuperscript{518} Id. at 769-70 (citing \textit{Barkley v. Stockdell}, 66 S.W.2d 43, 44 (Ky. 1933)).
Fundamental fairness does not allow a person to exercise both decision-making and review authority at the same time.\textsuperscript{519} This is against public policy and violates the Hall Brothers' right to due process.\textsuperscript{520} The fact that Hoffman abstained during the Planning Commission vote supports the inherent incompatibility of the offices because the act of abstention substantially interfered with his duties as a Commission member.\textsuperscript{521} On the other hand, if Hoffman votes on a Commission matter that is subsequently forwarded to the City Council, his Council vote would violate the due process rights of the applicants.\textsuperscript{522}

\textit{City of Munfordville v. Sheldon}, 977 S.W.2d 497 (Ky. 1998). In 1987, Munfordville Police Chief Robert Sheldon arrested private citizen Charlie Hays for DUI.\textsuperscript{523} In 1993, Hays was elected mayor and, one day after his election, summarily fired Sheldon, giving no reasons for the dismissal.\textsuperscript{524} Sheldon claimed he was entitled to protection under KRS § 15.520, the Police Officers' Bill of Rights, and brought an action against Hays and the city.\textsuperscript{525} Also, Sheldon claimed his firing was a retaliatory action by Hays because of the prior DUI arrest.\textsuperscript{526} In his deposition, Hays claimed he terminated Sheldon because of (1) job performance deficiencies, and (2) a citizen had made a written complaint accusing the chief of misconduct during a criminal investigation.\textsuperscript{527} The trial court held that Sheldon had been improperly discharged,\textsuperscript{528} holding at a minimum the chief was entitled to a hearing in front of the City Council, which is a due-process requirement of KRS § 15.520.\textsuperscript{529} The improper termination meant that Sheldon retained his position as chief.\textsuperscript{530} Therefore, the trial court threw out the retaliatory discharge claim because the firing became, in effect, a nullity.\textsuperscript{531} The Court of Appeals affirmed, but reasoned differently than the trial court.\textsuperscript{532} The Court of Appeals held that KRS § 15.520(1)(h)(8) applied and, therefore, only a hearing before the Mayor was required.\textsuperscript{533} This statutory provision required Mayor Hays to hold a hearing on the citizen complaint within sixty days.\textsuperscript{534} The failure of the Mayor to do this required Sheldon to be reinstated.\textsuperscript{535}

\textsuperscript{519} \textit{Lagrange City Council}, 3 S.W.3d at 771.
\textsuperscript{520} \textit{id.}
\textsuperscript{521} \textit{id.}
\textsuperscript{522} \textit{id.}
\textsuperscript{523} See \textit{City of Munfordville v. Sheldon}, 977 S.W.2d 497 (Ky. 1998).
\textsuperscript{524} \textit{id.}
\textsuperscript{525} \textit{id.}
\textsuperscript{526} \textit{id.}
\textsuperscript{527} \textit{id.}
\textsuperscript{528} \textit{id. at 498.}
\textsuperscript{529} See \textit{City of Munfordville}, 977 S.W.2d at 498.
\textsuperscript{530} \textit{id.}
\textsuperscript{531} \textit{id.}
\textsuperscript{532} \textit{id.}
\textsuperscript{533} \textit{id.}
\textsuperscript{534} \textit{id.}
\textsuperscript{535} See \textit{City of Munfordville}, 977 S.W.2d at 498.
Kentucky Supreme Court affirmed holding that, since Hays fired Sheldon for cause, due-process rights must be afforded the chief.\textsuperscript{536} KRS §§ 83A.080(2) and 83A.130(9) allow a mayor to terminate non-elected city officials (such as police officers) only if there is no statutory provision against it.\textsuperscript{537} In the case at bar, Hays admitted that he had removed Sheldon for cause.\textsuperscript{538} Hays did not remove Sheldon through the use of his executive discretionary (i.e. "at will") hiring power.\textsuperscript{539} Therefore, due process under KRS § 15.520 was statutorily required.\textsuperscript{540} This holding does not destroy a mayor's discretionary power to fire employees at will under KRS § 83A.080(2).\textsuperscript{541} "[O]ur holding merely forbids a mayor or other local executive authority from receiving a citizen's complaint against a police officer, then firing the officer based on that complaint, without ever affording the officer a right to publicly defend against the complaint as required by KRS § 15.520."\textsuperscript{542}

\textit{Hoard v. Sizemore}, 198 F.3d 205 (6th Cir. 1999). In May 1993, Onzie Sizemore defeated incumbent C. Allen Muncy in the Republican primary for Leslie County judge-executive.\textsuperscript{543} Sizemore ran unopposed by any Democrat in the general election.\textsuperscript{544} Twenty-two political supporters of Judge Muncy lost their county jobs when Judge Sizemore took over.\textsuperscript{545} These terminated employees filed a civil rights action against Sizemore and various other Leslie County officials and entities.\textsuperscript{546} Specifically, they alleged that their First and Fourteenth Amendment rights were violated because they were fired for exercising their political beliefs.\textsuperscript{547} Sizemore's motion for summary judgment based on the doctrine of qualified immunity was denied by the trial court.\textsuperscript{548} The Sixth Circuit Court of Appeals affirmed as to all plaintiffs except four of the higher-ranking employees.\textsuperscript{549}

The qualified immunity doctrine shields government officials from liability for civil damages so long as the official's conduct does not clearly violate established constitutional rights.\textsuperscript{550} Sizemore must show, as movant in a summary judgment motion, that no issue of material fact exists.\textsuperscript{551} In reviewing the lower court's denial of summary judgment, the Sixth Circuit said that the

\textsuperscript{536} Id. at 499.
\textsuperscript{537} Id. at 498.
\textsuperscript{538} Id.
\textsuperscript{539} Id.
\textsuperscript{540} Id. at 499.
\textsuperscript{541} See City of Munfordville, 977 S.W.2d at 499.
\textsuperscript{542} Id. (internal footnote omitted).
\textsuperscript{543} See Hoard v. Sizemore, 198 F.3d 205, 209 (6th Cir. 1999).
\textsuperscript{544} Id.
\textsuperscript{545} Id. at 210.
\textsuperscript{546} Id.
\textsuperscript{547} Id.
\textsuperscript{548} Id.
\textsuperscript{549} See Hoard, 198 F.3d at 222.
\textsuperscript{550} Id. (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
\textsuperscript{551} See Hoard, 198 F.3d at 211.
factual record had been fully developed through the discovery process as to the four higher-ranking terminated employees. 552 Therefore, the court had before it the factual basis to answer the question of law presented (i.e. whether or not political affiliation is an appropriate consideration for personnel decisions) as to the four employees. 553 These four plaintiffs occupied politically sensitive positions and, therefore, Sizemore was entitled to invoke the qualified immunity defense. 554 However, as far as the remaining plaintiffs were concerned, Sizemore's motivation in dismissing them was a genuine issue of material fact. 555 Therefore, no issue of law could be reviewed at this time by the federal appellate court. 556 Consequently, the court had no jurisdiction over Sizemore's appeal of the denial of summary judgment against these fifteen plaintiffs. 557

The first question which must be answered when determining if qualified immunity exists is whether the plaintiff has even asserted a constitutional violation. 558 If this question is answered affirmatively, only then does the court ask whether the constitutional right was clearly established. 559 In this case, the four jobs in question (Road Department Foreman, Assistant Road Foreman, Garage Supervisor, and Senior Citizens Director) were all subject to the "Branti exception" 560 to the First Amendment freedom of public employees. 561 The Branti exception requires a court to examine (1) the inherent duties of the position in question and (2) the duties as envisioned by the newly elected official. 562 "If this examination reveals that the position is inherently political in nature, then political affiliation is an appropriate requirement for the job." 563 All four positions met the requirements of the Branti exception. 564 Therefore, the court reversed the denial of summary judgment against Sizemore as to these four officials because all four positions are essentially political in nature. 565 These four jobholders cannot assert a claim against Sizemore because no constitutional violation has occurred. 566

III. COMMENTARY – HOME RULE

Home rule in the United States was sometimes envisioned in its early days as

552 Id.
553 Id. at 211-12.
554 Id. at 216.
555 Id. at 209.
556 Id. at 220.
557 See Hoard, 198 F.3d at 220.
558 Id. at 212.
559 Id.
560 Id. (quoting Branti v. Finkel, 445 U.S. 507 (1980)).
561 See Hoard, 198 F.3d 212.
562 Id.
563 Id.
564 Id. at 216.
565 Id.
566 Id. at 209.
giving the cities to whom such rule was granted full-fledged sovereignty over local affairs, thus bringing about dual state and local sovereignty along the national plan of federal and state governments. But such local sovereignty has never developed, nor have any clear-cut distinctions between state and local power.\footnote{OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 35, at 96 (1982).}

The essence of home rule is not so much a legal construct as it is a political or philosophical one. Home rule embodies the idea of the proper place to develop a political community. This political community finds its expression through the activities of the state and local legislatures and through the decisions of the courts.

Speaking broadly, home rule can be divided into statutory and constitutional varieties. Statutory home rule describes home rule as the term is commonly applied to counties in Kentucky. County home rule finds its current expression in KRS § 67.083. The section as it is today results from \textit{Fiscal Court of Jefferson County v. City of Louisville}.\footnote{See Fiscal Court of Jefferson County v. City of Louisville, 559 S.W.2d 478 (Ky. 1977).} As enacted in 1972, KRS § 67.083 read:

\begin{quote}
The fiscal court of any county is hereby authorized and empowered to exercise all rights, powers, franchises and privileges, including the power to levy all taxes not in conflict with the constitution and statutes of this state now or hereafter enacted, which the fiscal court shall deem requisite for the health, education, safety, welfare and convenience of the inhabitants of the county and for the effective administration of the county government to the same extent as if the General Assembly had expressly granted and delegated to the fiscal court all the authority that is within the power of the General Assembly to grant to the fiscal court of said counties.\footnote{1972 Ky. Acts 1652.}
\end{quote}

This attempt by the legislature to fashion a broad grant of home rule powers to counties was upended by the Kentucky Supreme Court in \textit{Fiscal Court of Jefferson County v. City of Louisville}.\footnote{See Fiscal Court of Jefferson County, 559 S.W.2d at 478.} The court took a dim view of a broad delegation of legislative power to the counties.

To paraphrase KRS § 67.083, set out in detail at the beginning of this opinion, the General Assembly granted fiscal courts ‘carte blanche’ authority to administer county government to the same extent as if the General Assembly had expressly granted and delegated to the fiscal court all the authority that is within the power of the General Assembly to grant to the fiscal courts of said counties. In essence, this court views such overly broad delegation of powers of the General Assembly to fiscal courts as a ‘quit claim deed’ to all its powers .... The metallic thread which history and tradition weave through the warp and woof of our Constitution is that while the General Assembly may grant governmental powers to counties it must do so with the precision of a rifle shot and not the casualness of a shotgun blast. The thoughtful, purposeful and deliberate delegation of a known power is required of the General Assembly. It is here that KRS § 67.083 fatally differs from the myriad of effective
specific grants of power which appear in other statutes.\textsuperscript{571}

The result was that a general welfare clause was not going to qualify as the basis for any grant of local government power in Kentucky. The current version of KRS § 67.083, a "laundry list" of powers, reflects the legislative reaction to the decision.

Statutory home rule was the model for cities in Kentucky as well when in 1980 the General Assembly enacted KRS § 82.082 giving home rule power to all classes of cities.\textsuperscript{572} Home rule was ultimately constitutionalized in 1994.\textsuperscript{573} Constitutional home rule generally takes one of two forms, "imperio" and "legislative." Constitutional home rule in Kentucky is an example of the latter.\textsuperscript{574} In most state constitutions that employ the legislative home rule model, the constitutional provision is self-executing.\textsuperscript{575} In Kentucky, it is not.\textsuperscript{576} KRS § 82.082 contains three criteria for determining whether an exercise of home rule power is valid: (1) that it is limited to the city's boundaries; (2) that it is in furtherance of a public purpose; and (3) that it can not be in conflict with a constitutional provision or with a statute.\textsuperscript{577}

KRS § 82.082(2) lays out two different tests to determine if conflict exists: (1) is it expressly prohibited by statute, or (2) is there a comprehensive scheme of state legislation on the same general subject.\textsuperscript{578} This second test is more properly a test for preemption.

Conflict and preemption are two separate concepts, although cases interpreting KRS § 82.082, like the statute itself, are not always careful to maintain that distinction.\textsuperscript{579} Conflict is when a local ordinance prohibits what a state statute permits, or permits what a state statute prohibits. In theory, conflict of this sort can be expressed or implied. Preemption, on the other hand, is when the state legislation occupies the field. It is a comprehensive scheme of legislation on the same general subject matter that does not leave any room for both state and local government action.

A recent opinion interpreting KRS § 82.082 offers some insight.\textsuperscript{580} It found a Louisville ordinance that required trigger locks or lock boxes for firearms stored

\begin{itemize}
\item[\textsuperscript{571}] Id. at 481-82 (emphasis added).
\item[\textsuperscript{572}] First class cities were given home rule in 1972. See KY REV. STAT. ANN. § 83.420 (Banks-Baldwin 1999).
\item[\textsuperscript{573}] KY. CONST. § 156b (as proposed by Acts 1994, chapter 168, § 1; ratified November 8, 1994).
\item[\textsuperscript{574}] As an example of imperio style home rule, see OHIO CONST. art. XVIII, § 3.
\item[\textsuperscript{575}] Imperio home rule provisions are also self-executing.
\item[\textsuperscript{576}] See KY. CONST. § 156b. "The General Assembly may provide by general law that cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city and not in conflict with a constitutional provision or statute." \textit{Id.}
\item[\textsuperscript{577}] See KY. REV. STAT. ANN. § 82.082 (Banks-Baldwin 1999). "A city may exercise any power and perform any function \textit{within its boundaries}, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act, that is in furtherance of a public purpose of the city and \textit{not in conflict} with a constitutional provision or statute." \textit{Id.} (emphasis added).
\item[\textsuperscript{578}] KY. REV. STAT. ANN. § 82.082(2) (Banks-Baldwin 1999).
\item[\textsuperscript{579}] But see Boyle v. Campbell, 450 S.W.2d 265 (Ky. 1970) (articulating the distinctions between conflict and preemption).
\end{itemize}
in one's home in conflict with and preempted by an existing statute, KRS § 65.870. Rep. Perry Clark, a member of the General Assembly, asked the Attorney General if this trigger lock ordinance was valid.\(^{581}\) OAG 99-10 begins its analysis by addressing whether the Louisville ordinance was in conflict with the statute.\(^{582}\) Under legislative-style home rule, it would be most logical to first ask the question, "[h]as the legislature specifically denied Louisville the power to enact this ordinance?" Rather than begin with the constitutional question, the opinion starts with the statutory one (Is there a conflict?). The opinion treats home rule in Kentucky as a strictly statutory process. Perhaps this should come as no surprise given the history of home rule in Kentucky. Before 1994 there was only the statutory question to answer. However, home rule today has a constitutional status, and ordinances enacted under home rule have a dignity not reflected in this opinion.\(^{583}\)

One can see some similarity between the approach of the Attorney General in OAG 99-10 and the approach of the Kentucky Supreme Court in Dannheiser v. City of Henderson.\(^{584}\) In interpreting the Local Development Authority Act, the court found an expression of legislative policy it understood to be non-exclusive.\(^{585}\) In Dannheiser, the court approvingly quotes from an article written in 1981: "[w]ith the institution of Home Rule, the General Assembly changed the equation and delegated all essential and implied powers to cities except those specifically denied them."\(^{586}\) What the court does not acknowledge is that the constitutionalization of home rule in 1994 changed the equation again. The court looked only to the 1980 statute form and not the 1994 constitutional amendment, and consequently proceeds directly to the question of preemption.

While it may be said that the results in both Dannheiser and OAG 99-10 are both "correct," neither opinion recognizes that an extra step is required after the 1994 constitutional amendment. Home rule should mean more today than it did when it existed only in statutory form.

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\(^{581}\) Note the unusual posture - a state legislator is asking a state executive officer to perform what is, in effect, a judicial function with respect to a local ordinance. The role of Attorney General is even more awkward in light of his responsibility as "chief law officer" of all political subdivisions of the Commonwealth. "The Attorney General is the chief Law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal advisor of all states officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his opinion touching any of their legal duties, and shall prepare proper drafts of all instruments of writing required for public use, and shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment." Id. (emphasis added).


\(^{583}\) The opinion declares the ordinance invalid, giving no heed to the presumption of constitutionality that ordinarily attaches to acts of a legislature.

\(^{584}\) See Dannheiser v. City of Henderson, 4 S.W.3d 542 (Ky. 1999). See supra text accompanying notes 51-76.

\(^{585}\) Id. at 549.

\(^{586}\) Id. (quoting J. David Morris, Municipal Law, 70 Ky. L.J. 293-96 (1981)).
INTRODUCTION

This survey of Kentucky civil procedure encompasses the more significant decisions of the Kentucky Supreme Court and the Kentucky Court of Appeals covering a period from early 1998 to the Fall of 2000. Recognizing that procedural matters are often an incidental part of any case on appeal, only those decisions in which a civil procedure issue was novel or the focus of the opinion will be covered in this review.

SUMMARY JUDGMENT

In its 1991 decision, Steelvest, Inc. v. Scansteel Service Center, Inc., the Kentucky Supreme Court clearly and unanimously chose to adopt a restrictive standard for summary judgment, rather than the more relaxed and expanded standard employed by the federal Courts. Expressing its preference that litigants should not be deprived of the right to trial for the sake of efficiency and expediency, the Court stated that summary judgment should be granted cautiously. In fact, the Court declared that summary judgment would be appropriate only when it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor. The significance of the Steelvest case is evident from the fact that it has been cited about as much as any case in the history of Kentucky jurisprudence, usually by a party opposing summary judgment.

Despite the restrictive standard adopted in Steelvest, summary judgment continues to be an important element of the civil litigation process. Considering the expense of modern litigation, it is in the interests of all parties to expedite the disposition of cases and to avoid unnecessary trials where no genuine issues of material fact are raised, and where the rights and liabilities of the parties can be determined by the Court as a matter of law. Indeed, recent decisions by the

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1 Judge Gregory M. Bartlett is a graduate of Thomas More College (A.B. 1967), Xavier University (M.A. 1971), and the University of Kentucky College of Law (J.D., Order of the Coif, 1973). He has served as Kenton Circuit court Judge, Third Division since 1993 and has been a member of the adjunct faculty of the Salmon P. Chase College of Law since 1988. Judge Bartlett is a member of the Kentucky Corrections Commission, having been appointed by Governor Patton in February of 1997. He is also the presiding Judge of the Kenton County Drug Court Program.

2 Margaret M. Maggio is a graduate of Loyola University of Chicago (B.S.N. 1976) and University of Illinois (M.S. 1982). She is a registered nurse and a certified nurse-midwife. Ms. Maggio is currently a law student at the Salmon P. Chase College of Law as well as a law clerk for Judge Gregory M. Bartlett.

3 807 S.W.2d 476 (Ky. 1991).

4 See id.

5 Id. at 480.

6 Id.
Kentucky Supreme Court and the Kentucky Court of Appeals confirm that summary judgment remains a vital tool for the civil practitioner. In several of these cases, the appellate courts have continued to define the standards to be used by trial courts when ruling on summary judgment requests.

The Kentucky Supreme Court's most recent analysis of summary judgment under Rule 56.03 was set forth in the case of Commonwealth Natural Resources & Environmental Protection Cabinet v. Neace. In affirming the entry of summary judgment, the Court restated the basic requirements for summary judgment in accordance with the decision in Steelvest and its predecessor, Paintsville Hospital Co. v. Rose. In essence, summary judgment is appropriate if a court determines that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The Court again noted that summary judgment procedure is not a substitute for trial and that the trial court is required to examine the evidence presented, not to decide a factual dispute, but merely to discover if a genuine issue of fact exists. All doubts must be resolved in favor of the party opposing the motion.

In Neace, the majority of the Court held that there was no genuine issue of any kind and that the plaintiff was entitled to a judgment as a matter of law. That case was brought by the Commonwealth Natural Resources and Environmental Protection Cabinet against the sole owner, officer, and director of a mining corporation to collect fines and penalties as a result of a violation of orders entered by the Cabinet. The circuit court entered summary judgment for the Cabinet, finding that there was no issue of fact to be resolved and that the defendant was personally liable to the Cabinet for two reasons. The defendant was liable under the doctrine of piercing of the corporate veil and pursuant to a statute which imposed individual liability on a corporate director.

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8 Id.
9 See KY. R. CIV. P. 56.03 (stating "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law").
11 Id.
12 683 S.W.2d 255 (Ky. 1985).
13 See Neace, 14 S.W.3d at 19.
14 Id.
15 Id.
16 Id. at 20.
17 Id. at 17.
18 Id.
The Neace case is a good example of the fact that it is not always clear when a factual dispute exists. In a dissenting opinion, Justice Keller expressed his belief that summary judgment was not warranted since there were issues of fact which should be resolved by the trial court, such as the defendant’s control of the corporation and his willful and knowing refusal to comply with the Cabinet’s orders.

Another case in which the Kentucky Supreme Court affirmed summary judgment is Welch v. American Publishing Co. of Kentucky, a decision of additional significance since it involved First Amendment issues. In Welch, the former mayor of Middlesboro, Kentucky filed a defamation and false light invasion of privacy lawsuit against the local newspaper as a result of the publication of a paid political ad that appeared during the plaintiff’s re-election campaign. The trial court dismissed the plaintiff’s complaint on summary judgment on the grounds that the plaintiff would be unable to establish at trial that the defendants acted with “actual malice.” In affirming, the Kentucky Supreme Court acknowledged the importance of summary judgment in litigation involving First Amendment issues. Further, the Court noted that precautions should be taken to avoid the chilling effect on free speech that defamation lawsuits create. The Court indicated that cases involving free speech litigation should be resolved more expeditiously and that trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end. It is not clear whether the decision of the Kentucky Supreme Court in Welch represents a departure from the approach to summary judgment procedure adopted in the Steelvest case outside the realm of First Amendment litigation.

In response to the appellant’s argument that the trial court erroneously applied the standard for summary judgment, the Court in Welch revisited the language of the Steelvest decision. In particular, the Court addressed the trial court’s role in assessing the evidence in order to determine whether judgment as a matter of law should be entered. It observed that much attention had been given the other use of the term “impossible” in Steelvest. Indeed, courts have repeatedly quoted the language in Steelvest that summary judgment is improper unless it would be “impossible” for the respondent to produce evidence at trial.

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19 See Neace, 14 S.W.3d at 15.
20 Id. at 21 (Keller J., dissenting).
21 3 S.W.3d 724 (Ky. 1999).
22 See id.
23 Id. at 726.
24 Id.
25 Id. at 729.
26 Id. (quoting Maressa v. New Jersey Monthly, 445 A.2d 376, 387 (N.J. 1982)).
27 See Welch, 3 S.W.3d at 729.
28 Id.
29 Id.
warranting a judgment in his favor. In fact, in his dissenting opinion in the Welch case, Justice Keller quoted that same phrase.

Writing for the majority in Welch, Justice Lambert explained that the language of the Steelvest case was merely a forceful statement that trial judges are to refrain from weighing evidence at the summary judgment stage. Further, the Court noted that the trial judge should review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. In addition, in the summary judgment analysis, the focus should be on what is of record, rather than what might be presented at trial.

It remains to be seen whether the comments of Justice Lambert in the Welch case will have an impact on the manner in which trial courts decide motions for summary judgment. In Steelvest, the Court declared that summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. The Court in Steelvest further recognized that summary judgment is not to be a substitute for trial, nor be the equivalent of a motion for a directed verdict. Since Steelvest, trial courts have followed the literal language of that case and have denied motions for summary judgment when there was any "possibility" that the moving party could prevail at trial. The language of the Welch case seems to suggest that trial judges should examine the evidence at the summary judgment stage of the proceeding, placing less emphasis on the "possibility" that the non-moving party could prevail at trial. Certainly, Justice Lambert's comments in Welch should be a warning to civil litigators that they must be prepared to convince the trial court that they have a viable case at the time of and in response to a motion for summary judgment.

Two recent decisions from the Kentucky Supreme Court addressed procedural issues in summary judgment practice. In Unisign, Inc. v. Commonwealth of Kentucky, summary judgment granting an injunction in favor of the Transportation Cabinet against a billboard company for violation of the Kentucky Billboard Act was upheld. In addition to disputing the constitutionality of the legislation, the defendant company argued that the Cabinet had engaged in discriminatory or selective enforcement. In denying relief, the Court noted that the company had failed to place affirmative evidence

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30 Id.
31 Id. at 731.
32 Id. at 730.
33 See Welch, 3 S.W.3d at 730.
34 Id.
36 Id.
37 See generally Welch, 3 S.W.3d at 724.
38 See id. at 730.
40 19 S.W.3d 652 (2000).
41 See id. at 657.
42 Id. at 654.
in the record to support its allegations. The Court stated that, "in any case submitted for summary judgment, there is an obligation to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

In *Cabbage Patch Settlement House v. Wheatly*, a trial court granted summary judgment in favor of the defendants in a personal injury case. The plaintiff had sustained injuries while participating in a basketball tournament sponsored by the defendants, but had previously signed a release and waiver of claims form. The lower court dismissed the plaintiff's complaint upon the grounds that the plaintiff had clearly and unambiguously released the defendants from all claims arising from their negligence. The Kentucky Court of Appeals reversed the dismissal, stating that the release did not extend to willful or wanton conduct, despite the fact that the plaintiff had made no claim of willfulness or wantonness against the defendants. The Court concluded that a jury question was raised as to whether there was willful or wanton negligence.

The Kentucky Supreme Court reversed and affirmed the trial court's entry of summary judgment. The Court noted that the Court of Appeals was without authority to review issues not raised in or decided by the trial court. Since the plaintiff had not alleged willful or wanton negligence on the part of the defendants, there was no issue of fact to be resolved and the defendants were entitled to judgment as a matter of law based upon the clear language of the release. Thus, summary judgment is appropriate only where it is based upon the undisputed facts presented and the law applicable to issues actually presented to the trial court.

Although not common in tort litigation, summary judgment is nevertheless appropriate in those cases where there is no genuine factual dispute and, based upon the applicable law, the non-moving party would be unable to prevail at trial. One example is the case of *Isaacs v. Smith*. In *Isaacs*, the Kentucky Supreme Court upheld the granting of summary judgment dismissing a lawsuit filed by a patron of a bar who had been shot by another patron who was

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43 Id. at 657.
44 Id.
45 987 S.W.2d 784 (Ky. 1999).
46 See id. at 785.
47 Id.
48 Id.
49 Id. at 786.
50 See *Cabbage Patch Settlement House*, 987 S.W.2d at 786.
51 Id.
52 Id.
53 Id.
54 Id.
56 5 S.W.3d 500 (Ky. 1999).
intoxicated. The plaintiff argued that the defendant violated Kentucky Revised Statute ("KRS") 244.080, which prohibits retail alcoholic beverage licensees from serving persons actually or apparently under the influence of alcohol, and that such violation would support his cause of action. The Kentucky Supreme Court considered the issue to be simply whether or not it was foreseeable that the plaintiff could be harmed by the conduct of the defendant in continuing to serve the intoxicated assailant. It held that the assault upon the plaintiff was not a foreseeable act within the intent of the statute so as to impose liability upon the defendant bar owner. The Court reasoned that, before liability can attach the violation of the statute in question must be a substantial factor in causing the injury, and the occurrence must be the type prevented by the statute. By comparison, the Court acknowledged that the defendant would be liable for serving an intoxicated customer who thereafter operates a motor vehicle and injures a third party.

In a dissenting opinion, Justice Stumbo, joined by Chief Justice Lambert and Justice Wintershimer, argued that sufficient evidence had been presented upon which a reasonable juror could find it foreseeable that the defendant’s service of alcohol to the intoxicated patron could result in the violent outburst which caused injury to the plaintiff. Both the majority and the dissenting opinions made reference to the case of Grayson Fraternal Order of Eagles v. Claywell for the proposition that proximate cause is generally an issue of fact, depending upon whether the results of the misconduct are reasonably foreseeable. However, the majority of the Court ruled that, as a matter of law, the plaintiff’s injuries were not a foreseeable consequence of the defendant’s action.

Another tort case in which causation for damages was an issue as a result of a summary judgment is Geyer v. Mankin. The trial court granted partial summary judgment in favor of a plaintiff who had been rear-ended by the defendant. At the trial, the Court allowed testimony that the plaintiff had not been wearing a seatbelt and did not mitigate her damages by failing to follow the directions of her physician, to assess damages. The jury returned a verdict finding the plaintiff to be 100% at fault.

57 See id. at 503.
59 See Isaacs, 5 S.W.3d at 501.
60 Id. at 502.
61 Id. at 503.
62 Id. at 502.
63 Id. at 503.
64 Id. at 504 (Stumbo J., dissenting).
65 736 S.W.2d 328 (Ky. 1987).
66 See Isaacs, 5 S.W.3d at 502.
67 Id. at 503.
68 984 S.W.2d 104 (Ky. Ct. App. 1998).
69 Id. at 105.
70 Id.
71 Id. at 106.
In reversing and remanding, the Kentucky Court of Appeals acknowledged that it was unclear whether the trial court intended by its summary judgment to find the defendant to be the sole cause of both the accident and the plaintiff's injuries, or whether it intended merely to find the defendant solely responsible for the accident.\(^{72}\) If the trial court intended as a matter of law to preclude any further consideration of fault for the plaintiff's damages, no evidence should have been presented regarding her failure to use a seatbelt or to follow the advice of her physician.\(^{73}\) On the other hand, if the trial court simply adjudicated the defendant's liability for the accident, then the plaintiff's contributing fault for her own injuries would be a fact issue to be determined by the jury under an apportionment instruction.\(^{74}\) The Kentucky Court of Appeals did not hold that summary judgment finding the defendant to be 100% at fault for causing the plaintiff's damages would have been improper, provided there was insufficient evidence of contributing fault on the part of the plaintiff.\(^{75}\) It merely remanded the matter to the trial court for clarification as to the extent of its summary judgment.\(^{76}\)

Summary judgment is a particularly appropriate method of resolving, litigation involving the interpretation of legal documents, such as wills, insurance policies, notes and mortgages, as well as the interpretation of statutory law. In *Blevins v. Moran*,\(^{77}\) the Kentucky Court of Appeals reaffirmed the entry of summary judgment in a will contest.\(^{78}\) That litigation turned upon the trial court's interpretation of the residuary clause in the decedent's will in light of KRS 394.400,\(^{79}\) the Anti-Lapse Statute.\(^{80}\) The lower court entered summary judgment for the surviving children of predeceased beneficiaries and against the beneficiaries under the residuary clause, finding that the testator did not intend to avoid the operation of the anti-lapse statute.\(^{81}\) In affirming, the Kentucky Court of Appeals noted that, since summary judgment involves no finding of fact, the appellate Court's review is *de novo* with no deference owed to the conclusions of the trial court.\(^{82}\)

In *Hartford Insurance Companies of America v. Kentucky School Boards*,\(^{83}\) a declaratory judgment action, the issue was whether a school board's automobile insurance policy or its general liability policy provided coverage for a lawsuit resulting from an accident in which a student was fatally injured.\(^{84}\) The child was

\(^{72}\) Id. at 107.

\(^{73}\) Id.

\(^{74}\) See Geyer, at 984 S.W.2d 107.

\(^{75}\) Id.

\(^{76}\) Id. at 108.

\(^{77}\) 12 S.W.3d 698 (Ky. Ct. App. 2000).

\(^{78}\) See id. at 704.

\(^{79}\) Ky. REV. STAT. ANN. §394.400 (Michie 1997).

\(^{80}\) See Blevins, 12 S.W.3d at 700.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) 17 S.W.3d 525 (Ky. Ct. App. 1999).

\(^{84}\) See id. at 526.
struck while crossing a street after exiting from a school bus. The automobile insurance carrier maintained that the accident did not arise from the "use" of the school bus, and thus, the general liability carrier should bear full responsibility for the claim. The trial court entered judgment in favor of the general liability carrier ruling that the auto insurer's policy provided coverage. On appeal, the Kentucky Court of Appeals affirmed the decision below adding that the case was appropriate for summary judgment since the parties had stipulated the facts and the interpretation of the terms of an insurance contract as a matter of law for the Court.

The construction and legal effect of financial documents was the subject of two recent Court of Appeals' decisions. In Hibbitts v. Cumberland Valley National Bank & Trust Co., a bank sued to recover on a promissory note that had been reaffirmed following the borrowers' bankruptcy. In response to the bank's motion for summary judgment, the defendants argued that they had not had adequate time for discovery, and that they were not liable for the debt since they had not signed a new promissory note in connection with the reaffirmation agreement. The circuit court granted summary judgment in favor of the bank, and the Kentucky Court of Appeals affirmed. In its opinion, the Court of Appeals recited the standard and procedure for summary judgment. In particular, it noted that, once the movant establishes that no genuine issue of material fact exists, the burden shifts to the opposing party to present some affirmative evidence of a factual dispute. In Hibbitts, the defendants failed to show the existence of a factual dispute or that discovery would reveal the existence of such a dispute. The Court concluded that summary judgment was proper since "[t]he construction as well as the meaning and legal effect of a written instrument ... is a matter of law for the Court.

The language of a mortgage was in dispute in First Commonwealth Bank of Prestonsburg v. West. In that foreclosure action, the bank sought to hold a mortgagor's interest in property subject to the notes executed by a co-mortgagor

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85 Id.
86 Id. at 527.
87 Id.
88 Id. at 529.
90 977 S.W.2d 252 (1998).
91 See id. at 253.
92 Id.
93 Id.
94 Id.
95 Id.
96 See Hibbitts, 977 S.W.2d at 254.
97 Hibbitts, 977 S.W.2d at 254 (quoting Morganfield National Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992) (citing Equitable Life Assurance Society of the United States v. Wells, 101 F.2d 608 (6th Cir. 1939))).
even though the mortgagor had no knowledge of the subsequent indebtedness. The bank was relying upon a future advance clause in the mortgage to secure repayment of the subsequent notes. The trial court denied the bank's motion for summary judgment on the basis that the language of the mortgage was not so clear and unambiguous so that a reasonable person would be put on notice that their property would be subjected to liability for the future advances. A unique aspect of this case is the fact that the order of the circuit court was deemed appealable even though the denial of a motion for summary judgment is generally not subject to appeal because it is interlocutory in nature. This case met the exception to the rule of non-appealability since there were no factual issues in dispute and the Court's ruling was strictly as a matter of law.

On appeal, the Kentucky Court of Appeals stated that the construction and interpretation of a contract, including questions of ambiguity, are issues of law to be decided by the Court. As such, the trial court's decision was reviewable de novo. Finding that the trial court erred in holding that the future advance clauses were ambiguous, the Court reversed and remanded the case for the entry of summary judgment in favor of the bank.

The interpretation of federal law was the basis for summary judgment in Deaton v. Connecticut General Life Insurance Co. The trial court dismissed a claim for attorney's fees filed against a disability insurer upon the grounds that the Federal Employee Retirement Income Security Act (ERISA) had pre-empted the plaintiff's state law claim. The attorneys alleged that they were entitled to restitution from the defendant insurer due to the fact that, as a result of their efforts, their client, the company's insured, received an award of social security disability benefits. The client's social security award reduced the insurance company's liability for payment of private disability benefits. Thus, the attorneys argued that they should be reimbursed from the insurance company on the basis of quantum meruit. However, the trial court concluded that it lacked subject matter jurisdiction due to the preemption by federal law. The Kentucky Court of Appeals affirmed the summary dismissal upon de novo review.

Noting that Kentucky law requires that summary judgment be granted cautiously

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99 Id. at 475.
100 Id.
101 Id. at 475-76.
102 Id. at 474 n.1.
103 Id.
104 See First Commonwealth Bank of Prestonsburg, 27 S.W.3d at 479.
105 Id.
106 Id. at 479, 481.
108 Id. at 897.
109 Id.
110 Id. at 898.
111 Id.
112 Id.
113 See Deaton, 17 S.W.3d at 898.
and only when it appears impossible for the non-movant to establish a right to
relief, the Court, nevertheless, agreed that summary judgment dismissing the
claim, because, it was preempted by federal law was correct.\textsuperscript{114}

In another case, the Kentucky state Courts were again required to consider
whether federal law preempted a state cause of action.\textsuperscript{115} In \textit{Leslie v. Cincinnati
Sub-Zero Products, Inc.},\textsuperscript{116} a wrongful death complaint was filed against the
manufacturer of a thermal unit used to regulate a patient's body temperature
during surgery.\textsuperscript{117} The lawsuit maintained that the product malfunctioned causing
serious injuries from which the patient eventually died.\textsuperscript{118} The trial court
sustained the defendant manufacturer's motion for summary judgment, ruling
that plaintiff's claims were preempted by the Medical Devices Amendments to
the Federal, Food, Drug and Cosmetic Act.\textsuperscript{119} In the alternative, the trial court
ruled that the plaintiff's case would be barred by the Kentucky Products Liability
Act.\textsuperscript{120}

Citing case law from both the United States Supreme Court\textsuperscript{121} and the
Supreme Court of Kentucky,\textsuperscript{122} the Kentucky Court of Appeals reversed the trial
court's summary judgment on the issue of federal preemption.\textsuperscript{123} The Court held
that the defendants had not met the burden of proving that federal law would
preempt the plaintiff's state common-law cause of action.\textsuperscript{124} It likewise held that
the plaintiffs had presented sufficient evidence to preclude summary judgment
based upon the Kentucky Products Liability Act.\textsuperscript{125} The Court explained that the
Products Liability Act does not alter existing law as to the burden of proof
concerning a defective product.\textsuperscript{126} The plaintiffs are not required to prove that the
thermal unit was not designed in accordance with the "state-of-the-art" at the
time of manufacture, but only that the product is defective.\textsuperscript{127}

In reversing and remanding the matter to the circuit court for jury trial, the
Court of Appeals commented that the appellate standard of review for summary
judgment is whether the trial court correctly found that there were no genuine
issues of material fact and that the moving party was entitled to judgment as a
manner of law.\textsuperscript{128} It further stated that the trial court must view the evidence in a
light most favorable to the party opposing the summary judgment motion, and

\textsuperscript{114} Id. at 899.
\textsuperscript{116} 961 S.W.2d 799 (1998).
\textsuperscript{117} See \textit{id.} at 800.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 801.
\textsuperscript{122} See \textit{Niehoff v. Surgidev Corp.}, 950 S.W.2d 816 (Ky. 1997).
\textsuperscript{123} See \textit{Leslie}, 961 S.W.2d at 803.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 804.
\textsuperscript{126} Id. at 803.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 804.
that summary judgment should be granted only if it "appears[s] impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor." Finally, the Court again noted that in reviewing the propriety of summary judgment it is not required to defer to the determinations of the trial court. Concluding that there were genuine issues of fact, the case was remanded to the circuit court.

In Oakley v. Flor-Shin, Inc., the Kentucky Court of Appeals again reversed a summary judgment that had dismissed a tort claim as a matter of law. The plaintiff had filed suit against a floor cleaning company alleging that one of its employees had sexually assaulted her while he was cleaning the floors of the store where the plaintiff worked. The lower court ruled that Kentucky law did not recognize the liability of an employer for injuries to a third party under the theory of negligent hiring. On appeal, the Court of Appeals held that an employer could be liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable harm to a third person.

In Oakley, the employee's criminal record, including past rape charges, and the fact that the company knew he would be working alone with another person, created a fact issue. The issue was whether the defendant company knew, or reasonably should have known, that the assailant was unfit for the job and that his placement in the plaintiff's store created an unreasonable risk to her. Accordingly, the Court reversed the summary judgment of dismissal and remanded the case for trial by a jury.

In three other cases, the Kentucky Court of Appeals overturned summary judgments due to the existence of genuine issues of fact. In Smith v. General Motors Corp., the purchaser of a new van filed suit alleging fraud, breach of warranty, and violation of the Kentucky Consumer Protection Act. The plaintiff initially complained that his vehicle repeatedly stalled at high speeds and that the defendants failed to correct the problem. During discovery he learned that the vehicle had undergone pre-sale service and repairs, including service on

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129 See Leslie, 961 S.W.2d at 804 (citing Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991)).
130 Id. at 804.
131 Id. at 805.
133 See id. at 442.
134 Id. at 439.
135 Id.
136 Id. at 442.
137 Id.
138 See Oakley, 964 S.W.2d at 442.
139 Id.
141 979 S.W.2d 127 (Ky. Ct. App. 1998).
142 See id. at 129.
143 Id. at 128.
the engine due to incidents of stalling at highway speeds.\textsuperscript{144} The defendants had not informed the plaintiff of these problems or repairs prior to purchase.\textsuperscript{145} The Court of Appeals reversed the summary judgment of the trial court holding that there were genuine issues of fact which, if established by the plaintiff, would support claims under all three causes of action: fraud, breach of warrant of merchantability, and violation of the Consumer Protection Act.\textsuperscript{146}

The Court of Appeals reversed a summary judgment entered against a surgeon in a malpractice action in \textit{Chalothorn v. Meade}.\textsuperscript{147} In that case, a sponge had been left inside the plaintiff following a cesarean section.\textsuperscript{148} The circulating nurse had incorrectly repeated the sponge count to the doctor.\textsuperscript{149} The defendant responded to the plaintiff's motion for summary judgment by submitting affidavits by him and other physicians.\textsuperscript{150} The affidavits stated that the defendant had complied with the standard of care of a reasonably prudent physician.\textsuperscript{151} The trial court apparently gave little weight to these affidavits and found the defendant surgeon negligent as a matter of law.\textsuperscript{152} The Kentucky Court of Appeals held that the affidavits filed in response to the motion for summary judgment were sufficient to defeat the motion and to present a jury issue as to the defendant's negligence.\textsuperscript{153} The Court stated the evidence must be viewed in a light most favorable to the party opposing the motion, and that appropriate weight must be given to the defendant's affidavits.\textsuperscript{154}

Finally, in \textit{Liggons v. House & Associates Insurance},\textsuperscript{155} the Court of Appeals reversed a summary judgment in favor of an insurance agent who had been sued by customers for damages allegedly sustained as a result of his failure to procure automobile insurance for them.\textsuperscript{156} Prior to filing suit for loss of income, mental anguish, and punitive damages, the plaintiffs had accepted payment from the defendant for the loss of the vehicle and had signed a document acknowledging the receipt of that payment.\textsuperscript{157} The trial court found as a matter of law that the acceptance of payment and signing of the document constituted an accord and satisfaction, releasing all claims.\textsuperscript{158} The Court of Appeals reversed, noting that generally the issue of accord and satisfaction is a question of fact.\textsuperscript{159} However,
when the controlling facts are clear and undisputed, the issue becomes one of law. In *Liggons*, the Court held that the facts of the case surrounding the receipt of payment and the language of the signed document were not so clear and undisputed to support a judgment as a matter of law. As a result, the case was remanded for trial on the plaintiff’s claims for losses other than for property damage, which had been paid.

**DIRECTED VERDICT**

A directed verdict at trial serves the same function as pre-trial summary judgment in that the Court decides the case or an issue as a matter of law. In order to sustain a motion for directed verdict, as with a motion for summary judgment, the court must determine that the movant is entitled to judgment as a matter of law. In fact, under the federal rules, the motion is referred to as a motion for judgment as a matter of law. It is often said that, by sustaining a motion for directed verdict, the court is taking the case from the jury since it must find that under the facts presented, reasonable jurors could only find in favor of the movant. As with summary judgment, when ruling on a motion for directed verdict, the court must view the evidence in the light favorable to the party opposing the motion, giving that party every reasonable inference that can be drawn from the evidence.

In two recent cases, the Kentucky Supreme Court discussed the propriety of directed verdicts. In one, the Court held that the plaintiff involved in a rear end automobile accident was not entitled to a judgment as a matter of law. In the other, the Court concluded that the trial court erred in dismissing a complaint against a surgeon based on the tort of battery.

In *USAA Casualty Insurance Co. v. Kramer*, the plaintiff was stopped in the left lane at a traffic light when her car was struck from behind. The defendant had been in the plaintiff’s lane but claims that, as he was moving into the right lane, another car pulled in front of him. As a result, he swerved back into the left lane and was unable to stop before striking the plaintiff’s vehicle. At trial,
the jury exonerated the defendant from any negligence.\textsuperscript{174} On appeal, the Court of Appeals reversed, holding that the plaintiff was entitled to a directed verdict on the issue of the defendant’s negligence.\textsuperscript{175}

The Kentucky Supreme Court granted discretionary review and reversed the decision of the Court of Appeals, remanding the case to the circuit court for reinstatement of the jury’s verdict.\textsuperscript{176} Based on the facts viewed in the light most favorable to the defendant, as the party opposing the motion, the Court concluded that the trial court did not err in refusing to direct a verdict for the plaintiff.\textsuperscript{177} The jury’s verdict was not deemed to be so palpably or flagrantly against the weight of the evidence so as to indicate that it was reached as a result of passion or prejudice.\textsuperscript{178} The Court added that when reviewing the denial of a directed verdict, the party who opposes the motion is entitled to all reasonable inferences which may be drawn from the evidence.\textsuperscript{179}

In \textit{Vitale v. Henchey},\textsuperscript{180} the Kentucky Supreme Court upheld the reversal of a directed verdict granted to a surgeon who had been sued for battery.\textsuperscript{181} The administrator of an estate claimed that the defendant had performed two surgeries on the decedent without obtaining consent.\textsuperscript{182} In fact, the decedent’s power of attorney had given express consent for another doctor to operate.\textsuperscript{183} The defendant substituted for the authorized surgeon without the knowledge or consent of the decedent’s legal representative.\textsuperscript{184} The trial court directed a verdict in favor of the defendant on the grounds that the plaintiff offered no proof that the substitution of surgeons violated the acceptable standard of medical care.\textsuperscript{185} The lower court also directed a verdict in favor of the physicians on the issue of whether the decedent had endured any conscious pain and suffering following her surgeries.\textsuperscript{186} The Kentucky Court of Appeals reversed the trial court on both grounds.\textsuperscript{187}

The Kentucky Supreme Court affirmed the Court of Appeals holding that the decedent’s failure to obtain any consent to operate constituted the tort of battery.\textsuperscript{188} Unlike a claim that a physician rendered treatment without obtaining informed consent, the total lack of consent is not negligence but battery, and

\begin{thebibliography}{9}
\bibitem{174} Id.
\bibitem{175} Id.
\bibitem{176} Id. at 782.
\bibitem{177} See \textit{USAA Casualty Ins. Co.}, 987 S.W.2d at 782.
\bibitem{178} Id.
\bibitem{179} Id. at 781 (citing Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461 (Ky. 1990)).
\bibitem{180} 24 S.W.3d at 659 (Ky. 2000).
\bibitem{181} Id.
\bibitem{182} Id. at 653-54.
\bibitem{183} Id. at 654.
\bibitem{184} Id.
\bibitem{185} Id. at 655.
\bibitem{186} Id.
\bibitem{187} See \textit{Vitale}, 24 S.W.3d at 655.
\bibitem{188} Id. at 657.
\end{thebibliography}
there is no need to prove a breach of the accepted standard of medical care.\(^{189}\) As a matter of first impression, the Court concluded that the doctrine of informed consent has not supplanted the cause of action for battery.\(^{190}\) Thus, the Court ruled as a matter of law that the defendant would be liable for any damages resulting from surgeries performed without consent.\(^{191}\)

The Court also agreed with the Court of Appeals that the plaintiff had presented sufficient evidence that the decedent had endured conscious pain and suffering following surgery and before her death.\(^{192}\) The defendant argued that the patient had remained unconscious following surgery.\(^{193}\) However, the plaintiff presented evidence that the decedent had been treated for pain, appeared to be in pain, moved her extremities, and responded to her name.\(^{194}\) Viewing the evidence in a light most favorable to the plaintiff, the Court concluded that a jury should decide the amount of pain and suffering, if any, experienced by the patient.\(^{195}\) The Court also ruled that the plaintiff could recover for such pain and suffering even though she may have endured the same or similar pain had she elected to have surgery at the hands of the authorized physicians.\(^{196}\)

DISCOVERY

In the period covered by this survey, the Kentucky Supreme Court and the Kentucky Court of Appeals issued a number of significant opinions pertaining to pre-trial discovery practice.\(^{197}\) Two of these decisions are of particular importance in the field of medical malpractice litigation,\(^{198}\) while another should be required reading for any attorney who practices personal injury cases.\(^{199}\)

The extent of the peer review privilege of KRS 311.377(2)\(^{200}\) was the subject of the Kentucky Supreme Court decision in Sisters of Charity Health Systems, Inc. v. Raikes.\(^{201}\) In three combined cases, plaintiffs in medical malpractice actions sought discovery of peer review records.\(^{202}\) When the Kentucky Court of Appeals denied the defendant’s petition for a writ prohibiting the trial courts

\(^{189}\) Id.
\(^{190}\) Id.
\(^{191}\) Id. at 659
\(^{192}\) Id.
\(^{193}\) See Vitale, 24 S.W.3d at 659.
\(^{194}\) Id.
\(^{195}\) Id.
\(^{196}\) Id. at 660.
\(^{197}\) See generally Burns v. Level, 957 S.W.2d 218 (Ky. 1997). See also Geary v. Schroering, 979 S.W.2d 134 (Ky. Ct. App. 1998).
\(^{198}\) See generally Sisters of Charity Health Systems, Inc. v. Raikes, 984 S.W.2d 464 (Ky. 1998). See also McFall v. Peace, Inc., 15 S.W.3d 724 (Ky. 2000).
\(^{199}\) See generally Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 1999).
\(^{200}\) See K.Y. REV. STAT. ANN. §311.377(2) (Michie 1997) (stating “[a]t all times in performing a designated professional review function, the proceedings, records, opinions, conclusions, and recommendations...shall be confidential and privileged”).
\(^{201}\) 984 S.W.2d 464 (Ky. 1998).
\(^{202}\) Id. at 465.
from enforcing an order compelling discovery of these materials, relief was sought in the Kentucky Supreme Court.\textsuperscript{203} Affirming the decision of the Court of Appeals, the Supreme Court held that the peer review privilege is limited to lawsuits involving persons who apply for or are granted staff privileges by hospitals or other health services organizations, and has no application to medical malpractice lawsuits.\textsuperscript{204} The Court reasoned that the statute was intended to provide protection to those who participate in the peer review process from suits by persons aggrieved by their action.\textsuperscript{205} It was not the purpose or intent of the General Assembly to hinder an aggrieved patient’s search for the truth in a malpractice suit against a hospital or physician.\textsuperscript{206}

In support of its decision, the Court acknowledged the universal rule that privileges should be strictly construed and that claims of privilege are disfavored when balanced against the need for litigants to have access to material evidence.\textsuperscript{207} Claims of privilege are to be carefully scrutinized with the burden of proving the application of the privilege resting with the party claiming its benefit.\textsuperscript{208}

The peer review privilege was addressed in a subsequent decision arising from a medical malpractice lawsuit.\textsuperscript{209} In \textit{McFall v. Peace, Inc.},\textsuperscript{210} a wrongful death action was filed against a hospital and a doctor following a patient’s suicide in the hospital.\textsuperscript{211} Following a lengthy trial, the jury returned a verdict in favor of the defendants.\textsuperscript{212} The estate of the deceased patient appealed, arguing that the trial court erred when it entered a protective order preventing them from discovering a Quality Assurance Review (QAR) form related to the suicide.\textsuperscript{213} The trial judge had ruled that the QAR form was protected by the peer review privilege.\textsuperscript{214}

The Kentucky Supreme Court reversed the judgment for the hospital, but affirmed the dismissal of the claims against the physician.\textsuperscript{215} The Court held that the trial court erred in determining that the QAR form was protected peer review material, reiterating that the peer review statute has no application to medical malpractice suits.\textsuperscript{216} However, rather than decide whether the error was harmless, the Court remanded the case against the hospital to the circuit court.\textsuperscript{217} It directed

\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 469.
\textsuperscript{206} Id.
\textsuperscript{207} See Sisters of Charity Health Systems, Inc., 984 S.W.2d at 469.
\textsuperscript{208} Id.
\textsuperscript{209} See McFall v. Peace, Inc., 15 S.W.3d 724 (Ky. 2000).
\textsuperscript{210} 15 S.W.3d 724 (2000).
\textsuperscript{211} See id. at 725.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 726.
\textsuperscript{215} Id. at 727.
\textsuperscript{216} See McFall, 15 S.W.3d at 726.
\textsuperscript{217} Id.
that the records containing the QAR form be produced to the plaintiff and that a
hearing be held to determine if the trial court’s error in protecting the QAR from
discovery would be grounds for a new trial.\textsuperscript{218} The Court affirmed the dismissal
of the case against the defendant physician since he had not been involved in the
discovery dispute, and the information in the documents concerning him had
already been discovered.\textsuperscript{219}

Any attorney who practices personal injury cases should read the opinion
rendered by the Kentucky Supreme Court in \textit{Fratzke v. Murphy}.\textsuperscript{220} As a result of
the Court’s decision in that case and due to their attorney’s failure to comply with
Rule 8.01(2),\textsuperscript{221} the plaintiff was deprived of a jury verdict which had awarded
her $89,500.00 as compensation for her injuries.\textsuperscript{222}

In response to a set of interrogatories served upon him, the plaintiff’s
attorney failed to itemize the damages claimed as a result of the accident, except
for medical expenses incurred to date.\textsuperscript{223} However, Rule 8.01(2) provides that a
party may obtain information as to the amount of a claim against him by serving
interrogatories on the opposing party.\textsuperscript{224} The amount of damages claimed at trial
cannot exceed that set forth in the answers to interrogatories.\textsuperscript{225} At trial, the
defendant’s attorney objected to any reference to damages other than the past
medical expenses, and objected to the jury instructions authorizing an award for
pain and suffering, future medical expenses, lost wages, and impairment of future
earning capacity.\textsuperscript{226} A judgment for such damages totaling $89,500.00 was
entered pursuant to a jury verdict.\textsuperscript{227}

Initially, the Kentucky Court of Appeals affirmed the judgment in favor of
the plaintiff, but after review and remand from the Kentucky Supreme Court,
ordered the trial court to vacate the award for the disputed damages.\textsuperscript{228} The Court
of Appeals was following the earlier decision of the Kentucky Supreme Court in
\textit{Burns v. Level}\textsuperscript{229} in which the trial court’s dismissal of a claim for damages for
failure to answer interrogatories was upheld.\textsuperscript{230} When the Supreme Court again
reviewed the \textit{Fratzke} decision, it affirmed the Court of Appeals’ decision to
vacate the award for damages other than for past medical expenses.\textsuperscript{231}

\begin{footnotes}
\item[218] \textit{Id.} at 727.
\item[219] \textit{Id.}
\item[220] 12 S.W.3d 269 (Ky. 1999).
\item[221] \textit{See Ky. R. Civ. P. 8.01}(2) ("[w]hen a claim is made against a party for unliquidated damages,
that party may obtain information as to the amount claimed by interrogatories; if this is done, the
amount claimed shall not exceed the last amount stated in answer to interrogatories").
\item[222] \textit{See Fratzke}, 12 S.W.3d at 273.
\item[223] \textit{Id.} at 270.
\item[224] \textit{See Ky. R. Civ. P. 8.01}(2).
\item[225] \textit{See Fratzke}, 12 S.W.3d at 271.
\item[226] \textit{Id.} at 270.
\item[227] \textit{Id.} at 271.
\item[228] \textit{Id.}
\item[229] 957 S.W.2d 218 (Ky. 1997).
\item[230] \textit{See generally id.}
\item[231] \textit{See Fratzke}, 12 S.W.3d at 273.
\end{footnotes}
held that Rule 8.01(2) provides its own remedy and is mandatory.\textsuperscript{232} If a party fails to disclose the amount claimed for an item of un-liquidated damage, that party cannot recover any amount.\textsuperscript{233}

The Court did not consider its ruling to be harsh in light of the fact that the plaintiff had the right to seasonably supplement her interrogatory answers so as to provide the amount claimed for the various items of damages.\textsuperscript{234} In addition, after the seasonable time to supplement expired, she could have moved the Court for leave to supplement.\textsuperscript{235} She did neither.\textsuperscript{236}

In dissenting opinions, Chief Justice Lambert and Justice Keller argued that based upon the decision in \textit{Burns v. Level}, the trial court should have the discretion whether to grant a directed verdict with respect to the plaintiff's unitemized damages claims.\textsuperscript{237} Nevertheless, since the majority held that failure to comply with Rule 8.01(2) which mandates that no recovery for unlisted damages be permitted, attorneys would be prudent to provide seasonable answers to interrogatories requesting an itemized statement of claimed damages.\textsuperscript{238}

In personal injury litigation, the discovery of a plaintiff's medical treatment records is considered necessary to mount an effective defense.\textsuperscript{239} Quite often, the plaintiff will execute a medical authorization allowing the opposing side to obtain such records directly from the treatment provider.\textsuperscript{240} The execution of the authorization may be conditioned on the agreement that the other party provide to the plaintiff a copy of all records retrieved.\textsuperscript{241} However, in \textit{Geary v. Schroering},\textsuperscript{242} the Kentucky Court of Appeals held that a trial court may not compel a plaintiff to execute a medical authorization permitting the unrestricted release of all medical information.\textsuperscript{243} The Court reasoned that all methods of discovery under the civil rules provide for notice to the opposing parties that they may be present to protect their interests.\textsuperscript{244} In addition, it is improper to issue a subpoena for the production of documents other than to a trial, hearing or deposition.\textsuperscript{245} The Court then observed that a compulsory medical authorization would be the equivalent to an ex parte subpoena, allowing for no notice to the plaintiff or opportunity to protect her legitimate privacy interests.\textsuperscript{246}

\begin{thebibliography}{9}
\bibitem{232} Id.
\bibitem{233} Id.
\bibitem{234} Id.
\bibitem{235} Id.
\bibitem{236} Id.
\bibitem{237} See \textit{Fratzke}, 12 S.W.3d at 273-74 (Lambert & Keller, J., dissenting).
\bibitem{238} Id. at 273.
\bibitem{240} Id.
\bibitem{241} Id.
\bibitem{242} Id.
\bibitem{243} Id. at 136.
\bibitem{244} Id. at 135.
\bibitem{245} See \textit{Geary}, 979 S.W.2d at 135.
\bibitem{246} Id. at 136.
\end{thebibliography}
Although medical authorizations serve to save the parties time and expense in collecting medical information, the civil rules do provide effective, alternative methods for this type of discovery.247 Non-party witnesses such as physicians, nurses, and medical records custodians can be deposed and subpoenaed to produce medical records.248 Absent an agreement between the parties, there is no choice but to undertake discovery as provided in the civil rules.249

As in many areas of civil procedure, the trial court has considerable discretion in the conduct of discovery.250 Two recent cases illustrate the extent of that discretion.251 In Morton v. Bank of the Bluegrass and Trust Co., a surviving spouse sued a bank and various insurance companies for wrongly removing her husband from a credit life insurance policy after he had been diagnosed with cancer.252 In the course of discovery, the plaintiff scheduled a deposition of a representative of one of the insurance companies and requested production of documents.253 On the day of the deposition, the company destroyed records which were requested and subsequently ordered to be produced.254 The plaintiff argued that the trial court erred by not imposing sanctions against the company under Rule 37.02.255 However, the Kentucky Court of Appeals concluded that the failure of the trial court to impose sanctions was not an abuse of discretion, stating that the trial court was in the best position to determine if the defendant’s conduct warranted sanctions.256

The discretion of the trial court to grant a party leave to respond to requests for admissions under Rule 36 was upheld in Harris v. Stewart.257 In Harris, the defendant was permitted to respond to the requests more than three years after the answers were originally due.258 The Kentucky Court of Appeals noted the fact that the opposing party suffered no prejudice as a result of the belated responses.259

**IMPLEADER**

Impleader, or third party practice, is the method by which parties may join additional parties to a pending lawsuit.260 Rule 14.01 provides that, “[a]
A defendant may ... assert a claim against a person not a party to the action who is
or may be liable to him for all or part of the plaintiff's claim against him.\textsuperscript{261}
Likewise, Rule 14.02 permits a plaintiff to utilize a third party complaint practice
where a counter-claim has been asserted against the plaintiff.\textsuperscript{262} In tort litigation,
impleader is often used by a defendant to assert a claim for indemnification or to
invoke apportionment of fault under KRS 411.182.\textsuperscript{263} Indeed, the right of a
defendant to recover complete indemnification from a third party despite the
adoption of comparative fault was the subject of the decision of the Kentucky
Supreme Court in \textit{Degener v. Hall Contracting Corp.}\textsuperscript{264}

The \textit{Degener} decision was rendered in two consolidated cases.\textsuperscript{265} In one,
police officers filed suit against a construction company as the result of injuries
sustained in the explosion of a homemade bomb.\textsuperscript{266} The makers of the bomb had
stolen the dynamite from the defendant, Hall Contracting Corporation.\textsuperscript{267} The
plaintiffs alleged that the construction firm had been negligent in failing to secure
the dynamite.\textsuperscript{268} A third party complaint filed by Hall Contracting Co. seeking
complete indemnity against the individuals who had made the bomb was
dismissed by the circuit court.\textsuperscript{269} It was dismissed on the grounds that the claim
was barred by the statute of limitations and that the advent of comparative
negligence and apportionment of fault had eliminated the right to common law
indemnity.\textsuperscript{270}

In the second case, an employee of a medical clinic sued the partnership for
violation of the Kentucky Civil Rights Act alleging a "hostile work
environment".\textsuperscript{271} The plaintiff claimed that one of the physicians in the group
had engaged in sexual harassment.\textsuperscript{272} The medical group filed a third party
complaint against the physician seeking common law indemnity.\textsuperscript{273} Based upon
the fact that KRS 344.450,\textsuperscript{274} the Civil Rights Act, creates a cause of action only
against the employer, the circuit court dismissed the employer's claim.\textsuperscript{275} The
Court cited authority to the effect that there could be no contribution from one
against whom the plaintiff had no cause of action.\textsuperscript{276}

\textsuperscript{261} KY. R. CIV. P. 14.01.
\textsuperscript{262} See KY. R. CIV. P. 14.02.
\textsuperscript{263} See KY. REV. STAT. ANN. § 411.182 (Michie 1997).
\textsuperscript{264} 27 S.W.3d 775 (Ky. 2000).
\textsuperscript{265} Id. at 777.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} See Degener, 27 S.W.3d at 777.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} Id. at 778.
\textsuperscript{274} See KY. REV. STAT. ANN. § 344.450 (Michie 1997) (stating "[a]ny person injured by any act on
violation of the provisions of this chapter shall have a civil cause of action in Circuit court to enjoin
further violations, and to recover the actual damages sustained").
\textsuperscript{275} See Degener, 27 S.W.3d at 778.
\textsuperscript{276} Id.
The Kentucky Court of Appeals reversed and remanded both cases.\textsuperscript{277} On review, the Kentucky Supreme Court affirmed in a most important and enlightening opinion that traced the history of contribution and apportionment between joint tortfeasors, as well as the history of common law indemnity.\textsuperscript{278} The Court held that the adoption of apportionment of fault between joint tortfeasors \textit{in pari delicto} has not eliminated the common law right of indemnity of a constructively or secondarily liable party to be totally indemnified from the one who has primary liability.\textsuperscript{279} The Court further held that the five-year period of limitations in KRS 413.120(6)\textsuperscript{280} would govern the defendant's third party complaint for indemnity.\textsuperscript{281} Finally, the Court ruled that an employer could maintain a claim for common law indemnity against its employee, despite the provision of the Civil Rights Act which creates a right of action only against the employer and not against the offending co-employee.\textsuperscript{282}

The \textit{Degener} decision is significant in the area of tort law in that it retains a defendant's right of complete indemnification from another party with whom the defendant is not \textit{in pari delicto}.\textsuperscript{283} In accordance with the law of apportionment of liability, each party is responsible only for that percentage of fault assigned by the jury.\textsuperscript{284} For joint tortfeasors who are \textit{in pari delicto}, this decision does not effect a change in the law. However, parties who are merely constructively or passively at fault are entitled to total indemnification for any percentage of liability that may be assessed against them.\textsuperscript{285}

\textbf{PRE-TRIAL PROCEDURE}

In two cases, the Kentucky Supreme Court has rendered opinions regarding the authority of trial courts to enter orders in pre-trial proceedings.\textsuperscript{286} One case dealt with class certification under Rule 23\textsuperscript{287} and the other with deposits into Court.\textsuperscript{288}

In \textit{Garrard County Board of Education v. Jackson}, the Supreme Court affirmed the decision of the Court of Appeals which had denied a petition for writ of mandamus seeking an order that the trial court decertify a class action.\textsuperscript{289} A suit had been filed against the board of education and others alleging exposure

\textsuperscript{277} Id. at 782.
\textsuperscript{278} See generally id. at 775.
\textsuperscript{279} Id. at 780.
\textsuperscript{280} See KY. REV. STAT. ANN. § 413.120(6) (Michie 1997) (stating "the following actions shall be commenced within five years after the cause of action accrued: (6) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated").
\textsuperscript{281} See \textit{Degener}, 27 S.W.3d at 782.
\textsuperscript{282} Id.
\textsuperscript{283} See generally id. at 775.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} See Garrard County Board of Education v. Jackson, 12 S.W.3d 686 (Ky. 2000); J.R.E., Inc., v. Asbury, 993 S.W.2d 960 (Ky. 1999).
\textsuperscript{287} See \textit{Jackson}, 12 S.W.3d at 686.
\textsuperscript{288} See \textit{J.R.E., Inc.}, 993 S.W.2d at 960.
\textsuperscript{289} See \textit{Jackson}, 12 S.W.3d at 691.
to unsafe environmental conditions at school, and the circuit court had certified the case as a class action. The class included all former and current teachers, employees, students and staff of the school in question. The Supreme Court held that the act of class certification itself is not the proper subject for relief by way of a writ of mandamus. The Court explained that writs are reserved for extraordinary situations, and that the petitioner must establish both that he has no adequate remedy by appeal, and that he will suffer great injury or a substantial miscarriage of justice will result. The Court found neither of these requirements were met by the appellants.

The appellants argued that allowing the case to proceed as a class action, with the attendant notification to potential members of the class, could create prejudice within the small community. They also cited the heightened burden and the expense of defending a class suit. The Court found that neither argument would demonstrate irreparable harm, and that the appellant's proper remedy would be by a direct appeal from a final judgment.

The authority of a trial court to order a party to deposit a sum of money held by the court before judgment was reviewed in J.R.E., Inc. v. Asbury. In that breach of contract action, the trial court ordered the defendant vendor of a pizza franchise to pay the prospective vendee's earnest money into Court. The vendor sought a writ of prohibition from the Kentucky Court of Appeals, but was denied relief. The Kentucky Supreme Court, however, reversed and remanded the case with directions that the Court of Appeals issue the writ. The Supreme Court held that a party cannot be compelled to deposit money into Court unless that party admits that the money is being held for or belongs to another party. Since the defendant denied owing the money to the plaintiff, the trial court had no authority to order the payment into Court in advance of adjudication of the plaintiff's entitlement to the funds.

290 Id. at 688.
291 Id.
292 Id. at 689.
293 See Jackson, 12 S.W.3d at 689.
294 Id. at 691.
295 Id. at 690.
296 Id.
297 Id.
298 See generally J.R.E., Inc. v. Asbury, 993 S.W.2d 960 (Ky. 1999).
299 See id. at 961.
300 Id.
301 Id. at 962.
302 Id. (citing KY. R. CIV. P. 63.07). "When it is admitted by the pleading or examination of a party that he has in his possession or control any money or other thing capable of delivery which being the subject of litigation,... the Court may order the same to be deposited in Court...").
303 Id.
JURISDICTION/VENUE

Subject matter jurisdiction is the power of Courts to hear and adjudicate certain types of cases. The term is also used in disputes over whether a party has complied with a given statute or rule so as to invoke a Court’s jurisdiction over a particular case. Personal jurisdiction addresses the Court’s power to adjudicate the rights or liabilities of individuals or other legal entities. Venue, on the other hand, determines the place where a suit should be brought and is set by statutes. All of these legal topics were discussed in recent decisions from our appellate courts.

The subject matter jurisdiction of the district Court over probate matters was the issue in McElroy v. Taylor. In McElroy, the guardian of an incompetent adult filed a renunciation of the will of the incompetent’s deceased wife. The executrix of the estate opposed the renunciation. The district Court ruled that it lacked jurisdiction and that only a Court of equity, a circuit court, could decide the right of a guardian to renounce a will on behalf of an incompetent. The Kentucky Supreme Court disagreed holding that renunciation of a will was a “matter” involving probate and, as such, was within the exclusive jurisdiction of the district Court. The Court also rejected the argument that the renunciation was an adversary proceeding in probate which must be brought in circuit court. In a dissenting opinion, Justice Cooper reasoned that, since a guardian has no right to renounce a will for a ward, a declaratory suit in the circuit court, the Court of general jurisdiction including equity, would be proper.

In Petrey v. Cain, the Kentucky Court of Appeals explained the distinction between the circuit court’s subject matter jurisdiction over child custody matters generally and its power to hear a particular dispute under the domestic relations statutes. Therein, a mother who wanted sole custody of her child filed a motion and affidavit seeking modification of the Court’s decree which had awarded joint custody. The father claimed that the circuit court lacked jurisdiction since the mother had not supported her motion with two affidavits.

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304 See generally Petrey v. Cain, 987 S.W.2d 786 (Ky. 1999).
305 Id. See also Underwood v. Underwood, 999 S.W.2d 716 (Ky. Ct. App. 1999).
307 See generally Beaven v. McAnulty, 980 S.W.2d 284 (Ky. 1998).
308 See generally Petrey v. Cain, 987 S.W.2d at 786 (Ky. 1999); Underwood v. Underwood, 999 S.W.2d 716 (Ky. Ct. App. 1999); McElroy v. Taylor, 977 S.W.2d 929 (Ky. 1998); Davis-Johnson v. Parmalee, 18 S.W.3d 347 (Ky. Ct. App. 1999).
309 977 S.W.2d 929 (Ky. 1998).
310 Id. at 930.
311 Id.
312 Id.
313 Id. at 930-31.
314 See McElroy, 977 S.W.2d at 931.
315 Id. at 932.
316 987 S.W.2d 786 (Ky. 1999).
317 Id. at 787.
318 Id. at 788.
A SURVEY OF KENTUCKY CIVIL PROCEDURE

The Kentucky Supreme Court held that the mother needed only one affidavit in order to comply with the provisions of KRS 403.350 and thus to invoke the jurisdiction of the circuit court, since her motion to change custody was filed more than two years after the decree. Had her motion been filed within two years of the prior decree, she would have been required by statute to have two affidavits. Without compliance with the statutory prerequisite, the circuit court, which usually hears such motions, would not have had the authority to do so.

In Underwood v. Underwood, the Kentucky Court of Appeals confirmed the subject matter of the circuit court to hear a suit against a decedent’s estate despite the failure of the plaintiff to comply with certain statutory requirements. In Underwood, a former wife filed suit against her ex-husband’s estate to enforce an award of maintenance and to recover a portion of his pension. The Court of Appeals affirmed the dismissal of the claim for pension benefits due to the plaintiff’s failure to present her claim to the personal representative in accordance with the statutes governing the administration of estates. The Court, however, observed that the plaintiff may have lost her right to present a claim against the estate, but the circuit court retained jurisdiction to hear the case.

In regard to the claim for maintenance, the Court held the plaintiff’s claim was not barred by the probate statutes and could be brought in Franklin County, where the ex-husband died. The estate had argued that the plaintiff was required to seek relief in the Oldham Circuit court which had entered the divorce decree. The Court ruled that the Franklin Circuit court had both subject matter jurisdiction and venue over this suit against the estate.

In a case with unusual facts, the Kentucky Court of Appeals held that a Kentucky divorce Court would have jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA) to determine the custodian of a child who was born in Ohio two weeks after his father filed a petition for dissolution of marriage. In Gullett v. Gullett, the child’s mother had moved to Ohio prior to the filing of the petition and claimed that the circuit court in Kentucky lacked jurisdiction to decide custody of her son. Noting that the UCCJA confers jurisdiction to the home state of the child “at the time of the commencement of

320 See Petrey, 987 S.W.2d at 788.
321 Id.
322 Id.
323 999 S.W.2d 716 (Ky. Ct. App. 1999).
324 Id. at 718.
325 Id. at 721.
326 Id. at 720.
327 Id. at 721.
328 Id. at 719.
329 See Underwood, 999 S.W.2d at 721.
331 Id. at 868.
the proceedings” the Court ruled that the unborn child had no home state at the
time of the filing of the petition.332 As a result, the Court reasoned that it would
be appropriate and in the best interest of the child for Kentucky to assume
jurisdiction under KRS 403.420(1)(d).333 Upon the child’s birth, Ohio became his
home state, but that fact did not divest the Kentucky Court of its jurisdiction.334

The Kentucky Court of Appeals considered the personal jurisdiction of
Kentucky courts under the long-arm statute in Davis-Johnson v. Parmalee.335 In
that paternity action, the plaintiff, a resident of Michigan, filed suit in the
Jefferson Family Court against the putative father, a resident of Texas.336 The
plaintiff asserted that KRS 454.210(2)(a)(8)(a) and (b)337 gave personal
jurisdiction to the Kentucky Court since the child was conceived in this state as a
result of the parties’ cohabitation within the jurisdiction.338 The defendant argued
that KRS 454.220, which governs actions for support against non-residents,
applied.339 Since that statute requires an action to be filed within one year of the
defendant’s leaving the state and since he had left Kentucky over two years
earlier, the defendant claimed that the Jefferson Family Court lacked personal
jurisdiction.340

The Court of Appeals held that KRS 454.210(2)(a)(8) provided jurisdiction
over the non-resident defendant for purposes of establishing paternity only.341
However, the Family Court did not have jurisdiction to award child support since
the petition was not commenced within one year as required by KRS 454.220.342
The Court further held that the long arm statute satisfied the requirements of the
due process clause of the Federal Constitution.343

Venue of civil actions is set by statutes and governs where suits ought to be
brought, rather than the power of the Courts to hear cases.344 Proper venue is
based upon such considerations as the residency of the parties,345 the situs of the
transaction or occurrence,346 and the convenience of all parties, witnesses and the
Court.347 Unlike subject matter jurisdiction, venue can be waived.348 Since venue

332 Id. at 869.
333 See Gullett, 992 S.W.2d at 870; Ky. REV. STAT. ANN. § 403.420(1)(d) (Michie 1997).
334 Id.
336 Id. at 348.
338 See Davis-Johnson, 18 S.W.3d at 348.
339 Id. at 349.
340 Id.
341 Id. at 351.
342 Id. at 350.
343 Id. at 350.
344 Id. at 352.
345 See generally Britton v. Davis, 103 S.W.2d 665, 667 (Ky. 1937).
346 See generally Vogt v. Powers, 291 S.W.2d 840, 842 (Ky. 1956).
348 See generally Beaven v. McAnulty, 980 S.W.2d 284, 285 (Ky. 1998).
349 See generally Jarvis v. Jarvis, 200 S.W.2d 475, 476 (KY. 1947).
may be proper in more than one jurisdiction, the plaintiff has the right to select one appropriate location over another. If the plaintiff files suit in the wrong venue, a motion to dismiss may be filed pursuant to Rule 12.

On occasion, a suit may be brought in a jurisdiction that may be quite inconvenient to the parties, attorneys, witnesses, or to the efficient adjudication of the case. In that event, a motion to dismiss pursuant to the doctrine of forum non conveniens may be filed. In Beaven v. McAnulty, the Kentucky Supreme Court considered the authority of the trial court to act in response to a claim that the forum chosen by the plaintiff was inconvenient. In Beaven, suit was filed in Jefferson County, which was the proper venue. The defendants moved to transfer the case to Marion County on the grounds that the plaintiff, the distillery, and personnel records were in that jurisdiction. When the trial court granted the motion to transfer, the plaintiffs sought a writ of mandamus. The Kentucky Supreme Court held that the circuit court had no authority by statute to transfer the case, and that the common law doctrine of forum non conveniens likewise would not permit a transfer. The doctrine would allow a Court to dismiss a case in certain circumstances, even though jurisdiction and venue is proper, but would not allow a transfer.

**Statute of Limitations**

The appellate courts of Kentucky continue to render decisions concerning the timeliness of the filing of lawsuits. The importance of these cases to both litigants and attorneys cannot be overemphasized, since this is one area of civil procedure where the Courts have little discretion in applying the statutes and rules. Indeed, the Courts acknowledge that statutes of limitation can be arbitrary and harsh. Several recent cases have considered theories by which claimants who have run afoul of the time limitations in bringing their lawsuit have attempted to obtain relief. Among the theories presented to the appellate courts

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349 See generally Blankenship v. Watson, 672 S.W.2d 941, 944 (Ky. Ct. App. 1984) overruled on other grounds, Department of Education v. Blevins, 707 S.W.2d 782, 785 (Ky. 1986).
350 See Ky. R. Civ. P. 12.
351 See Beaven v. McAnulty, 980 S.W.2d 284 (Ky. 1998).
352 Id.
353 Id.
354 Id. at 285.
355 Id.
356 Id.
357 See Beaven, 980 S.W.2d at 286.
358 Id. at 287-88.
360 See Reese, 6 S.W.3d at 383.
361 See generally Davis, 986 S.W.2d at 902. See also Gailor, 990 S.W.2d at 597; Roman Catholic Diocese of Covington, 966 S.W.2d at 286; Reese, 6 S.W.3d at 380; McLain, 16 S.W.3d at 320.
are the doctrine of continuing negligence,\textsuperscript{362} the relation-back of amendment rule,\textsuperscript{363} the discovery rule,\textsuperscript{364} and the doctrine of estoppel.\textsuperscript{365} As will be seen by a review of recent decisions, the Kentucky Courts have not been open to affording relief to tardy litigants.\textsuperscript{366}

Counsel for the plaintiff in \textit{Davis v. All Care Medical, Inc.}, argued three theories upon which the court could allow his client's belated products liability action to survive the one-year period of limitations.\textsuperscript{367} In \textit{Davis}, the plaintiff, who was a paraplegic, purchased a wheelchair from the defendant supplier of durable medical goods in May of 1990.\textsuperscript{368} Within a short time after receiving the product, he began suffering decubitus ulcers.\textsuperscript{369} In the spring of 1991, the defendant attempted to make adjustments to the chair.\textsuperscript{370} In June of 1991, a physician told the plaintiff that the wheelchair was the cause of the ulcer condition that had developed on his low back.\textsuperscript{371} In October of 1991, the defendant recommended that the plaintiff obtain a new chair.\textsuperscript{372} Finally, in March of 1992, the plaintiff purchased a new wheelchair from a different supplier.\textsuperscript{373}

In October of 1991, the plaintiff hired a law firm to file a claim against the defendant supplier.\textsuperscript{374} Suit was eventually filed on September 2, 1992, over two years following the purchase of the device and more than one year after the plaintiff was told by his doctor that the defendant's chair was causing him physical injury.\textsuperscript{375} A motion for summary judgment filed by the defendant All-Care was sustained upon the grounds that the plaintiff's complaint was not filed within the applicable statute of limitations.\textsuperscript{376} The Court of Appeals affirmed the dismissal of the plaintiff's claims, except for those alleged to have been sustained as a result of acts of negligence on the part of the defendant occurring within one year prior to the filing of the complaint.\textsuperscript{377}

In the Supreme Court, the plaintiff argued that his claims should not be barred in accordance with the theory of continuing negligence or based upon the

\textsuperscript{362} See \textit{Davis}, 986 S.W.2d at 905.
\textsuperscript{363} See \textit{Gailor}, 990 S.W.2d at 601. \textit{See also Reese}, 6 S.W.3d at 381.
\textsuperscript{364} See \textit{Davis}, 986 S.W.2d at 906. \textit{See also McLain}, 16 S.W.3d at 326; \textit{Roman Catholic Diocese of Covington}, 966 S.W.2d at 288.
\textsuperscript{365} See \textit{Davis}, 986 S.W.2d at 906. \textit{See also Ky. REV. STAT. ANN. § 413.190(2)} (Michie 1997).
\textsuperscript{366} See \textit{Davis}, 986 S.W.2d at 902. \textit{See also Gailor}, 990 S.W.2d at 597; \textit{Reese}, 6 S.W.3d at 380; \textit{McLain}, 16 S.W.3d at 326.
\textsuperscript{367} See \textit{generally Davis v. All Care Medical, Inc.}, 986 S.W.2d 902 (Ky. 1999).
\textsuperscript{368} See \textit{id.} at 903.
\textsuperscript{369} \textit{Id.}
\textsuperscript{370} \textit{Id.} at 904.
\textsuperscript{371} \textit{Id.}
\textsuperscript{372} \textit{Id.}
\textsuperscript{373} \textit{See Davis}, 986 S.W.2d at 904.
\textsuperscript{374} \textit{Id.}
\textsuperscript{375} \textit{Id.}
\textsuperscript{376} \textit{Id.}
\textsuperscript{377} \textit{Id.}
discovery rule.\textsuperscript{378} In the alternative, he argued that the defendant should be estopped to raise limitations as a defense.\textsuperscript{379} The Court rejected all three of the plaintiff’s arguments and affirmed the decision of the Court of Appeals.\textsuperscript{380} The Court declined to adopt the continuing negligence theory, and added that the facts of this case would not warrant its application in any event.\textsuperscript{381} It noted that the relationship between the plaintiff and the defendant could not be characterized as continuing or ongoing.\textsuperscript{382} Furthermore, the plaintiff could not avail himself of the continuing negligence theory since he was placed on notice of his problem and thereby his cause of action by his physician in June of 1991.\textsuperscript{383} The Court likewise rejected the argument that the discovery rule in KRS 413.140(2)\textsuperscript{384} would apply to this action.\textsuperscript{385} That statute relates to claims against physicians, surgeons, dentists or hospitals.\textsuperscript{386} It has also been applied to latent disease cases.\textsuperscript{387} Finally, the Court concluded that there was no basis to find that the defendant concealed or obstructed the plaintiff’s right to prosecute his claim as set forth in KRS 413.190(2),\textsuperscript{388} and thus, there were no grounds to estop the defendant from raising limitations as a defense.\textsuperscript{389} The Kentucky Supreme Court again denied relief from the statute of limitations in \textit{Gailor v. Alsabi}.\textsuperscript{390} In that case, the plaintiff filed suit for personal injuries as a result of an auto accident one day prior to the expiration of the two year period of limitations.\textsuperscript{391} Unfortunately, the defendant driver had died nearly two years prior to the filing of the complaint.\textsuperscript{392} When the plaintiff learned of the named defendant’s death, he did not move to appoint an administrator for the defendant’s estate until September of 1994, and did not file an amended complaint to substitute that administrator as a party until January of 1995.\textsuperscript{393} The trial court sustained the defendant’s motion for summary judgment based on the defense of limitations.\textsuperscript{394} The Court of Appeals however, reversed, holding that

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item See \textit{Davis}, 986 S.W.2d at 904.
\item \textit{Id.} at 906.
\item \textit{Id.} at 905.
\item \textit{Id.}
\item See \textit{Ky. Rev. Stat. Ann.} § 413.140(2) (Michie 1997) For an action against a physician, surgeon, dentist or hospital for negligence or malpractice, the cause of action shall be deemed to accrue at the time the injury is first discovered or with reasonable care should be discovered. \textit{Id.}
\item See \textit{Davis}, 986 S.W.2d at 906.
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{Davis}, 986 S.W.2d at 906.
\item 990 S.W.2d 597 (Ky. 1998).
\item \textit{Id.} at 600.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
Rule 15.03(2) permitted a relation-back of the amended complaint to the date upon which the original complaint was filed.396

After discretionary review was granted, the Kentucky Supreme Court reversed the decision of the Court of Appeals and ordered the original judgment to be reinstated.397 The Court held that the relation-back provision of Rule 15.03(2) could not apply to this case since the proper defendant, the administrator, could not have had notice within the period of limitations that the wrong party had been sued.398 The public administrator was not appointed until long after the period of limitations had expired.399

The majority of the Supreme Court also rejected the plaintiff’s claim that the defense should be estopped from raising limitations since the insurance company became aware of the death of its insured within the period of limitations but failed to provide that information to plaintiff’s counsel.400 The plaintiff pointed to the fact that the insurance company’s adjuster corresponded with plaintiff’s counsel on several occasions, referring to its insured without any indication that the person was no longer living.401 The Supreme Court held that, in absence of evidence that the insurance adjuster knew the plaintiff’s counsel was unaware of the death of the insured or somehow fraudulently concealed that fact from the plaintiff, there can be no claim of estoppel.402 In a strong dissenting opinion, Chief Justice Lambert argued that the insurance company should be estopped by its conduct in failing to inform the plaintiff of the death of its insured.403

Concealment of relevant information was the rationale for allowing the plaintiff in Roman Catholic Diocese of Covington v. Secter to file suit against the defendant some 17 years after the acts of sexual abuse of which he complained.404 The plaintiff alleged that, as a high school student, he was subjected to sexual contact by an employee of a church-operated school, but was unaware of the church’s knowledge of the employee’s propensity to abusive conduct and its failure to discipline the employee until a newspaper investigation revealed these facts many years later.405 After suit was filed, the defendant Diocese sought

395 See KY. R. CIV. P. 15.03(2). Rule 15.03(2) provides:
[a]n amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
Id.
396 See Gailor, 990 S.W.2d at 601.
397 Id. at 605.
398 Id. at 601.
399 Id.
400 Id. at 604.
401 Id. at 602.
402 See Gailor, 990 S.W.2d at 604.
403 Id. at 605 (Lambert J., dissenting).
405 Id. at 287.
The trial court overruled the defense motions, and the case proceeded to trial before a jury resulting in a verdict in the plaintiff's favor. The Court of Appeals affirmed the judgment, holding that the conduct of the Diocese in concealing its knowledge of the conduct of its employee, its failure to discipline or sanction the employee, its failure to inform students, parents or employees, or to report incidents of abuse to state authorities, amounted to obstruction of the plaintiff's cause of action as provided in KRS 413.190(2). The Court noted that the Diocese was under a statutory duty to report incidents of child abuse pursuant to KRS 199.335, but failed to do so. The failure to comply with a duty of disclosure was deemed to constitute concealment, or at least misleading or obstructive conduct.

Although it affirmed the plaintiff's judgment on the grounds that the defendant's obstruction would not allow it to plead limitations, the Court of Appeals rejected the plaintiff's alternative theory that the discovery rule would allow his belated complaint. The Court stated that it had declined to extend the discovery rule in a similar case, Rigazio v. Archdiocese of Louisville, and that neither the Kentucky Supreme Court nor the General Assembly had extended the discovery rule beyond professional malpractice or latent injury from exposure to harmful substances.

The obligation of plaintiff's counsel to discover the identity of the proper person to be named as a defendant in a lawsuit was exemplified in two cases decided by the Kentucky Court of Appeals. In McLain v. Dana Corp., the plaintiff filed a products liability action against the alleged manufacturer of a piece of machinery which had injured him while at his place of employment. In the course of discovery, the plaintiff learned that the named defendant was not the manufacturer of the harmful machine, but merely the maker of a component part. Thereafter, the plaintiff filed an amended complaint to add the actual manufacturers to the litigation. The new defendants filed a motion for summary judgment which was sustained by the trial court. The Court of Appeals affirmed the dismissal of the plaintiff's complaint, rejecting the
plaintiff's plea that the "discovery rule" be extended to cases of this nature. The Court also noted that it was beyond argument that the relation-back rule of Rule 15.03 did not apply since the new defendants had no knowledge of the lawsuit prior to being summoned well beyond the period of limitations.

Finally, in Reese v. General American Door Co., the Court held the relation-back rule of KY. R. Civ. P 15.03 did not apply to a manufacturer of a garage-door that had allegedly caused injury. The plaintiff had filed suit against two other companies before learning that Gadco was the actual manufacturer of the product. There was no question that Gadco had not received actual notice of the original complaint. The Kentucky Court of Appeals affirmed dismissal of the amended complaint, refusing to impute notice to the new defendant of the filing of the action against the original defendants.

TRIAL PROCEDURES

Two recent cases from the Supreme Court dealt with the manner in which trials are conducted. In Bowling Green Municipal Utilities v. Atmos Energy Corp., multiple plaintiffs filed suit against a utility company for damages resulting from a natural gas explosion. The defendant utility joined additional defendants through impleader. From a jury verdict for the plaintiffs, the defendant utility appealed claiming that the trial court committed error by allowing the plaintiffs a total of sixteen peremptory challenges, equal to the number given to the defendants, despite the fact that there was no antagonistic interests among the plaintiffs. The Kentucky Supreme Court reversed the judgment, holding that the lower court had erred in granting the additional peremptory challenges in violation of Rule 47.03(1). That rule allows co-parties to have extra challenges only when they have antagonistic interests. The Court added that the defendant did not need to show prejudice from the rule violation in order to be entitled to a reversal. The Court considered the rules regarding peremptory challenges to be more than technicalities, but rather substantive rights.

Id. at 326.
Id.
See generally id.
See id. at 381.
Id.
Id. at 384.
See Bowling Green Municipal Utilities v. Atmos Energy Corp., 989 S.W.2d 577, 578 (Ky. 1999); Glogower v. Crawford, 2 S.W.3d 784 (Ky. 1999).
See Bowling Green Municipal Utilities, 989 S.W.2d at 578.
Id. at 578.
Id.
See Bowling Green Municipal Utilities, 989 S.W.2d at 580; KY. R. CIV. P. 47.03(1).
Id.
See Bowling Green Municipal Utilities, 989 S.W.2d at 580.
Id.
In *Glogower v. Crawford*, the Supreme Court reversed the dismissal of a claim due to the plaintiff's failure to appear at trial.435 Two shareholders brought this suit against the president of the corporation.436 When one of the shareholders did not attend the trial, the court directed a verdict against him.437 The Court observed that no rule, state, or opinion mandates the physical presence of a plaintiff at trial.438 While the plaintiff may bear the burden of proof at trial, there is no provision requiring the plaintiff to testify on his own behalf.439 Evidence in support of a claim can be presented through witnesses, other than the plaintiff.440 Finally, the Court noted that if the defendant wanted to use the testimony of the plaintiff at trial, a subpoena could have been issued to compel the plaintiff's attendance.441

**APPEALS**

The Supreme Court clarified the appellate process within the structure of family courts in *Elery v. Martin.*442 The first family Court project began in Jefferson County, and the 1998 General Assembly passed legislation establishing additional family Court pilot projects in all Supreme Court districts throughout the state.443 The purpose for creating family Courts was to establish a Court devoted exclusively to family law matters.444 In order to accomplish this goal, legislation had to be passed combining what had formerly been the jurisdiction of circuit court and district Court.445 Family Courts, under KRS 23A.110,446 have jurisdiction over such traditional district Court cases as paternity and non-criminal juvenile proceedings, as well as jurisdiction over petitions in dissolution of marriage, child custody, visitation and support.447

In *Elery*, the putative father of a child appealed the Jefferson Family Court order requiring him to pay child support payments and other expenses of the mother in a paternity determination.448 The appeal was filed directly to the Kentucky Court of Appeals which held that the initial appeal should have been taken to the Jefferson Circuit court in accordance with the locally adopted rules of procedure for that family Court.449 Those rules provided that appeals from matters which otherwise would be heard by the circuit court should be filed with

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435 See *Glogower v. Crawford*, 2 S.W.3d 784, 786 (Ky. 1999).
436 *Id.* at 784.
437 *Id.*
438 *Id.* at 785.
439 *Id.*
440 *Id.*
441 See *Glogower*, 2 S.W.3d at 785.
443 See generally *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994).
444 *Id.* at 683.
445 *Id.* at 685.
446 KY. REV. STAT. ANN. § 23A.110 (Michie 1997).
447 See *Kuprion*, 888 S.W.2d at 681-62.
448 See *Elery*, 4 S.W.3d at 551.
449 *Id.* at 553.
the Kentucky Court of Appeals, while appeals from matters normally heard in
district Court should be filed with the circuit court. Since this judgment was
entered in a paternity action, ordinarily a matter for district Court jurisdiction, the
appellant was required to take his first appeal to the Jefferson Circuit Court.

The hazards to the practitioner of the strict interpretation and enforcement of
the civil rules governing appeals was exemplified by the Court of Appeals’
decision in Stewart v. Kentucky Lottery Corp. In Stewart, after summary
judgment was entered dismissing the complaint, the plaintiff filed a motion for
reconsideration. The trial court overruled that motion without hearing. The
clerk noted the entry of the order on the docket indicating that notice of the entry
was served by mail. However, it was uncontroverted that neither party to the
litigation received the order denying the plaintiff’s motion for reconsideration.
Upon learning that the trial court’s order had been entered, plaintiff’s counsel
filed a notice of appeal and a motion under Rule 60.01 and Rule 60.02. The
motion requested a nunc pro tunc order reflecting a new date of entry of the order
overruling the motion to reconsider. The trial court denied the motion under
Rule 60, and the Court of Appeals dismissed the appeal since the notice of appeal
was not filed within 30 days after the entry of the trial court’s order overruling
the motion for reconsideration.

Strictly construing the civil rules, the Court cited Rule 77.04(4) which
plainly states that the clerk’s failure to serve notice or a party’s failure to receive
notice does not affect the time for taking an appeal. Although the timely filing
of a notice of appeal is not jurisdictional, it is nevertheless the method by which
the jurisdiction of the appellate Court is invoked, and automatic dismissal of an
appeal is the penalty for late filing of such notice. The Court concluded that
substantial compliance simply does not apply to the filing of notices of appeal.

RES JUDICATA

It is arguable that no other doctrine within the field of civil procedure causes
as much confusion among lawyers and the Courts as does res judicata. Indeed,
the term itself, Latin for “a matter adjudged”, encompasses two distinct
principles: claim preclusion and issue preclusion. To add to the confusion, claim preclusion is the modern usage for res judicata in the narrow sense, while issue preclusion was formerly called collateral estoppel.

In the 1998 decision of Yeoman v. Commonwealth, the Kentucky Supreme Court took the opportunity to define the two components of res judicata. The issues arose in the context of a suit challenging the constitutionality of Kentucky House Bill 250, legislation aimed at making wide-range health care reforms. Since there had been litigation challenging earlier legislation which had included similar health care reform proposals, the Court first had to resolve claims that the prior litigation would preclude the current claim or the issues presented in the pending case. Holding that claim preclusion was not established, the Court listed the elements of that defense. First, there must be identity of the parties in both suits. Second, the causes of action must be the same. Finally, the prior action must have been decided on the merits. The Court denied the application of claim preclusion finding that the subject of the present litigation, House Bill 250, was similar but not identical to House Bill 1.

The Court also found no basis for precluding the plaintiffs from contesting the constitutionality of the provider tax portion of the bill. The Court noted that there are four prerequisites to establish issue preclusion. First, the issue in both cases must be the same. Second, the issue must have been actually litigated in the first proceeding. Third, the issue had to have been not only litigated, but also decided in the former suit. Fourth, the issue must have been necessary to the Court's judgment in the first case. Again, the Court found that the provider tax in House Bill 1 was not the same as the tax proposal in House Bill 250. Since the issues in the two cases were not identical, the plaintiffs were not precluded from litigating the constitutionality of the tax in House Bill 250. Having ruled that claim preclusion and issue preclusion did not apply, the

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466 Id. at 465.
467 Id. at 459.
468 Id. at 463.
469 Id. at 464.
470 Id. at 464-65.
471 See Yeoman, 983 S.W.2d at 464-65.
472 Id.
473 Id. at 465.
474 Id.
475 Id.
476 Id.
477 See Yeoman, 983 S.W.2d at 465.
478 Id.
479 Id.
480 Id. at 466.
481 Id.
Court proceeded to the merits of the case and upheld the constitutionality of House Bill 250.482

The Kentucky Supreme Court recognized issue preclusion in *United States Fidelity and Guaranty Co. v. Preston*.483 In that case, an automobile insurer filed a declaratory judgment action, seeking a determination that it did not owe uninsured motorist benefits as a result of the death of its insured in an accident that occurred in Georgia.484 The estate of the deceased insured had filed suit against the tortfeasor in federal Court in Georgia.485 A jury found the plaintiff's decedent to be 60% at fault.486 As a result, and in accordance with Georgia's modified comparative fault scheme, the plaintiff was not entitled to recover from the other party.487 In the declaratory action, the insurance company argued that its policy only paid damages that the insured was legally entitled to recover from the uninsured tortfeasor.488 Since the insured filed suit but was not legally entitled to recover from the uninsured tortfeasor under Georgia law, the insurance company denied coverage under its policy.489

The Kentucky Supreme Court held that the estate could claim contractual uninsured motorist benefits despite the inability to recover a judgment in Georgia.490 The Court reasoned that the insured merely had to establish the "essential facts" under the contract: that the uninsured motorist was at fault, and the extent of damages caused by the uninsured motorist.491 The Court further noted that the entry of a judgment against the tortfeasor is not a prerequisite for

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482 *Id.*
483 26 S.W.3d 145 (Ky. 2000).
484 See *id.* at 146.
485 *Id.*
486 *Id.*
487 *Id.*
488 *Id.*
489 See *United States Fidelity and Guaranty Co.*, 26 S.W.3d at 146.
490 *Id.* at 149.
491 *Id.* at 148.
obtaining benefits since an insured can collect in those cases where the uninsured driver is unidentified.\textsuperscript{492}

The Court nevertheless held that the insured could collect only 40\% of the damages incurred since the issue of apportionment of fault had been litigated in the Georgia action.\textsuperscript{493} Thus, issue preclusion would bar re-litigation of the percentage of the tortfeasor’s fault.\textsuperscript{494} The insured can collect 40\% of her damages, not to exceed the company’s limits.\textsuperscript{495}

\textsuperscript{492} Id.

\textsuperscript{493} Id. at 149.

\textsuperscript{494} Id.

\textsuperscript{495} See United States Fidelity and Guaranty Co., 26 S.W.3d at 149.
INTRODUCTION

In the decade since publication of the author’s treatise on negligence liability of occupiers and owners of land, a significant number of important decisions have been issued by the Kentucky Supreme Court and Court of Appeals. In this article the author will analyze these decisions against the backdrop of the common law and statutory modifications thereto. Reflecting the treatise’s original format, the article is directly limited to issues of negligence liability of occupiers and owners (including lessors) and excludes tort actions against such defendants involving strict liability or intentional torts. The article is also limited to suits against non-sovereign entities.

LIABILITY UNDER THE KENTUCKY TRESPASSER STATUTE

In 1976 the General Assembly attempted to substantially augment the already deferential status of the common law, which provided only limited duties by the owner or occupier to trespassers, by limiting liability in non-attractive
nuisance” cases to injuries “intentionally inflicted by the owner or someone acting for the owner.”

The latter language was clear and unequivocal and the assumption was that the General Assembly used “intent” in its accepted sense. In 1988, in *Kirschner v. Louisville Gas & Electric*, the Kentucky Supreme Court circumvented the concern with the niggardly statute’s constitutionality by giving “intent” an extraordinarily creative interpretation as merely codifying the common law as of 1891, i.e., “willful, wanton, or reckless conduct.”

As has been suggested elsewhere, language quoted in *Kirschner* defining the “willful, wanton, or reckless conduct” standard suggests that it is met by failure to use ordinary care after discovery of a trespasser’s peril. In other words, “intent” becomes failure to use reasonable care in discovered peril cases! This interpretation, together with the statutory exception for “attractive nuisances” and Kentucky precedent defining “constant trespassers” on a “limited area” as “gratuitous licensees,” “effectively castrated the statute and left it without any legal effect on existing law.” Unfortunately for the injured fifteen-year-old therein, however, the court found the “attractive nuisance” statute

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7 See KY. REV. STAT. ANN. § 381.231(1) (Lexis Supp. 2000).
8 KY. REV. STAT. ANN. § 381.232 (Lexis Supp. 2000). For a more detailed discussion see ELDER, supra note 2, § 2.05, nn.102-07.
9 See ELDER, supra note 2, at 102.
10 743 S.W.2d 840 (Ky. 1988). The *Kirschner* 4-2 majority was a fragile one. Justice Vance did not participate. See id. Only Justices Gant and Wintersheimer joined in Justice Stephenson’s opinion. Id. Justice Lambert concurred in the result only. Id. Chief Justice Stephens and Justice Leibson dissented. Id. In dicta, the opinion for three Justices rejected the abolition-of-categories approach. Id. at 844. For a further discussion see infra text accompanying notes 127-139.
11 See Kirschner, 743 S.W.2d at 842-44. The court’s upholding of the statute as constitutional was limited to § 54. Id. A subsequent opinion has expressly and pointedly noted this limited ground for sustaining the statute’s constitutionality. “We are not presented with a proper claim that the statutes violate any other section of the Kentucky Constitution.” North Hardin Developers v. Corkran, 839 S.W.2d 258, 259-60 (Ky. 1992) (emphases added). In that case the notice to the Attorney General requirement for raising constitutional claims had not been met. Id. For a further brief discussion of the latter see infra, notes 52, 394.
12 Justice Leibson correctly concluded the majority “stretch[ed] the . . . term ‘intentionally inflicted’ beyond recognition.” See Kirschner, 743 S.W.2d at 847 (Leibson, J., dissenting).
13 See id. at 842.
14 At the time of *Kirschner* the “jural rights” doctrine was limited to common law rights existent at the time of the 1891 Constitution. Note that this limitation subsequently dissavowed in a controversial decision. See infra note 394.
15 Kirschner, 743 S.W.2d at 842 (emphases in original). The opinion quotes from W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 212-13 (5th ed. 1984) (Supp. 1988), including the following: “... the usual meaning . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.” Id. at 843. Compare the exception in the “recreational use” statute. See infra text accompanying notes 416-24.
16 See ELDER, supra note 2, at 103-04.
17 See Kirschner, 743 S.W.2d at 843 (emphases added) (quoting the following from Kentucky Central R.R. Co. v. Gastineau’s Adm’r, 83 Ky. (1 Hines) 119, 122 (1885): “... It is not required to use care to anticipate and discover the peril to such a person, but only to do so after the discovery of the danger” (emphases added)).
18 See ELDER, supra note 2, at 103-04.
inapplicable, held that he was not a licensee as to the Eiffel Tower-type transformer on which he climbed to a height and was injured (although he apparently was such as to the playing area around the tower), the hazard was not a "concealed dangerous condition," and he was not covered by the discovered peril doctrine.

The first case discussing the creative construct superimposed on the statute in *Kirschner*, *List v. Southern Ry. Co.*, involved a youth discovered by the train engineer on a train trestle. Although decedent immediately began running in an attempt to reach the terminus of the trestle, he was unsuccessful and was killed by the train. Clearly, this was a discovered peril case, which at common law entailed a duty to use reasonable care with all available means at hand to avoid injury or death. The Court of Appeals clearly recognized this, concluding that under the common law and the statute defendant had "a duty to use ordinary care to prevent harm to one known to be in danger." Since negligence in such discovered peril circumstances connotes recklessness and the latter equates to "intent" under the *Kirschner* interpreted statute, liability was thus justifiable.

One can alternatively and more logically argue that the flagrant, conscious indifference of the engineer was true recklessness. However, such was not required under *Kirschner* unless a claim for punitive damages was made.

Anomalously, in non-discovered peril cases, true recklessness must be demonstrated to comply with *Kirschner*’s definition of "intent." A Sixth Circuit Kentucky case, *Middleton v. Reynolds Metals Co.*, is an excellent illustration of such recklessness. In that case, defendant’s property manager installed a quarter-inch steel cable several hundred feet inside defendant’s property at a height of eighteen inches to prevent trespassers from using a gravel road. A minor on a...
dirt bike driving 30-40 m.p.h. failed to see the wire in time to stop and was
seriously injured. No explanation was given for not providing “No
Trespassing” signs, other warnings, or affixing plastic jugs to the wire, which
was defendant’s admitted normal practice. Under the facts, the court majority
found that an issue of recklessness existed under the Kirschner rule, a
conclusion that is clearly consistent with Kentucky law imposing liability in
equivalent circumstances on reckless landowners.

The “Attractive Nuisance” Doctrine

In Coursey v. Westvaco Corp., the Kentucky Supreme Court confronted the
issue of whether to find the Kentucky “recreational use” statute inapplicable in
the case of a thirteen-year-old who became paralyzed by jumping into a water
covered sand pit on defendant’s property. This statute has no express exemption
for “attractive nuisances,” unlike the general statute upheld by the court on
limited constitutional grounds, providing for restricted liability of landowners
vis-a-vis trespassers. The Coursey opinion rejected 4-3 an implied exception
for “attractive nuisances” in light of the “absolute and unqualified” language in
the recreational use statute, the exception expressly provided therefore in other
jurisdictions which the General Assembly had elected not to adopt, and the very
specific (and limited) duties imposed by section 411.190(6) of the Kentucky
Revised Statutes. These factors supported a conclusion that the legislature
would have expressly adopted an “attractive nuisance” exception had it intended
this to be “preserved” under the “recreational use” statute. The court’s decision
as to legislative intent was assuredly correct despite Justice Leibson’s vigorous
and creative attempt to justify an exception for this “humanitarian doctrine of
longstanding.”

The court majority also referenced its “tendency ... to restrict, not enlarge”
the “attractive nuisance” rule in support of its decision. The court’s jurisprudence is not so clear-cut. Other cases reflect the view that the doctrine

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31 Id.
32 Id.
33 Id. at 883-84. But compare the dissent: “Sporadic pedestrian visits to a pond for fishing by local
teenagers do not, without more, give rise to a finding of defendant’s ignoring an obvious risk of
probable harm resulting from a motorcycle being used in such a manner as to render adequate
stopping distance impossible.” Id. at 884 (Kennedy, J., dissenting).
34 See ELDER, supra note 2, § 2.02, nn.7-8.
35 790 S.W.2d 229 (Ky. 1990).
36 KY. REV. STAT. ANN. § 411.190 (Michie 1992). The “recreational use” statute then in effect was
passed in 1966. See the discussion infra text accompanying notes 392-400.
37 See infra note 52, and the discussion infra note 394.
38 The exception is in KY. REV. STAT. ANN. § 381.231(1) (Lexis Supp. 2000). For an analysis of
these statutes see ELDER, supra note 2, § 2.05, and supra text accompanying notes 7-34.
39 See Coursey, 790 S.W.2d at 232.
40 Id.
41 Id.
42 Id. at 232-33 (Leibson, J., dissenting, with whom Combs, J., and Lambert, J., join, concurring).
43 See Coursey, 790 S.W.2d at 232.
has been applied "with some degree of liberality." A detailed analysis concluded that the self-admitted difficulty of reconciling the wealth of Kentucky precedent has resulted in "an anomalous and ambiguous area of the law with considerable diversity in case perspective" in applying the doctrine's underlying raison d'être, i.e., "modern humanitarian concepts of social duty or consideration for those not able to protect themselves, as the weak against the strong. . . ." This confusion resulted in large part from the strong Kentucky tradition of analyzing the doctrine case-by-case, with each case "governed by its own peculiar facts."

The Kentucky Supreme Court, by a 5-2 majority, rejected the "attractive nuisance" doctrine in North Hardin Developers, Inc. v. Corkran, a case involving a five-year-old child severely injured by a horse on a 27 acre farm owned by defendant. The Court of Appeals had recognized the general rule that a domesticated animal without a known vicious propensity did not "normally" entail liability, but came to the following conclusion on the facts before it: "[W]hen a herd of horses is introduced into an area heavily populated with children by the very company which developed the adjacent subdivision where they live, a different situation is presented."

Noting that a renewed constitutional attack on the trespasser statute had not met its requirements, the Kentucky Supreme Court dealt with the "attractive nuisance" exception thereto. It did not dispute the facts as stated by the Court of Appeals and conceded that a "large number" of children lived in the "immediate vicinity," that the defendant knew that trespasses by children had occurred, and that defendant had posted warning notices and hired a part-time employee to keep children off. The court noted the "paucity of authority" on the issue and cited two Kentucky cases distinguishable on their facts, involving a dog and a

44 See, e.g., Latta v. Brooks, 169 S.W.2d 7, 10 (Ky. 1943).
45 See Von Almen's Adm'r v. City of Louisville, 202 S.W. 880, 882 (Ky. 1918) (admitting it was "impossible" to reconcile some of its cases).
46 ELDER, supra note 2, at 55.
47 See L. & N. R.R. Co. v. Vaughn, 166 S.W.2d 43, 46 (Ky. 1942).
48 See ELDER, supra note 2, at 55.
49 See Greater Louisville First Fed. Sav. & Loan Ass'n v. Stone, 242 S.W.2d 739, 741 (Ky. 1951). See also ELDER, supra note 2, at 55, n.21.
50 839 S.W.2d 258 (Ky. 1992).
51 See id. at 259.
52 See id. at 259-60 (citing Maney v. Mary Chiles Hosp., 785 S.W.2d 480, 481-82 (Ky. 1990) (holding that the mandatory notice statute as to attacks on a statute's constitutionality — see KY. REV. STAT. ANN. § 418.075 (Lexis Supp. 2000) — rendered any judgment not complying therewith null and void). The court noted that Kirschner v. Louisville Gas and Electric Co., 743 S.W.2d 840 (Ky. 1998), upholding the statute had involved only § 54 and that it was not confronted with a "proper claim" under "any other section" of the Kentucky Constitution. North Hardin, 839 S.W.2d at 259-60 (emphasizes added). For a further discussion of Kirschner see supra text accompanying notes 6-34.
53 See North Hardin Developers, Inc., 839 S.W.2d at 259.
54 See Dyches v. Alexander, 411 S.W.2d 47, 48-49 (Ky. 1967). In an extraordinary decision the court ignored the plain and unambiguous language of the statute imposing strict liability on the "owner or keeper of a dog" which "injured or damaged any person or property" by refusing to impose strict liability in favor of a trespassing five-year-old entering through a gate kept closed in a four feet high fence, where the owners had no knowledge that the dog was vicious or had
horse respectively, as consistent with the "predominant view" (though the precedents "hardly speak with a single voice") rejecting the "attractive nuisance" doctrine as to "ordinary domesticated animals." 

The main and fatal defect in the court's decision was its refusal to look at the particular facts of the case and its abstract assessment of the "attractive nuisance" issue as applying to the class of "domesticated animals." This was made clear by its statement that its conclusion was consistent with its rejection of a "natural" versus "artificial" dichotomy in another context: "It is necessary to show that the condition causing injury was foreseeably dangerous and domesticated animals have not been so regarded." Later, in rejecting the application of Grayson's "universal" duty, the court said: "The distinction, however, between this case and the foregoing general rule is that domesticated livestock, absent a history of dangerous propensities, do not constitute a foreseeable risk of harm." In other words, the court ignored its modern tradition of closely tying the doctrine's application to the facts of the particular case.

The Kentucky Supreme Court distinguished an out-of-state case involving a horse in a residence yard enclosed by a couple of strands of wire, where the court emphasized the modest burden therein, "just a matter of some additional wiring," that would have sufficed to keep children out of danger. The court found the facts before it to "differ substantially," as the property consisted of a 27-acre farm where the owner had tried without success to stop the trespass. Permitting a jury to assess and balance the risks versus the burden, the court decided the previously bitten anyone. In a cryptic reference the court refused to treat a dog as "an attractive nuisance and . . . per se of a dangerous character." See Ewing v. Prince, 425 S.W.2d 732, 733-34 (Ky. 1968). An adult horse-rider plaintiff kicked by defendant's horse during a pleasure ride could collect for negligence only by a showing of known viciousness or dangerousness toward humans. Evidence of such known characteristics toward other animals was insufficient. See North Hardin Developers, Inc., 839 S.W.2d at 260.

The court made another similar statement: "Prior to application of the universal duty of care to a particular set of facts, it must appear that the harm was foreseeable and the facts must be viewed as they reasonably applied to the party charged with negligence, not as they appear in hindsight." Despite the emphasized language, the court never analyzed the doctrine in light of the particular facts of the case but only in the context of "domesticated animals" as a class. Id.

See the discussion in the text infra text accompanying notes 68-87. See Hofer v. Meyer, 295 N.W.2d 333, 336-37 (S.D. 1980). The court found a cause of action under the RESTATEMENT (SECOND) OF TORTS § 339 (1965) variation of the "attractive nuisance" doctrine. For an analysis of Kentucky precedent in light of § 339 see generally Elder, supra note 2, § 2.04, 53-101. In the Hofer case the court had also emphasized that the multiple cumulative factors found in § 339(a)-(e) were "closely interwoven" and that a horse in a "poorly fenced yard" near other residences with children constituted an "unreasonable risk" under factor (b). Hofer, 295 N.W.2d at 336-37. As to (c), a three-year-old was "certainly unable to comprehend the danger involved in coming near what was then a gentle and peaceful animal" or that his "sudden presence" or that of his dog might reverse the demeanor of the horse. In light of the facts plaintiffs had met their burden to show under (e) defendants' failure to use reasonable care either to protect the trespassing children or to eliminate the hazard. Id.

Compare the more defensible position in Deaton's Adm'r v. Kentucky & W.Va. Power Co., 164 S.W.2d 468, 469 (Ky. 1942). A jury issue was presented as to defendant's negligence in
issue as one of law, concluding hyperbolically: 

"[T]o prevent trespassing by the children and the cost of rendering the farm inaccessible to children would have been prohibitive." 63

Justice Leibson in dissent correctly viewed the case as "not a farm animal case, but an urban cowboy case," agreeing with the ordinary scenario but finding the case before the court different. 64 He excoriated the court for not analyzing the case in the context of the particular facts, saying "it is as important for the law to discriminate between differences as it is to apply neutral principles equally where no differences exist." 65 The majority had applied the rule "blindly regardless of circumstance," adopting "a per se rule in circumstances where such a rule is inappropriate." 66

Justice Leibson made a compelling argument for allowing the case to proceed to jury resolution. The case did not involve a farm where horses were "indigenous to the area," as the horses were not even there prior to "the build-up of the surrounding suburban area." 67 Indeed, the court's crabbed application of doctrine compares quite unfavorably with its refusal to "adher[e] unthinkingly" to the "common hazards" doctrine in "knee jerk" fashion, 68 concluding, in line with the Restatement (Second) of Torts, 69 that such dangers could result in liability where the defendant was aware that children "too young to appreciate such dangers are likely to trespass on his land." 70 Illustratively, Kentucky has modernly repudiated prior precedent 71 and upheld a claim involving a child burned by a smoldering, unattended fire. 72 The court therein "focused on factors evidencing the unreasonableness of the danger rather than the latency thereof," 73 noting the seriousness of the threat to persons and property, the fire's attraction to "curious and careless children of tender years," and that neighborhood children had free access to the risk. 74 Similarly, in another case the court deviated from its

maintaining an alluring, easily climbed electric tower near a public road without any precautions to prevent children from climbing thereon. Id. In a case involving the failure to stabilize a new but unstable "green" concrete wall at a construction site, the court concluded that the jury could have decided "security measures available to the defendants would not have been so burdensome as to be out of proportion to the risk involved." Goben v. Sidney Winer Co., 342 S.W.2d 706, 710 (Ky. 1960). On issues of risk-utility and failure to use reasonable care under Restatement (Second) of Torts § 339(d), (e) (1965), see Elder, supra note 2, at 93-99.

63 See North Hardin Developers, Inc., 839 S.W.2d at 262.

64 Id. at 262 (Leibson, J., dissenting, with Combs, J., joining).

65 Id. (emphases added).

66 Id. at 262-63.

67 Id. at 263.

68 See Elder, supra note 2, at 83. See generally, id. at 83-85, and the parallel suggestions in cases involving water hazards. Id. at 75-76 and nn.129-39.

69 Restatement (Second) of Torts § 339, cmt. j (1965).

70 See id.

71 See Elder, supra note 2, at 33 and n.177.

72 See, e.g., Louisville Trust Co. v. Nutting, 437 S.W.2d 484, 485-86 (Ky. 1969).

73 Elder, supra note 2, at 83.

74 See Louisville Trust Co., 437 S.W.2d at 485-86. Note that "ordinarily" fire is not covered by § 339, see Restatement (Second) of Torts § 339, cmt. j (1965), but that fires involving very young children would be subject to coverage. Id. See also Elder, supra note 2, at 84, n.178, and the precedent supporting § 339, illus. 7 found in Restatement (Second) of Torts App. Vol. 2,
general jurisprudence as to mobile and immobile trains\textsuperscript{75} and imposed liability for
dangerous train "switching" practices in an unfenced train yard adjacent to a
thoroughfare where children played.\textsuperscript{76}

The liberal Kentucky precedents imposing liability have not been limited to
cases involving children of so young an age as to be "completely incapable of
discretion and wholly irresponsible" for their acts.\textsuperscript{77} For example, in one decision
the court upheld a claim where a two-hundred pound iron wheel was propped on
defendant's platform. The wheel was easily lifted upright to a "dangerous
position" and fell and crushed an eight-year-old who tried to roll it while
playing.\textsuperscript{78} In a fact-intensive analysis,\textsuperscript{79} the court emphasized the ease with which
the risk could evolve, the availability of ready alternatives (including a nearby
warehouse), and the "natural and ordinary" proclivities of youthful conduct,
which defendant was required to foresee.\textsuperscript{80} In another case involving a "common
hazard," falling from a height, the court emphasized the "alluring and attractive
character" of an electrical tower in a path adjacent to a public road to which
plaintiff had "easy and inviting" access.\textsuperscript{81}

The above opinions, and a plethora of other cases\textsuperscript{82} supporting liability of
defendants for "inherently dangerous machines, materials, or substances left in an
exposed and dangerous position"\textsuperscript{83} involved risks, not unlike a herd of horses
"introduced" into a suburban neighborhood\textsuperscript{84} (which they were not
"indigenous" to), from conditions or agencies of harm which, while "observable
by adults, are likely not to be observed by children, or which contain the risks the
full extent of which an adult would realize but which are beyond the imperfect

\textsuperscript{134-35 (1966). Although the North Hardin majority referenced} Nutting, 839 S.W.2d at 260, it
applied the \textit{per se} rule to "ordinary domestic animals," inexplicably finding no parallel in its fact-
intensive analysis of the "attractive nuisance" doctrine to the facts in \textit{Nutting}.

\textsuperscript{75} See Elder, supra note 2, at 80-81, n.166, and 88, n.179.

\textsuperscript{76} See Mann v. Ky. & Ind. Terminal R.R. Co., 290 S.W.2d 820, 823-26 (Ky. 1956), 312 S.W.2d
451, 452-53 (Ky. 1958). Mann is one of the precedents cited in support of the § 339, illus. 7,
every of a small artificial goldfish pond adjacent to a nursery where a three-year old drowned.

\textsuperscript{77} See Mann, 290 S.W.2d at 823-26.

\textsuperscript{78} See American Ry. Express Co. v. Crabtree, 271 F. 287, 288 (6th Cir. 1921) (applying Kentucky
law).

\textsuperscript{79} See Elder, supra note 2, at 84-85.

\textsuperscript{80} See \textit{American Ry. Express Co.}, 271 F. at 288.

\textsuperscript{81} See Deaton's Adm'r v. Kentucky & W.Va. Power Co., 164 S.W.2d 468, 469-70 (Ky. 1942). The
court declined to follow other cases involving falls from an artificial or natural fixture, or from a
standing or moving train, or into a basement or cellar at a construction site, or into a hole. See
Elder, supra note 2, at 72-74, and nn.107-22.

\textsuperscript{82} See Elder, supra note 2, at 85-87, and nn.185-97.

\textsuperscript{83} Id. at 85.

\textsuperscript{84} See North Hardin Developers, Inc., 839 S.W.2d at 259 (quoting from Court of Appeals'
opinion); id. at 262 (Leibson, J., with Combs, J., joining, dissenting). In response to the majority's
suggestion of some difficulty viewing domesticated animals as "artificial conditions," Justice
condition of the land' is used to indicate that the condition of the land has not been changed by any
act of a human being . . . ." North Hardin Developers, Inc., 839 S.W.2d at 263 (Leibson, J., with
Combs, J., joining, dissenting).
realization of children." Unfortunately for the plaintiff in North Hardin (and the humanitarian underpinnings of the "attractive nuisance" doctrine)
the Kentucky Supreme Court rejected therein its more modern tendency to refrain from "knee jerk," reflexive reasoning and adopted a per se approach which ignored a risk that a jury could have easily found to be unreasonable under the circumstances.

LIABILITY TO LICENSEES

Licensee status has been traditionally defined as involving entrance "upon property of another, either by express invitation or with . . . implied acquiescence, not on any business of the owner or occupant, but solely in pursuit either of licensee’s own business, pleasure or convenience." The net result is a set of limited duties owned by the occupier and owner to the licensee, who is expected to take the premises as the [owner or occupier uses] them and [is] not entitled to expect that they would be prepared for his reception or that precautions would be taken for his safety in any manner in which [the owners or occupiers] did not prepare or take precautions for their own safety or that of their family.

A wealth of Kentucky precedent has interpreted which types of entrants are covered within this category and the duties owed thereto. Clearly, any duties owed trespassers are owed a fortiori to licensees. As to passive conditions on the land, the owner or occupier has no duty to licensees to inspect or discover the condition and put them in a "reasonably safe condition" or even warn thereof. However, defendant is not allowed to "knowingly" permit the licensee to "run upon a hidden peril" and must warn of either artificial or

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85 See RESTATEMENT (SECOND) OF TORTS § 339, cmt. i (1965); ELDER, supra note 2, at 86-87, and nn.196-97.
86 See ELDER, supra note 2, at 53-56, and supra text accompanying note 47.
87 See supra note 62.
88 See generally ELDER, supra note 2, § 3.01, 197-202.
89 See Cain v. Stevens, 274 S.W.2d 480, 481 (Ky. 1954).
90 See ELDER, supra note 2, § 3.01, 203-10.
91 See Tharp v. Tharp, 346 S.W.2d 44, 46 (Ky. 1961).
92 See ELDER, supra note 2, at 199-202.
93 Id. at 203-10.
94 Id. at 203 and nn.50-53. On trespasser liability see id., ch 2, and supra text accompanying notes 6-34.
95 See Shipp v. Johnson, 452 S.W.2d 828, 829 (Ky. 1969); Ockerman v. Faulkner's Garage, 261 S.W.2d 296, 297 (Ky. 1953); Kentucky & W. Va. Power Co. v. Stacy, 164 S.W.2d 537, 539 (Ky. 1942); ELDER, supra note 2, at 206 and nn.80-81.
96 See Shipp, 452 S.W.2d at 829; Ockerman, 261 S.W.2d at 297; Brauner v. Lentz, 169 S.W.2d 4, 6 (Ky. 1943); ELDER, supra note 2, at 207 and n.82.
97 See Ockerman, 261 S.W.2d at 297.
98 Id. at 297-98; Tharp, 346 S.W.2d at 46.
99 Id.
natural conditions. The possessor need not have actual knowledge of the unreasonable danger for the duty of warning to arise. It is enough that the defendant has actual knowledge of the condition, a “condition that a properly-instructed jury finds unreasonably hazardous to a licensee exercising ordinary care for his own safety.” The common law then “holds him to that which an ordinarily prudent person with the same knowledge would have anticipated.” This duty to warn is inapplicable in cases of “open and obvious” dangers, even where defendant is aware of prior injuries imputable thereto.

The common law rule for licensees is different as to acts of “active” negligence. In such cases, defendant owes a duty of “reasonable care” “in conducting a business activity on the premises.” This includes anticipating the licensee’s presence, and in general, “exercis[ing] ordinary care to discover peril, and in the exercise of such care to use all means at its command to prevent injury.” Thus, liability in Kentucky was imposed for a projecting arm from a train hitting a licensee on a crowded train platform, for permitting boys to play on heavy, easily moved shop machinery, for reversing a farm machine without

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100 See Coleman v. Baker, 382 S.W.2d 843, 848 (Ky. 1964); Kentucky & W. Va. Power Co. v. Stacy, 164 S.W.2d 537, 539 (Ky. 1942); Perry v. Williamson, 824 S.W.2d 869, 874 (Ky. 1992).

101 See Elder, supra note 2, at 208-09.

102 See Gravatt v. B.F. Saul Real Estate Inv. Trust, 601 S.W.2d 287, 289 (Ky. 1980).

103 Id. (emphases added). See infra text accompanying notes 122-33.

104 See Shipp, 452 S.W.2d at 829-30; Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. Ct. App. 1996).

105 See Shipp, 452 S.W.2d at 830. This knowledge was “immaterial,” as “no duty to warn a licensee [existed] except concerning hidden perils.” Id.

106 See Elder, supra note 2, at 207-08.

107 See Hardin v. Harris, 507 S.W.2d 172, 174-76 (Ky. 1974) (adopting Restatement (Second) Of Torts, § 341 (1965) (“A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if (a) he should expect that they will not discover or realize the danger, and (b) they do not know or have reason to know of the possessor’s activities and of the risk involved”)). See also Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. Ct. App. 1996) (quoting Hardin v. Harris, 507 S.W.2d 172, 174-75 (Ky. 1974), to the effect that the limited duties owed licensees (abstaining from willful or wanton misconduct, warning of hidden dangers) had been “gradually eroded with respect to injuries caused by activities conducted upon the premises” (emphases added)). Another decision distinguished Harris in a case involving activities conducted not by him but by third parties, young girl-social guests at a swimming party at a private residence. The duty that applied was based on Restatement (Second) Of Torts, § 318 (1965), not cases involving commercial pool or swimming operations, as in Bartley v. Childers, 433 S.W.2d 130 (Ky. 1968), and Stillwell v. City of Louisville, 455 S.W.2d 56 (Ky. 1970). For a discussion of the latter cases see infra text accompanying note 617. Under § 318, the owner had a duty of using reasonable care to control licensees “if present.” Restatement (Second) Of Torts, § 318 (1965). The Grimes Court found no evidence, however, of “horseplay, boisterous conduct, or any dangerous activity” linked to the drowning of the social guest. Grimes, 566 S.W.2d at 774. Accordingly, even if present at poolside, there was no evidence supporting the need to exercise control. Id. For a further discussion of § 318 seeinfra text accompanying notes 654-60.

108 See Elder, supra note 2, at 204.

109 Happy Coal Co. v. Garrison, 111 S.W.2d 596, 600 (Ky. 1937). This duty as to “active” negligence imposes no duty to use “reasonable care” to “discover” “defects in the premises.” Hardin v. Harris, 507 S.W.2d 172, 175 (Ky. 1974) (emphases added). See also infra text accompanying notes 120-21, 130.

110 See L. & N. R.R. Co. v. Kenney’s Adm’r, 172 S.W. 683, 686 (Ky. 1915).

engaging in a lookout for children known to be in the area, and for operating a train along tracks where an adjacent strip was habitually used as part of a road without either keeping a lookout or using cautionary signals.

The most important licensee case in the past decade was *Perry v. Williamson,* involving an injury to a Jehovah's Witness from a falling dead tree limb. The only issues on appeal related to jury instructions taken almost word-for-word from an authoritative source dealing with the requirements of warning in a hidden danger case. On the issue of what type of scienter sufficed for the duty to warn to arise, the Kentucky Supreme Court affirmed the instruction's provision of either "actual knowledge" or that the condition "had been brought to their attention by information from which in the exercise of ordinary care they should have know[n] it." The court found that the latter equated to the *Restatement (Second) of Torts* "reason to know" standard and did not in fact impose a duty to investigate and discover.

The *Perry* court also rejected the suggestion that a separate instruction should have been appended to the scienter requirement to the effect that the occupier-defendants "should have realized that the condition of the tree involved an unreasonable risk of harm" to the licensee. Reiterating earlier precedent, the court repulsed this suggestion. Knowledge of a condition that was in fact unsafe and found by a jury to be unreasonably dangerous sufficed, as "the law requires him to know it is unsafe." The court also rejected what the Court of Appeals

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112 See *Hardin,* 507 S.W.2d at 174-76.
114 824 S.W.2d 869 (Ky. 1992). There was no controversy as to her status as licensee. *Id.* at 870. See also the discussion, *id.* at 872 (finding she was a licensee because of the absence of a "mutual business purpose").
115 See *id.* at 869. Plaintiff had returned to the premises in response to an inquiry from respondents' daughter about religious literature. *Id.*
117 The Supreme Court reinstated the jury verdict for the licensee finding that the scienter requirement was met and the warning obligation had not been fulfilled. On the scienter issue the court cited the plaintiff-licensee's evidence—respondents knew the tree was dead and had not produced leaves the year before, that limbs had dropped for a period of time, that the tree needed to be taken down, and that this information had been provided them by a person in the tree removal business. *See Perry,* 824 S.W.2d at 874. Note that the duty to warn applied to both "natural" and "artificial" conditions. *Id.*
118 *Id.* at 871-74.
119 *Id.* at 874-75.
120 *Id.* (citing to PALMORE'S discussion of *RESTATEMENT (SECOND) OF TORTS* § 342 (1965)).
121 *See Perry,* 824 S.W.2d at 874-75.
122 *Id.* at 871-73. Note that *RESTATEMENT (SECOND) OF TORTS,* § 342 (1965) does contain language to this effect, i.e., the duty is owed only where the owner or occupier "knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees . . . . " (emphases added). In comment (a) thereto, "risk" is defined to include "not only the existence of a risk, but also its extent. Thus, 'knowledge' . . . implies not only that the condition is recognized as dangerous, but also that the chance of harm and the gravity of the threatened harm are appreciated." *Id.* at cmr. a.
123 *See Perry,* 824 S.W.2d at 873 (quoting *Gravatt v. B.F. Saul Real Estate Inv. Trust,* 601 S.W.2d 287, 289 (Ky. 1980)). See supra text accompanying notes 101-03.
124 *See Perry,* 824 S.W.2d at 873. The court rejected any suggestion that the instruction imposed upon respondents any duty of *discovering* the condition. Scienter as defined in the instructions was
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had deemed reversible error, i.e., the absence of a proviso that the defendant-
possessor "had reason to believe" that the licensee "would not discover the
condition of the tree or appreciate the risk of harm."125 Such an instruction was
demed unnecessary. The duty to warn was only as to non-obvious dangers. If
obvious, the possessor was not liable in any event.126

After this detailed and technical parsing of the instruction in light of settled
common law doctrine, Justice Leibson, in obiter dicta, imputed much of the
controversy in the case before the court to use of the "off-the-rack labels"127 of
the common law trichotomy — trespasser, licensee, invitee. Though status was
"an important factor," it was "by no means the end of the inquiry," for an
"enlightened system" did not "reason backward from labels" in determining the
existence of a duty of care but "reasons forward from circumstances, using
foreseeability, the gravity of the potential harm, and the possessor's right to
control his property, to decide what is reasonable conduct in the circumstances
and what is negligence."128 In his view, the traditional classifications were
"simply convenient classifications for defining certain basic assumptions
appropriate to the duty of the party in possession ... [and] help to define the real
issue, which is what is reasonable care under the circumstances?"129

Despite Justice Leibson's trenchant attack on the common law trichotomy,
the net impact thereof in the case before it was marginal. The "duty of
reasonable care" owed in the "circumstances of the case"130 had been met by
instructions based on the accepted modern view of the duties licensee status
imposed on the owner or occupier. This was made clear by the detailed analysis
of the instructions131 and by a lengthy quote following his critique of, the
trichotomy, which elucidated at some length the duties of a licensee.132 Indeed,

a prerequisite to liability. Id. at 873-74.

125 Id. at 871, 874.

126 Id. at 874. Compare the court's refusal to discuss the issue of a failure to include a comparative
negligence instruction, an issue not properly presented for review. Id. at 871 (citing Gravatt v. B.F.
Saul Real Estate Investment Trust, 601 S.W.2d 287 (Ky. 1980). The Court of Appeals had
concluded that comparative negligence was not an issue in non-obvious danger cases, since no
liability would be imposed if the danger were obvious). Perry, 824 S.W.2d at 871. Compare infra
text accompanying notes 227-233.

127 See Perry, 824 S.W.2d at 875.

128 Id. Note that this analysis is almost verbatim from Justice Leibson's dissent in Kirschner v.
Louisville Gas & Electric Co., 743 S.W.2d 840, 848-49 (Ky. 1988) (Leibson, J., dissenting),
although he does not cite to that dissent. See Perry, 824 S.W.2d at 875. The majority in Kirschner
rejected the abolition-of-categories approach in dicta. See infra text accompanying notes 134-39.

129 Perry, 824 S.W.2d at 875.

130 See id. at 876.

131 Id. at 871-75. The discussion repeatedly stated that, unlike the case of an invitee, a possessor
owed a licensee no duty to inspect, discover and make the premises reasonably safe. Id. at 873-75.
The Perry court's adoption of the language in RESTATEMENT (SECOND) OF TORTS § 342, cmt. e
(1965) — that the owner was "required to exercise reasonable care either to make the land as safe
as it appears or to disclose the fact that it is as dangerous as he knows it to be," "did not impose a
duty to remedy on the occupier or owner in all cases. Perry, 824 S.W.2d at 874. As a quote from
Palmore's commentary indicated, "'[m]aking the premises safe is merely an option on his part as a
means to obviate what otherwise is the duty to warn.'" Id. at 873 (emphases added).

132 Id. at 875-76 (quoting from HARPER, JAMES & GRAY, supra note 2, Vol. 5, 210-12).
subsequent cases have interpreted this aspect of *Perry* as not intended to abrogate the common law trichotomy.\(^\text{133}\)

Four years earlier, in *Kirschner v. Louisville Gas & Elec. Co.*,\(^\text{134}\) the fragile Supreme Court majority opinion, in other *obiter dicta*,\(^\text{135}\) strongly repudiated the suggestion that the rules of the common law trichotomy were "archaic, outmoded, and promote ‘all or nothing’ results" inconsistent with comparative negligence. The court criticized the proposed "reasonable care under the circumstances" substitute as abolishing the concept of duty, a common law threshold that was neither "illogical or unfair." Furthermore, adoption of comparative negligence did not support the abolition argument, as such "presupposes a dismissible issue of negligence...."\(^\text{136}\)

In the face of *Kirschner*'s strong rejection, it remains to be seen whether Justice Leibson's equally strong criticism in *Perry* will be the future basis for a full frontal assault on the trichotomy, the parallel to which the court expressly rejected in the context of landlord liability three years post-*Perry* without referring thereto. Presently, there is little evidence of a disposition to\(^\text{137}\) join the half of American jurisdictions\(^\text{138}\) adopting in whole or part the rejection-of-categories approach in the famous case of *Rowland v. Christian*.\(^\text{139}\)

Two other Kentucky cases delved into the significance of licensee status in the last decade. In one case, *Linn v. U.S.*,\(^\text{140}\) the court agreed with defendant in *dicta* that a visitor to a prisoner at a federal prison was there for his and the prisoner's "sole pleasure and benefit" and was thus a licensee.\(^\text{141}\) However, citing *Perry*’s rejection of labels as determinative, the court felt no need to "pigeon

\(^{133}\) See, e.g., *Scifres v. Kraft*, 916 S.W.2d 779, 781-82 (Ky. Ct. App. 1996); *Linn v. U.S.*, 979 F. Supp. 521, 523 (E.D. Ky. 1997) (discussing how Kentucky "still adheres" to the common law trichotomy); *North Hardin Developers, Inc. v. Corkran*, 839 S.W.2d 258, 261 (Ky. 1992); *Johnson v. Lone Star Steakhouse & Saloon*, 997 S.W.2d 490, 491-92 (Ky. Ct. App. 1999) (quoting from *Perry* and suggesting "a duty was owed by the possessor to any entrant ‘reasonably [to] be anticipated,’ plaintiff was held to be an invitee but barred from liability under the ‘open and obvious’ hazard doctrine).

\(^{134}\) 743 S.W.2d at 840.

\(^{135}\) Once the court had concluded that the trespasser statute had merely codified existing common law and was constitutional under § 54, the court had no legal bases upon which to ignore the statute, which was controlling. Consequently, its brief analysis of the issue was gratuitous *dicta*. *Id.* at 844.

\(^{136}\) See *Kirschner*, 743 S.W.2d at 844.

\(^{137}\) See *infra* text accompanying notes 466-477.

\(^{138}\) In 1998 the Supreme Court of North Carolina enumerated eleven jurisdictions adopting a reasonable care standard in all cases (including trespassers) and fourteen jurisdictions that had adopted such as to *legal* entrants, i.e., licensees and invitees. See *Nelson v. Freeland*, 507 S.E.2d 882, 886-87 (N.C. 1998). West Virginia has since joined the latter group. See *Mallet v. Pickens*, 522 S.E.2d 436, 441-48 (W. Va. 1999). Kentucky, via *Kirschner* is listed as among the states opposing the abolitionist movement. See *Nelson*, 507 S.E.2d at 888, n.4. As Professor Dobbs has indicated, the suggestion that the *Rowland* revolution has stopped is premature, as five new jurisdictions were added in the 1993-98 period (and a sixth since). See Dobbs, supra note 2, at 620.

\(^{139}\) See 443 P.2d 561 (Cal. 1968). For a further discussion see *infra* text accompanying note 466.

\(^{140}\) 979 F. Supp. 521 (E.D. Ky. 1997).

\(^{141}\) See *id.* at 523-24 (dicta).
hole" him because no breach of the duty owed an invitee (assuming he was such) was to be found in the factual record in any event.\textsuperscript{142}

In the third decision, \textit{Scifres v. Kraft},\textsuperscript{143} the Court of Appeals applied the social guest-licensee status to quadriplegic injuries suffered by a participant at a "luau"/BYOB party for forty or so guests at a private residence. Following section 342 of the \textit{Restatement (Second) of Torts},\textsuperscript{144} the court concluded that no duty existed to warn the licensee of any dangers or conditions that were "open or obvious" or "should or could be observed" by the social guest exercising reasonable care.\textsuperscript{145} In other words, a swimming pool was unreasonably hazardous only as to a "hidden defect or dangerous condition" posing a serious risk.\textsuperscript{146} Since the danger of hitting one's head diving into the pool was equally obvious or evident to both guest and host, no duty to warn existed.\textsuperscript{147}

The \textit{Scifres} court also rejected any suggestion that liability was imposable based on the social hosts' alleged failure to "supervise and control" the activities in and around the pool. The court conceded\textsuperscript{148} that the social host owed a duty to a social guest to control the conduct of other guests under the rule in section 318 of the \textit{Restatement (Second) of Torts},\textsuperscript{149} a duty based in the right of control over the property.\textsuperscript{150} However, the "boisterous activity" posing unreasonable risk of serious injury contemplated by controlling precedent envisioned more than the activities complained of as influencing Scifres to dive in the pool — drinking, dancing, three in swimming (two clothed in swimming attire, one naked), and the teasing of plaintiff-appellant.\textsuperscript{151} The court concluded that a duty of control only extended to "horse play . . . which poses a physical risk to the involuntary or unsuspecting victim or innocent bystander."\textsuperscript{152} Under

\textsuperscript{142} See id.

\textsuperscript{143} \textit{Scifres}, 916 S.W.2d at 780-81.

\textsuperscript{144} \textit{RESTATEMENT (SECOND) OF TORTS} § 342(c) (1965) (stating that the duty owed licensees is only where the licensee does "not know or have reason to know of the condition and risk involved"); \textit{See also id.}, cmt. e, h, & i.

\textsuperscript{145} \textit{See Scifres}, 916 S.W.2d at 781.

\textsuperscript{146} Id.

\textsuperscript{147} Id. The \textit{Scifres} court cited Perry's statement, see the discussion \textit{supra} note 131, that the owner or occupier had the duty to warn or "make the land as safe as it appears." \textit{Id.} at 781. As is discussed above, remedying the condition is defendant's option and is not mandated as part of the duty of care owed licensees. See the discussion \textit{supra}, note 131.

\textsuperscript{148} Id. at 781-82.

\textsuperscript{149} Id.

\textsuperscript{150} \textit{RESTATEMENT (SECOND) OF TORTS} § 318 (1965); \textit{See also infra} text accompanying notes 653-60.

\textsuperscript{151} \textit{See Scifres}, 916 S.W.2d at 782.

\textsuperscript{152} Id. at 780, 782.

\textsuperscript{153} Id. at 782. The court cited, in support of this proposition, \textit{Martin v. Shea}, 432 N.E.2d 46, 47-49 (Ind. Ct. App. 1982) (applying regular negligence standards and citing § 318, the court found potential liability in a case where few facts were reported but where plaintiff-non-participant was injured by "horseplay." The only discussion of the fact setting was the following: "During the course of the evening several of the guests participated in acts of 'horseplay' around the pool"); \textit{Mangione v. Dimino}, 39 A.D.2d 128, 332 N.Y.S.2d 683, 684-87 (N.Y. App. Div. 1972) (discussing how defendant hosts stood by while two other invited guests threw plaintiff "still resisting" in the pool fully clothed after twice avoiding them).
the circumstances before it, Scifres' voluntary decision to jump breached no duty of care to protect him against his disastrous conduct.  

INVITEE LIABILITY

Recent precedent over the last decade is consistent with the broad category of entrants covered by the invitee category. This category of entrant, though not accorded absolute liability or insurer status vis-à-vis the business invitor, is nonetheless owed "an active, affirmative, and positive duty" of "protective vigilance," i.e., a full duty of care to make the entered premises "reasonably safe" for the invitee. This obligation has been synthesized elsewhere as "including the use of reasonable care to discover natural or artificial conditions dangerous to the entrant and either the elimination of such known or discoverable conditions or the provision of a 'fair' or 'reasonably sufficient' warning." Furthermore;

[t]hese broad duties apply to myriad types of dangers posing an unreasonable risk to the invitee: dangerous vehicles, equipment, and fixtures; dangerous conditions caused by the possessor's modification of the natural terrain; slippery, obstructed or otherwise dangerous entrances, aisles or floors, stairs, or steps; the design or construction of the premises or equipment thereon; dangerous, concealed traps or obstructions; accidental, negligent, or intentionally created conditions or dangers emanating from third persons or animals.

154 See Scifres, 916 S.W.2d at 782.
156 See ELDER, supra note 2, at 233 and n.79.
157 See Lyle v. Megerle, 109 S.W.2d 598, 600 (Ky. 1937) (rejecting an affirmative conduct-failure to act dichotomy in slip-and-fall cases); City of Madisonville v. Poole, 249 S.W.2d 133, 135 (Ky. 1952) ("active, positive duty.")
158 Young's Adm'r v. Farmers & Depositors Bank, 103 S.W.2d 667, 669 (Ky. 1937); Winn-Dixie, Inc. v. Smith, 372 S.W.2d 789, 791 (Ky. 1963); Sands v. Sears, Roebuck & Co., 438 F.2d 655, 657 (6th Cir. 1971); ELDER, supra note 2, at 234 and n.81.
159 See Kavanaugh v. Daniels, 549 S.W.2d 526, 528 (Ky. Ct. App. 1977); Bowers v. Schenley Distillers, Inc., 469 S.W.2d 565, 567 (Ky. 1971) (adopting RESTATEMENT (SECOND) OF TORTS § 341A (1965)); Rommel v. Louisville Shopping Ctr., Inc., 436 S.W.2d 529, 531 (Ky. 1968); Lexington Country Club v. Stevenson, 390 S.W.2d 137, 140-43 (Ky. 1965); ELDER, supra note 2, at 234-35 and n.82.
160 See ELDER, supra note 2, at 234-36 (citations omitted).
161 ELDER, supra note 2, at 236-40 (citations omitted). But compare the "outdoor natural hazard"
A single recent appellate decision delved into the above broad general rule in a case involving an invitee who suffered a severe laceration on a loose section of a swimming pool handrail at defendant's motel. The trial court granted summary judgment on the ground that plaintiff failed to produce evidence either of the "length of time" the defect existed or maintenance records regarding pool inspection. The Court of Appeals reversed, finding the trial court applied the wrong legal standard in assessing whether defendant had complied with its duty to maintain the premises in a "reasonably safe" condition in accordance with the purpose of the invited use.

The Court of Appeals correctly found the trial court wrongly applied criteria used in "slip and fall" cases, i.e., whether the dangerous condition had lasted for a sufficient time to impute constructive notice to the defendant in time to allow it to remedy or warn invitees. Clearly, the latter approach would have applied to "foreign objects" such as broken glass. However, where the instrumentality causing the injury was peculiarly with the control of the motel, its duty to invitees goes further, requiring an inspection of the premises 'to discover dangerous conditions not known to him' and 'to take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.'

In other words, a duty of "reasonable inspection" was imposed and defendant-motel could be "charged with constructive notice" of dangerous conditions discoverable by such an inspection.

Another federal decision involving the U.S. as occupier-owner declined to find any basis for liability in a suit under the Federal Torts Claims Act where the guest visiting an inmate was hit by a 6.5 ounce metal covering of the electrical components of a ceiling fan. The fan had functioned without difficulty and the product maintenance manual had instructed that the product was maintenance free, needing only a check of the oil level every five years. The accident in question occurred six months before the five-year point. Inspection of the falling canopy had shown that it fell from a screw backing out of its...
aperture.\textsuperscript{171} The court conceded that an invitor, assuming the U.S. was such,\textsuperscript{172} undoubtedly owed a duty to make the premises reasonably safe under Kentucky law, including protection against dangers of which defendant should reasonably have been aware.\textsuperscript{173} However, since the operation of the fan had in no way put defendant on notice of a problem and it was unknown whether the screw backed out overnight or over an extended period, the court determined the defect was “so latent . . . that no person exercising ordinary care could be expected to discover it.” In sum, the accident was “completely unforeseeable” and it would have been “entirely unreasonable” to impose a duty to inspect for such “an obscure problem.”\textsuperscript{174}

As the above case shows, an invitee is not owed insurer-type liability and is entitled only to the use of reasonable care. Thus, plaintiff-invitees are subject to the rights and limitations of the common law the same as other foreseeable plaintiffs. A recent example exemplifies the limitations of the common law. In \textit{Carman v. Dunaway Timber Co., Inc.},\textsuperscript{175} the Kentucky Supreme Court analyzed a claim by an independent logger that defendant lumber company had violated a state KOSHA regulation (incorporating its federal counterpart) barring the off-loading of timber from a truck without “securing [such] with unloading lines or other unloading device.”\textsuperscript{176} It was defendant’s practice and that of the industry generally not to accept ownership of logs until the deliverer unchained the load to be purchased.\textsuperscript{177} This practice was followed and plaintiff’s right leg was crushed (and had to be amputated below the knee) despite the availability of defendant’s front-end loader to brace the load during unchaining.\textsuperscript{178}

In a 4-3 opinion, the court conceded that the regulation was intended to protect against the harm or event which in fact happened, one of the two critical elements for a negligence per se claim.\textsuperscript{179} However, the second requisite element was not met. As a “private businessman,” the deliverer was not an “employee” within the class of persons expressly protected by the regulation.\textsuperscript{180} Consequently, the plaintiff could only impose liability under the common law standard of “reasonable and prudent timber companies.”\textsuperscript{181} Under the latter criterion the court affirmed the trial judge in allowing defendant to introduce compliance with custom in the industry and appellant to introduce the KOSHA regulation as evidence in support of a negligence finding.\textsuperscript{182}

\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.} at 523. For the licensee analysis see infra text accompanying notes 140-42.
\textsuperscript{173} \textit{See Linn,} 979 F. Supp. at 523.
\textsuperscript{174} \textit{Id.} at 523-24.
\textsuperscript{175} 949 S.W.2d 569 (Ky. 1997).
\textsuperscript{176} \textit{Id.} at 570 (quoting from 803 KY. ADMIN. REGS. 2:317, incorporating by reference 29 C.F.R. §1910.265(d)(i)(b)).
\textsuperscript{177} \textit{See Carman,} 949 S.W.2d at 570.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.} at 570-71. Compare the cases where an invitee has been able to rely on negligence per se cited in \textit{Elder,} supra note 2, at 233-34, n.82.
\textsuperscript{181} \textit{See Carman,} 949 S.W.2d at 570.
\textsuperscript{182} \textit{Id.} at 571.
The criticism of the three dissenters focused on the purported hyper-technical construction of the statute and its substantial undermining of the purpose underlying KOSHA. In its view no individual was in "greater need of the protection" of the regulation than appellant, who was "precisely in the class... for whose benefit" the regulation was in existence, i.e., those "foreseeably injured" by a violation. The dissenters emphasized the "reality" of what had happened, a scenario occurring innumerable times annually in Kentucky because timber companies followed a custom widely recognized in the industry.

The case involved a close question. The majority's view was not illogical nor in flat contradiction of Kentucky law. Another path to potential liability, and the concomitant inducement to safer off-loading practices, would have been to treat the dangerous industry-wide practice as customary negligence under the black letter rule that customary practices are "not controlling where a reasonable man would not follow them." Indeed, for the reasons stated by the dissenters, the timber industry practice in question seems to be a quintessential example of the rationale for the exception:

No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community. If the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety.

Under this approach, the trial court would not permit the evidence if it could be shown conclusively as a threshold matter that "a reasonable man would not conform to the custom." On the issue of the "reasonable [person]," the state and federal regulations could be relied on to determine the reasonableness of the custom. As black letter doctrine indicates, a legislative enactment not meeting the class and/or harm requirements for negligence per se may nonetheless be considered on the reasonableness of defendant's conduct.

Another commonplace traditional hurdle to invitee success in suits against inviters is the requirement that the invitee prove by affirmative evidence constructive notice by the defendant in foreign object cases, i.e., the mandate that the condition had existed for a "sufficient length of time prior to [the] fall to warrant the inference that the defendant in the exercise of ordinary care could

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183 Id. at 571-72 (Lambert, J., dissenting, with Graves, J., and Stumbo, J., joining).
184 Id. at 571.
185 Id. at 572.
186 See supra note 2, § 10.14.
188 Id. at cmt. c.
189 Id.
190 See supra note 2, at 247-53.
have discovered the substance" and either warned plaintiff or eliminated the condition. Under this rule:

[The jury is not allowed to speculate concerning whether defendant could have discovered the condition and where it is equally possible that the matter was there for a substantial period and that it was dropped "immediately preceding" plaintiff's injury, no liability will be imposed upon defendant, as it is not an "absolute insurer." Any direct and circumstantial evidence can be used to show such constructive notice. However, defendant is not required to perform an "almost continuous inspection" or to be conversant with what is occurring at all points in time on all areas of its premises.

A large percentage of cases fail under this harsh constructive notice requirement. Kentucky case law has rejected attempts to ameliorate this traditional doctrine by either adopting a special duty in chain self-service counter cases, or by adopting strict liability by analogy to product liability. Indeed, the most liberal of constructive notice cases, where evidence was produced that aisles were "literally covered" by fruit and vegetable debris, together with bystander testimony that the particular item, a piece of watermelon, had been on the floor 25-30 minutes or more, was later grudgingly characterized as "near to, if not partially upon, the dividing line between liability and non-liability...."

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193 See Elder, supra note 2, at 249 and nn.133-34. In other words, defendant is not required to anticipate an act of third party negligence in dropping objects on the floor. Lane v. Caldwell, 306 S.W.2d 290, 291-92 (Ky. 1957); Bosley v. Steiden Stores, 178 S.W.2d 839, 841 (Ky. 1944). Of course, this is at odds with the obligation to anticipate and protect against even third party intentional or criminal misconduct under some circumstances. See infra text accompanying notes 602-88.
194 Elder, supra note 2, at 248-50 (citations omitted).
195 See Id. at 250.
196 See Lane v. Cardwell, 306 S.W.2d 290, 292 (Ky. 1957); Leonard v. Enterprise Realty Co., 219 S.W. 1066, 1068 (Ky. 1920).
197 See Elder, supra note 2, at 250.
198 For a sampling see generally Id. at 247-51 and specifically, 250, n.136.
199 See Bosler v. Steiden Stores, 171 S.W.2d 839, 841 (Ky. 1944) (noting the "commonly known fact" of customers in "food Chain Stores" waiting on themselves and the "almost inevitable" conclusion debris would be dropped, but the court concluded that eliminating injury would "require almost a constant standby employee or servant ... a requirement [that] would inevitably make the storekeeper an insurer and which burden the law declines to thrust upon him"). Id.
200 See Wiggins v. Scruggs, 442 S.W.2d 581, 582-83 (Ky. 1969); Jones v. Jarvis, 437 S.W.2d 189, 190 (Ky. 1969) (noting product liability policy factors were not present and that no jurisdiction had adopted such an approach).
201 See French v. Gardners & Farmers Mkt. Co., Inc., 122 S.W.2d 487, 488-90 (Ky. 1938). The court also noted that the premises were "literally covered" with vegetable debris, which indicated the premises "had not been cleaned for a considerable time, or, if cleaned within reasonable time before the accident, the rubbish and material accumulated very quickly, and in the latter event, appellees were charged with notice of the fast accumulation of such materials, and it was their duty to take precautions commensurable with the exigencies to keep their premises in a reasonably safe condition." Id. at 489. Note that the "fast accumulation"/"precautions commensurable" aspect of the case is consistent with and supportive of the "mode of operation" doctrine adopted by a plurality of the Supreme Court in Smith v. Wal-Mart Stores, Inc., 6 S.W.2d 3d 849 (Ky. 1999).
The constructive knowledge notice burden was recently used to dismiss a suit where plaintiff-shopper slipped in a puddle of water in a department store's aisle. The court acknowledged the "inherently difficult" burden imposed on plaintiff of proving constructive notice, but indicated any abrogation of such a requirement would be a form of absolute liability not allowed by the law. Where the only proof was that defendant's assistant manager walked down the aisle ten to fifteen minutes earlier and it was dry, plaintiff failed to prove an essential element of her claim.

Kentucky precedent only requires actual or constructive notice in non-employee created or "foreign object" cases and not in cases where defendant's own negligence is shown. As is "well established" in Kentucky slip-and-fall law:

[w]here the floor condition is one which is traceable to the possessor's own act — that is, a condition created by him or under his authority — or is a condition in connection with which the possessor is shown to have taken action, no proof of notice of the condition is necessary.

In a recent case, Wal-Mart Stores, Inc. v. Lawson, liability of defendant department store was upheld where evidence "trace[d]" the presence of a puddle of a slippery black substance in a ten-foot by twenty-to-thirty inch area in defendant's aisle to defendant's conduct via employees in either allowing water to seep from the garden center roof into the aisle in question or in placing plants therein to remove them from the cold weather.

In that same case, the court rejected the argument that the condition fell within the "open and obvious" danger as a matter of law-no duty rule. Undoubtedly, the "open and obvious" danger rule remains as a "major hurdle" confronting an invitee under the traditional approach. Where a dangerous condition is known or discoverable by the invitee, presumably plaintiff has

infra text accompanying notes 250-64.

202 See Bosler v. Steiden Stores, 178 S.W.2d 839, 841 (Ky. 1944).
204 Id. at 494-95.
205 Id. at 494.
206 Id. at 494-95.
207 See Elder, supra note 2, at 252.
209 Id. (quoting from Cumberland College v. Gaines, 432 S.W.2d 650, 652 (Ky. 1968)).
210 Wal-Mart, Inc., 984 S.W.2d at 485.
211 See id. at 487-88. The court also stated that constructive knowledge could be charged to defendant based on the following factors: the "wet and nasty" nature of cardboard found on his knee after the fall, the fact that the weather was interminable and few customers were about, and that two employees were nearby when appellant fell. Id. at 488. These bases for constructive knowledge seem to be far more liberal than much of the precedent. See generally Elder, supra note 2, at 258, n.136, particularly Kroger Grocery & Baking Co. v. Spillman, 130 S.W.2d 786, 787 (Ky. 1939) (noting that where there was no evidence of "how long" grapes were on the floor, the presence of defendant's employees nearby was not persuasive — it was "reasonable to assume" they, like plaintiff, did not see the grapes on the floor).
212 See Wal-Mart, Inc., 984 S.W.2d at 488-89.
213 See Elder, supra note 2, at 245.
equality of knowledge about the hazard and defendant has no "superior knowledge" of such. In such cases, the hazard or peril "afford[s] as effective notice," and it is not necessary to give a warning correct the condition, or take a precaution. The defendant's duty is treated as a logical corollary of the absence of plaintiff's contributory negligence at common law.

To some extent, plaintiff's harsh burden is mitigated by two doctrines in cases of "ordinary" allegedly obvious dangers: (1) the strong presumption accorded the entrant that the invitor has used ordinary care for his entrance; (2) the defensible adoption by some cases of a requirement that both the condition and risk be "apparent to and appreciated by" a "reasonable man in the position of the visitor exercising ordinary perception, intelligence, and judgment." Accordingly, the invitee is not required to be overly cautious and "look down directly at his feet with each step taken," but "can assume that dangerous obstructions or conditions will not impede his entrance or imperil his safety." Nonetheless, his invitee status "does not relieve him of the duty to exercise ordinary care for his own safety nor license him to walk blindly into dangers which are obvious, known to him, or that would be anticipated by one of ordinary prudence."

The "open and obvious danger" rule had a certain perverted logic under the common law where plaintiff's contributory negligence constituted an absolute bar. Its continued retention is very questionable. The dilemma posed by this no duty rule is well exemplified by the discussion in Wal-Mart Stores, Inc. v. Lawson. Following a leading case citing mitigating factor (2) above, the court concluded that precedent did not "compel" a directed verdict as to the

214 Id. at 242.
215 See Leslie Four Coal Co. v. Simpson, 333 S.W.2d 498, 500 (Ky. 1960); Fisher v. Hardesty, 252 S.W.2d 877, 879 (Ky. 1952).
216 See Layman v. Ben Snyder, Inc., 305 S.W.2d 319, 321 (Ky. 1957).
218 As one court concluded, if a plaintiff using due care would have seen the dangerous condition, defendant was not negligent. Conversely, if plaintiff was not negligent, the condition was not discoverable and defendant was liable. See Jones v. Winn-Dixie, 458 S.W.2d 767, 770 (Ky. 1970).
220 See ELDER, supra note 2, at 243.
221 Id. at 245 and n.122; RESTATEMENT (SECOND) OF TORTS § 343A, cmt. b (1965); see also Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526, 529 (Ky. 1969), and the discussion in Wal-Mart Stores, Inc. v. Lawson, 946 F. Supp. 492 (E.D. Ky. 1996) infra text accompanying note 228.
222 ELDER, supra note 2, at 245.
223 RESTATEMENT (SECOND) OF TORTS § 343A, cmt. b (1965).
224 See Humbert v. Audubon Country Club, 313 S.W.2d 405, 407 (Ky. 1958); ELDER, supra note 2, at 244 and n.115.
225 ELDER, supra note 2, at 244 (citations omitted).
226 See J.C. Penney Co. v. Mayes, 255 S.W.2d 639, 643 (Ky. 1953); Smith v. Smith, 441 S.W.2d 165, 166 (Ky. 1969); Rogers v. Professional Golfers Ass'n, 28 S.W.3d 869, 872 (Ky. Ct. App. 2000); ELDER, supra note 2, at 244 and n.118 (listing several examples).
227 984 S.W.2d at 488-89.
228 See id. (quoting extensively from Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526, 529 (Ky. 1969)).
dangerous slick adjacent to plants in an aisle intended for traversing by customers.\textsuperscript{229} The court may have had in mind plaintiff-appellee’s important testimony that he did not see the slippery substance because he was looking at the plants while walking.\textsuperscript{230} Instead of subsumption in the question of duty, the question of plaintiff-appellee’s negligence became an issue for comparative negligence analysis by the fact-finder, which found the invitee 25\% at fault.\textsuperscript{231} This persuasive, commonsensical approach reflects the logic and fairness of comparative negligence jurisprudence\textsuperscript{232} and the more modern approach to duty sometimes reflected in Kentucky precedent, rejecting knee-jerk bright line limitations\textsuperscript{233} thereon.  

Two more recent cases by other panels of the Court of Appeals have reaffirmed the validity of the “open and obvious”-no duty-total bar rule. Neither case\textsuperscript{234} discussed the decision in \textit{Wal-Mart Stores, Inc. v. Lawson}. In the first of the two, \textit{Johnson v. Lone Star Steakhouse \& Saloon},\textsuperscript{235} a restaurant patron conceded she was aware of peanut shells on the floor resulting from defendant’s practice of providing free peanuts to patrons. Furthermore, she deemed them a hazard.\textsuperscript{236} The Court of Appeals applied the “open and obvious” danger rule, which barred any duty — either to warn or remedy the condition\textsuperscript{237} even if hazardous — and impliedly rejected the suggestion that the case fell into the exception adopted in section 343A of the \textit{Restatement (Second) of Torts}\textsuperscript{238} for open and obvious dangers where “‘the possessor should anticipate the harm despite such knowledge or obviousness.’”\textsuperscript{239}  

In the second of the two recent “open and obvious” danger cases, \textit{Rogers v. Professional Golfers Ass’n},\textsuperscript{240} the Court of Appeals held that a golf tournament spectator’s slip and fall on a grassy hillside en route to a particular green the day after a heavy rainfall was non-actionable as a matter of law. Plaintiff-appellant was aware of the rainfall, the general contours of golf courses (this one in particular) and encountered the hillside despite her concern over prior knee surgery. The court rejected her suggestion that a fact issue was presented as to whether the danger was non-obvious, i.e., that the matted grass was dry on top.

\textsuperscript{229} See \textit{Wal-Mart, Inc.}, 984 S.W.2d at 489.
\textsuperscript{231} See \textit{Wal-Mart, Inc.}, 984 S.W.2d at 487, 489.
\textsuperscript{232} See supra text accompanying notes 316, 330, 378 & 506. See also supra text accompanying notes 823-27, 838-47.
\textsuperscript{233} See the discussions of Grayson Fraternal Order of Eagles v. Claywell, 736 S.W.2d 328 (Ky. 1987), infra notes 593, 628, & 701-847.
\textsuperscript{235} 997 S.W.2d at 490.
\textsuperscript{236} See \textit{id.} at 492.
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} See supra, note 230.
\textsuperscript{239} See \textit{Johnson}, 997 S.W.2d at 492 (quoting from \textit{Bonn v. Sears Roebuck \& Co.}, 440 S.W.2d 526, 528 (Ky. 1969)).
\textsuperscript{240} 28 S.W.3d 869 (Ky. Ct. App. 2000).
but slippery underneath, concluding that with ordinary care "she would have realized the danger from this hazard." 241

The Rogers court also rejected the invitee’s suggestion that the defendant owed her a duty despite the condition’s “open and obvious” nature because of the expectation that plaintiff and other spectators would use the hillside despite the hazard involved, 242 refusing to follow the well-documented 243 section 343A exception. 244 Plaintiff specifically focused on denial of access to the tournament event in question through the safer “tennis village” area because she did not have the specific pass required. 245 The court quoted in depth from a precedent discussing section 343A, which imposed a duty “where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the risk,” 246 but found it inapplicable. 247 It distinguished the solitary cited precedent involving a delivery person who slipped on a slippery delivery ramp covered by ice and snow after being denied access via a less risky entrance. 248 Unlike the latter, plaintiff-appellant had not been compelled to cross the hillside, having had access to several options other than the one chosen. 249

Shortly thereafter, in Smith v. Wal-Mart Stores, Inc., 250 the Kentucky Supreme Court sent powerful indications of a willingness of at least several members of the court to revisit at least some aspects of the court’s traditional rules in slip-and-fall cases. The facts in Smith were only briefly stated therein. While pushing a grocery cart, Smith fell due to a “wet, blue liquid” (an Icee or Slushee). An employee of Wal-Mart testified he had been down the same aisle only 5-10 minutes earlier and had seen no evidence of a spill. 241 The Court of Appeals reversed a judgment for plaintiff on the ground plaintiff had failed to

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241 See id. at 872-73.
242 Id. at 873.
244 RESTATEMENT (SECOND) OF TORTS § 343A (1965). This duty may require a warning and the taking of “other reasonable steps to protect him. . . if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.” Id., at cmt. f.
245 See Rogers, 28 S.W.3d at 871.
246 Id. at 873 (quoting from Wallingford v. Kroger Co., 761 S.W.2d 621, 624-25 (Ky. Ct. App. 1988) (discussing RESTATEMENT (SECOND) OF TORTS § 343A, cmt. f (1965))). The latter gives another example, a customer’s distraction, which may prevent him from discovering what is obvious or forgetting same. Id. See also id., illus. 2-4; ELDER, supra note 2, at 245-47 and nn.123-26.
247 See Rogers, 28 S.W.3d at 873. Under this view, further discovery regarding design of the course, defendant’s knowledge of the hazardous condition and defendant’s role in designing, maintaining and inspecting the course were irrelevant. Id. at 874.
248 Id. (distinguishing Wallingford v. Kroger Co., 761 S.W.2d 621 (Ky. Ct. App. 1988)). For a further discussion of the latter see infra text accompanying notes 358-67.
249 See Rogers, 28 S.W.3d at 873. For a further discussion of the “open and obvious” danger problem and § 343A, see the “outdoor natural hazards” discussion, infra text accompanying notes 284-391.
250 6 S.W.3d 849 (Ky. 1999).
251 See id. at 830 (Stumbo, J., with Johnstone, J., and Keller, J., concurring).
provide any evidence of "sufficient length of time" to justify imputing constructive notice so that defendant could have remedied the condition.\footnote{252}

The first opinion by Justice Stumbo, and joined by two others, declined to adopt a new "mode of operation"\footnote{253} approach, as the issue had not been preserved for appeal.\footnote{254} However, this plurality reversed and reinstated the jury verdict, finding sufficient evidence of constructive notice in the transformation of the Icee from its normal "semi-frozen state" into liquid form. The "sufficient time" or constructive notice/should have warned or remedied the condition issue was thus one for the jury.\footnote{255}

Three other members of the court in a concurring opinion by Justice Cooper agreed with the latter conclusion\footnote{256} but would have adopted the "mode of operation" doctrine. The concurring members savaged the "onerous," "daunting," "virtually insurmountable" burden of proving constructive notice, and the "unlikelihood of success in that regard," as evidenced by a list of cited precedents to the contrary.\footnote{257} This negative posture was at odds with the invitor's duty of maintaining the premises in a reasonably safe condition for its customers.\footnote{258} As a substitute, they proposed requiring plaintiff to prove only a foreign substance and that this was a substantial factor in producing her injury. Then, the burden would shift to defendant as a matter of affirmative defense to prove both that its employees did not create the condition and that it had been there for an insufficient time to permit warning or removal.\footnote{259}

Justice Wintersheimer, in a lone dissent, was clearly correct in concluding the facts cited in the opinion by Justice Stumbo did not meet the constructive notice standards developed in "well settled" Kentucky precedent.\footnote{260} Accordingly, litigants in future slip-and-fall cases will be subject to a greatly relaxed standard as to constructive notice under the view adopted by a strong 6-1 majority on this issue. At least three justices would adopt a strong form of the "mode of operation" doctrine. Given that three others were willing to ignore the archaic traditional posture of precedent stringently construing constructive notice, a future majority for this new doctrine seems highly likely.

Moreover, the adoption of this more defensible view is consistent with and only a modest, logical extension of Kentucky rejecting the constructive notice requirement in cases of defendant-"created" risks,\footnote{261} the enhanced duties of invitors under French v. Gardener & Farmers Market Co. in cases involving

\footnote{252}{\textit{Id.}}
\footnote{253}{\textit{Id.} The court cited but did not discuss Jackson v. K-Mart Corp., 840 P.2d 463 (Kan. 1992). See infra text accompanying note 264.}
\footnote{254}{\textit{See Smith,} 6 S.W.3d at 830 (Stumbo, J., with Johnstone, J., and Keller, J., concurring).}
\footnote{255}{\textit{Id.} at 830-31.}
\footnote{256}{\textit{Id.} at 831 (Cooper, J., with Lambert, C.J., and Graves, J., concurring).}
\footnote{257}{\textit{Id.}}
\footnote{258}{\textit{Id.}}
\footnote{259}{\textit{Id.} at 831-32.}
\footnote{260}{\textit{See Smith,} 6 S.W.3d at 832-33 (Wintersheimer, J., dissenting). Compare the precedent espousing this much narrower approach cited in \textsc{elder}, supra note 2, at 250 and n.136.}
\footnote{261}{\textit{See Elder,} supra note 2, at 252 and nn.141-46.}
quickly accumulating debris, and the invitee’s duty to anticipate dangerous acts (negligent, intentional, or even criminal) of third persons, including those drinking and driving. The “mode of operation” doctrine merely shifts the focus slightly to whether entities engaged in a business open to the public should have foreseen customer spillage (whether by sales on premises or off) and used care proportionate to the risk to discover and remedy the condition. There is nothing either radical or revolutionary in adopting the “mode of operation” rule, which merely reflects the application of general negligence principles to this limited but altogether too commonplace setting.

Snow & Ice: “Outdoor Natural Hazards”

In 1990 in Schilling v. Schoenle, the Kentucky Supreme Court revisited the issue of liability for negligence per se of adjacent landowners for failure to remedy sidewalk defects and/or remove smoke or ice in violation of a municipal ordinance. The court relied on Vissman v. Koby as indistinguishable “controlling authority.” The latter had also been promulgated as a “public safety measure” but the court therein had interpreted it as intended only as creating financial obligations of the adjacent landowners, following older precedent in Kentucky and decisions in other jurisdictions. The Schilling court gave a single “valid policy reason” for declining to distinguish or overrule Vissman — the concern that such a holding would have the effect of relieving the municipality of its undoubted duty of and liability for defects in sidewalks to pedestrians.

Two significant problems are evidenced by even a superficial glance at the majority opinion. The first is that its narrow construction flagrantly ignored the local legislature’s intent to promulgate a public safety measure. Concededly, black letter law provides that negligence per se will not apply if the statute, ordinance or regulation “is found to be exclusively . . . to impose upon the actor

262 See supra text accompanying notes 201-02.

263 See infra text accompanying notes 602-88.


265 782 S.W.2d 630 (Ky. 1990).

266 See id. Plaintiff slipped on a sidewalk defect covered by snow. Id. at 631. Both the building owner and adjacent business, the lessee, were sued. Id. Both were absolved of liability by the decision. Id. The court treated the case as not involving an ordinance expressly imposing tort liability on the adjacent landowners. Id. at 631-33.

267 309 S.W.2d 345 (Ky. 1958).

268 See Schilling, 782 S.W.2d at 632.

269 Id.

270 Id. at 632-33.

271 Id. at 633. Schilling was deemed controlling in the later Court of Appeals case of Estep v. B.F. Saul Real Estate Inv. Trust, 843 S.W.2d 911, 915 (Ky. Ct. App. 1992).

272 See Schilling, 782 S.W.2d at 633. There was no doubt that plaintiff-appellant could hold the city liable by negligent defects in public sidewalks provided the 90 day-notice requirements under KY. REV. STAT. ANN. § 411.110 (Michie 1992) were met. Her claim against the city had been dismissed for failure to meet his threshold precondition. Id.

273 Id. at 632. The court concedes this. Id.
the performance of a service which the state or any subdivision of it undertakes to give the public... 274 One illustration supporting the “exclusive” purpose rule involves a snow and ice removal ordinance “construed to have no other purpose than to impose responsibility to the city,” a fact made clear by the landowners’ express liability for the costs of repair/removal. 275 This line of cases is not, however, controlling or even particularly helpful in a scenario like Schilling. As the dissenter’s opinion made explicit, the express purpose of the ordinance in question was “protection of the public health, safety and welfare.” 276 In other words, the stated purpose specifically rejected the basis for the limitation adopted in the Restatement (Second) of Torts illustration.

Justice Leibson in dissent was assuredly correct in concluding that the majority’s refusal to view the ordinance as a valid public safety measure justifying negligence per se liability was a “purely arbitrary” interpretation indistinguishable from cases imposing duties to travelers on public highways from mandatory vehicular statutes that brakes be kept in good repair and that headlights and turn signals work. 277 Justice Leibson also incisively analyzed the majority’s concern over absolving the city of liability as “neither reasonable or inevitable” but “so many empty words, “a specious argument.” 278 No such absolution could 279 or would in fact 280 occur. Under the ordinance the adjacent landowners would have become primarily liable in tort to injured pedestrians with the municipality secondarily liable 281 for such injuries. In effect, the majority’s analysis served as a “backhand method” to immunize landowners from the foreseeable results of violating the ordinance — an effect he deemed “no valid reason” for adhering to “poorly reasoned precedent.” 282

The common law liability of occupiers/owners and lessors for outdoor and indoor snow and ice accumulations is a very complicated issue and has been analyzed in detail elsewhere. 283 Two important decisions were issued in the last decade. The first was the Court of Appeals’ decision in Estep v. B.F. Saul Real Estate Inv. Trust. 284 In that case the plaintiff-appellant slipped and fell on a segment outside appellee department store in a commercial mall owned and

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274 Restatement (Second) of Torts § 288 (1965).
275 See id. at illus. 5.
276 See Schilling, 782 S.W.2d at 634 (Leibson, J., dissenting) (emphases added). The majority conceded that no constitutional question or other issue as to the ordinance’s validity had been raised. Id. at 632.
277 Id. at 635 (Leibson, J., dissenting).
278 Id. at 634-35.
279 Id. at 634. Justice Leibson stated that the city had no legal authority to immunize itself from common law tort liability by passage of an ordinance. Id.
280 Id. at 634-35.
281 Id. at 634. Justice Leibson noted the ordinance specifically provided that “existing” liability was unaffected. Id. He also cited the example of the liquor vendor also secondarily liable where the drunk-driver was primarily liable. Id. See also Grayson Frat. Order of Eagles v. Claywell, 736 S.W.2d 328 (Ky. 1987).
282 See Schilling, 782 S.W.2d at 634 (emphasis in original). Both appellants had received written notice of the defect in the sidewalk and it had been circled in red paint by a city inspector. Id.
283 See Elder, supra note 2, § 4.02, at 260-69.
operated by the co-appellee commercial lessor. The parking lot had been cleared and the snow removed. Plaintiff and her husband thought the sidewalk had been cleared and also saw a “thin skiff” of snow on the sidewalk.\(^{285}\) When they stepped over piles of snow onto the sidewalk, both tumbled but only plaintiff was injured. She alleged that ice hidden by the snow was the cause of her fall. The trial court granted summary judgment under the leading case of *Standard Oil Company v. Manis.*\(^{286}\)

Plaintiff-appellants in *Estep* tried to circumvent the “outdoor natural hazard” common law doctrine on three grounds: (1) the non-obviousness of the condition in question; (2) the section 343A exception to the obvious dangers rule; and (3) appellees’ undertaking to clear the sidewalk in question. As to (1), the court followed *Schreiner v. Humana, Inc.*,\(^{287}\) which had found that not all natural hazards were “equally apparent” to both invitees and inviters and that obviousness was fact-dependent on the “unique facts of each case.”\(^{288}\) In that case the thin transparent layer of ice developed on a sidewalk that appeared to be clear. Thus, awareness of general ice-snow conditions was not a bar to liability. Under the *Schreiner* approach an issue of defendants’ knowledge was presented in light of plaintiff-appellants’ claim the ice-under-snow condition of the sidewalk was *not obvious to them.*\(^{289}\)

Alternatively, the court upheld the claim under (3) based on defendants’ voluntary assumption of a duty by attempting to clear the sidewalk to attract customers. Once assumed, the duty had to be implemented non-negligently.\(^{290}\) The court anticipated and rejected the suggestion that commercial lessors and tenant-invitors would be deterred thereby from acting to clear the premises for customer benefit. The recognition of a duty was “only to encourage them to do

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\(^{285}\) See *id.* at 912.

\(^{286}\) 433 S.W.2d 856 (Ky. 1968). See *infra* text accompanying notes 320-34.

\(^{287}\) 625 S.W.2d 580 (Ky. 1982).

\(^{288}\) See *id.* at 581, quoted in *Estep,* 843 S.W.2d at 913. The plaintiff-appellant in *Schreiner* was a 67 year old woman, who noted as she approached that snow had been removed from the sidewalk and that the walkway appeared to be “perfectly clear.” *Id.* She slipped on a “transparent” or “clear layer of ice” as she stepped onto the cleared walkway. *Id.* The court emphasized her testimony that she “could see nothing on the walkway” and the evidence respondent’s maintenance department had been forewarned of the condition before her fall. *Id.* However, no warnings were issued and no attempts to ameliorate the hazard were made. *Id.* Indeed, the court cited the testimony that respondent failed to engage in the “customary” sprinkling of sand, cinders or sawdust. *Id.* The *Estep* court noted that *Schreiner* was not cited or discussed in the Supreme Court’s post-*Standard Oil* decision of *Corbin Motor Lodge v. Combs,* 740 S.W.2d 944 (Ky. 1987), but distinguished that case from *Schreiner.* See *Estep,* 843 S.W.2d at 913-14. The obviousness to the plaintiff in *Corbin Motor Lodge* of the natural hazard was “conclusively established” by a severe storm which Combs had encountered when entering defendant’s establishment. See *Corbin,* 740 S.W.2d at 944. He was injured upon exiting under the exact same conditions. *Id.* A more significant factor in *Schreiner* was the fact defendant-appellee had cleared the sidewalk, likely promoting reliance by the plaintiff-appellant on the deceptive safety of the passageway. See *Schreiner,* 625 S.W.2d at 580.

\(^{289}\) See *Estep,* 843 S.W.2d at 913-14.

\(^{290}\) *Id.* at 914-15. Of course, by definition, the undertaking rule was inapplicable where no such voluntary undertaking in fact occurred. See *Sheehan v. United Services Auto. Ass’n,* 913 S.W.2d 4, 6 (Ky. Ct. App. 1996) (noting that no evidence demonstrated that an insurer had undertaken an inspection for the insured’s benefit).
so in a reasonable and safe manner.\textsuperscript{291} The court did not make it specifically clear whether the undertaking finding was based on the condition being in a worse condition, either from an increased risk or invitee reliance, alternative requirements under the black letter rule.\textsuperscript{292} However, implicit in the court’s finding of non-obviousness was a suggestion of increased risk and/or reliance by the patron.

Lastly, the court dealt with argument (2) that the section 343A rule should be extended to “open and obvious” “outdoor natural conditions” such as snow and ice. The court referenced the out-of-state precedent for such a position and “notable arguments”\textsuperscript{293} in support thereof by Kentucky judges but felt bound by clear controlling Supreme Court precedent. It limited itself to suggesting that the litigation before it and the distinctions required to be made demonstrated why the “outdoor natural hazards”/snow-and-ice accumulations rule might need to be reconsidered, at least in the context of the modern commercial shopping mall, a scenario “vastly different” from the leading case of Standard Oil Company v. Manis,\textsuperscript{294} involving an invitee’s delivery to a distributor of bulk gasoline. The latter neither held itself out as open to the public generally nor had a mall’s motive “to entice . . . customers . . . by creating at least an aura of safety . . . .”\textsuperscript{295}

The Kentucky Supreme Court recently revisited the Standard Oil Co. v. Manis “outdoor natural hazard” rule in the case of PNC Bank, Ky. Inc. v. Green,\textsuperscript{296} where a patron fell on an icy sidewalk at a branch of defendant-appellant’s bank. The court vigorously reaffirmed Standard Oil as reflecting the “current state of the law”\textsuperscript{297} in Kentucky as to obvious dangers and found no fact issue as to the open and obvious nature of the danger in the case in question. Plaintiff-appellee had visited during daylight on a day of intermittent sleet and snow, noticed the icy condition of the walkway and saw no evidence clearing measures had been taken. In addition, she admitted “walking on eggs” earlier that day to keep from falling.\textsuperscript{298}

The Supreme Court distinguished Estep as involving a fact issue of obviousness of the hazard. In that case plaintiff saw that the parking lot had been cleared and “surmised” that the sidewalk had been similarly cleared. The court quoted from Estep that she was “unaware of the transparent layer of ice on the seemingly cleared sidewalk until she stepped on it . . . .”\textsuperscript{299} The court also distinguished another case, City of Madisonville v. Poole,\textsuperscript{300} as involving ice on

\textsuperscript{291} Estep, 843 S.W.2d at 915 n.3.
\textsuperscript{292} See RESTATEMENT (SECOND) OF TORTS § 323 and cmt. c, e (1965). Where neither is shown, the drafters attached a “no opinion caveat” in (2). \textit{Id.}
\textsuperscript{293} See \textit{Estep}, 843 S.W.2d at 914. See also Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 947-48 (Ky. 1987) (Lambert, J., with Leibson, J., joining, dissenting); Ashcraft v. People’s Liberty Bank & Trust Co., Inc., 724 S.W.2d 228, 229-30 (Ky. Ct. App. 1987) (Miller, J., concurring).
\textsuperscript{294} See \textit{Estep}, 843 S.W.2d at 915 n.3.
\textsuperscript{295} 30 S.W.3d 185 (Ky. 2000).
\textsuperscript{296} See \textit{id.} at 186. See also infra text accompanying notes 320-34 (critiquing Standard Oil).
\textsuperscript{297} \textit{Id.} at 186-87.
\textsuperscript{298} \textit{Id.} at 187 (quoting \textit{Estep}, 843 S.W.2d at 913). The court did not specifically cite to Schreiner v. Humana, Inc., 625 S.W.2d 580 (Ky. 1982), relied on in \textit{Estep}, but its analysis of \textit{Estep} tracks that in \textit{Schreiner}. \textit{Id.} See also supra text accompanying note 288.
\textsuperscript{299} 249 S.W.2d 133 (Ky. 1952).
an unlit porch of a clubhouse which the entrant could have assumed was ice-free since it was covered.

The court also differentiated the "undertaking" aspect of _Estep_ while acknowledging that it restated a "well-known rule," i.e., "a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore." The court was clearly concerned that an unfettered "undertaking" assumption of duty rule would deter businesses from taking voluntary measures in the interest of customer safety. In the court's view it was "against public policy, and even common sense, to impose liability on those who take reasonable precautions if such does [sic] not escalate or conceal the nature of the hazard, while absolving those who take no action whatsoever."

In such outdoor natural hazard cases the court distinguished cases involving "reasonably prudent measures" to enhance safety as in the case before it, where a bank teller had spread a melting substance three times that day. The court absolved the bank for doing nothing in the over 1.5 hours just prior to plaintiff-appellee's fall. On a day of intermittent sleet and snow, it would have been "virtually impossible . . . to have maintained a constant watch" of the sidewalk. Even "(m)ore importantly," nothing the bank did made the hazard "any less obvious or increased the likelihood" of a slip-and-fall. The _Estep_ scenario, by contrast, exemplified the type of situation where an undertaking would result in liability, i.e., where a business owner's actions "in fact, heighten or conceal the nature" of the danger.

The opinion by Justice Graves spoke for four members of the court. One member concurred in the result only. Two members dissented. Thus, at least a majority of four saw no need to revise the "outdoor natural hazard" rule or to distinguish the commercial mall from the _Standard Oil_ truck driver injured delivering a bulk cargo to defendant's plant. Chief Justice Lambert in dissent rejected the "worn out, rigid theories" cited by the majority and reiterated his views in _Corbin Motor Lodge v. Combs_. He also provided a persuasive

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300 _See PNC Bank_, 30 S.W.3d at 187. The court noted _Standard Oil_ had distinguished the case on this ground. _Id_. _See also infra_ text accompanying note 320.

301 _See PNC Bank_, 30 S.W.3d at 187. The court cited to Louisville Cooperative Co. v. Lawrence, 230 S.W.2d 103, 104-05 (Ky. 1950). _Id_. Defendant-appellee's contractual undertaking as to wet timber scrapings during construction in the area constituted an "undertaking" upon which plaintiff-appellant detrimentally relied. _Id_.

302 _Id_. at 188.

303 _Id_. at 187.

304 _Id_.

305 _Id_. at 187-88.

306 _Id_.

307 _See PNC Bank_, 30 S.W.3d at 188 (Graves, J., with Cooper, J., Johnstone, J., Keller, J., concurring).

308 _Id_. (Wintersheimer, J., concurring in result only).

309 _Id_. (Lambert, C.J., with Stumbo, J., joining, dissenting).

310 _Id_. at 186-88 (discussing _Estep_, which had proposed such a distinction). _See also supra_ text accompanying note 294.

311 _See PNC Bank_, 30 S.W.3d at 189 (Lambert, C.J., with Stumbo, J., joining, dissenting).

312 _Id_. at 188-89 (citing _Corbin Motor Lodge v. Combs_, 740 S.W.2d 944, 947-48 (Lambert, J., with
“economic benefit” rationale for imposing a duty on “public establishments” that stay open for business during bad weather and “encourage” customers to do business with them. Only the establishment open to the public was in a position to and had the “realistic opportunity to prevent the harm while remaining open for business and realizing its economic benefit.” Chief Justice Lambert would have extended section 343A of the Restatement (Second) of Torts to “outdoor natural hazards” and imposed a duty of care despite the obviousness of the natural hazard. Plaintiff-appellant’s fault, if any, would only be relevant to comparative fault.

In its reaffirmation of the “outdoor natural hazard rule” the majority cited to and relied on a hydra-headed trio of precedents — its opinions in Standard Oil Co. v. Manis and Corbin Motor Lodge v. Combs and the Court of Appeals’ opinion in Ashcraft v. Peoples Liberty Bank and Trust Co. A re-examination of these decisions is necessary as a backdrop for assessing modern post-Ashcraft precedents not cited by the court in PNC Bank and their continuing significance for Kentucky practitioners.

At the outset it should be noted that Standard Oil relied on a dichotomy between “natural outdoor hazards” as “obvious” or “apparent” to appellee-invitee as to the appellant-owner — which were not “unreasonable risks” that the invitor had either a duty to warn against or remedy or remove — and the

Leibson, J., joining, dissenting). 313

Id. at 188-89 (Lambert, C.J., with Stumbo, J., joining, dissenting).

314 Id. at 188.


316 See PNC Bank, 30 S.W. 3d at 188 (Lambert, C.J., with Stumbo, J., joining, dissenting).

317 433 S.W.2d 856 (Ky. 1968). See infra text accompanying notes 320-34.

318 740 S.W.2d 944 (Ky. 1987). See infra text accompanying notes 335-43.


320 See Standard Oil, 433 S.W.2d at 858-59 (emphases in original). The court found “clearly distinguishable” City of Madisonville v. Poole, 249 S.W.2d 133, 134-37 (Ky. 1952). Id. In City of Madisonville, an owner or possessor owed an “active, positive duty” of “protective vigilance” to use reasonable care to know and remedy any unsafe condition on an approach to the area of invitation, the club house. See City of Madisonville, 249 S.W.2d at 133. The case involved a fall in the shadow of an unlit covered clubhouse porch at night which involved a non-obvious hazard. Id. This interpretation was recently reconfirmed. See PNC Bank, 30 S.W.3d at 187. Interestingly, in discussing assumption of risk, a separate defense later abrogated in Parker v. Redding, 421 S.W.2d 586 (Ky. 1967), see infra text accompanying note 337, the court barred the defense and followed settled precedent that it was inapplicable where a person under a duty to maintain premises has “created a situation in which it is reasonably necessary to undergo a risk in order to protect a right.” City of Madisonville, 249 S.W.2d at 137 (quoting Restatement (Second) of Torts §893 (1938)). Compare the post-Parker discussion of the reasonableness of plaintiff’s encounter in the “common areas” context. See also infra text accompanying notes 368-78.

321 See Standard Oil, 433 S.W.2d at 858. Conversely, where the natural hazard was non-obvious or latent, a duty to warn arose. See Caplan v. U.S., 877 F.2d 1314, 1317-18 (6th Cir. 1989) (distinguishing Standard Oil and Corbin Motor Lodge, the court found the government breached its duty to warn a contract-tree cutter that its herbicide tree-cutting program eight years earlier had caused tree root systems to decay with the risk that they would fall of their own weight or with slight disturbance). Compare Rich v. U.S., 119 F.3d 447, 448, 452 (6th Cir. 1997) (rejecting the argument that the FTCA’s “discretionary function” exception applied, the court found that a steep hazardous downward curve was not a hidden danger and that the slickness of the road from a morning rain was an “obvious natural hazard” under the Caplan-Standard Oil precedents) cert
“different category”\textsuperscript{322} of the “indoor unnatural hazard”\textsuperscript{323} where a duty of care was imposable. \textit{Standard Oil}, however, involved an \textit{outdoor} natural hazard during daylight on a wooden ice-covered platform.\textsuperscript{324} Plaintiff therein was “fully aware” of accumulated ice and snow in the general area and saw that the wooden walkway was moist, which suggested melting ice had been present. In such circumstances the presence of “unmelted ice, or refreezing water, was a distinct possibility.”\textsuperscript{325}

Based on the above facts, the unanimous \textit{Standard Oil} opinion came to two overarching extravagant conclusions. The court first cavalierly concluded that under such circumstances defendant “could not have reasonably foreseen that appellee would proceed \textit{without exercising commensurate caution},”\textsuperscript{326} Three inaccurate assumptions underlay this statement. One is that any injuries encountered thereby necessarily would be attributable to the entrant’s negligence. The logical corollary of the latter is that reasonable care \textit{by the entrant} could have or would have obviated the danger. Neither is a defensible proposition as fact or law. It is equally conceivable that an entrant using reasonable care could or would be injured in any event where defendant undertakes no remedial measures.\textsuperscript{327} The second erroneous assumption (at least after adoption of

\textsuperscript{322} See \textit{Standard Oil}, 433 S.W.2d at 859.

\textsuperscript{323} \textit{Id.} at 858. The court relied on \textit{Lyle v. Megerle}, 109 S.W.2d 598, 599-600 (Ky. 1937). \textit{Id.} In \textit{Lyle}, a “very slick” accumulation of muddy slush tracked in on a tile floor had existed for “an appreciable length of time” in “plain view” of defendant’s employees. \textit{See Lyle}, 109 S.W.2d at 600. The court found defendant owed an “active, affirmative, and positive duty” of care and concluded it would be an “extreme view to hold that a fall was unforeseeable,” as distinguishing slips inside from those involving ice or snow on “outside steps or entranceways.” \textit{See Standard Oil}, 433 S.W.2d at 858-59.

\textsuperscript{324} See \textit{Standard Oil}, 433 S.W.2d at 857, 859. The court referenced but ignored defendant-appellant’s “custom” to maintain the walkway free of snow and ice. \textit{Id.} at 857. Of course, \textit{if} a duty was imposed, failure to comply with defendant’s customary practice would constitute evidence of negligence. See \textit{Dobbs, supra} note 2, at 394-95; \textit{Ray v. Hardee’s Food Systems, Inc.}, 785 S.W.2d 513, 520 (Ky. Ct. App. 1990), discussed \textit{infra} note 618. Note that the \textit{Standard Oil} court referenced the fact that appellant’s employee had removed snow and ice from the structure earlier. \textit{See Standard Oil}, 433 S.W.2d at 857. Apparently, this had not enhanced the risk or induced reliance by appellee, as the court quoted from an Ohio opinion quoted in an early Kentucky decision, which intimated liability might be imposable where a landlord “creat(ed) a greater danger than was brought about by natural causes. . . .” \textit{Id.} at 858 (quoting from \textit{Ferguson v. J. Bacon & Sons}, 406 S.W.2d 851, 852 (Ky. 1966)). That no undertaking was involved was made clear by the court’s later reference to the “hazard . . . created by natural elements.” \textit{Id.}

\textsuperscript{325} See \textit{Standard Oil}, 433 S.W.2d at 859. The court relied in part on \textit{Ferguson v. J. Bacon & Sons}, 406 S.W.2d 851, 852 (Ky. 1966). \textit{Id.} In that case an employee of a dress shop in a shopping center sued defendants, including the owner-operator of the shopping center, when she fell on a patch of ice covered by a light snow in the parking lot en route to work. \textit{See Ferguson}, 406 S.W.2d at 852. The court found her to be an invitee, rejecting the suggestion that landlord-tenant rules applied, but then applied the general rule barring liability for snow and ice conditions on premises “properly constructed and not inherently dangerous.” \textit{Id.} In such cases “all persons . . . must assume the burden of protecting themselves. . . .” \textit{Id.} The court found appellant “knew” of the snow and ice in the parking lot and found no duty despite its concession that she was “being cautious in her trek” and was “apparently injured” by snow hiding the ice patch from view. \textit{Id.}

\textsuperscript{326} \textit{Standard Oil}, 433 S.W.2d at 859 (emphases added).

\textsuperscript{327} See, e.g., \textit{Ferguson v. J. Bacon & Sons}, 406 S.W.2d 851, 852 (Ky. 1966) (invoking the plaintiff-appellant who was injured despite “being cautious” in traversing the parking lot). \textit{See also} Schreiner v. Humana, Inc., 625 S.W.2d 580, 581 (Ky. 1982) (rejecting the suggestion that “one who falls on ice is not exercising due care in all cases”).
comparative fault) is that an unreasonable encounter by a business entrant with the condition is unforeseeable. This assumption is misguided, particularly in a workplace scenario such as existed in *Standard Oil*, where employment-based economic compulsion apparently precipitated the encounter and where arguably no alternative route existed to make the delivery. The logic, structure and underpinnings of comparative negligence would modernly demand a recognition that such encounters are foreseeable, if not likely, by at least some invitees. Finally, the court assumed that it was wholly appropriate that as between invitee and invitor, the burden should fall wholly on the former even if the condition could have been prevented or remedied by reasonable care — a deviation from the basic policies underlying comparative fault thereafter adopted.

The second cavalier statement by the *Standard Oil* opinion was its two pronged denial of a duty of the invitor to (a) “stay the elements” or (b) “make the walkway absolutely [sic] safe.” The former is an uncommonly silly statement. The latter is hyperbolic overkill which misstated both the law and the duty asserted. The law has always rejected insurer or absolute liability in invitor-invitee cases. No such duty was proposed by the injured party in *Standard Oil*. What was sought was imposition of a duty of care as to outdoor natural hazards posing an unreasonable danger, a duty then and since recognized in Kentucky in some cases as to indoor obvious hazards and to outdoor hazards of the non-snow and ice variety.

Nineteen years later, in 1987, the Supreme Court revisited and reaffirmed the rule 5-2 in *Corbin Motor Lodge v. Combs*. Three years earlier the court had adopted pure comparative negligence. Counsel for respondents argued that this

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328 That this was implicit in the court’s analysis was made clear by its earlier statement that “a person charged with negligence is not bound to foresee the negligence of another.” *See Standard Oil*, 433 S.W.2d at 858.

329 *Id.* at 857. Plaintiff-appellee was following the “customary” unloading procedure, which “required him to traverse” the wooden walkway where he fell while stepping onto a small elevated platform. *Id.* But compare the analysis of this aspect of *Standard Oil* in *Wallingford v. Kroger Co.*, 761 S.W.2d 621 (Ky. Ct. App. 1988). *See supra* text accompanying notes 358-61. *See also* Ferguson & J. Bacon & Sons, 406 S.W.2d 851, 852 (Ky. 1966) (involving an employee of a shop in a shopping center traversing in cautious fashion).

330 *See* text infra accompanying n. 36.

331 *Id.* at 859 (emphases added).

332 *See* RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965).

333 *Note* that *Standard Oil’s* opinion expressly concluded that the invitor’s duty of maintaining reasonably safe condition only extended to hidden dangers and not to “normal or obvious risks.” *Id.* at 857. A quotation from 38 AM. JUR. Negligence, § 96 (1941) also suggested that this duty could be met by “‘adequate and timely notice.’” *Id.* The court thus seems to have denied generally any additional duty to remedy and § 343A’s exception as to obvious dangers posing an unreasonable risk, both of which were then and are now a part of Kentucky law. *See* ELDER, *supra* note 2, at 245-47 & nn.123-126.

334 *See* Cantrell v. Hardin Hospital, 459 S.W.2d 164, 165 (Ky. 1970) (curbing in an unlit outside parking lot of hospital); Jones v. Winn-Dixie at Louisville, Inc., 458 S.W.2d 767-70 (Ky. 1970) (sidewalk abutment in poor lighting and with a deceptive look); Downing v. Drybrough, 249 S.W.2d 711, 712 (Ky. 1952) (dividing strip between aisles of parking lot if not adequately illuminated). *See also* ELDER, *supra* note 2, at 253-59 & nn.148-49 (discussing areas covered by the invitor’s scope of invitation).

335 740 S.W.2d 944 (Ky. 1987).

336 *See* Hilen v. Hays, 673 S.W.2d 713, 717-19 (Ky. 1984). The court abolished contributory
decision and the court's pre-Standard Oil subsumption of assumption of risk within contributory negligence\textsuperscript{337} justified a new look at Standard Oil, which arguably involved a contributorily negligent party.\textsuperscript{338} The court rejected this reinterpretation of Standard Oil. It was not based on a contributory negligence rationale but was a no duty-no negligence grounds—"special category" rule with "persuasive considerations" justifying its retention.\textsuperscript{339} Apparently, the latter meant no more than "stability" of the common law, where precedent was founded in a "reasonable premise."\textsuperscript{340} Although it conceded "some reasonable arguments" for revision had been made, change in the law was neither necessary to avoid an "absurd result" nor "compelled to avoid grave injustices."\textsuperscript{341}

On its facts the court decided the case involved an "open and obvious" hazard as a matter of law. Respondent had admitted that the weather was terrible (compelling the interstate to close), that he had crossed the very sidewalk in question prior to the fall, and that he knew it was "extremely slick."\textsuperscript{342} The Corbin Motor Lodge court noted its then recent denial of review in the similar case of Ashcraft v. Peoples Liberty Bank & Trust Co.\textsuperscript{343} The latter can be viewed as a worse case scenario for the Standard Oil doctrine, evidencing its utter and callous indefensiveness. Plaintiff-appellant therein had fallen in the parking lot during day-time hours on snow and ice which defendant-appellees had made no attempt to clear despite the passage of three days since a "heavy snow."\textsuperscript{344} The court found that it was "clearly visible" that nothing had been done to clear the ice and snow and that the Standard Oil-no duty rule barred liability as to the obvious hazard which appellant was aware of and encountered.\textsuperscript{345}

As a review of this trio aptly demonstrates, it is difficult not to concur with Chief Justice Lambert's forceful view that the Standard Oil rule has "outlived its usefulness"\textsuperscript{346} and ought to be reconsidered in light of "modern reality"\textsuperscript{347} with its burgeoning variety of business establishments\textsuperscript{348} in "convenient, appealing, and negligence as an absolute bar and adopted pure comparative fault based on "present day morality and concepts of fundamental fairness." \textit{Id.} Under such an approach, the "windfall" for either the defendant or plaintiff under the existing "all-or-nothing" approach was abolished. Later, the legislature adopted a comparative fault statute. \textit{See} KY. REV. STAT. ANN. § 411.182 (Michie 1992). \textit{See also} discussion infra text accompanying notes 824-27, 840-47.


\textsuperscript{338} \textit{See Corbin Motor Lodge}, 740 S.W.2d at 945-46.

\textsuperscript{339} \textit{Id.} at 946. \textit{See also} Ashcraft v. Peoples Liberty Bank & Trust Co., 724 S.W.2d 228, 229 (Ky. Ct. App. 1987).

\textsuperscript{340} \textit{See Corbin Motor Lodge}, 740 S.W.2d at 946.

\textsuperscript{341} \textit{Id.}

\textsuperscript{342} \textit{Id.} at 945-47.

\textsuperscript{343} 724 S.W.2d 228 (Ky. Ct. App. 1987), \textit{dis. rev. denied} (1987).

\textsuperscript{344} \textit{See id.} at 229.

\textsuperscript{345} \textit{Id.}

\textsuperscript{346} \textit{See Corbin Motor Lodge} v. Combs, 740 S.W.2d 944, 947 (Ky. 1987) (Lambert, J., with Leibson, J., joining, dissenting).

\textsuperscript{347} \textit{Id.} at 948.

\textsuperscript{348} \textit{Id.} at 947.
presumably safe environment[s] where the allured public relies on expectations of safety and convenience engendered by defendants. In these cases there is a clear economic motive for and benefit from snow-ice removal activities where businesses remain open for business. Indeed, such businesses, as evidenced in Corbin Motor Lodge, may even have an enhanced level of business as a "natural refuge" in heavy weather.

Under such circumstances it is difficult to justify not allowing an injured party to attempt to show that the invitor failed to use reasonable care under all the circumstances to protect its patrons. The Standard Oil-Corbin Motor Lodge-PNC Bank rule "defies logic" and does just that. It bars consideration of the normal considerations entering a negligence calculation in such cases — the expectations of customers and practices of like-situated business; the availability of equipment to remove snow and ice; the temperature; how recently or distantly in time the precipitation had occurred and whether it was continuing; the owner's or occupier's level of awareness and appreciation of the hazard; what effort, if any, had been made by the only party in a position to do anything to remove, spread melting agents or warn of the condition; the foreseeable danger to patrons despite its obviousness; the likelihood of patrons deciding to encounter the risk for a host of reasons (many quite legitimate); other relevant factors. However, the no duty rule based on "worn-out, rigid theories" automatically shields owners and occupiers precludes just such fact-intensive scrutiny and actively fosters the do-nothing-for-three-day climate found in Ashcraft.

The stunning crudity of the blunderbuss-no duty-"outdoor natural hazard" rule reaffirmed in PNC Bank leaves unclear the status of two decisions issued after Corbin Motor Lodge and not referenced by the majority in PNC Bank. In Wallingford v. Kroger Co. the Court of Appeals found Standard Oil not controlling where a Coca-Cola deliveryman was "compelled by his employment" to use a particular entrance, asked for and was denied assistance in clearing the walkway.

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349 Id.
350 Id.
352 See Corbin Motor Lodge, 740 S.W.2d at 947 (Lambert, J., with Leibsón, J., joining, dissenting).
353 Id.
354 See generally the factors cited as relevant in Corbin. Id. at 947-48. See also PNC Bank, 30 S.W.3d at 188-89 (Lambert, J., with Stumbo, J., joining, dissenting). Ashcroft v. Peoples Liberty Bank & Trust Co., 724 S.W.2d 228, 229-30 (Ky. Ct. App. 1987) (Miller, J., concurring).
355 See Corbin Motor Lodge, 740 S.W.2d at 947 (Lambert, J., with Leibson, J., joining, dissenting).
356 See PNC Bank, 30 S.W.3d at 189 (Lambert, C.J., with Stumbo, J., joining, dissenting). The gross anomaly of this rule is aptly reflected by a comparison with the court's recent liberalization of the rule for constructive notice in indoor slip-and-fall cases and plurality support for a "mode of operations" doctrine. See also supra text accompanying notes 250-64.
357 See Corbin Motor Lodge, 740 S.W.2d at 947 (Lambert, J., with Leibson, J., joining, dissenting).
359 See id. at 624. Plaintiff had no option but "to proceed at his peril or risk losing his means of livelihood." Id. See also Standard Oil Co. v. Manis, 433 S.W.2d 856 (Ky. 1968). In Standard Oil, by contrast, there was no evidence that the walkway was the only mode of entry. Id.
passageway, went to "great lengths" to clear it himself, and was injured despite his efforts. These factors constituted "a far different situation" than in *Standard Oil*.

The *Wallingford* opinion also cited to and relied on section 343A as an authoritative statement of an exception to the generally applicable open and obvious outdoor hazard rule. In light of *Manis* and *Corbin Motor Lodge* that reliance would be dubious but for the exception the Court of Appeals carved out based on *Ferguson v. J. Bacon & Sons*, which was quoted at length by the *Standard Oil* opinion. The *Ferguson* decision had concluded that the no duty rule applied unless it was shown that defendant "created" an "inherent danger" via "design, construction or otherwise." In *Wallingford* an issue for trial was raised as to the dangerous steepness of the loading ramp. Plaintiff-appellant's negligence, if any, was then a matter of comparative negligence under this "exception" to *Standard Oil*.

In 1989 the Court of Appeals declined to follow the *Standard Oil*-*Corbin Motor Lodge* rule in *Davis v. Coleman Management*, involving a scenario where plaintiff-appellant-tenant had slipped and fallen on a sidewalk outside her apartment in appellee's fourplex. Despite freezing temperatures and snow over a period of days, the landlord allegedly had made no efforts to remedy the icy and snowy condition of the sidewalk. The court's logic in fashioning an exception was simple. The no-duty rule was inapposite in landlord-tenant cases, where the "natural accumulations" rule was subsumed within the landlord's duty to keep "common areas" reasonably safe. In such "common areas" the tenant's knowledge of the dangerous condition was not controlling, unlike

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360 See *Wallingford*, 761 S.W.2d at 624. The court distinguished *Standard Oil* on the ground that there was no evidence the injured party took "reasonable steps" for his own security. *Id.* Of course, this is merely an attempt to characterize *Standard Oil* as a case implicitly involving contributory negligence, an argument rejected by *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944, 945-46 (Ky. 1987), and *Ashcraft v. People's Liberty Bank & Trust Co.*, 724 S.W.2d 228, 229 (Ky. Ct. App. 1987), dis. rev. denied (1987).

361 See *Wallingford*, 761 S.W.2d at 624.

362 *Id.* at 624-25.

363 406 S.W.2d 851, 852 (Ky. 1966). See supra notes 324-25.

364 See *Standard Oil*, 433 S.W.2d at 858.

365 See *Wallingford*, 761 S.W.2d at 625. See also *Ferguson*, 406 S.W.2d at 851.

366 See *Wallingford*, 761 S.W.2d at 624.

367 *Id.* at 625. An issue existed for trial as to whether Kroger was a lessee with no responsibility for the design or whether the building was designed to its specifications. *Id.*


369 See *id.* at 38. After trying unsuccessfully to start her vehicle, plaintiff-appellant slipped en route to the grocery with her son. *Id.* See also *RESTATEMENT (SECOND) OF TORTS* § 360 cmts. d, e (1965) (noting that the "common areas" doctrine applies to areas outside the building leased used in common by tenants).

370 See *Davis*, 765 S.W.2d at 38.

371 *Id.* at 38-39.

372 See generally *ELDER*, supra note 2, § 5.02(e), at 298-307.

373 See *Davis*, 765 S.W.2d at 39. The court termed this the "majority rule." *Id.* See also *RESTATEMENT (SECOND) OF TORTS* § 360 cmt. b (1965); *Fuhs v. Ryan*, 571 S.W.2d 627, 628 (Ky. Ct. App. 1978). *Fuhs* involved a tenant who was injured while descending an icy external stairway
invitor-invitee cases where the invitee's knowledge generally barred any duty of care. Moreover, the landlord was the only individual with control over the area in question and in a position to take reasonable measures to make the "common areas" reasonably safe, a responsibility that would not constitute an "undue burden.

At trial the landlord's actions were to be assessed under a reasonableness under the circumstances standard in light of the landlord's actual or constructive notice, the length of time the condition had remained and the lessor's opportunities to take remedial measures. Likewise, the tenant's actions needed to be assessed under a reasonableness standard as to contributory negligence in light of the necessity for using the stairwell at that time and the availability of alternate routes.

Whether the Court of Appeals' exception to the no duty-"outdoor natural hazard"-"natural accumulations" rule for landlord-tenant cases will survive PNC Bank is an open question. The duties of landlords as to common areas are generally the same as invitors' duties to invitees within the scope of the invitation, i.e., maintaining the premises in reasonably safe condition. The argument that if the lessor does not, no one will finds a ready parallel in the invitor situation. The only discernible difference — and it seems quite significant — is that of compulsion and urgency. Common areas may be the only available means of egress and ingress. To impose upon a tenant the

from a third floor unit. Id. Note that the latter court noted that the unprotected nature of the stairwell violated a city ordinance. Id. The court did not rely on the negligence per se exception to the landlord non-liability rule. See ELDER, supra note 2, § 5.02(g), at 311-15. This would be an alternative ground in some cases involving natural hazards. Note also, that in this respect the Davis court specifically noted Ky. Rev. Stat. Ann. § 383.595(1)(c) (Lexis Supp. 2000), which requires a landlord to "(k)eep all common areas of the premises in a clean and safe condition. . . ." This statute had not been pleaded in Davis. See Davis, 765 S.W.2d at 39. In jurisdictions where this has been adopted (See infra note 465) this statutory duty would provide a powerful policy justification for the Davis exception to the Standard Oil-Corbin Motor-Lodge-PNC Bank rule since the statute's language is inclusive and provides neither an express nor reasonably implied exception for "outdoor natural hazards." Id.

See Davis, 765 S.W.2d at 39. See also supra text accompanying notes 358-67; RESTATEMENT (SECOND) OF TORTS § 343A (1965) (noting the exception).

See Davis, 765 S.W.2d at 39.

Id. The court cited to Justice Lambert's dissent in Corbin Motor Lodge v. Combs, 740 S.W.2d 944 (Ky. 1987). Id. Compare discussion supra note 354.

See Davis, 765 S.W.2d at 39. The court was analyzing the doctrine of contributory negligence and following its earlier analysis in Fuhs v. Ryan, 571 S.W.2d 627, 628-29 (Ky. Ct. App. 1978), indicating that a tenant had a right to reasonably proceed to encounter known hazards under such circumstances. Id. Modernly, these factors would be relevant to the entrant's comparative fault. See also discussion supra note 336.

See ELDER, supra note 2, at 303-07.

Id. at 232-53.

Id. at 253-59.

See Davis, 765 S.W.2d at 39.

See supra text accompanying notes 313-14.

See Fuhs v. Ryan, 571 S.W.2d 627, 628-29 (Ky. Ct. App. 1978). The external icy stairwell was the only means of access to and from the injured tenant's third floor unit. Id. at 628. The Standard Oil decision was distinguished as not "contain(ing) the elements of compulsion which a tenant
alternatives of captivity in the leased unit or encountering the obvious hazard for reasons of necessity or urgency with no hope of remuneration for injuries suffered by a negligent landlord is an uncommonly bad bargain unjustified by law or policy, at least in residential landlord tenant situations. These factors justify treating the residential tenant differently from the invitee who encounters "outdoor natural hazards" in public establishment cases where such factors are likely absent, or at least less compelling.

Whatever the ambiguities of the "outdoor natural hazard" rule, two concepts seem quite clear. One is that the doctrine does not apply if the condition is an indoor one "created" by affirmative conduct of the owner or occupant or employees thereof. Thus, as the Court of Appeals held in Wal-Mart Stores, Inc. v. Lawson, the general invitor duty of maintaining the premises in a reasonably safe condition applied where employees at defendant-appellee's garden store moved flowering plants from the outdoor display section during "cold, rainy and snowy" weather into the enclosed display area and a wet and black slippery area developed from water draining off the garden shop roof and commingling with potting soil from the relocated plants. The court distinguished the Standard Oil-Corbin Motor Lodge cases as not involving risks "created" by employees but rather hazards "simply as a result of adverse weather conditions . . . equally obvious to both parties."

The second clear proposition is that the naturalness of the "outdoor natural hazard" rule has to do with the source of the moisture or precipitation, not whether the area of the accident remains in its pristine or natural condition or has been modified by the owner or occupier. In Rogers v. Professional Golfers Ass'n, the Court of Appeals affirmed what was implicit in prior Kentucky precedent, i.e., that whether the hillside locus of the fall was "natural" or an "altered" and "unnatural" transformation of farmland to golf course was simply "irrelevant:" "Even if the condition is man-made, the open and obvious rule would apply."

might have in using the only exit available." Id. The plaintiff also alleged she descended, after a delay, "feeling compelled to get to work." Id.

385 As to commercial landlords, the situation may be well different. Many commercial landlords are indistinguishable from and may be sued jointly with invitees. See supra text accompanying notes 284-85. See also Ferguson v. J. Bacon & Sons, 406 S.W.2d 851, 852 (Ky. 1966).

386 Query whether a parent going to a grocery to buy necessities for his or her family is measurably different. Although not potentially captive in the leased premises, the urgency or necessity of feeding one's family may be equally compelling.

387 984 S.W.2d 485, 488-89 (Ky. Ct. App. 1998). The case was treated as a slip-and-fall case involving a risk "created" by defendant. See id. See generally supra text accompanying notes 208-11.

388 See Wal-Mart, 984 S.W.2d at 486-89.

389 Id. at 488-89 (emphases added).


391 Id. at 873. Compare the parking lots, sidewalks, and wooden walkways involved in prior cases applying the "outdoor natural hazard" doctrine. See supra text accompanying notes 295-306, 317-45.
Kentucky's Recreational Use Statute

In 1966, Kentucky adopted “essentially unchanged” the model act encouraging landowners to make land and water areas open to the public for recreational purposes by limiting their duties and liabilities to “persons entering thereon for such purposes.” Modest changes were incorporated in 1998, effective in 2000. Under the recreational use statute an owner who fulfills the burden of proving coverage by the “protective ambit” of the statute is absolved of the common law duties “displace(d)” by the statute and is subject

393 See Coursey v. Westvaco Corp., 790 S.W.2d 229, 230 (Ky. 1990) (noting 46 jurisdictions had some type of recreational use statute).
394 See KY. REV. STAT. ANN. § 411.190(2) (Lexis Supp. 2000). A 1992 decision rejected as moot an attack on the statute’s constitutionality in light of Sublett v. United States, 688 S.W.2d 328, 329 (Ky. 1985). See also Midwestern, Inc. v. Northern Ky. Com. Center, 736 S.W.2d 348, 351 (Ky. Ct. App. 1987). The perfunctory analysis in Sublett, a certification case, is unpersuasive. The entrant was a U.S. public park visitor. See Sublett, 688 S.W.2d at 328. Such public entrants are generally treated as public invitees owed a duty of reasonable care. See RESTATEMENT (SECOND) OF TORTS § 332(2) cmt. d, illus. 1-4 (1965). “A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.” Id. See also ELDERS, supra note 2, at 230-32 & nn.69-75. However, the court interpreted the statute as “creat(ing) a class of users which by such dedication loses its label as trespassers but does not acquire the label of invitees.” See Sublett, 688 S.W.2d at 329. The court held this was a “reasonable classification” that did not violate §§ 14 or 54 or “other pertinent sections” of the Kentucky Constitution. Id. There are two problems with the court’s terse conclusion. One, the issue was wrongly framed and based on a false premises, i.e., that all such entrants were not previously invitees. Second, the opinion is inconsistent with the more demanding standard of later Kentucky constitutional jurisprudence. See Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 811-18 (Ky. 1991). A statute of repose for product liability actions against builders violated § 59’s special legislation-equal protection clause and §§ 14, 54 and 241, the “jural rights” provisions. Id. The court applied these provisions to “fundamental jural rights as presently accepted in society, not frozen in time to the year 1891”. Id. at 817. See also Williams v. Wilson, 972 S.W.2d 260, 265-69 (Ky. 1998) The court held that the statutory standard — KY. REV. STAT. ANN. § 411.184 (Michie 1992) — requiring “subjective awareness” for punitive damages impaired the right to punitive damages under a gross negligence standard as it existed prior to 1891. Id. The court did not have to rely on the “most controversial” and “heavily criticized” Perkins’ doctrine, “constitutionalization” of newly discovered rights, relying instead on protecting “well established” rights in 1891 from “legislative erosion or abolishment.” Id.
395 The term “owner” was redefined in KY. REV. STAT. ANN. § 411.190(b) (Lexis Supp. 2000) to include those with a “reversionary or easement interest.” Id. Also, a comma was added after “occupant.” Id. This makes it clear that “occupant” is a separate category from “person in control of the premises.” The absence of the comma between these two phrases in the earlier version made it appear as if the latter was a definition of the former. In (i)(c) “horseback riding” was added to the list of “recreational” purposes covered by the statute. Id. Lastly, the term “charge” in (1)(d) was clarified by a proviso to the effect that it does “not include fees for general use permits issued by a government agency for access to public lands if the permits are valid for a period of not less than thirty (30) days.” Id.
396 See Coursey v. Westvaco Corp., 790 S.W.2d 229, 232 (Ky. 1990). The court imposed on the landowner the burden of showing he “knew and condoned” the public’s recreational use of the premises. Id. As the case before it involved a certified question, the court intimated no position as to whether the injury therein, from diving into a water-filled sand pit, was covered by the recreational use statute. Id. at 230.
398 Id. at 612. Such common law duties were not reinserted merely by showing the covered landowner agreed by lease with the lessor-owner to maintain liability insurance. Id. at 610.
to liability in cases of free use thereof only for "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."  

Several decisions in the last decade have interpreted the panoply of the statute’s coverage. In a pivotal case, Coursey v. Westvaco Corp., 403 the Kentucky Supreme Court rejected any suggestion that a formal dedication was required but concluded that a landowner asserting protection thereunder must show "at a minimum [that] he knew and condoned the public making use of his land for a recreational purpose...." This must be demonstrated by "words, actions or lack of action" from which intent to open to the public such land or water to recreational use of the public could be "reasonably inferred." 402 Recent decisions have applied the statutory immunity to an injury at a city-owned public park open to the public for free 403 and to a drowning occurring at a lake in part subleased from the Kentucky Department of Parks containing a floating marina, boat ramp, parking lot and picnic area, all of which were open to the public "free of charge." 404 A third applied the immunity to a case of implied consent involving a school parking lot/playground left open to use by local youths as part of archdiocesan "good neighbor" policy. 405

A couple of Kentucky opinions delved into and rejected attempts to circumvent the statute’s exceptionally limited liability to reinstate a duty of ordinary care. In an important opinion, Coursey v. Westvaco Corp., 406 the Kentucky Supreme Court rejected 4-3 the suggestion that the “absolute and unqualified” 407 statutory language which limited the landowner’s duty left any doubt as to the doctrine of “attractive nuisance” applying to recreational child entrants. 408 In another case the Court of Appeals rejected a broad definition of

399 See infra text accompanying note 409.
401 790 S.W.2d 229, 232 (Ky. 1990).
402 See id.
403 See City of Louisville v. Silcox, 977 S.W.2d 254, 255-57 (Ky. Ct. App. 1998). Citing an out-of-state case, appellee argued that a Kentucky regulation appertaining to public bathing facilities “effectively repea[led]” the recreational immunity. Id. The court disagreed, finding that the alleged modifications — drawing of water from the creek, removal of sand from the creek impeding the intake valve and construction of picnic tables and hiking trails—did not constitute a “modified” use “for the purpose of public swimming or bathing” under the regulation in question. Id.
404 See Collins v. Rocky Knob Associates, Inc., 911 S.W.2d 608, 610 (Ky. Ct. App. 1995), dis. rev. denied (1996). The court noted in concluding defendant was an owner that the “recreational purpose” in § 411.190(1)(c) included but was “not limited to” “hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.” Id. The court did characterize the marina operation (a percentage of revenue of which was payable as rent) as a “commercial” venture with a purpose of promoting “full realization” of the lake’s recreational use potential. Id. However, the marina was closed at the time of the drowning and the victims were not lessees of docking slips at the marina. Id. at 612.
406 790 S.W.2d 229, 232 (Ky. 1990).
407 See id. The court cited the “no duty of care” provision in § 411.190(3), the negation of assurances of safety, rejection of invitee or licensee status and repudiation of responsibility and incurrence of liability provisions in § 411.190(4)(a)-(c). Id.
408 Id. Had the legislature intended to preserve the “attractive nuisance” doctrine, the court suggested it would have expressly so provided. Id. Compare Justice Leibson’s strong dissent. Id.
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"charge" and held that a parking fee assessed per car (regardless of the number of persons therein) for only one of several parking lots at a city park and where bikers and hikers entered free was not an admission fee "paid in exchange for permission to enter" under the "clear language" of the statutory exception. As a corollary, one case did affirm that paid entrance to a commercial cave attraction gave rise to a "negative implication" that no "special treatment" was to be accorded such a landowner. The court impliedly affirmed the entrant's invitee status and applied general Kentucky policy standards for invalidating releases from liability.

A trio of decisions has interpreted the exception to limited statutory liability in cases involving "willful or malicious failure to guard or warn." All affirmed that the language was not limited to cases involving deliberate intent to harm and applied to various types of aggravated negligence. One decision found a jury issue of "affirmative" misconduct where a landowner "created and maintained" a tippable basketball goal from which neighborhood youths repeatedly removed counterweights to enhance slam-dunking and where the hazard could have been easily warned of and remedied by cementing the goal in place. Two other decisions rejected the suggestion a jury issue of "willful or

See also supra text accompanying notes 35-42.

See § 411.190(6)(b). Liability is not limited where "the owner charges the person or persons who enter or go on the land for the recreational use thereof . . . ." Id. A "charge" "means the admission price or fee asked in return for invitation or permission to enter or go upon the land. . . ." Id. § 411.190(1)(d) (emphases added). However, as to land leased to the state or subdivision, "any consideration received by the owner" does not constitute a charge. Id. § 411.190(6)(b).


See § 411.190 (6)(b).

See City of Louisville, 977 S.W.2d at 257. The court cited to and relied on out-of-state parking and other special fee cases not linked to entrance and use of general amenities and facilities. Id. at 256-57.


See ELDER, supra note 2, at 221-30.

See Coughlin, 895 F. Supp. at 161. The court cited "(w)ell-settled" Kentucky law which "disfavors and, indeed, bars exculpatory agreements from enforcement." Id. It distinguished its "narrow" "race track" exception. Id. See also Donegan v. Beech Bend Raceway Park, Inc., 894 F.2d 205, 207-08 (6th Cir. 1990); discussion infra note 464; Estate of Peters v. United States Cycling Federation, 779 F. Supp. 853, 855-56 (E.D. Ky. 1991) [the estate did not show that a competitive cyclist was killed as the result of willful or wanton misconduct]. Coughlin, 895 F. Supp. at 162, the evidence showed negligence at most and such was barred by the release, as not extending to all activities "recreational in nature." Id.


See Collins, 911 S.W.2d at 611 (citing Kirschner v. Louisville Gas & Electric Co., 743 S.W.2d 840, 842-43 (Ky. 1988)). See also ELDER, supra note 2, § 2.05, at 102-07; supra text accompanying notes 6-34 (discussing the latter case and its interpretation of the Kentucky trespasser statute § 381.232).

See Collins, 911 S.W.2d at 611. See also Huddleston, 843 S.W.2d at 907 n.4. Plaintiff alleged the school's custom of "repeatedly repositioning" the goal with no warning posted or additional precautions was "in effect, resetting a trap." Id. This was a question of fact for the jury. Id.

See Huddleston, 843 S.W.2d at 902, 906-07.
malicious" fault existed in cases of "passive" misconduct involving the water hazards therein — a jump from an embankment into a muddy stream and a drowning after closing hours at a marina on prom night where alcohol may have been involved. The decisions concluded such risks were "material and inherent" in water hazards and defendants were "entitled to assume" that the entrants "would see and observe that which would be obvious through the reasonably expected use of an ordinary person's senses and would act accordingly."

The "Unusually Dangerous" or "Extrahazardous" Public Crossing Doctrine.

Clearly, all public crossings over railroad tracks are "dangerous" by definition and a railroad owes members of the public "care commensurate with the danger" thereat, i.e., "such care and precautions for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection." In such cases, defendant-railroad must meet the applicable notification or signaling requirement, the duty of lookout, and the limitations on speed in cities, towns and concentrated population communities (but not in crossings in open country or at a cross technically within corporate limits which is the practical equivalent of a country crossing).

See Collins, 911 S.W.2d at 611. See also City of Louisville v. Silcox, 977 S.W.2d 254, 257-59 (Ky. Ct. App. 1998) (noting that, as in Collins, the defendant did not "create" the water hazard, "introduce any object ... which could have resulted in" plaintiff's injury, nor was there any suggestion "any unusual features maintained on the premises" precipitated their deaths). While the decisions on the facts as to non-willfulness are justified, the "active"-"passive" dichotomy is wholly illegitimate. Assume that repeated instances of serious injuries and/or deaths are attributable to a hidden hazard or unusual feature of the body of water. In such a case a failure to guard or warn might constitute willfulness. Note, however, that no such evidence was produced in either of the above cases and the risks were deemed "reasonably obvious" risks of swimming "natural and inherent" in water in its "natural condition." Id. Compare the discussion of hidden or concealed dangers in "attractive nuisance" cases. See ELDER, supra note 2, at 75-78.


See Collins, 911 S.W.2d at 609, 611. No one knew how decedents died. Id. at 611. Consequently, the theories of liability asserted based on defendant's alleged knowledge of hazardous conditions — deep water, sharp rocks along an unlit shore, submerged impediments and entanglements, boat wakes and drunken or malevolent persons on the premises — were speculative. Id.

Id. at 611-12. The court stated that voluntary intoxication did not enlarge the duty owed or modify the duty of care entrants were required to use for their own safety. Id. at 612. The court cited KY. REV. STAT. ANN. § 411.190(7)(b) (Michie 1992), which reaffirmed that the recreational use statute did not "(r)elieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this section to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care." See Silcox, 977 S.W.2d at 258.

See Louisville & N. R. Co. v. Molloy's Adm'tx, 91 S.W. 685, 688 (Ky. 1906).

See Louisville & N. R. Co. v. Cummins' Adm'r, 63 S.W. 594, 595 (Ky. 1901).


See ELDER, supra note 2, at 130-41.

Id. at 141-49.

Id. at 149-55.

Id. at 156-57.
Where, however, an "unusually dangerous" or "extrahazardous" crossing is involved, a great volume of "somewhat confusing" Kentucky precedent imposes upon defendant the "added duty" to adopt other reasonable means of warning the traveling public of the "unusually dangerous" crossing, whether by a watchman, a flagman, or "such means of safety as reasonably prudent" railroads would implement in light of the exigencies of the crossing. If such additional measures of warning or notification are not adopted, "the speed of the train must be so regulated as not to unnecessarily imperil the safety of persons using the highway." The Kentucky cases have generally limited the special protection for the "unusually dangerous" or "extrahazardous" public crossing to situations where the public highway user "exercising ordinary care and prudence . . . can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train." By definition, the rule applies only to obstructions to view or hearing that are of the "exceptional" rather than the "ordinary" type and does not apply to "slight" impediments, or crossings which "differed but little from the usual and ordinary crossing," or "any fact scenario where the traveler could see the train's approach for a considerable distance.

Two cases in the last decade have interpreted this special rule requiring more than merely the "usual and accepted manner" of signaling the train's approach.
In one case, *Citizens State Bank v. Seaboard Sys. R. R.*, the court upheld a judgment based on an instruction requiring additional protection in a city setting where two factors were shown — a large warehouse at the crossing which "presented a real and substantial obstruction" to sight and where a heavy volume of traffic (5,200 cars daily) utilized the crossing. In light of these "extrahazardous" factors the jury could reasonably have concluded that "greater safety measures should have, and could have, been taken" by defendant than the two measures evidenced in the record — ringing of a bell and presence of automatic flagging signals which the driver did not hear or see.

In a more recent federal case, *Jewell v. CSX Transp., Inc.*, involving a rural setting, the Sixth Circuit Court upheld the trial court's directed verdict for the defendant-appellee on the "extrahazardous" crossing claim where the expert based his conclusion of extrahazardousness solely on a complex of factors — the angle of the crossing, mandating that the driver look 90° or more to his or her right; glare from the sun setting at the time of the collision; the vehicle's blind spot; the narrow nature of the crossing; the elevated road bed; ruts in the road—but where no "real and substantial obstruction to sight or hearing" was involved. The court emphasized the testimony that the train was visible for 2,200' (for the last 1300' of which the road was straight) and that no physical impediment existed at the crossing itself.

The appellate court agreed with the district court that Kentucky law "requires an actual physical inability to see or hear the train." 444

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445 *Id.*
446 *Id.* at 588. In sustaining the verdict the court cited other disputed evidence of excessive speed, 30-35 in a 25 m.p.h. zone in violation of an Owensboro ordinance. *Id.* at 587-88. Note that Kentucky formerly provided for mandatory signaling in cities as required by the local legislative body. KY. REV. STAT. ANN. § 277.190 (Michie 1989). Non-compliance therewith constituted negligence. *Id.* See Louisville & N. R. Co. v. Galloway, 294 S.W. 135, 137 (Ky. 1927); ELDER, *supra* note 2, at 136. In a change effective in 1994 a city, county, urban-county, or charter city governing body "may regulate the sounding of train whistles at night" if the entity adopts the rules promulgated by the Federal Railroad Administration. See KY. REV. STAT. ANN. § 277.190(2) (Lexis Supp. 2000).
447 *See Citizens State Bank, 803 S.W.2d at 587-88.*
448 *Id.* at 587-88. The court also approved an instruction dealing with the driver-co-defendant's apportioned share requiring that he likewise had a corollary "higher duty" if by the exercise of ordinary care he knew or should have known of its extrahazardous nature. *Id.* at 588. See also Cox's Adm'r v. Cincinnati N. O. & T.P. Ry. Co., 37 S.W.2d 859, 862 (Ky. 1931) (modifying Louisville & N. R. Co. v. Crockett's Adm'x, 24 S.W.2d 580, 582 (Ky. 1930), which had not required that plaintiff "use ordinary care to learn whether or not the crossing is unusually dangerous" but only to use a "commensurate degree of care" if he or she "sees or knows" that the crossing is "unusually dangerous").
449 135 F.3d 361 (6th Cir. 1998).
450 *See id.* at 363. The court synthesized Kentucky law thusly: "Under Kentucky law, a railroad is not required to have gates, lights, or other warnings at a crossing unless there is a statute imposing such an obligation, or the circumstances are such that ordinary prudence and foresight would anticipate the need for additional warnings, as in the case of an extra-hazardous crossing." *Id.* at 363. The only warning device at the crossing in question was the standard crossbucks. *Id.* at 362. No other devices — lights, bells, or mechanical gates had been installed. *Id.*
451 *Id.* at 364.
452 *Id.* at 363-64.
hear, and not merely such human factors as a disinclination to look for a train due to the angle of the intersection, distractions or diversions.\textsuperscript{453}

While the court's reliance on a rigid "actual physical ability" criterion as a threshold requirement may be too inflexible and at odds with some significant Kentucky precedent to the contrary,\textsuperscript{454} the denial of the special protection of the "unusually dangerous" or "extrahazardous" crossing rule was consistent with the precedent denying its application where the opportunity of the driver to see the oncoming train's approach for a "considerable distance" was proved.\textsuperscript{455}

\section*{LIABILITY OF LANDLORDS TO TENANTS AND THEIR INVITEES AND GUESTS}

The traditional posture of the common law evidenced a narrow legal domain of tort liability of landlords,\textsuperscript{456} "reflective of the existing power relationships and the hierarchical superiority of land at the time the common law rules were developed."\textsuperscript{457} The anachronistic\textsuperscript{458} notion of \textit{caveat emptor}\textsuperscript{459} thus viewed the lease as a conveyance or sale of the leased premises for a term.\textsuperscript{460} Tort liability, if there be any, was to be imposed \textit{only} on the tenant as occupier,\textsuperscript{461} not the landlord with only a reversionary interest.\textsuperscript{462}

Kentucky has followed this "general rule."\textsuperscript{463} As a modern case has stated, "(i)t has been a long standing rule in Kentucky that a tenant takes the premises as he finds them."\textsuperscript{464} Accordingly, the landlord "need not exercise even ordinary

\textsuperscript{453} Id. at 364-65 (emphases added). Where the facts did not justify an "extra-hazardous" crossing instruction, the court concluded it would have been error to have allowed the jury to decide whether to impose an obligation on the railroad to take other precautions. \textit{Id.} The court relied on Ill. Central R. R. Co. v. House, 352 S.W.2d 819, 821-22 (Ky. 1961). \textit{Id.}

\textsuperscript{454} Note that a significant amount of precedent supports a broader approach focusing on "all factors relevant to visibility and audibility." See \textit{Elder}, supra note 2, at 172 & n.52. Under this approach the physical obstruction criterion is the primary or dominant factor but is not a per se pre-condition to liability. For a very defensible example of a more flexible approach see the discussion of the \textit{Allnut} case in supra note 438.

\textsuperscript{455} See \textit{supra} note 443.

\textsuperscript{456} See generally \textit{Elder}, supra note 2, § 5.01, & 279-83.

\textsuperscript{457} Id. at 279. See also infra text accompanying note 474; Diocese of Covington v. Christian Appalachian Project, 787 S.W.2d 704, 705 (Ky. Ct. App. 1990) (noting that where a lessor by lease was obligated to maintain "fire and extended coverage" insurance on the property, a Kentucky such a clause was constructed as a contractual assumption of loss of fire, thus precluding either the lessor or insurer from claiming against the tenant for causing the fire).

\textsuperscript{458} See \textit{Elder}, supra note 2, at 279-83.

\textsuperscript{459} Id. at 279. See also \textit{Miles} v. Shauntee, 664 S.W.2d 512, 517-18 (Ky. 1983); infra text accompanying notes 473-79.

\textsuperscript{460} See \textit{Miles}, 664 S.W.2d at 517-18 (rejecting an implied warranty of habitability in a counterclaim for damages in response to a forcible entry and detainer action, concluding it was for the legislature to "create rights and duties non-existent under the common law").

\textsuperscript{461} See \textit{Rogers} v. Redmond, 727 S.W.2d 874, 875 (Ky. Ct. App. 1987); \textit{Clary} v. Hayes, 190 S.W.2d 657, 659-60 (Ky. 1945). As to tenant-occupier-possessors, the rules of the common law trichotomy apply. See generally \textit{Elder}, supra note 2, at ch. 1-4. Of course, the net result is often on injured person with no viable defendant. See infra note 469.

\textsuperscript{462} See \textit{PROSSER AND KEETON}, supra note 2, at 434.

\textsuperscript{463} See \textit{Miles}, 664 S.W.2d at 517-18; \textit{Starns} v. Lancaster, 553 S.W.2d 696, 697 (Ky. Ct. App. 1977).

\textsuperscript{464} Milby v. Mears, 580 S.W.2d 724, 728 (Ky. Ct. App. 1979), \textit{dis. rev. denied} (1979). See also \textit{Miles}, 664 S.W.2d at 518. Compare \textit{Jones} v. Hanna, 814 S.W.2d 287, 288-89 (Ky. Ct. App.}
care to furnish reasonably safe premises, and . . . is not generally liable for injuries caused by defects therein."\textsuperscript{465} A decade ago this author concluded there was "no indication of a willingness of the Kentucky courts to overturn this arbitrary and irrational common law general rule"\textsuperscript{466} (with the multiple exceptions thereto) and adopt the minority doctrine\textsuperscript{467} reflected in \textit{Sargent v. Ross},\textsuperscript{468} applying a general duty of reasonable care under all the circumstances. Under this "no duty" general rule "clearly foreseeable plaintiffs are not owed a duty of reasonable care with regard to risks which would likely be considered 'unreasonable' if a duty of reasonable care was imposed on the lessor."\textsuperscript{469}

\textsuperscript{465} \textit{Mears}, 580 S.W.2d at 728. \textit{See also Miles}, 664 S.W.2d at 518. Note that the Supreme Court refused to find an implied warranty of habitability as a defense to nonpayment under a statute which applied only to two populated counties in violation of § 59 of the Kentucky Constitution. \textit{See Miles}, 664 S.W.2d at 518. The General Assembly responded by authorizing cities, counties and urban county governments to adopt the Uniform Residential Landlord Tenant Act in its entirety. \textit{See KY. REV. STAT. ANN. § 383.500 (Lexis Supp. 2000).} Extensive obligations are imposed on a landlord, including compliance with building and housing codes "materially affecting health and safety," making "all repairs" and doing "whatever is necessary to put and keep the premises in a fit and habitable condition," keeping "all common areas of the premises in a clean and safe condition," and maintaining listed facilities and appliances "in good and safe working order and condition." \textit{See KY. REV. STAT. ANN. § 383.595(1)(a)-(d) (Lexis Supp. 2000).} Note that provisions of legislative enactments may be the basis for a negligence per se claim. \textit{See ELDER, supra} note 2, § 5.02(g), at 311-15. \textit{See also KY. REV. STAT. ANN. § 383.625(2)(3) (Lexis Supp. 2000) (providing for damages and injunctive relief (except as provided in § 383.505-715) in addition to the remedy provided in (1)).} \textit{See also supra} note 373 (discussing "common areas" and the statute).

\textsuperscript{466} \textit{ELDER, supra} note 2, at 280. \textit{See generally} \textit{Starns v. Lancaster}, 553 S.W.2d 696, 697 (Ky. Ct. App. 1977) (declining "in this case" to join the "modern trend" to adopt the famous rejection-of-categories case in occupier owner situations, \textit{Rowland v. Christian}, 443 P.2d 561 (Cal. 1968)). \textit{See also supra} text accompanying notes 126-38; \textit{Miles}, 664 S.W.2d at 517-18 (quoting from \textit{Milby}, 580 S.W.2d at 728 that the "longstanding rule in Kentucky that a tenant takes the premises as he finds them" and that the "(t)he landlord need not exercise even ordinary care to furnish reasonably safe premises, and he is not generally liable for injuries caused by defects therein"); \textit{Franklin v. Tracy}, 77 S.W. 1112-15 (Ky. 1904) (rejecting the early Tennessee precedent imposing a duty of ordinary care on lessors, as "out of harmony with the overwhelming weight of authority on the subject").

\textsuperscript{467} \textit{See ELDER, supra} note 2, at 281.


\textsuperscript{469} \textit{See ELDER, supra} note 2, at 283 (discussing examples of this no duty rule in application see the list of illustrations).
In 1995 in *Adams v. Miller* the Kentucky Supreme Court revisited this issue in a case involving a suit against a lessor of a single family residence with neither a fireplace screen nor a smoke detector to protect the tenants from fire hazards attributable to fireplaces, the sole source of heat. A burning coal or ember "popped" onto an adjacent mattress and started a disastrous fire, resulting in two dead and a third seriously injured. Among other issues, the court confronted a proposed common law duty of reasonable care by landlords in place of the *caveat emptor*-no duty doctrine, where a devisee takes the premises as he/she finds them. The court tersely recited the arguments proffered in favor of the proposed change — the antiquated common law rule's source in agrarian English law with its sacrosanct view of land, that the law should "reflect the realities of modern life and general principles of tort law" — but reaffirmed the "current state" of Kentucky law as "proper." The court reasoned that existent law provided "adequate remedies when necessary," "(m)ost notably" the "judicially created exceptions" to the non-liability rule. The court declined to judicially "legislate" this proposed modification, a change "more aptly performed" by the General Assembly.

A great volume of Kentucky precedent has delineated this "proper" traditional *caveat emptor* rule and the "judicially created exceptions" thereto. One of the exceptions, involving violations of statute, administrative regulations or ordinances, was also at issue in *Adams* in two linked respects. The first dealt with whether a broadly worded recent statute — "(n)o owner shall fail to furnish and use reasonable adequate protection and safeguards against fire loss, or fail to adopt and use processes and methods reasonably adequate to render such places safe from fire loss" — required installation of smoke detectors. The court majority agreed with the argument that the broad language above did not "clearly and unambiguously" indicate legislative intent that owners of single

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470 908 S.W.2d 112 (Ky. 1995), *rev’d in part*, Giulian v. Guiler, 951 S.W.2d 318, 320-23 (Ky. 1997). In the latter the court disavowed and repudiated *Adams’* denial of a child’s right of parental consortium. *See id.* It did not purport to and cannot be construed as "abrogating" *Adams in toto* despite the headnote in *Giuliani*. *See Giuliani*, 951 S.W.2d at 318. This has been the interpretation elsewhere. *See Schiembeck v. Davis*, 143 F.3d 434, 439 (8th Cir. 1998). Consequently, the remaining aspects of *Adams* reflect the current state of Kentucky law. It is worth noting that the three dissenters did not explicitly challenge the reaffirmation of the traditional rule and rejection of the proposed general duty of reasonable care. *Id.* at 116-19.

471 *See Adams*, 908 S.W.2d at 113-14.

472 *See supra note 470.*

473 *See Adams*, 908 S.W.2d at 115.

474 *Id.*

475 *Id.* at 115-16.

476 *Id.* at 116.

477 *Id.* at 116.

478 *See ELDER, supra note 2, § 5.01, at 279-83.

479 *Id.* § 5.02(a)-(h), at 284-322. *See also supra text accompanying notes 368-86; discussion infra notes 633-38, 661-69 and accompanying text.

480 *See ELDER, supra note 2, § 5.02(g), at 311-15.

family rental facilities were required to install smoke detectors. Had such a requirement been intended, it could have been easily expressed.

Alternatively, appellants contended that the court should recognize judicially what the legislature intended but did not explicitly state and cited the statute requiring the Commissioner of Housing, Buildings and Construction to issue "standards of safety" "based on good engineering practice and principles as embodied in recognized standards of fire prevention and protection, providing for a reasonable degree of safety for human life against the exigencies of fire and panic. . . ." However, this argument contained two major problems. The latter statute did not itself require anything of the landlord defendant. In addition, the regulation promulgated thereunder specifically exempted single-family dwellings from the resultant Fire Prevention Code. Appellants argued in response that the regulatory exemption was in violation of the statutory mandate as to "recognized standards" since national standards required smoke detectors in single-family residences. The court conceded appellant made a legitimate point. However, it was not determinative, as neither the General Assembly nor its delegate, the Commissioner, was required to adopt the national standard. Furthermore, since the Commissioner's rule was unambiguous and not in excess of his delegated power, the court declined the opportunity of "judicially creating this requirement and effectively taking a legislative role."

The court also rejected the argument that the regulatory exception was arbitrary and irrational in light of the small incremental cost of installation. The court found an unimpressive "rational reason" for a single v. multiple family dichotomy. In the former a decision of the person(s) in "physical control" of the premises not to install a smoke detector would not impact other members of the public, a matter of "extreme importance." The latter "distinguishing factor" of course ignores the proposed duty — that the landlord install the smoke detector, not the person in physical control, the lessee. The three dissenters termed the rented dwelling a "fire trap" and the proposed exclusion-excuse in the

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482 See Adams, 908 S.W.2d at 114. Other than the generality of the language, the court may have been concerned with the language in paragraph (2), which referred to "the public or any employee," language not included in paragraph (1). See § 227.440 (1)-(2). This phrase would not seem to encompass lessors generally and might have raised concerns as to paragraph (1)'s panopoly of coverage. Id.

483 See Adams, 908 S.W.2d at 114.

484 Id.


486 See Adams, 908 S.W.2d at 114.

487 Id. at 113-15.

488 Id. at 115.

489 Id.

490 Id.

491 Id.

492 Clearly, the lessor, prior to the lease, as a condition of renewal, or with the consent of the lessee during the lease can install smoke detectors. If the lessee thereafter disconnects them without notice of the lessor, the lessor's obligation is still met, as any technical violation would likely be excused. See Restatement (Second) of Torts § 288A (1965). Under § 288A(2)(b) the defendant does not violate the statute, regulation or ordinance where he "neither knows nor should know of the occasion for compliance." Id.
Fire Prevention Code for single family dwellings "unteenable." No "rational basis" existed for such a distinction, as evidenced by the national standard indicating otherwise.493

More recently, the Court of Appeals in Lambert v. Franklin Real Estate Co.494 applied the landlord non-liability-caveat emptor495 rule in the context of injuries and deaths from electrocution on the leased premises to a tenant and guests of the tenant.496 The court held that under this general rule a tenant "put in complete and unrestricted possession and control" was owed only the duty of disclosure of "known latent defects"497 at the time of the lease, the "fraud" or "deceit" exception.498 Only the same limited duties were owed to the tenant's lawful guests.499 However, this duty of disclosure was limited to a condition "unknown to the tenant and not discoverable through reasonable inspection"500 and did not extend to "clearly visible" power lines "as open and obvious to a tenant as it is to a landlord."501

The Court of Appeals' decision in Lambert is consistent with the extensive case law502 interpreting the "fraud" or "deceit" exception and the "open and obvious"503 danger exception thereto and well exemplifies the draconian rules of the common law in the landlord liability context. This is readily observed by comparing the status of the co-appellee utility company, which was held to a duty of "the highest degree of care to protect all persons in all places they have a right to be."504 The court found that a question of fact existed as to breach of said duty on the facts, which involved deadly wires running overhead in close proximity to a water well in the occupant's yard, a circumstance of which the utility company had actual knowledge.505 The injuries and deaths resulting from contact with or coming in close proximity to the wires while removing a thirty feet section of

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493 See Adams, 908 S.W.2d at 116 (Leibson, J., with Stumbo, J., joining, dissenting); Id. at 117 (Wintersheimer, J., with Stumbo, J., joining, dissenting).


495 See id. at *3.

496 Id. at *2.

497 Id. at *3.

498 See generally ELDER, supra note 2, § 5.02(a), at 284-90.


500 Id. at *3 (quoting from Milby v. Mears, 580 S.W.2d 724, 728 (Ky. Ct. App. 1979)), dis. rev. denied (1979).

501 Id. at *4. The court found no basis for imposing additional responsibilities on the landlord appellees by the "happenstance" that they were also involved in the electric utility business. Id. at n.4. These entities were not the vendors of electricity to the leased premises. Id.

502 See generally ELDER, supra note 2, § 5.02(a), at 284-90.

503 Id. at 288-90 nn.22-38. See also Roland v. Griffith, 163 S.W.2d 496, 498-99 (Ky. 1942) (denying liability when the shock to plaintiff from an exceptionally dangerous fuse box with uninsulated wiring in a bathroom near a washer was an "obvious" condition, not one that was "concealed" or "obscure" in position).


505 Id. at *5 n.5.
pipe from a dysfunctional well raised fact issues of foreseeability under the
“utmost care” standard.\footnote{Id. at *2, 4-5. The court noted that comparative negligence might be raised at trial as to the method used in removing the pipe from the well in proximity to wires. Id. at *5 n.6. Note the difference to the treatment of the landlord-appellees where discoverability by the tenant-guests negated the duty and did not merely diminish damages under comparative negligence. Id.}

Limited Kentucky precedent\footnote{See ELD\'ER, supra note 2, § 5.02(d), at 296-97.} undoubtedly adopts an additional exception to the general rule of landlord non-liability for negligence of tenants in the use of leased premises.\footnote{Id. § 5.02, at 277-83.} The exception applies where lessor has leased the premises for the purpose of admitting the public and the entrant thereon has been injured by a “condition of the land” existing at the time when the lessee takes possession and the landlord “knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons,” the lessor “has reason to expect that the lessee will admit them before the land is put in safe condition for their reception,” and the lessor “fails to exercise reasonable care to discover or to remedy the condition, or otherwise to protect such persons” against harm from the condition.\footnote{See RESTATEMENT (SECOND) OF TORTS \S 359 (1965).}

In the leading Kentucky case of \textit{McDonald} v. \textit{Talbott},\footnote{447 S.W.2d 84, 85-86 (Ky. 1969). The case can also be viewed as a “common areas” case. See infra note 637 (discussing the “common areas” doctrine in the context of snow and ice accumulations). See also supra text accompanying notes 368-86.} a patron of a beauty shop was bitten while traversing an area near another tenant’s residence en route from a parking lot provided by defendant to a co-tenant’s beauty salon. Plaintiff-invitee of the beauty salon was bitten by a dog owned by the other tenant’s non-resident regular visitor-daughter.\footnote{See \textit{McDonald}, 447 S.W.2d at 84-85.} The court applied an “expanded variation”\footnote{See ELD\'ER, supra note 2, at 296.} of the open-to-the-public exception imposing liability for injuries from a condition caused by a tenant different from the one whose premises were open to the public. Furthermore, the court did not discuss and apparently was not concerned with whether the dangerous condition was existent at the time of the lease or developed subsequent thereto.\footnote{Id. at 296-97 & n.4.} The court found an issue of liability in light of evidence of knowledge of the dog’s vicious propensities under the accepted rule that “one who owns premises to which the public is invited is under a general duty to exercise ordinary care to keep those premises in a reasonably safe condition.”\footnote{\textit{McDonald}, 447 S.W.2d at 86.}

A later Kentucky appellate decision applying the \textit{McDonald} open-to-the-public precedent \textit{Ireland} v. \textit{Raymond}\footnote{796 S.W.2d 870 (Ky. Ct. App. 1990).} involved an attack by a tenant’s pit bulldog on plaintiff-appellant-neighbor on either a public thoroughfare or on the injured party’s own land, \textit{not on the premises leased} to the tenant-dog owner. The trial court found for the landlord on the ground that the injuries were not received on the leased premises, opining that a different conclusion would have
arisen had the attack occurred thereon. Apparently, that would have given the landlord the requisite control required by *McDonald* with concomitant imposition of a duty of care. The Court of Appeals seems to have adopted this view. It discussed and distinguished a California decision, *Uccello v. Laudenslayer*, on three grounds — plaintiff-child was an “invitee” of the tenant, the attack occurred on the leased premises, and the landlord knew of the dog’s vicious propensities. The *Ireland* court found no basis for liability where the dog bite occurred “under circumstances over which appellees had no control” and where no scienter as to the dog’s viciousness had been shown.

The result in *Ireland* is correct but the reasoning flawed. An analysis of *Uccello* demonstrates that it does not reflect Kentucky law or policy. *Uccello* imposed a duty based on two lines of precedent supporting a duty of reasonable care regarding an attack on leased premises not open to the public. It relied heavily on the famous California decision of *Rowland v. Christian*, rejecting the common law trichotomy in favor of a general duty of reasonable care, and recently expressly repudiated by the Kentucky Supreme Court in cases of lessors of land. The California court also relied on the traditional “nuisance” exception, imposing liability as to those injured outside the premises, and the concomitant duty of the lessor to control the risks of the lessee to such other landowners by not renewing the lease. The non-renewal-control concept was found to be likewise applicable to deter injuries on non-open-to-the-public land where the child injured was an invited guest of the lessee.

Kentucky has undoubtedly adopted the outside the premises exception but has not and likely would not extend a comparable duty on premises not open to the public. Such a development would constitute a major incursion on the rule of landlord non-liability for negligence of the lessee on the devised premises. The “nuisance” exception and duties imposable thereby reflect a far different

516 See id.
518 See *Ireland*, 796 S.W.2d at 871-72.
519 Id. at 872.
520 See *Uccello*, 118 Cal. Rptr. at 744 n.2, 745, & 747-48.
521 443 P.2d 561 (Cal. 1968).
522 See id. at 563-69.
523 See *Elder*, supra note 2, § 1.01, at 5-7, § 5.01, at 282 n.15.
524 See supra text accompanying notes 463-77.
525 See *Uccello*, 118 Cal. Rptr. at 746-47.
526 Id.
527 See *Elder*, supra note 2, § 5.02(h), at 316-22. Limited precedent has extended lessor liability to a scenario where the lessor renewed the lease after lessee had “erected or maintained” a nuisance on the leased premises. See *East End Improvement Co. v. Sipp*, 14 Ky. L. Rptr. 924 (1893). See also *RESTATEMENT (SECOND) OF TORTS* § 379 cmt. e (1965); *RESTATEMENT (SECOND) OF TORTS* § 837 cmt. e, g, i (1979); *Elder*, supra note 2, at 317 n.5.
528 See *Elder*, supra note 2, § 5.01, at 279-83.
529 Id. at 280 n.12.
philosophy than on premises injuries, i.e., that neither landlord (nor lessee-owner-occupant for that matter) is allowed to endanger persons outside the premises, whether on public or private land. Moreover, Kentucky law, which has retained the common law trichotomy with a tepid gloss, would treat an invited guest not as an "invitee" but only as a "licensee"-social guest to whom the lessee-occupant-owner would owe only limited duties.

Undoubtedly, the Uccello approach makes sense, as does Rowland v. Christian generally, and is consistent with Kentucky's eloquent espousal of a "universal" duty of care in the famous case of Grayson Fraternal Order of Eagles v. Claywell. However, that approach has not been followed as a basis for disestablishing the common law trichotomy, a view adopted by about half of American jurisdictions in some form, and has been expressly rejected in a recent landlord liability case reaffirming the traditional non-liability rule. Until changed, Kentucky courts are obliged to follow traditional law.

The "Firefighter's"/"Police Officer's" Rule

In 1986, in Hawkins v. Sunmark Industries a closely divided (4-3) Kentucky Supreme Court applied the "firefighter rule" to bar liability against three defendants - an absentee commercial lessor (and designer-builder of the gas station), occupant-lessee of a gas station and a backing motorist-in a case where firefighters were injured when the poorly designed and affixed pump precipitated a "fire bomb" "holocaust" enveloping firefighters called to the scene of the fire. A final party, the manufacturer of the defective gas dispenser

530 Id. at 319-20, 322. In the words of Kentucky's leading case, Green v. Asher Coal Mining Co., 377 S.W.2d 68, 73 (Ky. 1964), a lessor "may consent to having his own land practically destroyed, [but] he may not knowingly expose neighboring lands to injury likely to ensue therefrom and claim immunity from wrongdoing by virtue of a lease." This is but an application of the "ancient and just" maxim sic utere tuo et alienum non laedas, i.e., "the duty of every man so to use his own property as not to injure the person or property of others." Shell v. Evarts, 178 S.W.2d 32, 35 (Ky. 1944) (applying the rule in a licensor-licensee case).

531 See Elder, supra note 2, § 6.01, at 327-42, § 6.03, at 346. See also Leibson, supra note 2, § 10.68.

532 See supra text accompanying notes 127-39 and notes 456-77.

533 See supra text accompanying notes 127-33.

534 See Elder, supra note 2, at 199 & n.14, at 201-02. See also supra notes 88-89, 114, & 140-41.

535 See Elder, supra note 2, at 203-10. See also supra text accompanying notes 88-154.

536 See Elder, supra note 2, § 1.01, at 5-7, § 5.01, at 279-82 & n.14; See also discussion supra text accompanying notes 127-39 and notes 456-79.

537 736 S.W.2d 328 (Ky. 1987).

538 See supra text accompanying notes 138-39.

539 727 S.W.2d 397 (Ky. 1986). See also Elder, supra note 2, at 211-17.

540 See Hawkins, 727 S.W.2d at 400-01. Five years later the Supreme Court in a unanimous opinion approved this threesome as all encompassed within the class of people to be encouraged to summon assistance from the fire department "rather than restrained from doing so by concern over personal liability to the firefighters who would respond." See Sallee v. GTE South, Inc., 839 S.W.2d 277, 280 (Ky. 1992).

541 See Hawkins, 727 S.W.2d at 398.

542 Id. at 401.
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(and the only party not petitioning for rehearing), was left holding the proverbial bag — the only party remaining in the suit. Justice Leibson, in a biting dissent, suggested that the dichotomy between lessor-designer-builder and manufacturer raised non-frivolous questions of denial of equal protection under section 59 of the Kentucky Constitution.

Five years later Justice Leibson wrote an opinion for a unanimous court severely circumscribing the panoply of coverage of this doctrine in the case of Sallee v. GTE South, Inc. In that case a paramedic for the city-county fire department was injured "during the course of his employment" when he tripped in an underfilled trench created by defendant-respondent's employees in laying underground cable in a public street while responding to a call to "treat and transport" the victim of an assault. Appellant-paramedic appealed the dismissal of his claim and the Court of Appeals' affirmance, claiming that the "firefighters rule" was not a "general rule" abrogating claims for all line of duty injuries but a "limited public policy exception" inapplicable to the facts at hand. The Supreme Court agreed and reversed and remanded.

The Supreme Court acknowledged the "firefighter's rule" as a "common law rule of longstanding" but viewed it against Kentucky's traditional posture of

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543 Id. (Leibson, J., with Stephens, J., joining, dissenting). The remaining defendant, the manufacturer, was "trapped" into being the only defendant by deciding against a baseless petition for rehearing. Id.

544 Id.

545 Sunmark, as commercial owner-landlord, was not an entity induced to call the fire department "uninhibited by any concern for potential liability." Id. at 402. The non-deterrence rationale was thus "completely lost" as to it. Id. Furthermore, as to both the manufacturer and the commercial owner in its capacity as builder-designer of the pumping station, the case was "essentially a products liability case." Id. at 402-03 (Leibson, J., with Stephens, C.J., joining, dissenting). A later unanimous opinion by Justice Leibson quoted approvingly from Hawkins' treatment of the manufacturer as outside the panoply of the "firefighter's rule" coverage. See Sallee v. G.T.E. South, Inc., 839 S.W.2d 277, 280 (Ky. 1992). Note that unlike Kentucky, the majority view of the precedent has applied the "firefighter's rule" to cases involving a product creating a fire or enhancing its damage. See Dobbs, supra note 2, at 778.

546 839 S.W.2d 277 (Ky. 1992).

547 See id. at 278. The court noted that the city-county government intervened as payor of worker's compensation, seeking reimbursement. Id. at 278 n.1.

548 Id. at 278.

549 In addition to the non-deterrence rationale discussed in the text, and almost exclusively relied on in Sallee, other policy arguments were briefly discussed. See infra text accompanying notes 556-72 and notes 595-600. One was a public-policy based on assumption of risk of "the ordinary risks of... a dangerous occupation." Id. (quoting from Hawkins, 727 S.W.2d at 400). This is a form of "pure" or "strict" assumption of risk despite Hawkins' concession that Kentucky limited such to the contractual or employment context. See Hawkins, 727 S.W.2d at 400. The Hawkins decision responded to the "no contract" other than with the government employer view by noting that firefighters were paid from the public fiscal funds, which "in some measure" are paid by the property owners the firefighter is employed to protect, "intended beneficiaries" of the policy. Id. Hawkins also discussed but disavowed reliance on the traditional premises liability doctrine treating firefighters as licensees. Id.

550 See Sallee, 839 S.W.2d at 278. The court noted that due to the "firefighter's rule" issues of defendant-appellee's negligence and contributory negligence had not been resolved. Id. See also infra note 555 (discussing the issue of comparative negligence in a "rescue doctrine" situation).

551 See Sallee, 839 S.W.2d at 278 (quoting from Hawkins, 727 S.W.2d at 399). This statement was made in the context of the majority's rejection of a challenge to the rule under a "jural rights" analysis under § 14 of the Kentucky Constitution. See also Hawkins, 727 S.W.2d at 399.
"carefully scrutiniz[ing]"\(^{552}\) and "narrowly circumscrib[ing]"\(^{553}\) claims of privilege defeating application of general tort principles. Viewed in this light, the "firefighter's rule" was limited to injuries caused by "negligence in the creation of the very occasion for his engagement, the precise risk which the public pays him to undertake."\(^{554}\) This immunity from the rules of general tort liability (including the "rescue doctrine")\(^{555}\) was based in a policy that those requiring protection need to be induced to summon the "appropriate public protection agency"\(^{556}\) "free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk."\(^{557}\) Accordingly, "(p)ublic employees such as firefighters, police officers "and the like" responding to the created risk and injured by that "specific risk" were to be barred from suing the creator thereof.\(^{558}\) This defense was, however, unavailable to the Sallee defendant-appellee for two linked reasons. It was not in the class of defendants

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\(^{552}\) See Sallee, 839 S.W.2d at 278. See also Nazareth Literary & Benevolent Inst. v. Stephenson, 503 S.W.2d 177, 179 (Ky. 1973) (denying a privilege from discoverability of internal documents dealing with professional activities of a physician).

\(^{553}\) See Sallee, 839 S.W.2d at 278. Protection by immunizing the negligent party was justified only "where protecting the public makes it essential to do so."\(^{Id.}\)

\(^{554}\) Id. (emphases added) (quoting from the court's "seminal" precedent, Buren v. Midwest Industries, Inc., 380 S.W.2d 96, 98 (Ky. 1964)). Note that a co-creator of the risk need not do so contemporaneously with other concurrent tortfeasors. As Hawkins said in extending protection to the owner-commercial landlord, "(i)t matters not that the negligence complained of occurred immediately before the fire or remotely during the time when the owner was constructing the building."\(^{Hawkins, 727 S.W.2d at 401.}\)

\(^{555}\) See Waibel v. Sprecher, 824 S.W.2d 887, 888-89 (Ky. Ct. App. 1992). The case involved the "rescue doctrine" and a jury found that a fire caused in appellees' house and which precipitated plaintiff-appellant's rescue and injuries involved no breach of the standard of reasonableness.\(^{Id.}\) In interesting and important dicta the court found no error in the trial court's instruction applying comparative negligence principles to the situation of a rescuer.\(^{Id.}\) Citing a Florida decision on point, Ryder Truck Rental, Inc. v. Korte, 357 So.2d 228, 230 (Fla. Dist. Ct. App. 1978), the court agreed that the "rescue doctrine" as a method of circumventing the contributory negligence bar under the common law was outmoded.\(^{Id.}\) In dicta, the court held that comparative negligence applied, with the "rescue doctrine," supplying the basis for a finding of proximately caused injury by the negligent source of the peril to the rescuer.\(^{Id.}\)

\(^{556}\) See Sallee, 839 S.W.2d at 279-80. The court noted that this non-deterrence from seeking assistance rationale was of importance both to the creator of the risk and the public in general.\(^{Id.}\) at 279. See also infra text accompanying notes 598-600.

\(^{557}\) See Sallee, 839 S.W.2d at 279 (emphases added).

\(^{558}\) Id. Only those categories of "public employees" barred by the "firefighter/police officer" rule were mentioned.\(^{Id.}\) What is covered by the "and the like" grouping is unclear.\(^{Id.}\) However, the class is limited by the qualification that they, like fire fighters and police officers, are only barred where they, "as an incident of their occupation, come to a given location to engage a specific risk . . . and . . . only [as] to that risk."\(^{Id.}\) (emphasis in original). See also Dobbs, supra note 2, at 775-79 (discussing persons to whom the doctrine is applicable). Note the business invitee category has been broadly interpreted in Kentucky and elsewhere to include government functionaries involved in safety or building inspections and revenue collection activities. \(^{Id.}\) at 776-77. See also Creech v. Heaven Hill Distilleries, Inc., 497 S.W.2d 934, 935-36 (Ky. 1971) (liquor inspector); Anderson & Nelson Distilling Co. v. Hair, 44 S.W. 658, 659 (1898) [same]; Bowers v. Schenley Distillers, Inc., 469 S.W.2d 565, 566-67 (Ky. 1971) (in house tax assessor for ATF of IRS).
owners, occupiers and others similarly situated — who created the risk and needed protection and the risk was not one the paramedic was “called upon to engage, but by a risk different in both kind and character.” Thus, two of the “three prongs necessary” for the rule’s application were unmet.

In other words, the firefighter’s rule was limited to the “personal risk inherent in dealing with the emergency which necessitated his presence” and only to the particular hazards related to such negligently created risks. By definition, then, risks unrelated to the condition precipitating the professional rescuer’s presence would seem to be outside the rule. Thus, presumably even where a covered defendant creates a risk of injury, e.g., a fire from smoking in bed, a professional rescuer arriving for such purposes would not be barred from suing for conditions unrelated to the risk of fire, such as defects or dangerous conditions on the premises.

A number of cases elsewhere follow this approach. Others disagree and protect defendants “not only when the officer is injured by the very risk that necessitated the officer’s presence but also a range of associated risks.” Although injured in the course of employment by a risk that was neither unforeseeable nor clearly unassumed by the professional rescuer,

559 See Sallee, 839 S.W.2d 279. The court broadly defined this group to include owners, occupiers and “persons otherwise fitting the description of those who, in the situation presented, need to be protected,” so that they would summon “the appropriate public protection agency.” Id. at 279-80. The court specifically rejected any limitation to owners and occupiers, a view consistent with the overwhelming tenor of the case law. See Dobbs, supra note 2, at 769-72 & n.7. See also Fletcher v. Illinois Cent. Gulf R.R. Co., 679 S.W.2d 240, 243 (Ky. Ct. App. 1984), dis. rev. denied (1984). The rule originated in premises liability concepts but the fact that plaintiff-appellant-police officer was not injured on defendant-appellees’ premises was of “no significance.” Id. Indeed, the Sallee court provided an illustration of a person having no discernible claim to occupier or owner status, i.e., the drunk driver whose incident or accident lead to injuries to a police officer at the site via the intervention of a negligent third party. See Sallee, 839 S.W.2d at 279. The creator of the incident, presumably on or alongside a public highway, was covered by the rule. Id.

560 Sallee, 839 S.W.2d at 279. Presumably, had the paramedic been injured while engaged in providing emergency medical assistance to the injured victim, he would have been barred from suing the victim (assuming arguendo, the victim was negligent in allowing himself or herself to get in that predicament) as to risks of the same “kind and character.” Id. The cases are divided as to paramedics and the like being covered by the rule. See Dobbs, supra note 2, at 777. However, the “kind and character” requirement does not, of course, mean that the exact degree of risk or manner of injury need be specifically foreseen for the rule to apply. For example, in Hawkins, the gas dispenser loosened from its base started a “small fire.” See Hawkins, 727 S.W.2d at 398. When the firefighters approached with a chemical extinguisher, the small fire exploded into a “fire bomb” with a “flame thrower effect” because of its design and construction. Id.


562 See Degener v. Hall Contracting Corp., 27 S.W.3d 775, 777-81 (Ky. 2000). A co-defendant settling with police officers for bomb injuries suffered during disarming as a result of negligence in storage of stolen dynamite had a right of indemnification against the bomb-makers, the “active wrongdoers.” Id. See the critique infra in the text accompanying notes 855-99.

563 See Dobbs, supra note 2, at 773 & nn.5-8.

564 Id.

565 Id. at 773-74.

566 Id.
the Sallee variation of the rule apparently applies only where such persons "come to a given location to engage a specific risk . . . and only to that risk." 567

The Kentucky Supreme Court in Sallee also makes it clear that a professional rescuer summoned to the scene is precluded from suing only the creator of the risk, not third parties whose negligence comes into play after the rescuer's arrival to cause injury to the rescuer. This is made quite clear by the court's express repudiation 568 of the trial judge's suggestion that a police officer injured by another driver while investigating a drunk driving incident or accident would be barred from suit. 569 That suggestion "painted with too broad a brush," 570 as the "firefighter's rule" would only immunize persons involved in the drunk driving incident or accident, not the negligent driver who injured the police officer. 571 The officer, like the firefighter before the court, "assumed the risk that occasioned their presence, but not a further risk from a different source." 572

A federal decision, Workman v. Columbia Natural Resources, 573 achieved a result consistent with Sallee but without citing it in its brief analysis of the "firefighter rule." This case involved litigation for injuries to a state forestry employee who ruptured defendant's unmarked gas pipeline in a rural area while bulldozing a "firebreak" to impede spread of a forest fire. 574 Citing only Kentucky's "seminal" 575 decision, 576 the court correctly rejected the "firefighter's rule" on the facts, concluding that the rule "normally applied" 577 where the injured firefighter sued the particular entity that negligently caused the fire injuring the firefighter. In the case before the court, however, no claim had been made that defendant "caused" the fire. 578

The Sallee opinion made it clear that some earlier case law in Kentucky was rightly decided on the ground that the firefighter or police officer in question was injured in responding to a hazard created by the defendant's negligence and the risk resulting in injury arose from the "specific risk" they were summoned to encounter. Thus, the police officer injured from inhaling toxic fumes while engaged in evacuations as a result of defendant's negligent train derailment was barred from suing the railroad, 579 and firefighters were correctly barred from

567 See Sallee, 839 S.W.2d at 279.
568 Id.
569 Id. (quoting from the trial court's opinion supporting summary judgment).
570 Id.
571 Id. Of course, absent the "firefighter rule," the original defendant would be liable if such a subsequent negligent act was foreseeable at the time of the negligently created risk. See infra text accompanying notes 596-97.
572 See Sallee, 839 S.W.2d at 279.
574 See id. at 639. The source of the duty was based in the court's adoption of a "universal rule of negligence," with the issue of foreseeability of the firefighter's injuries in a rural area nine-tenths of a mile from a road being a question for the jury. Id. at 641-42.
575 See Sallee, 839 S.W.2d at 278.
576 See Workman, 864 F. Supp. at 641 n.1 (citing Buren v. Midwest Industries, Inc., 380 S.W.2d 96, 98 (Ky. 1964)).
577 Id.
578 Id.
suing the three parties — commercial lessor, lessee and car operator — for explosion-related injuries resulting from responding to the hazard created by the trio's concurrent negligence in creating the explosion hazard. 8

On initial, superficial analysis, the Sallee opinion's reiterated emphasis on the raison d'être of the "firefighter's rule," i.e., that the firefighter or police officer was barred from suing for injuries resulting from responding to a risk created by defendant, might raise doubts about the continuing viability of basic aspects of Buren v. Midwest Industries, Inc. 581 Buren barred firefighters from suing based on existing fire code violations which permitted "the more rapid spread of a fire" and the owner-occupier's arguably "unreasonable and negligent" delay in summoning firefighters. However, it is quite doubtful that Sallee intended or contemplated such a distinction between creation of the danger on the one hand and enhanced danger through failure to maintain the premises or by delay. The Buren court expressly rejected such distinctions as having no "reasonable" or "logical" basis. The Sallee opinion repeatedly cited to and quoted from Buren and characterized it as Kentucky's "seminal case," thus leaving no reason to conclude that its conclusions were no longer authoritative.

In sum, the Sallee opinion rejected the broad, almost all-encompassing "inherent risk" doctrine adopted elsewhere, a doctrine that largely abrogates any common law protection for course of employment injuries in favor of a much more limited immunity. This limited immunity applies to situations where the summoner of police officers or firefighters creates the need for firefighter or police officer presence and where the injuries suffered are the "specific risk" that such firefighter or police officers is engaged to encounter. In addition to these unrelatedness and independent subsequent act exceptions, the Sallee decision also specifically referenced the "unusual hidden hazard" and "continuing 'active' negligence" exceptions and made it clear that these were not the sole bases for circumventing the rule. Clearly, Sallee's stringent limitations foreshadow the

rev. denied (1984). See also Sallee, 839 S.W.2d at 279.

580 See Hawkins v. Sunmark Industries, Inc., 727 S.W.2d 397, 399-401 (Ky. 1986). See also Sallee, 839 S.W.2d at 278, 280.

581 380 S.W.2d 96 (Ky. 1964).

582 See id. at 98-99.

583 Id. at 99.

584 Id. at 98.

585 Id. at 99.


587 Id. at 278.

588 See supra note 562-67 and accompanying text. See generally DOBBS, supra note 2, at 773 & nn.10-12.

589 See DOBBS, supra note 2, at 773. "Although these risks did not occasion the officer's presence, they were a part of the bundle of risks associated with the particular operation and that was enough. In particular, when the injury occurs on the defendant's land, the officer assumes the risks that portions of the premises not open to the public may be in dangerous condition." Id.

590 See supra text accompanying notes 562-67.

591 See supra text accompanying notes 568-72.

592 See Sallee, 839 S.W.2d at 279 n.2.
court's willingness to contemplate others intimated in Kentucky precedent and the law in other jurisdictions.

In sum, the Sallee opinion offers an extremely mild endorsement of the "firefighter's rule" in a "narrowly circumscribe(d)" form and evidences a clear willingness to graft other exceptions thereon. Maybe it is time to rethink the doctrine in toto and apply the "universal" duty of reasonable care. As Kentucky's "seminal" case conceded, injuries and loss of life in firefighting are "reasonably foreseeable consequences" of negligent creation of a fire or a failure to keep premises in a reasonably safe condition. Kentucky's strong tradition of limiting immunity "except where protecting the public makes it essential to do so" would seem to call into question the "firefighter's rule," particularly the exceedingly weak substratum upon which Sallee hung its reformulation of the "firefighter's rule," i.e., the non-deterrence of summoning assistance, a rationale the late Dean Prosser disparaged as "surely preposterous rubbish." The Kentucky Supreme Court should consider doing what a few other jurisdictions have done (primarily by statute) and abolish the rule (and the necessary and expanding circumvention exceptions engendered to obviate some of the more flagrant forms of injustice) altogether.

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593 See Elder, supra note 2, at 215-17. Indeed, Grayson, the famous vendor liability case discussed involved a collision with a police car, injuring one officer and killing another. See Grayson Fraternal Order of Eagles v. Claywell, 736 S.W.2d 328, 329 (Ky. 1987). The circumstances of the accident are unclear. Id. Presumably, it occurred while the officers were on patrol or otherwise involved in "routine duties." Id. See also infra text accompanying notes 701-37. Many cases deny application of the "firefighter's rule" in such circumstances. See Labrie v. Pace Membership Warehouse Inc., 678 A.2d 867, 869-72 (R.I. 1996); Cameron v. Abatiell, 241 A.2d 310, 311 (Vt. 1968); Cook v. Demetrakas, 275 A.2d 919, 922-23 (R.I. 1971) (following Cameron but finding duties non-routine); Gray v. Russell, 853 S.W.2d 928, 929-31 (Mo. 1993); Winston v. BMA Corp., 857 S.W.2d 541, 542-43 (Mo. Ct. App. 1993). In any event, the combination of limitations adopted by Sallee discussed in the text supra would achieve the same result in most such cases.

594 See Dobbs, supra note 2, at 769-79.

595 See Sallee, 839 S.W.2d at 278. Dobbs lists Kentucky via Sallee as one of a number of jurisdictions "counsel(ing) a cautious or narrow use of the rule." See Dobbs, supra note 2, at 772 & n.29.

596 See Sallee, 839 S.W.2d at 278.

597 See Buren v. Midwest Industries, Inc., 380 S.W.2d 96, 98 (Ky. 1964).

598 See Sallee, 839 S.W.2d at 278 (emphasis added).

599 Id. at 279. The court listed the following as one of "three prongs necessary" (emphases added) to apply the rule: "The purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk." Id.

600 See Prosser and Keeton, supra note 2, at 431. See also Christensen v. Murphy, 678 P.2d 1210, 1217 (Or. 1984); Bath Excavating & Const. Co. v. Wills, 847 P.2d 1141, 1148 n.14 (Colo. 1993); Harris v. Atchison, T. & S.F. Ry. Co., 538 F.2d 682, 686 n.5 (5th Cir. 1976); Waggoner v. Troutman Oil Co., Inc., 894 S.W.2d 913, 917 (Ark. 1995) (Roof, J., dissenting); Hannah v. Jensen, 298 N.W.2d 52, 56 n.2 (Minn. 1980) (Scott, J., dissenting).

601 See Dobbs, supra note 2, at 772 & n.27, 33. Others have substantially limited it by statute id. nn. 31,33 or declined to recognize it at all. Id., nn.28,30.
LIABILITY OF OWNERS, OCCUPIERS AND LESSORS FROM CRIMINAL ATTACKS

In a pivotal case issued at the beginning of the decade, Britton v. Wooten, the Kentucky Supreme Court revisited a bald assertion made over eighty years earlier in the infamous case of Watson v. Kentucky & Indiana Bridge and R.R. Company. Watson involved the issue of whether a defendant railway would be liable for a gas spill negligently caused by a derailment where a factual question existed as to whether the gas was subsequently maliciously ignited. The court determined that a defendant was “not bound to anticipate the criminal act of others by which damage is inflicted and hence is not liable” — only the malicious match-thrower, not the negligent derailer, could be held liable.

The Britton court reassessed the continuing vitality of Watson’s knee jerk dogma in the context of an acknowledgment that “[t]his archaic doctrine has been rejected everywhere.” It specifically confronted the suggestion that an act of arson igniting negligently stacked, combustible trash rendered tenant’s negligence only an “occasion of an injury” and not a proximate cause by analyzing section 448 of the Restatement (Second) of Torts, which states that defendant’s negligent conduct does not result in liability where it “only creates ‘a situation which afforded an opportunity’ for another to commit on intentional tort or crime . . . .” The court rejected this non-liability argument, noting the “all important caveat” thereto — the mere “opportunity rule applied unless the actor [the defendant] at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created and that a third person might avail himself of the opportunity to commit such a crime.” Two

602 817 S.W.2d 443 (Ky. 1991).
603 126 S.W. 146 (Ky. 1910).
604 Id. at 151.
605 Id. at 150-51.
606 See Britton, 817 S.W.2d at 449.
607 Id. at 448-49.
608 Id. at 449 (quoting Restatement (Second) of Torts § 448 (1965)).
609 See Britton, 817 S.W.2d at 449.
610 Id. (quoting Restatement (Second) of Torts § 448 (1965) (emphasis added)).
other sections, 449 and 302B, were cited in support of rejection of "any all-inclusive general rule" equating third party criminal acts with the loss-shifting doctrine of superseding cause. The court upheld liability for negligence where defendant's conduct was a "contributing cause, wherein the immediate cause is a subsequent criminal act." Under such a view, a criminal act (arson), which ignited trash negligently allowed to accumulate, was "not a superseding cause under any reasonable application of tort law."

The Britton court relied in part on authoritative commentary characterizing as "[p]erhaps the most significant trend . . . in recent years . . . the increasing liberalization in allowing the wrongs of other people to be regarded as foreseeable where the facts warrant that conclusion if they are looked at naturally and not through the lens of some artificial archaic notion." This reformulated focus in Britton set the scene for three Kentucky decisions involving on-premises criminal attacks in the last decade. As a backdrop it should be noted that prior modern Kentucky case law was quite limited on the issue of liability for third party intentional or criminal acts. In one decision, the court affirmed a drive-in theater-invitor's duty to use reasonable care to protect a patron from assaultive other patrons but found that "smarting around," "bothering some girls" and "looking for boys in leather jackets" did not suffice for reasonable anticipation of

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611 Restatement (Second) of Torts § 449 (1965). "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby" id. (emphasis added). In a comment the drafters state: "To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity." Id. at cmt. b. This obligation exists, however, only where "the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct . . ." Id. at cmt. a.

612 Restatement (Second) of Torts § 302B (1965). "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal" id. (emphasis added). Among the situations where the reasonable person is required to anticipate such misconduct is where a relation imposes a duty of protection, such as in the case of the innkeeper-guest or invitor-invitee relation. Id. at c(B) and illus. 4.

613 See Britton, 817 S.W.2d at 449 (emphasis added).

614 Id. at 452. Note that the comparative negligence/several liability rule in Ky. Rev. Stat. Ann. § 411.182 (Michie 1992), has been applied where one co-defendant was negligent and the other was an intentional criminal tortfeasor. See Roman Catholic Diocese v. Secter, 966 S.W.2d 286, 288, 291 (Ky. Ct. App. 1998) (upholding an apportionment of 25% to the priest-abuser and 75% to the negligence diocese-employer). However, a later case found Roman Catholic Diocese not inconsistent with a secondarily liable negligent tortfeasor being allowed to seek total indemnification against a primarily liable "active" wrongdoer. Roman Catholic Diocese was construed as not involving an indemnity claim and as involving in pari delicto joint tortfeasors. See Degener v. Hall Contracting Corp., 27 S.W.3d 775, 780-81 (Ky. 2000). Degener followed in part Crime Fighters Patrol v. Hiles, 740 S.W.2d 936, 937-41 (Ky. 1987), where the court found that a business establishment and its security firm were both entitled to a complete indemnity as against the perpetrator of a criminal assault on a patron. Indemnity, not contribution applied, as the former parties who failed to prevent the assault were not in pari delicto with the assailant. See Crime Fighters Patrol, 740 S.W.2d at 937-41.

615 See Britton, 817 S.W.2d at 451 (quoting Harper, James & Gray, supra note 2, at 495-96 (quote synthesized from original court text)).
an attack on plaintiffs, who were not so attired. In another case the court supported a claim for negligence in failing to detect and prevent boisterous “flipping” of patrons at a public swimming pool in violation of a standard strictly enforced at other pools. A third, more directly relevant decision upheld a claim by a victim of violence against a tavern owner where the sole employee on duty acted dilatorily in failing to ensure that the initiators of a first attack left or in failing to call the police.

The latter precedents are distinguishable from the single modern Kentucky decision refusing to impose upon the business invitor the “additional duty” to not enhance risks of criminal misconduct by “failing to comply with the demands of an armed robber.” Under these unusual facts the Court of Appeals held that liability for mere “verbal resistance” would force proprietors into “offering total acquiescence to armed robbers for fear of civil litigation which, in effect, furnishes a criminal with an additional coercive advantage.”

In the first of a trio of recent cases in the last decade involving on-premises criminal attacks, Waldon v. Housing Authority of Paducah, the Court of Appeals rejected the aforesaid no duty to acquiesce in criminal demands

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617 See Stillwell v. City of Louisville, 455 S.W.2d 56, 57-59 (Ky. 1970). See Bartley v. Childers, 433 S.W.2d 130 (Ky. 1968) (holding that defendant’s failure to prevent “horseplay” was a factor in finding a commercial swimming facility breached a duty of care). See also the horseplay-licensee cases discussed infra text accompanying notes 650-60, note 763. The court cited to and relied in part on RESTATEMENT (SECOND) OF TORTS § 344 (1965), imposing liability for the failure to use reasonable care by a “possessor of land...open to the public...for physical harm caused by the...intentionally harmful acts of third persons....” Id. A duty arises normally only where the possessor “knows or has reason to know that the acts of the third person are occurring or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.” Id. at cmt. f.
618 See Heathcote v. Bisig, 474 S.W.2d 102, 103-04 (Ky. 1971). Compare Isaac v. Smith, 5 S.W.3d 500, 501-03 (Ky. 1999), where a shooting at a bar arising from an earlier “brief shouting match” was found unforeseeable as a matter of law. See infra text accompanying notes 746-800. Compare Thoni’s Oil Magic Benzol Oil Stations, Inc. v. Johnson, 488 S.W.2d 355, 357-58 (Ky. 1972) (approving employer liability where “conditions of employment...invite attack upon employees by creating highly unusual and unreasonable exposure to danger without the employment of reasonable protective measures,” where the employer “greatly and unreasonably increased the risk,” and injury to the employee as a result was not merely possible but “likely or probable.” A case had not been presented under this set of standards), with Ray v. Hardee’s Food Systems, Inc., 785 S.W.2d 519, 520 (Ky. Ct. App. 1990) (finding a claim stated where an employer allegedly ignored a threat communicated to a shift supervisor — that a third person was coming to kill plaintiff-appellant-employee with a gun — in violation of the employer’s own specific safety rules for employee safety, which required the summoning of police immediately where there were “threats of violence or disturbances of peace.”). Thoni was distinguished as not involving, as in the case before the court, a violation of employee safety rules and “an impending threat of harm.” Id. The workers’ compensation remedy was no bar, as the parties agreed the injury was outside the scope of employment. Id. at n.1.
precedent and imposed liability on a public housing authority, where a tenant was shot and murdered “outside her residence.” The court first confronted and rejected any reliance on section 411.155. Section 411.155 immunizes any “person or entity” from “damages of any kind resulting from injuries to another person sustained as a result of the criminal use of any firearm by a third person” absent either a conspiracy or the defendant’s “willfull” aiding, abetting, or causing the commission of the criminal act using the firearm. The court delved into the “legal morass” of the “jural rights” doctrine and found that the statute “patently offend[ed]” sections 14 and 54 of the Kentucky Constitution. It also rejected the argument that the statute merely codified existing common law, presumably the law of proximate causation.

The Waldon court cited and summarily approved Grayson’s general duty of care by “every person to every other person” and then followed sections 302B and 449 of the Restatement (Second) of Torts. Accordingly, issues of

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621 The acquiescence cases have often and correctly been treated differently from other foreseeable criminal attack cases. See Dobbs, supra note 2, at 879-80 & nn.24-25. However, Waldon relied solely on Adkins’ indication that Kentucky law had not adopted certain Restatement (Second) of Torts rules, including §§ 302B and 449. See Waldon, 854 S.W.2d at 779.

622 See Waldon, 854 S.W.2d at 778. This factor was critical. See infra text accompanying notes 633-38 and notes 664-65. Note that the city had also been sued. The court rejected vicarious liability in light of the “separate corporate identity” of the housing authority. Waldon, 854 S.W.2d at 780. The court also acknowledged that a city housing authority was not immune from tort liability under Kentucky precedent, see Calvert v. Investments, Inc. v. Louisville & Jefferson County Metro. Sewer Dist., 805 S.W.2d 133, 135-39 (Ky. 1991) (holding that a metropolitan sewer district was liable as a municipal corporation and not immune under state sovereign immunity). However, plaintiff’s only articulated claim of negligence by the city was an amorphous allegation of failure of police protection. See Waldon, 854 S.W.2d at 780. This was insufficient to sustain a claim under Kentucky law unless a “special duty” was owed the particular injured party. Id. The court cited Bolden v. City of Covington, 803 S.W.2d 577, 580-81 (Ky. 1991), where the court concluded that allegations that the city through its housing officials incompetently implemented its system for dealing with dangerous housing code violations was not actionable. See Waldon, 854 S.W.2d at 780. The non-liability rule in this “narrow and limited area” involving regulatory decisions quasi-judicial or quasi-legislative in nature was based not in city or sovereign immunity but in the policy that “the incompetent performance of decision-making activity of this nature by a governmental agency is not the subject of tort liability.” Bolden, 803 S.W.2d at 581. The co-defendant property owner apportioned 25% of liability had not appealed. Id. at 579. In the opinion by Justice Leibson, the court’s most plaintiff-oriented jurist, a unanimous court opined pointedly: “Legal liability flowing from the existence of these fire and safety violations rests on the owner or other person in possession and control of the building.” Id. at 581.


624 See id.

625 Waldon, 854 S.W.2d at 778.

626 See id. For a brief discussion of recent “jural rights” precedent see supra note 394.

627 See Waldon, 854 S.W.2d at 778.

628 See id. at 778-79. For a detailed discussion of Grayson see infra notes 701-745 and accompanying text.

629 Restatement (Second) of Torts § 302B (1965). See note 612 supra. Waldon, 854 S.W.2d at 779. For other cases construing § 302B see Wesley v. Page, 514 S.W.2d 697, 699 (Ky. 1974) (finding where a teacher authorized live ammunition to be used in a school musical, an “extremely dangerous situation which requires extraordinary care” by the teacher, she was on notice from the “very adventurous nature of teenagers” to anticipate the “unexpected.” Her negligence was a “substantial contributing factor” even though the injury’s “immediate cause” was a “deliberate act” by the shooter); Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 441-42 (Ky. Ct. App. 1998) (applying the “majority rule,” the court upheld a negligent hiring claim, where defendant...
proximate cause were to be addressed by applying "general concepts of foreseeability." Thus, although not an insurer, the lessor’s "conduct can make him liable to his tenant for the criminal acts of third persons, if the landlord fails to take reasonable steps to avoid injury from reasonably foreseeable criminal acts."

The Waldon opinion assumed that general principles of negligence applied to the case, i.e., that defendant was under a duty to use reasonable care under the circumstances therein. If this was the basis for the court's opinion, it was wrong as a statement of Kentucky law. As stated elsewhere, Kentucky precedent has never imposed a general duty of reasonable care on lessors. Maybe what the court meant to suggest was that this duty of care was based not on some general duty of care owed by lessors to tenants and other lawful guests but was founded in the generally accepted common law duty in Kentucky (and elsewhere) of protecting such persons from dangerous conditions in "common areas." The pivotal point in the case was thus the shooting of decedent "outside her residence," presumably in a "common area" under the lessor's control. The court's citation to a "common area" icy sidewalk case seemed to suggest that

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630 Restatement (Second) of Torts § 449 (1965).

631 See Waldon, 854 S.W.2d at 779. For other Kentucky cases applying § 449 see House v. Kellerman, 519 S.W.2d 380, 382 (Ky. 1974) (adopting §§ 440-453); Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 779-80 (Ky. 1984) (adopting §§ 440-453); Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 441-42 (Ky. Ct. App. 1998).

632 Waldon, 854 S.W.2d at 778-79 (emphasis added). Although inaccurate as a statement of Kentucky law, Waldon's self-stated rule may reflect the "general trend" nationally. See Dobbs, supra note 2, at 833. While noting this trend, the author acknowledges that "almost every decision for liability has a counterpart somewhere that rejects liability." Id. The Waldon court referenced the leading case on the intervening/superseding cause dichotomy, Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776 (Ky. 1984) (noting the confusing nature of the intervening v. superseding cause debate, the court concluded "deliberate non-action" by a purchaser of a defective product with notice of its defectiveness was not a superseding cause, and opined that an intervening criminal act "reasonably foreseeable" at the time of defendant's negligence would not relieve defendant of liability) (citing Wheeler v. Andrew-Jergens Co., 696 S.W.2d 326, 327-28 (Ky. Ct. App. 1985) (stating that third party tampering with defendant's product was not a superseding cause if a "reasonably prudent manufacturer" would have sealed the shampoo product before marketing it)). The Waldon decision was later distinguished in a case involving shootings by a teenager who injured and killed classmates allegedly as the result of watching a movie, video games and internet web sales. The court found the shooter's criminal acts to be unforeseeable and superseding causes. See James v. Meow Media, Inc., 90 F. Supp.2d 798, 806-08, 811, 818 (W.D. Ky. 2000) (bringing claims under negligence, strict products liability and civil RICO).

633 See supra text accompanying notes 456-79.

634 See Elder, supra note 2, at § 5.02(a), 298-307.

635 See Restatement (Second) of Torts § 360 (1965).

636 See Waldon, 854 S.W.2d at 778.

637 See Davis v. Coleman Management Co., 765 S.W.2d 37, 38-40 (Ky. Ct. App. 1989). For a discussion see infra text accompanying notes 368-81, and notes 410-35. Note that McDonald v. Talbot, 447 S.W.2d 84, 85-86 (Ky. 1969), an open-to-the-public case which involved a dog attack en route from the parking lot to a tenant's business, may also be viewed as a "common areas" case and affords some support for extension to foreseeable criminal attacks. Note that an unreported appellate decision rejected landlord liability for an attack in a common area, finding that the landlord had no such duty as to criminal acts of third persons unless the landlord had agreed to such in the lease or otherwise undertaken them, inducing reliance by the tenants. See Logan v. Landmark Management Co., 33 Ky. L. Summary 7, 16 (Ky. Ct. App. 1986), dis. rev. denied
this was the true basis for the imposition of a duty. In such "common area" cases the injured (or in this case killed) tenant's knowledge of the danger would not absolve the landlord of liability.\(^{638}\)

In *Waldon*, defendant-appellee-landlord was aware the assailant was living "without its permission"\(^{639}\) with his daughter or other relations and was informed by decedent (among others) that the assailant had issued "repeated threats to kill her."\(^{640}\) However, as the court noted, the lessor did not act to either evict or "otherwise discourage his presence."\(^{641}\) Nor, despite this knowledge and the frequency of crimes at the housing project, did defendant have security officers patrolling the area, a practice it had previously followed.\(^{642}\) These two factors presented issues of breach of a duty and proximate cause\(^{643}\) for the jury.

The question may be raised as to whether any other basis for a duty would have arisen under the common law. Black letter law provides that no duty of aid or protection arises merely because defendant knows or should know of a third person's peril absent action by defendant.\(^{644}\) However, a defendant can be subject to a duty to aid or rescue if one of a number of special relations is involved,\(^{645}\) such as an innkeeper or "possessor of land who holds it open to the public"\(^{646}\) as to "members of the public who enter in response to his invitation."\(^{647}\) The Restatement (Second) of Torts also indicates the list therein is not intended to be fully inclusive\(^{648}\) and appends a caveat as to other relations which might precipitate a duty, noting that "the law appears ... to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."\(^{649}\) But for the strong recent reaffirmation of the general rule of landlord non-liability and *caveat emptor*,\(^{650}\) the landlord-tenant relationship,
particularly with the element of control a landlord has (via eviction for breach, non-renewal of lease), would seem to justify a duty to protect and aid under the facts of Waldon even if the shooting had occurred outside a “common area” from the same known, threatening source.

Similarly, the common law imposes no duty to control a third person to prevent physical harm to another, unless a special relation exists between (1) the actor and the third person or (2) between the actor and the person threatened. The latter alternative raises the same issue discussed above. The former option raises the question of the resident-assailant’s status as trespasser or licensee. While the Restatement (Second) of Torts takes no position regarding a trespasser, the black letter rule does emphasize that the possessor’s “peculiar ability to control third persons using his property” as licensees requires the use of due care where there is actual or constructive knowledge of the necessity of preventing harm to others. In some cases, the possessor may be required to terminate permission to use a chattel (and, presumably land) to fulfill the requirement of this duty.

The latter rule could have been relied on in Waldon provided two contingencies were met. One, the landlord’s reversionary interest in the leased areas would have to have been viewed, together with his undoubted control over common areas, as sufficient to make him a “possessor.” This may be doubtful in light of Adams’ reaffirmation of the traditional non-liability rule. Second, the lessor’s knowing acquiescence in the assailant’s residence with a daughter or relatives would have to have been viewed as an implied license, not an implausible stretch of imagination under the facts. Alternatively, the rule would have to have been extended to a known trespasser under the caveat proviso.

Another Kentucky criminal attacks case, Ross v. Papler, involved a landlord sued for the “premeditated, cold, calculated” “quick and brutal” killing.

651 See Restatement (Second) of Torts § 315(a) (1965).
652 Id. at § 315(b).
654 See Restatement (Second) of Torts § 318 and cmt. a (1965) (comment title).
655 Id. at § 318 cmt. a.
656 Id. at § 318 cmt. d.
657 See supra accompanying and note 462.
658 See supra accompanying and notes 470-79. But see KY. REV. STAT. ANN. § 381.231(2) (Michie 1992) (defining “owner” under the trespasser statute as “any person who possesses any interest in real estate or any lawful occupant of real estate”).
659 As to the definition of licensee see Elder, supra note 2, at § 3.01, 197-202 & § 2.06(a), 108-29. On the general definition of a trespasser see id., at § 2.01, 11-16, and the Kentucky trespasser statute, id. at § 2.05, 102-07.
660 See supra note 653. See generally Bradford v. Clifton, 379 S.W.2d 249, 250 (Ky. 1964) (stating that “[h]abitual or customary use ... without objection ... may give rise to an implication of consent to such use to the extent that the users have the status of licensees ...”), and Elder, supra note 2, at 197-98 & nn.1-5, 199-202 & nn.13-49, & § 2.06(a).
of two women employees of a massage parlor. In analyzing the issue of duty, the court reiterated the general rule of landlord non-liability but then concluded that an exception existed for "reasonably foreseeable criminal acts" under Waldon. For the reasons given above, this general, abstract exception does not reflect current Kentucky law. Consequently, the basis for a duty must be shown to exist under one of the traditional exceptions adopted by Kentucky precedent. As the deaths occurred on the leased premises rather than in a "common area" under the landlord's control, Waldon would not control as precedent. However, the broad interpretation of the open-to-the-public exception adopted in Kentucky would have justified the finding of a duty, as Kentucky does not limit the rule to conditions existent at the time of the lease and has extended it to another tenant's dog. The analogy to someone allowed entrance by lessee's employees seems apt. The rule's coverage also extends to those admitted by the lessee for the public use, which would include the tenant's employees by definition.

Assuming a duty could be thusly shown, the court was correct in finding no breach of a duty of care. During the period of the lease (2 ½ years), no violent incidents occurred on the property, no threats had been directed to the employees (including decedent) of the lessee to the knowledge of police or decedent's spouse, the decedent had not expressed concern for either her safety or the safety of the massage parlor, and no violent crimes of any variety had occurred in the general locale for three to four years prior to decedent's death. Rumors brought to the lessor's attention about the leased premises being used as a "front" for prostitution did not suffice, as no "concrete evidence" supported such a use in fact. Accordingly, no basis for liability existed where no showing had been made that the victim's death was foreseeable based on "prior similar incidents" either at the leased premises or in "the general area."

The third Kentucky decision in the trio, Grisham v. Wal-Mart Stores, Inc., involving a criminal attack in a well-lit parking lot at night, found a duty based

662 See id. at 791-92.
663 Id. at 791.
664 Id. (citing Waldon, 854 S.W.2d at 779).
665 See supra accompanying notes 628-39.
666 Id.
667 See the discussion of McDonald v. Talbot, 447 S.W.2d 84 (Ky. 1969) supra accompanying notes 507-14.
668 See RESTATEMENT (SECOND) OF TORTS § 359 & cmt. e (1965).
669 Id. Note that under Kentucky "common areas" precedent a lessee's employees are covered. See ELDER, supra note 2, at 301; Wright & Taylor, Inc. v. Smith, 315 S.W.2d 624, 626 (Ky. 1958); Nash v. Searcy, 75 S.W.2d 1052, 1053 (Ky. 1934) (stating that the rule is "clearly recognized as a firmly settled principle in the law"); RESTATEMENT (SECOND) OF TORTS § 360 & cmt. f (1965) (stating that "[i]t is the lessor's business, as such, to afford his lessee facilities for receiving all persons whom he chooses to admit for any lawful purpose").
670 See Ross, 68 F. Supp.2d at 792-93.
671 Id.
672 Id. at 793 (citing Grisham v. Wal-Mart Stores, 929 F. Supp. 1054, 1059 (E.D. Ky. 1995), aff'd, 89 F.3d 833 (6th Cir. 1996)).
on Britton, Waldon's analysis of Grayson and prior case law involving a duty of a business invitor to a business invitee. Clearly, a general duty of care existed as a host of business invitor-invitee cases suggests. Moreover, the duty extends to "ordinarily and customarily" used areas of the commercial premises such as a parking lot other than in snow-ice "outdoor natural hazards" cases.

The Grisham court noted the "split of authority" as to whether plaintiff must demonstrate reasonable foreseeability based on criminal conduct on defendant's premises or may also rely on criminal acts in the "general area" thereof, but found no need to resolve the issue. The court applied a "similarity" test based on the Napper, drive-in case analyzed earlier, and found it met in Waldon, which involved the very criminal act which the assailant threatened. However, no such violent acts had occurred on Wal-Mart's premises prior to the attack on plaintiff Grisham.

Under the "general area"/"vicinity" option the evidence was also unpersuasive. The expert testimony on "parking lot robberies" during the same Christmas season as plaintiff's injury was rejected. Although no "bright line rules" as to number and frequency had been developed, neither a "single incident" nor "sporadic incidents" sufficed. The statistical evidence as to off-premises area assaults could not be considered for failure to show any such acts occurred prior to the attack on plaintiff. The evidence as to the three robberies the previous December was similarly defective under the "sufficiently similar" incident test. Two of the three did not involve a weapon; one occurred on the highway and the other two at "unidentified business locations." Consequently, the latter did not make a criminal shooting in defendant's retail parking lot a "reasonably foreseeable event." Lastly, a mere showing that other local businesses took security measures did not evidence a duty, particularly where it was unclear (1) what the nature of and reasons for the security were and (2) whether the measures were adopted prior to or after plaintiff's injuries.

In sum, existing case law dealing with owner-occupier or lessor defendants mandates an initial determination for the basis for imposition of a duty, i.e.,

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674 See id. at 1057. See also the discussion of Napper supra accompanying note 616.
675 See the illustrative cases cited in ELDER, supra note 2, at 225 & nn.24-25.
676 See City of Madison v. Poole, 249 S.W.2d 133, 135 (Ky. 1952). See supra accompanying notes 299-300, 320.
678 See supra accompanying notes 283-391.
680 See Grisham, 929 F. Supp. at 1057.
681 Id. at 1056-57.
682 Id. at 1058 (citing out-of-state cases).
683 Id. (citing such evidence was "not relevant" on the "foreseeability" issue).
684 Id. at 1056, 1058. "Bare" FBI statistics compiled on the increase in assaults and robberies likewise did not suffice, as the court could not determine thereby whether the "sufficiently similar" incidents criterion was met. Id. at 1058.
685 Id. At least some of the entities had only inside security in response to incidents involving teenagers, not criminal assaults. Id. at 1058-59.
whether plaintiff is owed the duty of care owed a business invitee by a business invitor or is within one of the accepted exceptions to the traditional landlord non-liability rule. Once a basis for a duty is shown, however, the "sufficiently similar" rule seems unduly narrow. Although consistent with some of the limited Kentucky precedent on point,\(^{686}\) it is not mandated by the broad black letter *Restatement (Second) of Torts* provisions regularly cited in Kentucky jurisprudence, and is inconsistent with the expansive philosophy espousal by the Supreme Court in *Britton*, with its specific rejection of a narrow view of superseding cause.\(^{687}\) Kentucky courts should resolve the issue and can and should look to the precedent elsewhere supporting a "totality of the circumstances" approach. This approach is "only the ordinary rule in negligence cases, which determines foreseeability, by considering 'all the factors a reasonably prudent person would consider,' no more no less."\(^{688}\)

**LIABILITY OF VENDORS AND PURVEYORS OF INTOXICATING BEVERAGES**

Modern Kentucky law begins with *Pike v. George*,\(^{689}\) a case involving a suit against liquor store owners by a minor passenger in a car driven by a fellow minor, sold (together with plaintiff-appellant passenger) a fifth of liquor in violation of a Kentucky criminal statute. The court acknowledged the rule of non-liability then widely followed elsewhere\(^{690}\) and some supportive Kentucky precedent\(^{691}\)--i.e., that the imbibing of alcohol, not its sale was the proximate cause of the injuries and/or death caused in fact thereby\(^{692}\)--but concluded that a negligence cause of action based on the then liquor licensee statute\(^{693}\) (and section

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\(^{686}\) See supra accompanying notes 616-18.

\(^{687}\) See Britton v. Wooden, 817 S.W.2d 443, 451-52 (Ky. 1991). It is "not necessary" that the negligent party "foresee the specific subsequent act in the chain of causation." *Id.* (quoting from Seelbach v. Cadick, 405 S.W.2d 745, 749 (Ky. 1966)).

\(^{688}\) *DOBBS*, supra note 2, at 878 (quoting Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1023 (N.J. 1997)).

\(^{689}\) 434 S.W.2d 626, 627 (Ky. 1968).

\(^{690}\) See *id.* at 629 (referring to it as the "general rule").

\(^{691}\) See Britton's Ad'm'r v. Samuels, 136 S.W. 143, 144 (Ky. 1911) (finding that a sale of alcohol to an inebriated person resulting in death was not actionable absent an allegation (not present) that the sale was "for the purpose of injuring him, or with the knowledge that he intended to drink of it to such an extent as to produce injury or death or that he had reasonable grounds to believe that deceased could not be safely trusted with the whiskey . . . "); Waller's Ad'm'r v. Collinsworth, 137 S.W. 766, 767 (Ky. 1911) (holding that where a shooting death emanated from unlawful sales of alcohol in a dry county, the sale of the vendor to the intoxicated was not the "efficient cause" of death, as he could not "reasonably contemplate" such a homicide).

\(^{692}\) See Britton's Ad'm'r, 136 S.W. at 144 (stating "death was produced, not by the sale, but by the drinking thereof by the deceased. The proximate cause of the death, therefore, was not the wrongful or unlawful act complained of"); Waller's Ad'm'r v. Collinsworth, 137 S.W. 766, 767 (Ky. 1911) (finding that the sale of the liquor was not the "efficient cause" of decedent's death but only "produced a condition of mind" from which the shooting by another drunk illegally sold alcohol by defendant could have occurred). This no proximate causation rule was really a "no duty" rule. See *DOBBS*, supra note 2, at 899.

\(^{693}\) See KY. REV. STAT. ANN. § 244.080(1) (prohibiting a retail licensee from selling, giving away, or delivering any alcoholic beverages to a minor or procuring or permitting such sale, giving away or delivery to a minor). This statute was modified in 1972. See KY. REV. STAT. ANN. § 244.080 (Michie 1994). It was modified again in 1998. See KY. REV. STAT. ANN. § 244.080 (Lexis Supp. 2000).
446.078 of the Kentucky Revised Statutes694 was substantiated by the allegations in the claim. In coming to this conclusion, the court referenced a series of precedents — business invitees held liable for violations of statutes or ordinances for the public’s protection,695 liability of vendors696 and furnishers of products,697 liability of a package liquor dealer who sold whiskey to a customer knowing he intended to drink the entire quart on a bet698—but relied primarily on the supporting legal authority under Kentucky law (including the “attractive nuisance” doctrine)699 reflecting a “special protection of minors from injury.”700

In the almost two decades after Pike, a major change occurred in the national legal culture on issues of vendor liability. As the Kentucky Supreme Court concluded in Grayson Fraternal Order of Eagles v. Claywell,701 the non-liability rule had become “now overwhelmingly rejected” with the numbers of repudiators on the increase.702 Indeed, the court doubted that Kentucky precedent had ever adopted a “blanket” non-liability rule.703 Assuming arguendo it had, a critically important factor had intervened since the court’s 1911 precedents, i.e., the advent

694 Ky. Rev. Stat. Ann. § 446.070 (Lexis 1999). “A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or a forfeiture is imposed for such violation.” Id. This statute is the basis for negligence per se. See Grayson Fraternal Order of Eagles v. Claywell, 736 S.W.2d 328, 333-34 (Ky. 1987).

695 See Blue Grass Restaurant Co. v. Franklin, 424 S.W.2d 594, 597-99 (Ky. 1968) (determining that a violation of an ordinance requiring handrails on both sides of a stairwell was negligence per se); Greyhound Terminal of Louisville v. Thomas, 209 S.W.2d 478, 479-80 (Ky. 1947) (determining that a violation of an ordinance requiring handrails on both sides of a stairwell was negligence per se). Both decisions concluded that the injury from falling was that intended to be protected against vis-a-vis a member of the public and consequently “must be considered” as the “proximate cause” of the injury. Greyhound Terminal, 209 S.W.2d at 479; Blue Grass Restaurant, 424 S.W.2d at 597. This reflects the traditional “class” and “harm” analysis that subsumes issues of proximate causation in negligence per se cases.


697 Compare C.D. Herme, Inc. v. R.C. Tway Co., 294 S.W.2d 534, 536-538 (Ky. 1956) (rejecting the privity limitation and applied ordinary negligence rules to the manufacturer of a product rejecting any limitation to those “inherently, intrinsically or imminently dangerous”), with Baker v. White, 65 S.W.2d 1022, 1023-25 (Ky. 1933) (holding that a local ordinance prohibiting sale of fireworks was not a “statute” under § 466.070 authorizing a cause of action for violation of “any statute” even though “a penalty or forfeiture” was imposed), and Ford Motor Co. v. Atcher, 310 S.W.2d 510, 511-13 (Ky. 1957) (finding that continued use of an auto with defective doors by purchaser was a superseding cause cutting off liability of the manufacturer and dealer for injuries to a child who fell out the door when it opened on the highway). On ordinances as the basis for negligence per se see supra note 695.

698 See Nally v. Blandford, 291 S.W.2d 832, 833-35 (Ky. 1956). The court found that the dealer and his employee could have reasonably foreseen that death would result from sale with such knowledge. Id. The court then treated the tort as “an intentional wrongful act” to which the decedent’s contributory negligence was no bar. Id. The court relied on dicta in Britton’s Adm’r v. Samuels, 136 S.W. 143 (Ky. 1911). Id.

699 See Pike, 434 S.W.2d at 629. On the “attractive nuisance” doctrine, see generally ELDER, supra note 2, § 2.04, 53-101, and supra accompanying notes 35-87.

700 Pike, 434 S.W.2d at 629.

701 736 S.W.2d 328 (Ky. 1987).

702 See id. at 329-30, 332. See DOBBs, supra note 2, at 900.

703 Id. at 330-31. See the synthesis of Britton’s Adm’r v. Samuels, 136 S.W. 143 (Ky. 1911), supra note 691.
of the automobile with its penchant for carnage. Consequently, there was no justification for "sanctification of any ancient fallacy." The facts before the court in Grayson were highly sympathetic and the environment hospitable to liability. The victims were two police officers, and the defendants were a private club and its bartender selling alcohol to members in a "dry county" in violation of state law. In addition, the recent drop in deaths due to intoxicated drivers had been reversed and a new deterrent was needed. In such circumstances, both the seller and buyer were held to be tortfeasors, with the vendor often the more culpable party as a "sober contributor" to the intoxication. The only sensible answer thereto was common law liability of both under a general standard that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury," a "universal duty" of care.

In adopting this standard the court was forced to confront two legal hurdles. The first was whether Pike's sale to a minor was a crucial distinction. The court replied in the negative, finding that minors and intoxicated adults were covered in the same statute and shared a common feature — both classes were "high risk drinkers" involving a "substantial likelihood" of alcohol-induced accidents. For these reasons, society needed to be protected against them and

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704 See Grayson, 736 S.W.2d at 331. The court quoted from a case analogizing an intoxicated person at the wheel to an insane individual with a firearm or a stick of dynamite that necessitated defusing to eliminate the public risk. See Jardine v. Upper Darby Lodge No. 1973, Inc., 198 A.2d 550, 553 (Pa. 1964). As the court said in the latter respect, "[t]o serve an intoxicated person more liquor is to light the fuse." Id.

705 See Grayson, 736 S.W.2d at 332.

706 Id. at 329. Presumably, the officers were acting in line of duty. The court made no mention of the "police officer's" version of the "firefighter's rule," possibly because its then current rationale had a premises liability component. See generally supra accompanying notes 539-601. In any event, the rule should not apply to injuries incurred by happenstance during "routine duties" like patrol. See supra note 593.

707 See Grayson, 736 S.W.2d at 329, 333. The facts synthesized as to the bartender's knowledge and actions suggest that the totality of his actions, including coercing them out of the bar and lot so he could go home were more than merely negligent. Id. at 329.

708 Id. at 331-32.

709 Id. at 332.

710 Grayson, 736 S.W.2d at 330 (quoting Gas Service Co., Inc. v. City of London, 687 S.W.2d 144, 148 (Ky. 1985) (reaffirming municipal liability except in cases involving regulatory functions of a quasi-judicial or quasi legislative nature)). Some later decisions have interpreted the "duty to all" analysis as "a beginning point" for duty analysis: "The examination must be focused so as to determine whether a duty is owed and consideration must be given to public policy, statutory and common law theories in order to determine whether a duty existed in a particular situation." Fryman v. Harrison, 896 S.W.2d 908, 910-11 (Ky. 1995). The court found no legal duty owed by a jailor to someone in the "public at large," i.e., an unknown, unidentifiable person. Id. The court distinguished Grayson as involving a bartender who "consciously and actively assisted" the intoxicated individual by supplying the liquor and distinguished psychiatrist-patient-failure to warn an identifiable victim cases. Id. at 909. See also Sheehan v. United Servs. Auto. Ass'n, 913 S.W.2d 4, 5-6 (Ky. Ct. App. 1996) (applying the general rule that an insurer owed no third person a duty to use reasonable care vis-a-vis a dangerous condition, in this case weapons, located at the insured's premises).

711 See Grayson, 736 S.W.2d at 333.

712 Id. at 332-33.

713 Id. at 333.
they needed to be protected from self-directed harm.\textsuperscript{714} Any distinction based on a result-oriented notion of “duty” would be “arbitrary.”\textsuperscript{715}

The second obstacle was in basing potential liability on a statute that on its face did not apply to defendants, who were acting illegally rather than pursuant to a retail licensee. The court cited two arguments in response. One was clear black letter law — that the unavailability of a criminal penalty did not preclude use of a statute as a standard of care for purposes of negligence per se in tort.\textsuperscript{716} The second was that defendants’ illegal, non-licensee status did not “avoid” the protection of the statute “but simply compounds it.” “The unlicensed vendor has no right to sell alcoholic beverages at all, and even less right to do so in violation of standards imposed upon the licensed vendor.”\textsuperscript{717}

The court then proceeded to flesh out in broad strokes the criteria of the cause of action in general (and without adhering strictly to the class/harm analysis of negligence per se.)\textsuperscript{718} The “public” protected by \textit{Pike} included both consumer-patrons\textsuperscript{719} and third parties\textsuperscript{720} where there was evidence the retail licensee knew or should have known\textsuperscript{721} it was serving “a person actually or apparently under the influence”\textsuperscript{722} of alcohol and where it knew or should have known from the prevailing circumstances\textsuperscript{723} there was a “reasonable likelihood”\textsuperscript{724} the person leaving the licensed premises would drive a motor vehicle. In the court’s view the question was not a legal one of \textit{duty} but a factual one of \textit{proximate cause} for the jury, i.e., whether the ensuing accident was “within the scope of the foreseeable risk”\textsuperscript{725} posed by the sale.

As indicated above, the court strongly intimated the duty was owed both to foreseeably injured members of the public \textit{and} intoxicated consumer-patrons. The latter posed and poses a more controversial issue for courts.\textsuperscript{726} The court also

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\item[\textsuperscript{714}] \textit{Id.} (quoting McClellan v. Tottenhof, 666 P.2d 408, 413 (Wyo. 1983)).
\item[\textsuperscript{715}] See \textit{Grayson}, 736 S.W.2d at 330. “The operative facts continue to be proof of negligent conduct, foreseeability and proximate cause.” \textit{Id.} See \textit{Gas Serv. Co. Inc. v. City of London}, 687 S.W.2d 144, 148 (Ky. 1985). “A variety of legalisms have been suggested as helpful,” including duty/no duty. \textit{Id.} “The abstract resolution of whether there is a duty is invariably result-oriented, a question of policy-making involving the weighing of interests and a conclusion based on whether the court’s conscience is or is not, comfortable with the result... These classifications... in the long run prove arbitrary pigeonholes for conclusions arrived at intuitively...” \textit{Id.}
\item[\textsuperscript{716}] See \textit{Grayson}, 736 S.W.2d at 333.
\item[\textsuperscript{717}] \textit{Id.} 736 S.W.2d at 333.
\item[\textsuperscript{718}] \textit{Id.} at 334. The court cited to \textit{RESTATEMENT (SECOND) OF TORTS} § 286 (1965), entitled “When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted,” but then analyzed the case as if it were a common law negligence case based on notions of reasonable care and proximate cause. \textit{Id.}
\item[\textsuperscript{719}] See \textit{Grayson}, 736 S.W.2d at 333-334. The court’s analysis in this respect may have turned out to be wrong. \textit{See supra} accompanying notes 801-50.
\item[\textsuperscript{720}] See \textit{Grayson}, 736 S.W.2d at 333, 334.
\item[\textsuperscript{721}] \textit{Id.} at 334.
\item[\textsuperscript{722}] \textit{Grayson}, 736 S.W.2d at 334 (quoting \textit{KY. REV. STAT. ANN.} § 244.080(2) (Michie 1994)). See \textit{KY. REV. STAT. ANN.} § 244.080(2) (Lexis Supp. 2000).
\item[\textsuperscript{723}] See \textit{Grayson}, 736 S.W.2d at 332.
\item[\textsuperscript{724}] \textit{Id.} 736 S.W.2d at 334.
\item[\textsuperscript{725}] \textit{Id.}
\item[\textsuperscript{726}] See DOBBS, \textit{supra} note 2, at 900-01 (noting the “division of opinion” on the issue).
\end{enumerate}
\end{footnotesize}
took pains to distinguish vendor liability resulting from sales to intoxicated patrons from the far more controversial issue of liability of social hosts for acts of social guests served under comparable circumstances. The court distinguished the scenario briefly on two grounds. First, the statute in question only "established a standard of care owed to a business invitee." Second, the traditional common law had distinguished the duties of care owed to business invitees and social guest-licensees, "a difference that has been critical in some cases."

Two justices tendered scathing dissents accusing the court of judicial adoption of a dram shop act by a "quantum leap" of logic, whereby a statute expressly limited to defaults by a retail licensee to its patrons becomes likewise applicable to "bootleggers" and third parties injured by the bootlegger's customers. The dissenters found little support for the majority position in Pike, which had been "obviously predicated" on the law's special protectiveness toward minors. The dissenters also interpreted the majority's opinion to be "inescapably the forerunner" of social host liability in light of its adoption of a "universal duty" that logically applied coequally to social host and invitor.

A decade after Grayson the Kentucky Supreme Court issued its next liquor liability opinion, a 5-2 decision in Watts v. K, S & H. In that case a quartet of sixteen-year-olds skipped school with one teenager driving. One passenger, Charles, went into defendants' retail liquor store at 9:00 a.m. or 10:00 a.m. and bought a case of beer and a pint of rum. He was not asked for proof of age and it was disputed whether the clerk could see the car and other passengers. The youths partied with friends, drank and played pool the rest of the day but returned to school at dismissal time. Two then left in a different car driven by Neal, who was neither the driver nor the purchaser of alcohol that morning. Neal lost control of the car while recklessly passing on a yellow line, swerved to avoid a

727 See Dobbs, supra note 2, at 901-02 (stating "[s]ocial-host liability today remains the exception rather than the rule").
728 See Grayson, 736 S.W.2d at 335.
729 Id. But compare the later decision absolving the vendor of liability where the consumer-minor was injured. See infra accompanying notes 808-47.
730 See Grayson, 736 S.W.2d at 335. See generally supra accompanying notes 89-264.
731 See Grayson, 736 S.W.2d at 337 (Stephenson, J., dissenting); id. at 337-38 (Vance, J., dissenting).
732 Id. at 337 (Stephenson, J., dissenting).
733 Id. Compare the more traditional analysis of negligence per se in Carman v. Dunaway Timber Co., supra accompanying notes 175-86, where the court found a KOSHA regulation inapplicable to non-"employee" foreseeable plaintiffs.
734 See Grayson, 736 S.W.2d at 338 (Vance, J., dissenting). See also id. at 337 (Stephenson, J., dissenting).
735 Id. at 338 (Vance, J., dissenting).
736 Id. at 337 (Stephenson, J., dissenting).
737 Id. (stating "[t]he principles are exactly the same, and the injured third party is just as injured by one as the other"). Id. at 338 (Vance, J., dissenting).
738 957 S.W.2d 233 (Ky. 1997).
collision, and hit the Watts' car head on. The driver-father was killed and his son "catastrophically injured." 739

Following a jury trial, the judge apportioned the $6 million plus judgment 70% to the intoxicated minor driver and 30% to the liquor store owners. 740 The Court of Appeals reversed, concluding that plaintiff-appellant had impermissibly split his cause of action by filing separately against the driver and liquor store owners 741 — the latter were sued just prior to the effective date of section 413.241 of the Kentucky Revised Statutes and just after Grayson. 742 The Kentucky Supreme Court reversed and reinstated the trial court's opinion. The court acknowledged that a "sharing" of liquor/accompaniment by other minors case had never been before the court but refused to overturn the jury's resolution of the "difficult and complex" issues of proof. 743 It held that the purchaser's "sharing" of the alcohol with the teenaged group on a school morning and the devastating collision resulting therefrom in either that or another car were "not clearly unforeseeable" under the Grayson standards. 744 A two party dissent would have limited Grayson's sphere to the purchaser and any persons injured by him or her. Anything outside those parameters was a superseding cause. "Anything beyond that is unforeseeable and unreasonably extends the scope of liability." 745

Where defendant's violation of section 244.080(2) of the Kentucky Revised Statutes by sale to an intoxicated person resulted in criminal conduct directed at a fellow patron, a recent highly problematic 4-3 decision by the Kentucky Supreme Court denied liability. In Isaacs v. Smith 746 a "brief shouting match" between one customer (Smith) and another customer (Isaacs) precipitated the attention of night club security personnel. However, neither patron was asked to depart or cease drinking. A half hour later Isaacs approached Smith sitting alone at his table and got behind Smith while his friend engaged Smith in conversation. Isaacs then withdrew a concealed handgun and shot Smith in the back. 747 The majority of four denied Smith a cause of action 748 under section 244.080(2) in a confused and confusing opinion.

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739 See id. at 234-35.
740 Id. at 234.
741 Id. at 234, 236-38. The Supreme Court rejected the "splitting" argument. Id. at 236-38. The parents of Neal and the corporate owner of the vehicle were also sued under a "negligent entrustment" theory. Id. at 238.
742 The court stated that its opinion was "narrowly drawn" on a "very specific and peculiar" fact setting and did not take into account modifications in the law taking place after the injury and prior to the opinion. See Watts, 957 S.W.2d at 240. This statute, effective in 1988, found and declared that "the consumption of intoxicating beverages, rather than the furnishing or sale of such beverages, is the proximate cause of any injury ..." KY. REV. STAT. ANN. 413.241(1) (Michie 1992). See also id. at § 413.241(1) (Lexis Supp. 2000).
743 See Watts, 957 S.W.2d at 239.
744Id. at 238-39.
745 Id. at 241 (Stephens, C.J., dissenting).
746 S.W.3d 500 (Ky. 1999).
747 See id. at 501.
748 Id. at 501-03.
The *Isaacs* court conceded, as it must in light of *Grayson*, that violations of section 244.080(2) of the Kentucky Revised Statutes may entail liability under negligence per se. Having said that, the court then made some curious, if not bizarre statements ("While it is unquestioned that violations of statutes constitute negligence per se, that statement is coextensive with the requirement that the violation 'must be a substantial factor in causing the result'")\(^{749}\) and commingled inextricably concepts of negligence per se — with its focus on whether the plaintiff was within the class to be protected and whether the harm was that the enactment was intended to prevent\(^{750}\) — with analysis of general doctrines of proximate cause that normally apply where no statute justifying negligence per se is involved and the general standard of the reasonably prudent person applies.\(^{751}\)

Four options for a non-liability finding under section 244.080 seem to have been available, all of which find some support in the *Isaacs* opinion: (1) that off-premises victims of drivers served on-premises while intoxicated were the exclusive class of persons intended to be protected from the exclusive harm (physical harm or death due to drunk driving) intended to be prevented by the enactment;\(^{752}\) (2) that fellow patron-business invitees were not within the class of persons to be protected;\(^{753}\) (3) that, even if within the class to be protected, the statute was not intended to cover the specific type of harm occurring (i.e., criminal shooting\(^{754}\) by concealed weapon); (4) that, even if within the class to be protected, the statute was not intended to protect against the general type of injury suffered.\(^{755}\)

As to (1), the reader searches the face of section 244.080 in vain to find any evidence that prevention of off premises injuries to third persons by drunk drivers was the "obvious motivation"\(^{756}\) for this broad statute. Assuming, *arguendo*, that this is an accurate conclusion, there was no justification for a finding that it was...

\(^{749}\) Id. at 502.


\(^{751}\) *See DOBBS*, supra note 2, at 325-26 (stating "[p]roximate cause" is "often equivalent" to class of person/risk of injury or harm analysis in negligence per se cases although the latter may be "a little more precise ... [B]ut courts usually appear to have the same ideas in mind when they use the language of proximate cause")

\(^{752}\) Id. at 502 (stating "the mere violation of a statute does not necessarily create liability unless the statute was specifically intended to prevent the type of occurrence which has taken place"); id. at 503 (stating an injury to a third party on the premises was "not foreseeable within the intent of the statute, and as such, liability to [sic] the establishment does not attach"). *Id.*

\(^{753}\) This is half of option (1) and subsumed therein. *See supra* note 752.

\(^{754}\) For further indicators see *Isaacs*, 5 S.W.3d at 502. The court agreed with the trial court's rejection of a comparison between alcohol-impaired driving and shooting as "untenable." *Id.* "[T]he violation must be one intended to prevent the specific type of occurrence before liability can attach." *Id.*

\(^{755}\) *Id.* "The issue here is simply whether or not it was foreseeable that Isaacs, given his intoxicated condition, could cause injury to a third party as a result of [defendant's] act of continuing to sell him liquor such as would render the establishment liable under Ky. REV. STAT. ANN. § 244.080. We hold that it does not." *Id.* Clearly, option (4) was adopted by the court in its holding. This was the dissenter's interpretation. *Id.* at 504 (Stumbo, J., with Lambert, C.J., and Wintersheimer, J., joining, dissenting). "[T]he majority has removed consideration of the instrumentality of the injury from the equation..." *Id.* For further indication see *id.* at 501-03 (rejecting the "particular, precise form of injury" rule).

\(^{756}\) *Id.* at 502.
the exclusive motivation, the only ground for so limiting negligence per se in respect thereto.\textsuperscript{757} It is equally, if not more plausible, that the legislature was also concerned with a host of antisocial activities, connected with alcohol abuse in bars\textsuperscript{758} e.g., boisterous conduct, fights, brawls, etc., that occur on premises when alcohol is sold to minors, those actually or apparently under the influence, habitual drunkards, those known to be convicted of a misdemeanor due to alcohol, or a felon.\textsuperscript{759} In other words, a number of public safety purposes impacting a variety of on-and-off-premises foreseeable victims could be envisioned. Of course, under black letter law there may be more than one purpose to a statute,\textsuperscript{760} as is clear from a plain reading of section 244.080 viewed in toto — including at the very least on premises injuries to other patron invitees.\textsuperscript{761}

For this reason option (2) was likewise untenable, as it would require the quantum leap in logic that those injured by a criminal act off-premises (driving while intoxicated) and possibly distant in time and place from the source of inebriation were contemplated as within the statute but that on-premises co-patrons close in space and likely in time to the source of intoxication (and which the common law deemed to be owed a duty of reasonable care by the bar against foreseeable criminal acts of other patrons)\textsuperscript{762} as without the protection of the statute. The mind boggles at the illogic of such an anomaly. In light of the case

\textsuperscript{757} In Restatement (Second) of Torts § 288 (1965), entitled “When Standard of Conduct Defined by Legislation or Regulation Will Not Be Adopted,” the black letter rule provides that courts “will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment... whose purpose is found exclusively... (d) to protect a class of persons other than the one whose interests are invaded, or... (f) to protect against other harm than that which has resulted...” (emphasis added). Affirmatively, another section provides negligence per se is available where such “class” and “harm” are the purpose of the enactment “exclusively or in part...” Restatement (Second) of Torts § 286 (1965) (emphasis added). See also supra pp. and notes 273-75.

\textsuperscript{758} See Stackniewicz v. Mar-Cam Corp., 488 P.2d 436, 439 (Or. 1971). A liquor regulation — prohibiting a “licensee” from “permit(ting) or suffer(ing) any loud, noisy, disorderly or boisterous conduct, or any profane or abusive language, in or upon his licensed premises, or permitting any visibly intoxicated person to enter or remain...” was appropriate for negligence per se as it “concerns matters having a direct relation to the creation of physical disturbances in bars which would, in turn, create a likelihood of injury to customers. A common feature of our western past... was the carnage of the barroom brawl... We find it reasonable to assume that the commission... had in mind the safety of patrons of bars as well as the general piece and quietude of the community.” Id. (emphasis added). The court found that plaintiff, who suffered “vicious” head injuries during a “brawl,” was within the class to be protected from and the harm was of the kind the regulation was intended to prevent, “permitting visibly intoxicated persons to remain on the premises, and failing to remove them therefrom after they had threatened violence...” Id. (emphasis added).

\textsuperscript{759} See KY. REV. STAT. ANN. § 244.080(1)-(4) (Michie 1994). See also id. at § 244.080(1)-(4) (Lexis Supp. 2000). This broader public safety focus is best exemplified by the prohibition of sale to felons. There is no necessary correlation between convicted felons and alcohol misuse. Indeed, one can argue at least as plausibly that the felons’ potential (as a class) for violence was the intended harm against which the statute was intended to protect. If this is true, the statute is one with a broad array of public safety purposes, with a broad class of protected plaintiffs.

\textsuperscript{760} See supra notes 757-58, and supra accompanying notes 274-76.

\textsuperscript{761} See supra note 758, and Heathcoate v. Bisig, 474 S.W.2d 102 (Ky. 1971), discussed infra accompanying notes 763-767.

\textsuperscript{762} See supra accompanying note 618, and infra note 763.
law on the books at the time\textsuperscript{763} of the original version of the statute in 1972\textsuperscript{764} (and its modified repassage in 1998),\textsuperscript{765} it cannot be assumed that the legislature intended such a perversely limited interpretation of a broadly worded statute, ignoring, if not curtailing in effect the panoply of the common law.

Option (3) would require an exceptionally narrow construction of the “harm” aspect of negligence per se that finds no basis in the text of 244.080. In light of the Kentucky common law jurisprudence’s increasing willingness to find criminal acts foreseeable,\textsuperscript{766} including case law in effect in 1972,\textsuperscript{767} it seems especially dubious to impute to the legislature such a narrow focus — unless, of course, such a construction was intended as result-determinative. Indeed, such a narrow construction of the \textit{specific means} of harm was directly at odds with a qualification expressly adopted by the court majority (and cited gleefully by the dissent!)\textsuperscript{768} that “. . . so far as foreseeability enters into the question of liability for negligence, \textit{it is not required that the particular precise form of injury be foreseeable} — \textit{it is sufficient if the probability of injury of some kind to persons within the natural range of effect of the alleged negligent act could be foreseen}.”\textsuperscript{769}

Option (4) would have entailed looking at the general type of harm — physical injury via attack (without the specification of the instrumentality) — and a concomitant conclusion that the legislature intended no such harm to be prevented by the statute. For reasons given above such an intent is too bizarre and anomalous to impute to the legislature in 1972 or thereafter and is at odds with then accepted doctrine, which rejected any “‘particular precise form of injury’” in favor of “‘injury of some kind.’”

Perhaps, the \textit{Isaacs} court’s incautious commingling of negligence per se and general proximate causation analysis, though confusing, has little practical impact on the end result in most cases. As Professor Dobbs has recently opined, “the language of the courts in common law cases is sometimes more complicated, but both purpose and results are largely the same whether a statute

\textsuperscript{763} See Heathcoate v. Bisig, 474 S.W.2d 102, 103-04 (Ky. 1971) (finding that a bar owed its patron a duty of reasonable care against criminal attacks by other patrons once the bartender was on notice of their “pugilistic propensities”). For a more detailed analysis see \textit{supra} accompanying note 618, and \textit{ELDER} \textit{supra} note 2, at 240-41 & n.103. See the “horse play” discussions \textit{supra} accompanying notes 617, 651-60, 763.

\textsuperscript{764} See KY. REV. STAT. ANN. § 244.080 (Michie 1972).


\textsuperscript{766} See \textit{supra} accompanying notes 602-88.

\textsuperscript{767} See \textit{supra} accompanying notes 616-18.

\textsuperscript{768} See \textit{Isaacs}, 5 S.W.3d at 504 (Stumbo, J., with Lambert, C.J., and Wintersheimer, J., joining, dissenting).

\textsuperscript{769} \textit{Isaacs}, 5 S.W.3d at 502 (quoting \textit{Miller v. Mills}, 257 S.W.2d 520, 522-23 (Ky. 1953)). A bus company owed its passengers the highest degree of practicable care,” including protecting them from assault or violence. Consequently, where the bus driver got into a fight with third parties outside the bus, he could have “anticipated that missiles might be thrown, or even that firearms might be discharged” injuring passengers. \textit{Id.} The court concluded that it was “immaterial” whether the driver could have foreseen the passenger would leave the bus. \textit{Id.} It was enough that he could have “foreseen that injury might befall the passengers” during the fight. \textit{Id.} at 523. Plaintiff’s departure “merely affected the form of injury without materially increasing the probability” thereof. \textit{Id.}
is violated or not. Nonetheless, viewing the majority opinion from a proximate causation perspective makes it no less inexplicable. Analyzed against the widely adopted limitation to the risk approach — where the foreseeable risks that make defendant's conduct negligent likewise define the scope of liability — reflected in the majority opinion, the basis for the court's conclusion of non-foreseeability as a matter of law (and not raising an issue of fact for the jury) is ambiguous. At times, the majority seemed to concentrate on the criminal act of shooting as unforeseeable. At other times, the majority seemed to focus more broadly on the unforeseeability as a matter of law of Isaacs, given his intoxicated status, "causing injury to a third party" in any form. This is the dissenters' interpretation of the majority opinion. On occasion, the majority's analysis seemed to dwell on the licensee's inability to anticipate that Isaacs would injure Smith "simply because the two had quarreled earlier in the evening." Viewed individually or collectively, the above factors negated, in the majority's view, any issue of foreseeability for jury resolution.

By contrast, "unquestionably," the case before it was "distinguishable" from the situation of an intoxicated patron-driver who injured a third person. The latter was "certainly a foreseeable consequence" of the violation of the statute. The certainty of the court as to the foreseeability of the one and the unforeseeability of the other is breathtaking. In another context where the same court was analyzing the issue of deference to the jury on resolution of issues of disputed fact rather than, as here, denying the right to make that determination on an issue of proximate cause in the first place, a quintessential issue of fact, the Kentucky Supreme Court unanimously disclaimed any "superior ability to divine

770 See Dobbs, supra note 2, at 457, and supra note 751.
771 See Dobbs, supra note 2, at 453-58.
772 Id.
773 The court quoted Grayson's famous statement, "[E]very person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury," Grayson, 736 S.W.2d at 332, but concluded that "such a duty applies only if the injury is foreseeable." See Isaacs, 5 S.W.3d at 502.
774 See Isaacs, 5 S.W.3d at 502-03.
775 See Grayson, 736 S.W.2d at 334 (stating that "[e]xcept . . . where reasonable minds could not differ . . . the question of foreseeable risk is covered by the usual instruction relating to proximate cause, which is an issue framed for the jury . . .").
776 The court cited to the 1911 case Waller's Adm'r v Collinsworth, 137 S.W. 766 (Ky. 1911), see supra note 691, rejected in large part in Grayson, see supra accompanying notes 701-30, that injuries by shooting were per se "not a natural or probable consequence" of sale of alcohol. See Isaacs, 5 S.W.3d at 502.
777 See Isaacs, 5 S.W.3d at 502.
778 See id. at 504 (Stumbo, J., with Lambert, C.J., and Wintersheimer, J., joining, dissenting).
779 See Isaacs, 5 S.W.3d at 503.
780 The court had to determine the unforeseeability of plaintiff's injuries as a matter of law to circumvent the Grayson rule that proximate causation — a factual question based on foreseeability — is a jury issue. See Isaacs, 5 S.W.3d at 502.
781 Id. at 503 (emphasis added).
782 Id. 5 S.W.3d at 503 (emphasis added).
783 See id. at 502. The court affirmed the traditional approach but disagreed that "the results of the misconduct in this were reasonably foreseeable by the establishment." Id.
the truth by reason of judicial office, and we question the good judgment of any judge who thinks he has such powers.\textsuperscript{7784} At the end of its opinion the majority held that the bar’s sale of liquor was “not a foreseeable cause” as Smith “would not have been injured but for Isaacs’ intervening act.”\textsuperscript{7785} Presumably, the court was treating this criminal act as superseding\textsuperscript{786} as a matter of law, following its own clear edict that the intervening, superseding issue is generally one for the court where the underlying facts are not at issue.\textsuperscript{787} Its conclusory follow up remark was even less helpful: “All that can be speculated is that [defendant’s] liquor sale might (or might not) have produced a condition out of which the altercation might (or might not) have resulted.”\textsuperscript{788} Of course, a similar conclusion could have been drawn as to off-premises injuries by inebriated drivers served by the bar — but was implicitly rejected in \textit{Grayson}.\textsuperscript{789} As Dobbs has pointedly stated, this form of analysis is but a conclusory reformulation of superseding cause. “Sometimes the idea is expressed by saying, somewhat argumentatively, that the defendant only passively created a condition or occasion that made harm possible but that he was not a cause. All of these statements express conclusions, but none of them offers either reasons or guidance to lawyers. Such statements add one more layer of confusion to the analysis.”\textsuperscript{790}

The dissenters viewed the law and facts quite differently. They noted that the majority had “removed consideration of the instrumentality of the injury from the equation”\textsuperscript{791} but then still concluded that “further fueling Isaacs’ intoxication, given his prior behavior, did not create a foreseeable risk of the attack on Smith.”\textsuperscript{792} By contrast, in the dissenters’ view, it was not entirely unforeseeable that, by continuing to serve alcohol to an intoxicated customer who had already created one disturbance by harassing Smith and [friend], the club created the risk that the belligerent customer might attempt to do harm to those with whom he had earlier quarreled . . . [A] reasonable juror could conclude that Isaacs’ violent outburst was within the scope of further serving alcohol to the intoxicated, hostile patron . . . .\textsuperscript{793}

\textsuperscript{7785} See Isaacs, 5 S.W.3d at 503.
\textsuperscript{7786} See supra accompanying notes 602-15.
\textsuperscript{7787} See supra note 610.
\textsuperscript{7788} See Isaacs, 5 S.W.3d at 503 (emphasis added).
\textsuperscript{7789} See \textit{Grayson}, 736 S.W.2d at 730-35. See also the court’s discussion of RESTATEMENT (SECOND) OF TORTS § 448 (1965) in Britton, supra accompanying notes 607-10.
\textsuperscript{7790} Dobbs, supra note 2, at 461 (emphasis added). Indeed, this way of stating a conclusion is “especially unfortunate, since it suggests that conditions cannot be causes, which is neither factually nor legally the case.” Id. at n.6.
\textsuperscript{7791} Isaacs, 5 S.W.3d at 504 (Stumbo, J., with Lamberl, C.J., and Wintersheimer, J., joining, dissenting).
\textsuperscript{7792} Id.
\textsuperscript{7793} Id. (emphasis added).
Any experienced police officer will confirm that continued sales to intoxicated patrons pose risks to bar patrons — aggravated battery by fists, bottles, bar fixtures, knives, and, yes, in the increasingly violent, gun-ridden world, by guns. These incidents are far too foreseeable to be ignored, less countenanced and implicitly encouraged by a conclusion that the natural concomitant of such a sale is, as a matter of law, beyond the purview of the jury, a conclusion reached via judicial interposition of an artificially narrow, easily manipulable definition of foreseeability.

If the "particular, precise form of injury" need not be foreseeable, but only "injury of some kind to persons within the natural range of effect" need be foreseen, the bar patron, like his counterpart-common law business invitee suing the bar as business invitor, needs and deserves protection against foreseeable criminal attacks, whatever the specific modality of harm. Whatever justifications may exist for denying a remedy to police officer called to the scene in response to a vendor defendant’s negligent creation of a risk by such sales, public policy in no way supports imposing a no duty-no proximate causation hurdle to a bar patron injured from the same negligence in serving the visibly intoxicated. In such a scenario the policies underlying the "firefighter’s"/"police officer’s" rule are inapplicable.

In 1988, in response to Grayson, the General Assembly made a legislative finding and declaration in section 413.241(1) that the “consumption” of intoxicating beverages, “rather than the serving, furnishing, or sale” thereof, is “the proximate cause” of injury or death “inflicted by an intoxicated person upon himself or another person.” Paragraph (2) then followed with an express provision that no permittee who sells or serves intoxicating beverages to a person . . . shall be liable to such person or to any other person or to the estate, successors, or survivors of
either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving. 803

The only logical, indeed, permissible, reading of paragraph (2) is that it expressly recognized, reaffirmed and reiterated both the Grayson holding of vendor liability to third persons804 ("any other person")805 and the Grayson dicta protecting the intoxicated adult consumer of the alcohol806 ("such person"). It is highly likely the motivation for paragraph (2)808 was concern that paragraph (1)'s "consumption"-"the proximate cause" finding-declaration would be viewed as an attempt to repudiate a modern common law right protected by the "jural rights" doctrine.809 However, the language referring to "any other person" (Grayson) is inextricably intertwined with the "such person" language (Grayson dicta). A half-loaf conclusion — that only Grayson's holding was reiterated810 — would be illogical and contrary to the clear language of paragraph (2).

Under this analysis a constructively aware vendor of alcohol to an adult "already intoxicated" consumer who goes out and injures or kills both himself and another motorist or pedestrian would be liable to both, with the consumer's fault in voluntarily consuming presumably relevant to comparative fault apportionment under section 411.182.811 It is less clear what (2) intended as to sales to a minor who is "already intoxicated." Third party liability would be available under Pike812 and Watts813 and the interpretation of section 244.080(1).814 on sales to a minor. Liability of the vendor to the intoxicated minor is less clear, as paragraph (2) of section 413.241 deals only with sales to "already intoxicated" "lawful" or adult purchasers.815 Logically, however, the "unless" proviso should be interpreted as reflecting a clear legislative policy to likewise protect inebriated minors. The legislature cannot be presumed to have intended to discriminate against minors (a group it has traditionally accorded protection),816 a distinction

804 See Grayson, 736 S.W.2d at 333-34.
806 See Grayson, 736 S.W.2d at 333-34.
808 As the court noted in DeStock #14, Inc. v. Logsdon, 993 S.W.2d 952, 956-57 (Ky. 1999), the initial version did not contain the "unless" clause and would have "abrogated Grayson." Later amendments resulted in the "unless" clause, which "effectively reinstated the holding in Grayson." Id. at 957.
809 See supra accompanying note 394.
810 See supra note 808.
812 See supra accompanying notes 689-700.
813 See supra accompanying notes 738-45.
816 See Elder, supra note 2, at 53-91, § 2.04, and supra accompanying notes 35-87, and the discussion of Pike, supra accompanying notes 689-700. Note that the minor plaintiff in Pike was a
that might cause section 59 problems. And it would be perverse to give a vendor who engages in a double violation — minority and intoxication — greater protection than one who engages in a single — intoxication — violation.

The statute — section 413.241 is silent as to whether a sale to a minor who is not "already intoxicated" will entail liability. Vendor liability to third parties is undoubted in such cases under Pike and Watts. Arguably, the legislature's reference only to "over the age" "lawful" or adult purchasers was intended to reflect heightened protection of and induce enhanced protectiveness for immature drinkers by retail vendors in recognition of Grayson's broad policy of treating both "the intoxicated person and the minor" as both "high risk drinkers . . . " and protecting both them and society against their own delicts. This is particularly true in light of Pike's facts, involving an injured passenger who was a co-illegal purchaser of the liquor. Under this interpretation there would be no need to qualify the broad "consumpion" "the proximate cause" language of paragraph 413.241(1) because it did not logically apply to them in any event.

A recent federal decision, Dubord v. GMRI, Inc., struggled with the semantic morass of section 413.241 in just such a setting, i.e., an underaged drinker two months short of majority who caused serious injuries by high speed reckless driving to a total of seven persons — including himself. The court sketched out some broad policy arguments in support of its conclusion that no cause of action was available to plaintiff. The court noted that for "virtually all purposes" those over 18 are "full-fledged members of society" with co-purchaser of the liquor that resulted in the crash in which he was injured. See Pike, 433 S.W.2d at 626-27, and supra accompanying note 689.

\[\text{See supra note 394.}\]


\[\text{See Grayson, 736 S.W.2d at 332-33 (quoting McClellan v. Tottenhoff, 666 P.2d 408, 413 (Wyo. 1983)).}\]

\[\text{See Pike, 434 S.W.2d at 626-27, and supra accompanying notes 689-90. Note that both the plaintiff-co-purchaser and commercial vendor were acting illegally, the type of in pari delicto conduct referenced by the court in Dubord. See infra accompanying notes 825-839.}\]

\[\text{See id. at 780. Dubord misstated the amount he had drunk under defendant's honor system. Id. Note that he was also not wearing a seatbelt, which would have diminished his recovery in any event. Kentucky has adopted the "seatbelt defense" as an aspect of the doctrine of avoidable consequences. See Wemyss v. Coleman, 729 S.W.2d 174, 178, 181 (Ky. 1987). In 1994, Ky. Rev. Stat. Ann. § 189.125(6) (Michie 1997) was passed, requiring the wearing of seatbelts. Ky. Rev. Stat. Ann. § 189.125(5) provides that such a failure "shall not constitute negligence per se." An authoritative commentator has suggested Wemyss "seems unaffected." LEIBSON, supra note 2, at 238. Without discussing Ky. Rev. Stat. Ann. § 189.125(5), a Court of Appeals decision adopted negligence per se based on a Louisville ordinance but found no evidence existed to indicate injuries would have been less severe if the seatbelt had been worn. See Laughlin v. Lamkin, 979 S.W.2d 121, 125 (Ky. Ct. App. 1998).}\]

\[\text{Dubord, 52 F. Supp.2d at 781.}\]
"commensurate rights and liabilities under the law," including possible prosecution for the underlying violation, and opined that such a technically underaged, otherwise adult drinker, should not "escape personal responsibility for his own voluntary conduct." The court referenced the policy of "unspoken moral revulsion against rewarding youthful drunks for their own recklessness and self-indulgence." The Dubord court also relied in part on the in pari delicto maxim and found the two violations — illegal purchase and illegal sale "distinguishable." Consequently, plaintiff's "contribution to his own injury is 100% . . . ." The latter conclusion is questionable. It is not at all clear that the underaged business-invitee-drinker and the business-invitor-vendor are necessarily equally at fault. The latter is presumably and by definition acting as a reasonably prudent person with expertise in detecting and preventing sales to minors and the intoxicated. Moreover, the in pari delicto argument is at odds with both the common law and statutory philosophy and underpinnings of comparative fault, which

827 Id. at 782. The court cited to three out-of-state cases. Id. at 781-83. Two were from New York: Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997); Sheehy v. Big Flats Community Day, Inc., 541 N.E.2d 18, 22 (N.Y. 1989). The latter concluded that in light of the limited remedies provided by other statutes, provision of a remedy by implication would be "inconsistent with the evident legislative purpose" of the statutory scheme. The court said it neither could nor would "overrid(e) this legislative policy judgment." Id. Clearly, the court would have adopted a cause of action if the legislation had evidenced a policy favoring protecting the voluntarily intoxicated individual such as is found in § 413.241(2). Likewise, Winters v. Silver Fox Bar, 797 P.2d 51, 52-56 (Haw. 1990), involved no express legislative recognition of an intoxicated drinker claim. Indeed, the court referred to potential legislative action by "remedial measure" to shift "the burden and responsibility of injuries to minors resulting from their voluntary consumption . . . to the commercial seller" but such was left to "the wisdom of the Legislature . . . ." Id. at 56.

828 See Dubord, 52 F. Supp.2d at 781 (citing KY. REV. STAT. ANN. § 244.085(2), (3) (Michie 1994)).

829 See Dubord, 52 F. Supp.2d at 782. Presumably, under the court's analysis injured minors under 18 would be treated differently on the ground they lack legal capacity. Such differential treatment of the two groups would be difficult to justify in light of their treatment as fungible under the sale to minor liquor statutes. See KY. REV. STAT. ANN. § 244.080(1) (Lexis Supp. 2000).

830 Dubord, 52 F. Supp.2d at 182 (quoting Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997)). Of course, if Dubord has correctly interpreted the law as to under 21-18 or over adults, a fortiori, a true (21 or over) adult would be barred from suit.

831 In BLACK'S LAW DICTIONARY 898 (4th ed. 1968), the term is defined: "Where each party is equally at fault, the law favors him who is actually in possession [or defending]."

832 See Dubord, 52 F. Supp.2d at 782. In other words, plaintiff was "as much an 'offender'" in the sense of KY. REV. STAT. ANN. § 446.070 (Lexis Supp. 1999), see supra accompanying note 694, as defendant-vendor. Dubord, 52 F. Supp.2d at 782.

833 Dubord, 52 F. Supp.2d at 782. In other words, the court relied on the common law presumption favoring the defendant where both parties are equally at fault, a total victory for defendant at odds with the rejection of the "all-or-nothing" approach by Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984).

834 Compare the standard applied to the timber company, supra accompanying note 181. And see the rationale for rejecting social host-alcohol dispensor liability, i.e., that, unlike commercial vendors, social hosts lack the expertise in evaluating the amount of alcohol the imbibers can consume with safety. See Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987); Settlemeyer v. Wilmington Veterans Post No. 49, 464 N.E.2d 521, 524 (Ohio 1984) (citing other cases).


applied to "all tort actions . . . involving fault of more than one party" and apportions damages based on "equitable share . . . in accordance with the respective percentages of fault" after the jury has considered "both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."

The court also found its view "buttressed" by section 413.241(2), which it interpreted as barring absolutely "first-party claims by overage persons" against vendors for injuries resulting from sales while intoxicated and was "convinced this constraint" would apply also to those between 18 and 21 in light of section 413.241(1). There are two fallacies with this argument. As indicated above, an alternative construction of section 413.241 exists, i.e., that section 413.241(1) does not apply to minors in any event. Additionally, viewing section 413.241(2) as barring all third party actions involving overage intoxicated consumers flies in the face of the statutory language ("such person") and the legislative adoption of the Grayson dicta. Indeed, the Dubord court seems to recognize the shakiness of its interpretation by its footnote recognizing that no issue had been presented as to whether the vendor "did or should have recognized" that Dubord was inebriated while at defendant's licensed premises.

As stated above, section 413.241(2) explicitly provides for liability in cases of sale or service to an adult "already intoxicated" consumer where the reasonably prudent vendor or server is constructively aware. A compelling argument makes a comparable case for the same claim as to an underaged consumer under like circumstances. As stated above commercial vendors and servers have expertise in detecting and preventing sales to the intoxicated, both adult and minor. Moreover, in such cases Grayson recognized that the vendor as "sober contributor to the intoxication process" is "oftentimes more" at fault than the drinker. In such circumstances, the in pari delicto argument relied on by the Dubord court would run afoul of both common law and statutory

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837 Id. at § 411.182(1).
838 Id. at § 411.182(3).
839 Id. at § 411.182(2).
840 See Dubord, 52 F. Supp.2d at 782 (emphases added). The implications of the finding-declaration in § 413.241(1) that "consumption" is "the proximate cause" of injury or death "inflicted by an intoxicated person upon himself or another person" are unclear (emphases added). Presumably, under Dubord's analysis, the implication is that the policy would be inapplicable as to true minors, those under 18. What are the implications viewed more broadly? Does the "consumption" "the proximate cause" rule apply to a drunk slipping on an icy sidewalk created by defendant's negligence outside the door? Or is such a person "off the premises" under § 413.241(2)? Does it apply to bar an action for a fall on a dangerous, non-obvious or otherwise unreasonably risky floor en route to the bathroom? Can such on-off distinction be justified? What of a fistfight plaintiff-intoxicated patron gets into with another intoxicated patron and which the commercial vendor could have easily foreseen and prevented? Are either or both patrons barred from suit by § 413.241(1)? Note that such a conclusion would effectively abrogate a commercial vendor's liability to its patrons under the common law. See supra accompanying notes 618.
841 See supra accompanying notes 801-10.
842 See Dubord, 52 F. Supp. 2d at 782, n.2.
843 See supra accompanying notes 801-19.
844 See supra accompanying note 834.
845 Grayson, 736 S.W.2d at 332.
comparative fault and subsume a type of implied statutory contributory negligence defense within the structure of section 413.241.

Both sections 413.241 and 411.182 became effective the same day, July 15, 1988.\footnote{See KY. REV. STAT. ANN. § 413.241 (Michie 1992); KY. REV. STAT. ANN. § 411.182 (Michie 1992).} Kentucky courts have interpreted section 411.182 as impliedly repealing an earlier statute, which contained in part a contributory negligence defense in product liability actions.\footnote{In Caterpillar, Inc. v. Brock, 915 S.W.2d 751 (Ky. 1996), cert. denied, 520 U.S. 1166 (1997), the Kentucky Supreme Court on certification from the Sixth Circuit held that § 411.182 impliedly repealed § 411.320(1) of the 1978 act, which made any alteration or modification (which included a "failure to observe routine care and maintenance") a complete defense. The court reasoned that § 411.182 was passed following its decision in Reda Pump Co. v. Finck, 713 S.W.2d 818, 819-21 (Ky. 1984), which held that § 411.320, not comparative negligence under Hilen v. Hays, 673 S.W.2d 713, 718-20 (Ky. 1984), controlled in product liability cases. See Caterpillar, Inc, 915 S.W.2d at 753. The "straightforward" language of § 411.182 was held to allow "only one construction: that in all tort actions, including products liability actions, fault is to be apportioned among all parties to each claim." Caterpillar, Inc., 915 S.W.2d at 753. Such "exemplifie[d] the concept of fundamental fairness" of Hilen. Id. (emphases added). The latter case did not deal directly with § 411.320(3), the separate absolute statutory defense for plaintiff's contributory negligence in product cases. However, the logic of that decision and all other precedent directly or indirectly on point have found an implied repeal as to (3) also. See Smith v. Louis Berkman Co., 894 F. Supp. 1084, 1090-91 (W.D. Ky. 1995); Wyke v. Sea Nymph, Inc., 758 F. Supp. 418, 422 (W.D. Ky. 1990) (following Koehing); Koehing v. International Armament Corp., 772 S.W.2d 634, 635-36 (Ky. 1989) (implying § 411.182 would control over § 411.320(3) but for a retroactivity problem); Ingersoll-Rand Co. v. Rice, 775 S.W.2d 924, 929 (Ky. Ct. App. 1989). See supra note 847.} Only a perverse construction of section 413.241 could find either an overage or underage intoxicated individual 100% liable under a statute passed the same day as another statute interpreted as merely \textit{diminishing the recovery} of a product misuser in a suit against a manufacturer.\footnote{See supra note 847.} If the it-takes-two-to-tango philosophy of comparative negligence and statutory comparative fault is deemed necessary by societal policies of fundamental fairness and deterrence of misconduct,\footnote{See Hilen v. Hays, 673 S.W.2d 713, 718-19 (Ky. 1984) (stating that the "fundamental fairness" of pure comparative fault, "liability for any particular injury in direct proportion to fault," "eliminates a windfall for either claimant or defendant as presently exists in our all-or-nothing situation . . . .").} parallel policies apply in the licensed vendor of intoxicating beverages setting, where licensee control over overage and underage abuse of alcohol is necessary to reduce the carnage on the highways referenced in \textit{Grayson}.\footnote{See Grayson, 736 S.W.2d at 331.} Such a legal philosophy can and should be based in section 411.182.

Section 413.241(3)\footnote{See Degener v. Hall Contracting Corp., 27 S.W.3d 775 (Ky. 2000); DeStock #14, Inc. v. Logsdon, 993 S.W.2d 952 (Ky. 1999).} contains broad language — "[t]he intoxicated person shall be primarily liable with respect to injuries suffered by third persons" — that raises the issue of the continuing significance of common law indemnity, i.e., the right of one of two or more joint tortfeasors to shift the entire burden to the other(s), and whether this doctrine was subsumed within section 411.182 or remains separately extant as a common law doctrine. Two recent Kentucky Supreme Court decisions,\footnote{KY. REV. STAT. ANN. § 413.241(3) (Michie 1992); id. at § 413.241(3) (Lexis Supp. 2000).} neither of which cites the other, have delved into this
issue. There was no doubt therein that an innocent party merely vicariously liable remained entitled to indemnification. The only doubt was whether the “active-passive” scenario involving more than one tortfeasor survived section 411.182’s mandatory apportionment of several liability. In 1995 a respected commentator had opined that the “active-passive” doctrine likely did not survive section 411.182.

The Kentucky Supreme Court analyzed this issue recently in the non-liquor liability context in the case of Degener v. Hall Contracting Co., involving indemnity claims by “settling passive” tortfeasors who failed to act to prevent the “active” wrongdoers from allegedly injuring the plaintiffs in the original litigation — thieves who injured police officers by a bomb made from dynamite stolen from one defendant and a sexually harassing physician with staff privileges at a clinic operated by the other defendant. The Degener opinion concluded that section 411.182 and “apportionment of causation and the requirement of several liability obviates any claim for contribution among joint tortfeasors whose respective liabilities are determined in the original action.” However, this was limited to situations involving “joint tortfeasors in pari delicto” and had no application where a “constructively or secondarily liable” was involved, who had a continuing right to “total indemnity from the primarily liable party” with whom there was no “in pari delicto” relationship.

The Degener majority found both settling initial defendants to be “passive” wrongdoers with a right of total indemnity against the “active wrongdoer.” Justice Keller, alone in dissent, concluded that section 411.182 was intended to vitiate “equitable implied indemnity” and that the majority “effectively overrules” Hilen v. Hays and “repeals” section 411.182. He disparaged “equitable implied indemnity” as a “‘blunt instrument’” for shifting the entire
loss to a single tortfeasor — "active" — "passive" — that were merely appropriate factors to be assessed by the jury in determining apportionment under Kentucky's pure comparative fault scheme. In the second case issued before Degener, DeStock #14, Inc. v. Logsdon, the Kentucky Supreme Court dealt with an array of issues arising from sections 413.241 and 411.182. In that case DeStock, operating Applebee's, a neighborhood bar and restaurant, allegedly served Logsdon while intoxicated. Logsdon rearended a car operated by Reid with Alvey as passenger, causing the car to collide with a third vehicle. Reid and Alvey sued Logsdon and DeStock, asserting liability under section 413.241. DeStock crossclaimed against Logsdon for indemnity as to any sums to be paid to Reid and/or Alvey.

After discovery Reid and Alvey settled with Logsdon. Subsequently, summary judgments were issued dismissing Reid's and Alvey's claims against DeStock and its crossclaim against Logsdon. Reid and Alvey filed an appeal and DeStock did the same as a precaution as to its crossclaim against Logsdon. The Court of Appeals reversed and remanded for additional proceedings. The Supreme Court granted review on this issue of "first impression" of section 413.241 and reversed with specific directions.

The court noted that prior cases such as Pike and Grayson had never reached the issue of the nature of the licensee-vendor's liability, i.e., whether (1) the drunken driver's liability was imputed to the vendor (as in cases of "negligent entrustment" of a vehicle to one known to be inebriated), or (2) whether the licensee-vendor's negligence would be concurrent with the drunk driver and subject to apportionment under section 411.182, or (3) whether the drunk driver was "primarily liable" and the licensee-vendor only "secondarily liable" and not in pari delicto. In this respect the Court noted Grayson's "strongly worded dictum" — "the seller is as much a wrongdoer as the buyer, oftentimes more so because at least the seller is a sober contributor to the intoxication process." After tracing the history of section 413.241's passage, including the "reinstate(ment)" of Grayson's holding in section 413.241's "unless clause," the court confronted the Reid-Alvey suggestion that section 413.241(2) (with its "unless clause") was intended to "emasculate" section 413.241(1) (and its "consumption" — "the proximate clause" declaration-finding) and section 413.241(3) (with its imposition of primary liability on the intoxicated person

\[861\] Id. at 785 (quoting Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362, 367 (Minn. 1977)).

\[862\] See Degener, 27 S.W.3d at 785 (Keller, J., dissenting).

\[863\] Id. at 785-86. He suggested that the majority view "potentially reinstates contributory negligence by, at least theoretically, allowing a 'passively negligent' defendant to bring an action for equitable implied indemnity against an 'actively negligent' plaintiff." Id. at 786-87.

\[864\] 993 S.W.2d 952 (Ky. 1999).

\[865\] See id. at 954-55.

\[866\] Id. at 955.

\[867\] Id. (citing Owensboro Undertaking & Livery Ass'n v. Henderson, 115 S.W.2d 563, 564 (Ky. 1938).

\[868\] See DeStock, 993 S.W.2d at 955.

\[869\] Id. (quoting Grayson, 736 S.W.2d at 332).

\[870\] See Destock, 993 S.W.2d at 956-57.
“with respect to injuries suffered by third persons”). The court rejected this "emasculating" argument, noting that none of the draft versions had ever intended complete immunization of licensee-vendors from liability. For example, even the original of section 413.241(3) had not attempted to bar liability for sale or service to a minor. 871

Reid and Alvey also contended that section 413.241(1)’s "consumption"-"the proximate cause" finding-declaration and section 413.241(2)’s imposition of intoxicated driver-primary liability were "inherently inconsistent." 872 The court applied standards of interpretation to sections of the same statute in conflict seeking to "harmonize [them] if possible" and to avoid a construction that would make any section thereof "meaningless or ineffectual." 873 The court resolved this conflict by imputing Logsdon’s liability to DeStock if the latter’s employees sold Logsdon alcohol where the reasonable person-employees were constructively aware Logsdon was already inebriated and such sale was a substantial factor in causing him to be intoxicated at the time of the collision and a substantial factor in causing the collision. In such a case both DeStock and Logsdon were liable to Reid and Alvey, but under section 413.241(3) Logsdon was "primarily" so, DeStock only "secondarily" so. In other words, section 413.241 "dispelled" the idea in Grayson’s dictum that the licensee-vendor and the inebriated driver were to be viewed as in pari delicto. 874 Unlike prior case law dealing with common law public policy ramifications of the latter concept, 875 in this case that issue had been decided by the legislature in section 413.241. 876

The legislative determination as to "primary"-"secondary" (and rejection of in pari delicto as between inebriated driver and licensee-vendor) also "nullified the basis" for Logsdon’s summary judgment as to DeStock, i.e., (1) that their shares were to be determined under Hilen v. Hays and section 411.182 and (2) Logsdon’s liability was limited to sums he had paid Reid and Alvey to settle their claims. 877 The court cited to the "causal relation" language in section 411.182 878 and held that section 413.241(1) had legislatively resolved that DeStock’s negligence was not a "proximate cause of Reid’s and Alvey’s injuries." Accordingly, comparative fault and apportionment under section 411.182 were not applicable to a determination of DeStock’s liability to the injured parties. 879 As to the latter, Logsdon’s liability was imputed to DeStock, and the injured parties could sue them both and recover against either or both. 880 However, as

871 Id. at 957.
872 Id.
873 Id.
874 Id.
875 The court cited to Crime Fighters Patrol v. Hiles, discussed supra note 859. See DeStock, 993 S.W.2d at 957-58.
876 See DeStock, 993 S.W.2d at 958.
877 Id.
878 See KY. REV. STAT. ANN. § 411.182(2) (Michie 1992). It ignored the “nature of the conduct” language prefatory thereto. Id.
879 See DeStock, 993 S.W.2d at 958.
880 Id.
between DeStock and Logsdon, DeStock’s “secondarily liable” statutory status entitled it to indemnity from the “primarily liable” intoxicated driver, Logsdon.\textsuperscript{881}

In so concluding, the court declined to give priority to section 411.182’s application to “all tort actions” (and the analysis in \textit{Caterpillar Inc. v. Brock})\textsuperscript{882} over section 413.241(1), (3). Since both sections 411.182 and 413.241 were effective the same date, one “broad” and “general,” the other, “specific” or “particular,” the court construed them as “entitled to equal dignity and . . . construed [them] so as to give effect to both.”\textsuperscript{883} Applying these canons of construction, the court held that section 411.182 “[did] not require apportionment of liability between the drunken driver and the dram shop in an action brought under section 413.241 of the Kentucky Revised Statutes.”\textsuperscript{884} It did note parenthetically however, that any fault of Reid as driver would demand an apportionment between him and Logsdon, and DeStock’s liability to Reid would be limited to the percentage allocation attributed to the intoxicated driver, Logsdon.\textsuperscript{885}

The summary judgment given DeStock had been based on the theory that the release by Reid and Alvey to Logsdon, who was “primarily liable,” constituted a release also of DeStock, which was only “secondarily liable . . . .” This was error.\textsuperscript{886} The court distinguished earlier precedent where the “secondarily liable party” was only \textit{vicariously liable} based on agency principles.\textsuperscript{887} Where, however, as here, liability was based on Logsdon’s drunken driver and DeStock’s separate tortious action through the “independently negligent” acts of sale or service of alcohol to Logsdon, the release to Logsdon did not release DeStock.\textsuperscript{888}

The court evidenced little concern with Logsdon’s contention that DeStock’s right of indemnity would entail loss of benefit of his settlements with Reid and Alvey, as he had settled with knowledge of DeStock’s crossclaim for indemnification. The terms of the settlement were not disclosed in the record. However, \textit{if} a “hold harmless” clause\textsuperscript{889} was entered, Reid and Alvey would be barred from recovery against DeStock under the following reasoning. DeStock would be entitled to indemnity from Logsdon for such recovery and Reid and Alvey would be contractually required to “hold harmless” Logsdon to the extent of the indemnification agreement. However, \textit{if} no “hold harmless” agreement was entered, Reid and Alvey were entitled to go to trial against DeStock, which would be allowed credit against any judgment damages in favor of Reid and Alvey to the extent of the amounts received in settlement from Logsdon. And

\textsuperscript{881} \textit{Id.}

\textsuperscript{882} \textit{See supra} accompanying note 847.

\textsuperscript{883} \textit{DeStock}, 993 S.W.2d at 959.

\textsuperscript{884} \textit{See id.}

\textsuperscript{885} \textit{See id.}

\textsuperscript{886} \textit{Id.}

\textsuperscript{887} \textit{Id.} (citing \textit{Copeland v. Humana of Kentucky, Inc.}, 769 S.W.2d 67, 69-70 (Ky. Ct. App. 1989)).

\textsuperscript{888} \textit{See DeStock}, 993 S.W.2d at 959.

\textsuperscript{889} \textit{Id.} at 959-60 (referencing \textit{Crime Fighters Patrol v. Hiles}, 740 S.W.2d 936, 937 (Ky. 1987)).
DeStock would be entitled to indemnity against Logsdon for any amounts required to be paid in damages to Reid and/or Alvey.

Although DeStock found section 411.182 inapplicable in the indemnity context of sections 413.241(1)-(3), its conclusions would not control in the Dubord setting discussed in detail above, where only sections 413.241(1) and (2) came into play. It needs to be emphatically reaffirmed that section 413.241(3) deals only with the “primarily liable” status of the “intoxicated person . . . with respect to injuries suffered by third persons.”

DeStock says nothing about suits between the intoxicated person and the licensee-vendor, as it deals only with indemnity.

Accordingly, applying DeStock’s rules and canons of interpretation, what is to be made of the cause of action expressly accorded the intoxicated consumer-patron (“such person” — “that person” in the 1998 version presently in force) under section 413.241(2) in light of the broad declaration-finding in section 413.241(1) that “consumption” is “the proximate cause” of injury or death “inflicted by an intoxicated person upon himself or another person.” To give the latter full effect would be to absolutely bar the claim expressly provided in section 413.241(2) and render substantial aspects thereof nugatory. However, in light of DeStock, no such construction is either required or defensible. Applying the “harmoniz[ation]” rule cited above, “no part” of section 413.241 should be rendered “meaningless or ineffectual.” Consequently, the cause of action expressly provided for in section 413.241(2) should control over the broader, general language in the finding-declaration section. Thus viewed, under the analysis aforesaid, section 411.182 would control in determining the extent to which the injured or dead consumer-patron’s claim should be limited in a suit against the licensee-vendor. Section 413.241(3) on its fact is clearly inapplicable under any valid canon of construction. The consumer-patron cannot be considered both the “intoxicated person” and the injured “third person[ ].”

CONCLUSION

As the above hopefully exhaustive (and arguably exhausting) analysis demonstrates, Kentucky courts have been confronted with a myriad of important issues, including trying to make sense of the General Assembly’s confusing sortie into tort liability issues involving liquor licensee-vendors. With only occasional exceptions, the courts’ opinions have focused intently on the narrow

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890 See DeStock, 993 S.W.2d at 959-60.
894 See DeStock, 993 S.W.2d at 957.
895 Indeed, it would be difficult not to find the licensee-vendor in pari delicto in the intoxicated consumer-patron injury situation in light of the Supreme Court’s characterization of Grayson’s sale of alcohol to an intoxicated person as a situation where a defendant’s employee “consciously and actively assisted an intoxicated patron in committing the illegal act of driving while drunk.” Fryman v. Harrison, 896 S.W.2d 908, 910-11 (Ky. 1995) (emphases added).
issues and facts before them, rejecting any reanalysis of existing law and methodology in light of the now slight majoritarian abolition-of-categories approach and its counterpart in the landlord-tenant/guest setting. This absence of any overarching philosophy has unfortunately resulted in curious anomalies, e.g., the Kentucky Supreme Court’s issuance of opinions less than a year apart reaffirming its modernly indefensible no duty “outdoor natural hazards” rule while evidencing a strong predisposition to rethink its traditionally conservative and grossly inequitable posture to indoor slip-and-fall cases. The Supreme Court’s philosophy lacks coherence, making it difficult to predict its reaction to future developments appearing before it. However, as the analysis herein suggests, the court-watching process in the occupier and owner arena will not be boring.
INTRODUCTION

The purpose of this article is to provide the legal practitioner with a current status of Kentucky law in medical malpractice. Section I outlines the history of medical malpractice by reviewing the basic principles developed over the years. Section II discusses the survey cases of the past two years and provides analysis of the decisions.

BACKGROUND

A. Negligence

1. Elements

The tort of negligence requires the plaintiff to prove three elements. The elements are as follows: (1) a duty owed to the plaintiff by the defendant; (2) a
breach of that duty; and (3) consequent injury. The same elements are required in a medical malpractice case.

While the standard of care will vary with different areas of specialty, some duties are common to all physicians who undertake the treatment of a patient. A physician has a duty to comply with the professional standards of care to which he or she is bound. The standard of care required of any physician requires the exercise of reasonable and ordinary knowledge, skill, and diligence as physicians in similar geographical areas ordinarily use under like circumstances. However, the Supreme Court of Kentucky in Blair v. Eblen determined that the "community standard" was too rigid. The court held that the standard of care is that which is expected of a reasonably competent practitioner in the same practice area acting in the same or similar circumstances. Factors considered to determine if the requisite standard of care is established include, (a) locality, (b) availability of facilities, (c) area of practice, (d) location and proximity of specialized physicians and facilities, and (e) other relevant circumstances.

Another duty bestowed upon a physician is to give patients all necessary and continual attention as long as the situation requires. The physician must make arrangements for the care of the patient if the physician will be unavailable to provide continual and proper care. Another duty is to inform the patient of the known risks and potential outcomes of treatment and obtain informed consent from the patient.

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5 Id.
6 See Reams v. Stutler, 642 S.W.2d 586, 588 (Ky. 1982).
7 See Stacy v. Williams, 69 S.W.2d 697, 704 (Ky. 1934) (quoting Pike v. Honsinger, 49 N.E. 760, 762 (N.Y. 1898)).
8 Id. at 704.
9 See Walden v. Jones, 158 S.W.2d 609, 610 (Ky. 1942).
10 See Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. 1970).
11 Id.
12 Id.
13 See Johnson v. Vaughn, 370 S.W.2d 591, 596 (Ky. 1963).
14 Id.
15 See KY. REV. STAT. ANN. § 304.40-320 (Banks-Baldwin 2000). The statute provides:

   In any action brought for treating, examining, or operating on a claimant wherein the claimant's informed consent is an element, the claimant's informed consent shall be deemed to have been given where:

   (1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience; and

   (2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures;

   (3) In an emergency situation where consent of the patient cannot reasonably be obtained before providing health care services, there is no requirement that a health care provider obtain a previous consent.

Id.
The physician is deemed to have breached his or her duty when the physician renders treatment that falls below this standard of care. However, a mere error in judgment does not constitute negligence. There is no presumption of negligence because of a patient’s mental pain and suffering, because of a physician’s failure to cure, or because of bad results. Furthermore, there is no inference of negligence based on side effects medicine may have on a patient. Negligence must be proven by the physician’s failure to perform in accordance with the requisite standard of care owed to the patient. In general, a physician’s failure to conform to the standard of care must be proven by expert testimony.

A physician is liable only when the breach of duty proximately causes injury to the plaintiff. The plaintiff has the burden to prove that the negligence of the physician was the proximate cause of the injury. In general, this element must also be proven through expert testimony. However, the exception is where the causation is so apparent the average person would be able to recognize that the physician’s negligence proximately caused the injury. A mere possibility of proximate causation is not sufficient. Proximate causation must be proven within a reasonable medical probability. Therefore, the plaintiff must prove through expert testimony that the defendant breached his or her duty of care and thereby proximately caused injury to the plaintiff.

B. Liability

1. Physician

The physician is liable for want of the required knowledge and skill or from omission to use reasonable care and diligence in the treatment of the plaintiff. In addition, there are two theories that hold the physician liable for the actions of hospital staff. The theories are the “borrowed servant doctrine” and the “captain of the ship doctrine.” The borrowed servant doctrine provides that a surgeon borrows the hospital’s support staff and nurses during surgery. Therefore, the

16 See Prewitt v. Higgins, 22 S.W.2d 115, 117 (Ky. 1929).
17 See, e.g., Meador v. Arnold, 94 S.W.2d 626, 631 (Ky. 1936).
18 Id. at 631.
19 See Prewitt, 22 S.W.2d at 117.
20 Id.
21 See Meador, 94 S.W.2d at 631.
22 Id.
23 Id.
24 See, e.g., Jarboe v. Harting, 397 S.W.2d 775, 777 (Ky. 1965).
25 Id. at 778.
26 Id.
27 See id. at 777 (citing Kelly Contracting Co. v. Robinson, 377 S.W.2d 892 (Ky. 1964)).
28 Id.
29 See Walden v. Jones, 158 S.W.2d 609, 610 (Ky. 1942).
30 See City of Somerset v. Hart, 549 S.W.2d 814, 816 (Ky. 1977).
physician is responsible for their negligence during surgery. Since the nurse is "borrowed," the hospital is relieved from liability under the borrowed servant doctrine.

In *City of Somerset v. Hart*, the Supreme Court of Kentucky noted that the borrowed servant doctrine imposes liability on the physician for the negligent acts of a hospital employee during surgery. The court reasoned, however, that this doctrine tends to ignore the legal principle of agency that a person can serve two masters. Frequently, it is a mutual interest that the nurse obeys orders from both the hospital and surgeon. As a matter of law, when a nurse performs duties which are of mutual interest to both the surgeon and hospital and "effects their common purpose," the act is as a servant of both hospital and surgeon. Therefore, the hospital is not necessarily eliminated from liability under Kentucky's borrowed servant doctrine.

Second, the captain of the ship doctrine provides that the surgeon is in complete control of the operation. Since the surgeon has control, the liability for negligent acts by hospital staff falls on the surgeon. However, the courts have slowly begun to impose liability on the hospital for the negligence of physicians and other hospital staff. As a result, plaintiffs may now have a cause of action against the physician and hospital for medical malpractice.

2. Hospital

Until recently, hospitals were charitable institutions and exempt from responsibility for the negligent acts of their employees. Since hospitals were primarily supported by philanthropies and religious organizations, the courts afforded them immunity. In addition, hospitals were viewed as "hotels providing rooms, buildings, where private medical practitioners treat private patients." Hospitals were not viewed as providing care to the patients.

31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* at 817.
35 *Id.*
36 See *City of Somerset*, 549 S.W.2d at 817.
37 *Id.*
39 *Id.* at 680.
40 See Braden & Lawrence, *supra* note 38, at 681.
41 *Id.* at 678.
42 *Id.* at 677.
43 Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 258 (Ky. 1985) (citing Stacy v. Williams, 69 S.W.2d 697, 707 (Ky. 1934)).
44 *Id.* at 258.
Therefore, charitable immunity afforded hospitals absolute immunity from negligent acts of physicians, nurses, and hospital personnel.\footnote{See Braden & Lawrence, supra note 38, at 678.}

However, most hospitals have become "for profit" organizations \footnote{Id. at 681.} and courts have imposed several duties on those hospitals, including the duty to provide proper care to patients.\footnote{See Williams v. Saint Claire Med. Ctr., 657 S.W.2d 590, 597 (Ky. Ct. App. 1983).} Therefore, the public policy justification for charitable immunity has dissolved.\footnote{See Braden & Lawrence, supra note 38, at 681.}

There are several duties hospitals owe patients. First, hospitals have duties that include maintaining facilities; providing and maintaining medical equipment; and hiring, supervising and retaining nurses and other staff employees.\footnote{See Williams, 657 S.W.2d at 594.} Second, liability can be imposed for negligent failure to have in place procedures and protocols that protect patients and for failure to enforce established procedures and protocols.\footnote{Id.} Third, hospitals have a duty to provide and promote proper care given to patients.\footnote{Id. at 597.} Breach of these duties that proximately causes injury to the patient will expose the hospital to liability.\footnote{Id.}

Fourth, hospitals have a duty to provide a safe environment for treatment and recovery.\footnote{Id. at 930.} When a hospital has unsafe premises due to its negligence and that condition causes injury to the patient, the duty is breached and the hospital can be liable.\footnote{See Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 257-58 (Ky. 1985).}

Lastly, courts apply the ostensible agency doctrine to impose liability on the hospital for the negligent acts of independent contractors working within the hospital.\footnote{Id. at 257 (Due to the fact that the hospital is open to the public and the public expects care provided through the operation of hospital procedures, the hospital is liable).} In one case, an emergency room physician, who was not employed by the hospital, treated a patient negligently in the facility furnished by the hospital.\footnote{Id. at 257 (quoting RESTATEMENT (SECOND) OF AGENCY § 267 (1958)).} The court held the hospital liable based on the ostensible agency doctrine.\footnote{Id. at 258 (Due to the fact that the hospital is open to the public and the public expects care provided through the operation of hospital procedures, the hospital is liable).}

This doctrine is defined as:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.\footnote{Id.}

There are several reasons to apply the ostensible agency doctrine. First, the people seeking care do not know the status of employment between the care

\footnotetext[45]{See Braden & Lawrence, supra note 38, at 678.}
\footnotetext[46]{Id. at 681.}
\footnotetext[47]{See Williams v. Saint Claire Med. Ctr., 657 S.W.2d 590, 597 (Ky. Ct. App. 1983).}
\footnotetext[48]{See Braden & Lawrence, supra note 38, at 681.}
\footnotetext[49]{See Williams, 657 S.W.2d at 594.}
\footnotetext[50]{Id.}
\footnotetext[51]{Id. at 597.}
\footnotetext[52]{Id.}
\footnotetext[53]{See Lexington Hosp. v. White, 245 S.W.2d 927, 929 (Ky. 1952).}
\footnotetext[54]{Id. at 930.}
\footnotetext[55]{See Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 257-58 (Ky. 1985).}
\footnotetext[56]{Id. at 257.}
\footnotetext[57]{Id. at 258 (Due to the fact that the hospital is open to the public and the public expects care provided through the operation of hospital procedures, the hospital is liable).}
\footnotetext[58]{Id. at 257 (quoting RESTATEMENT (SECOND) OF AGENCY § 267 (1958)).}
providers and the hospital. Second, it would be unreasonable to require a patient to determine the employment status of those providing care in the hospital. Third, plaintiffs should have the right to assume that the treating physician is rendering services as an employee of the hospital. In addition, courts have also applied this principle toward anesthesiologists, pathologists, and radiologists, all of whom are supplied by the hospital and not selected by the patient.

C. Damages

I. Measurement

The law of Kentucky allows an injured party in a medical malpractice action to recover full compensation. In general, the purpose of tort law is to place the injured party in the position he or she would be in had the tort not occurred. Also, Kentucky recognizes that punitive damages could be recovered for negligent conduct that exceeds ordinary negligence. Punitive damages are not actual damages. They are awarded to punish the wrongdoer and deter such conduct. The standard for a trial court to review excess damages is the "no blush rule." If the judge does not blush, the award is not excessive and the court will not reverse. When the jury verdict is inadequate, the appropriate remedy is a new trial.

In a medical malpractice action, the measure of damages is the reasonable compensation for past and future bodily pain and mental suffering endured, permanent impairment of ability to earn money, past and future lost wages, and past and future medical expenses. The Kentucky Court of Appeals, in

59 Id. at 258.
60 Id.
61 See Paintsville Hosp., 683 S.W.2d at 258.
62 Id. at 257.
63 See Smith v. McMillan, 841 S.W.2d 172, 175 (Ky 1992).
64 Id.
65 See Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998).
66 See Ky. REV. STAT. ANN. § 411.184(1)(f) (Banks-Baldwin 2000). The statute provides:
As used in this section and KRS 411.186, unless the context requires otherwise:
(f) "Punitive damages" includes 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.

Id.
67 Id.
69 Id.
70 See McVey v. Berman, 836 S.W.2d 445, 448 (Ky. 1992).
71 See Dorris v. Warford, 100 S.W. 312, 313 (Ky. 1907).
72 See McVey, 836 S.W.2d at 449.
73 See Dorris, 100 S.W. at 313.
Beauchamp v. Davis, held that when a patient's injury is a broken bone, the patient is entitled to damages accrued in excess of that which naturally flows had the patient been treated with the requisite standard of care.\textsuperscript{75} If the possibility of beneficial results is destroyed because of the physician's negligence, the plaintiff is entitled to all expenses incurred in the entire course of treatment.\textsuperscript{76} These special damages include expenses incurred for doctors, nurses, medicines, and hospitals after the alleged negligence occurred.\textsuperscript{77} The issue of special damages is submitted to the jury.\textsuperscript{78} Furthermore, the plaintiff is entitled to future mental and physical pain and suffering.\textsuperscript{79}

Recently, the Kentucky Court of Appeals decided that a minor could be awarded damages for the loss of parental consortium.\textsuperscript{80} The common law recognizes that the child can bring the claim to recover from a wrongdoer whose negligent act caused the injury or death of the child's parent.\textsuperscript{81} The proof of loss of parental consortium and monetary loss are factors considered separately from the statutory wrongful death claim.\textsuperscript{82}

\section*{D. Statutory Provisions}

\subsection*{1. Peer review privilege}

Professional review proceedings and records of medical staff are not privileged from discovery in a medical malpractice case.\textsuperscript{83} In 1980 the General Assembly reenacted Kentucky Revised Statutes section 311.377, originally passed in 1976.\textsuperscript{84} This statute is a waiver of a claim for damages by applicants

\textsuperscript{75} See Beauchamp v. Davis, 217 S.W.2d 822, 826 (Ky. 1948).
\textsuperscript{76} Id. at 826.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See McVey, 836 S.W.2d at 449.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} See Sweasy v. King's Daughters Mem'l Hosp., 771 S.W.2d 812, 816 (Ky. 1989).
\textsuperscript{84} See Ky. Rev. Stat. Ann. § 311.377 (Banks-Baldwin 2000). The statute provides:

(1) Any person who applies for, or is granted staff privileges after June 17, 1978, by any health services organization subject to licensing under the certificate of need and licensure provisions of KRS Chapter 216B, shall be deemed to have waived as a condition of such application or grant, any claim for damages for any good faith action taken by any person who is a member, participant in or employee of or who furnishes information, professional counsel, or services to any committee, board, commission, or other entity which is duly constituted by any licensed hospital, licensed hospice, licensed home health agency, health insurer, health maintenance organization, health services corporation, organized medical staff, medical society, or association affiliated with the American Medical Association, American Podiatry Association, American Dental Association, American Osteopathic Association, or the American Hospital Association, or a medical care foundation affiliated with such a medical society or association, or governmental or quasigovernmental agency when such entity is performing the designated function of review of credentials or retrospective review and evaluation of the competency of professional acts or conduct of other health care personnel. This subsection shall have equal application to, and the waiver be effective for, those persons
for staff privileges against individuals who are members or employees of a peer review entity.\textsuperscript{85} It also protects individuals who participate in the process.\textsuperscript{86} It makes the proceedings, records, opinions, conclusions, and recommendations confidential and privileged; therefore, they are not subject to discovery in civil actions or administrative proceedings.\textsuperscript{87}

The peer review entity is any committee, board, or commission that is established by qualified health care organizations to review credentials or perform retrospective review and evaluation of the competency of professional acts or conduct of other health care professionals.\textsuperscript{88} This statute has been held to be limited to suits against such peer review entities and not applicable in medical malpractice actions.\textsuperscript{89}

who, subsequent to June 17, 1978, continue to exercise staff privileges previously granted by any such health services organization.

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

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

(4) No person who presents or offers evidence in proceedings described in subsection (2) of this section or who is a member of any entity before which such evidence is presented or offered may refuse to testify in discovery or upon a trial of any civil action as to any evidence, document, or record described in subsection (3) of this section or as to any information within his own knowledge, except as provided in subsection (5) of this section.

(5) No person shall be permitted or compelled to testify concerning his testimony or the testimony of others except that of a defendant given in any proceeding referred to in subsection (2) of this section, or as to any of his opinions formed as a result of such proceeding.

(6) In any action in which the denial, termination, or restriction of staff membership or privileges by any health care facility shall be in issue, agents, employees, or other representatives of a health care entity may with the consent of such health care entity testify concerning any evidence presented in proceedings related to the facility's denial of such staff membership or privileges.

(7) Nothing in this section shall be construed to restrict or prevent the presentation of testimony, records, findings, recommendations, evaluations, opinions, or other actions of any entity described in subsection (1) of this section, in any statutory or administrative proceeding related to the functions or duties of such entity.

(8) In addition to the foregoing, the immunity provisions of the federal Health Care Quality Improvement Act of 1986, P.L. 99-660, shall be effective arising under state laws as of July 15, 1988.

\textit{Id.}


\textsuperscript{86} \textit{Id.}


\textsuperscript{89} See Sweasy, 771 S.W.2d at 816.
2. Informed consent

Kentucky has an informed consent statute that sets forth the requirements of establishing informed consent. Valid consent is to be established from all the evidence surrounding the circumstances. There is no statutory requirement that consent must be in writing. Therefore, verbal consent can be established and will be deemed sufficient. The extent of disclosure to secure informed consent is evaluated in terms of what the physician knew or should have known at the time the treatment was recommended. Also, the hospital, as a "health care provider," has a duty to inform the patient of known risks.

Yet, in an emergency where the patient is unconscious and unable to give consent, and the medical condition requires immediate attention, the physician who operates before obtaining consent is not necessarily negligent for failing to obtain consent.

A physician who fails to obtain informed consent may be held liable for assault. In this situation, the physician is liable in damages for assault not medical malpractice or negligence.

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In any action brought for treating, examining, or operating on a claimant wherein the claimant's informed consent is an element, the claimant's informed consent shall be deemed to have been given where:

(1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience; and

(2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures;

(3) In an emergency situation where consent of the patient cannot reasonably be obtained before providing health care services, there is no requirement that a health care provider obtain a previous consent.

Id.

91 See Kovacs v. Freeman, 957 S.W.2d 251, 255 (Ky. 1997).

92 Id.

93 Id.

94 See Holton v. Pfingst, 534 S.W.2d 786, 789 (Ky. 1975).


96 See Tabor v. Scobee, 254 S.W.2d 474, 476 (Ky. 1951).

97 Id. at 475.

98 Id.
A. Informed Consent

In Vitale v. Henchey, the Supreme Court of Kentucky considered the propriety of the trial court’s directed verdict on behalf of the defendants on the plaintiff’s malpractice claim. 99

Henchey, the son of Sallee, had a medical power of attorney. 100 Dr. Sparrow telephoned Henchey at his home in California to request surgery because Sallee’s condition had worsened. 101 The surgery was outside the scope of Dr. Sparrow’s expertise, so he recommended Dr. Wieman. 102 Dr. Sparrow also mentioned a Dr. Vitale, whom he did not recommend. 103 Henchey gave consent for Dr. Wieman to perform the surgery. 104 However, unknown to Henchey, Dr. Wieman was to be out of town and his partner, Dr. Vitale, performed the surgery. 105

Dr. Vitale also performed a second surgery. 106 Again, Henchey consented over the telephone with Dr. Sparrow to proceed with the surgery. 107 Sallee died the next day. 108 Henchey filed an action alleging that Dr. Vitale operated without consent and that Henchey’s mother endured pain and suffering as a result of the surgeries. 109

At trial, Henchey introduced no proof that the substitution of surgeons violated the standard of care, and for this reason the trial court directed a verdict against Henchey on the issue of liability. 110 The court of appeals reversed and remanded the case for a new trial on the claim pursuant to a battery theory. 111

Kentucky recognizes an action for battery, an intentional tort, when an operation is performed without consent of the patient. 112 An action will lie without the intent to harm because the requisite intent is intent to make contact with the person, not the intent to cause harm. 113 The Vitale court considered whether the Kentucky Informed Consent Statute transforms such a battery claim into a negligence action and determined that it does not. 114

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100 Id. at 653.
101 Id. at 654.
102 Id.
103 Id.
104 Id.
105 See Vitale, 24 S.W.3d at 654.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id. at 653.
111 See Vitale, 24 S.W.3d at 653.
112 Id. at 656 (citing Tabor v. Scobee, 254 S.W.2d 474 (Ky. 1951)).
113 Id. at 657-58.
114 Id. at 656.
The record in *Vitale* raised the issue of whether the deceased was "partly conscious" before death. While in *Vitale* the court of appeals pointed out that a showing of actual damages is not an element of battery, it held that the evidence raised a jury question as to whether Sallee had experienced conscious pain and suffering.

**B. The Peer Review Privilege**

In 1998, the Supreme Court of Kentucky considered the applicability of the statutory peer review privilege to medical malpractice cases. Three cases were combined on appeal from the court of appeals decision to deny the writ of prohibition. The Supreme Court of Kentucky affirmed the decision, holding that the statutory peer review privilege is limited to suits against peer review entities.

In so holding, the court articulated that as a general rule privileges are strictly construed and that the intent of the General Assembly was to not adversely affect the rights of discovery for plaintiffs in a medical malpractice claim.

On February 24, 2000, the Supreme Court of Kentucky held in *McFall v. Peace, Inc.*, that the peer review privilege does not apply to actions for medical malpractice. These two opinions specifically overrule *Adventist Health Systems/Sunbelt Health Care Corp. v. Trude*, which had held the privilege statute applies to any civil action.

The law in Kentucky is that peer review documents are discoverable in medical malpractice actions.

**C. Standard of Care**

The failure of a surgeon to correctly account for sponges used in surgery was found to be negligence as a matter of law in *Laws v. Harter*. However, in a recent case, a material issue precluding summary judgment was found to arise where a surgeon relied upon a nurse's sponge count. In *Chalothorn v. Meade*, the Kentucky Court of Appeals recently held that affidavits from the defendant and other physicians indicating that the defendant complied with the standard of care precluded summary judgment on liability.

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115 *Id.* at 659.
116 *Id.*
117 *See Sisters of Charity Health Sys. v. Raikes*, 984 S.W.2d 464 (Ky. 1998).
118 *Id.* at 465.
119 *Id.* at 470.
120 *Id.* at 468.
121 *Id.* at 469.
122 *See McFall v. Peace, Inc.*, 15 S.W.3d 724, 726 (Ky. 2000).
123 880 S.W.2d 539, 542 (Ky. 1994).
124 *See McFall*, 15 S.W.3d at 726.
125 *See Laws v. Harter*, 534 S.W.2d 449, 450 (Ky. 1975).
127 *Id.*
In *Chalothorn v. Meade*, the plaintiff underwent a Cesarean section resulting in a sponge being left inside her after closure. The defendant, Dr. Chalothorn, asked the nurse if all the sponges were accounted for before closing the patient. The nurse followed procedure and informed the doctor that one sponge was missing. Dr. Chalothorn began searching for the sponge and was then incorrectly informed by the nurse that the sponge had been found in the nursery. Therefore, he closed the incision. Only later did the staff determine that the sponge was still missing. Another operation was performed three days later to remove the sponge.

Dr. Chalothorn argued that a material issue of fact precluded summary judgment against him on liability. In support, he provided affidavits of other physicians stating that he had not violated the standard of care. The court of appeals agreed that a jury question as to liability existed and vacated the judgment of the Floyd County Circuit Court, remanding for a trial on the issue of liability. The court distinguished the *Laws* case on the grounds that the sponge count was reported to Dr. Chalothorn as correct and there was no decision to close Mrs. Meade's incision while a sponge was unaccounted for.

**D. Expert Witnesses**

An action based on lack of informed consent "is in reality one for negligence in failing to conform to a proper professional standard . . . ." In *Hawkins v. Rosenbloom*, the Court of Appeals reiterated the general rule that in any medical malpractice case, expert testimony is required to negate informed consent. In *Hawkins*, defendant met with plaintiff for an office visit to discuss the general risks of gallbladder surgery. The chart contained an office note of this conversation dictated by the doctor, and the patient signed an informed consent form confirming this discussion.

The *Hawkins* Court distinguished the case of *Keel v. Saint Elizabeth Medical Center*, in which no information was given to the patient regarding the risks and hazards of the planned procedure. The court of appeals reasoned that when no
information is given to the patient, the lack of informed consent is so apparent
that a layman may easily recognize it or infer it from the evidence. Because
such an inference is within the realm of common knowledge, no expert testimony
is required.

E. Hospital Liability

*Owensboro Mercy Health System v. Payne* was a medical malpractice action
arising from the treatment of Robert Payne for injuries sustained in a car
accident. At Owensboro Mercy Health System, Payne underwent surgery for
about eight hours. On the transfer to his recovery room the oxygen and heart
monitors were disconnected. Immediately upon arriving in the ICU, Payne
suffered from cardiac arrest and continued to be in a vegetative state.

On appeal, the defendant challenged the qualifications of the plaintiff's
experts. In general, a determination of competency is within the discretion of
the trial court. The court of appeals held that the trial court did not abuse its
discretion in allowing the testimony of the expert pulmonologist and critical care
nurse because the witnesses were competent in knowledge and skill for the
testimony they provided.

The hospital also argued that the doctor's negligence was a superseding act
relieving the hospital of liability. The court held that the hospital can be
relieved only if it had no duty to provide care to the plaintiff. Because
Owensboro Mercy Health System had a duty to provide oxygen and monitoring
pursuant to its own policies, the court held, the issue of the hospital's liability
was for the jury to decide.

F. Sovereign Immunity for the University of Kentucky Medical Center and a
Claim for Loss of Parental Consortium

In *Charash v. Johnson*, the University of Kentucky Medical Center (UKMC)
was dismissed as a defendant by the trial court based on sovereign immunity.
The claim arose when the patient sustained injuries in a car accident and was
transported to UKMC. He was treated and admitted to the hospital but died the

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144 *See Hawkins*, 17 S.W.3d at 119.
145 *Id.* at 120.
147 *Id.* at 677.
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *See Owensboro Mercy Health Sys.*, 24 S.W.3d at 678.
153 *Id.* at 679.
154 *Id.*
155 *Id.*
21, 2000).
next day. The estate of the deceased sought damages for funeral expenses, conscious pain and suffering of the deceased, and destruction of earning power. In addition, a claim was filed on behalf of the deceased's children for the loss of love and affection from their father, for which damages were awarded at trial.

In holding that UKMC is entitled to sovereign immunity, the Kentucky Court of Appeals relied on the Supreme Court's opinion in Withers v. University of Kentucky, which held UKMC is entitled to sovereign immunity. Regarding apportionment of fault pursuant to Kentucky Revised Statutes section 411.182, the court held that the evidence at trial did not show any responsibility on the part of UKMC and that therefore UKMC was not included in the apportionment instruction.

The Charash court also addressed the scope of the claim of a minor child for loss of parental consortium. The Supreme Court of Kentucky recognized this cause of action in Giuliani v. Guiler. In Charash, the defendants argued that such a claim ends upon the death of the parent. The court disagreed, noting that a parental consortium claim is a reciprocal to the statutory claim for loss of a child's consortium under Kentucky Revised Statutes section 411.135, which allows a parent to receive damages upon the child's death for loss of affection and companionship during the child's minority. Therefore, the court opined, the claim for loss of parental consortium does not end at the death of the parent, but recovery is allowed through a child's minority.

Lastly, the Charash court considered whether the defendants could themselves offer expert testimony. The defendants did not identify themselves as experts on the answers to interrogatories and therefore failed to comply with Kentucky Rule of Civil Procedure 26.02(4). The Court of Appeals held that

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157 Id. at *1.
158 Id.
159 Id.
160 Id.
161 See Withers v. University of Kentucky, 939 S.W.2d 340, 346 (Ky. 1997).
163 Id. at *3.
164 See Giuliani, 951 S.W.2d at 323.
165 See Charash, 2000 WL 462605, at *3.
166 Id.
167 Id.
168 Id. at *4.
169 KY. R. CIV. P. 26.02(4) provides:

(4) Trial preparation: experts.

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c)
the trial court did not abuse its discretion in limiting the defendants' testimony to the facts they had learned and the opinions they had formed based on firsthand knowledge.\footnote{0}

\footnote{Id.; see Charash, 2000 WL 462605, at \*4.}

\footnote{See Charash, 2000 WL 462605, at \*4.}
THE ECONOMIC LOSS RULE IN KENTUCKY:
WILL CONTRACT LAW DROWN IN A SEA OF TORT?

Thomas R. Yocum and Charles F. Hollis, III

EH CONSTRUCTION, LLC v. DELOR DESIGN GROUP, INC.

Currently, a motion for discretionary review is pending before the Supreme Court of Kentucky, seeking to reverse the Kentucky Court of Appeals' decision in EH Construction, LLC v. Delor Design Group, Inc. The outcome of this case will likely have a resounding effect on a doctrine long popular with Kentucky's civil defense lawyers: the Economic Loss Rule. More significantly, it will likely impact the realms governed by contract and tort laws, respectively. It will do so by determining whether remedies that are traditionally only available in contract should now be made available in tort in situations where no contractual privity exists between the respective parties.

EH Construction is a construction law case. Delor Design Group, Inc., the owner of a commercial building in Louisville, hired Presnell Construction Managers, Inc. as the construction manager for a renovation project. Delor then hired EH as its general contractor for the project. No privity of contract existed between Presnell and EH. When numerous disputes ensued, relating to the timing and quality of the work as well as to the payment of outstanding invoices, EH filed suit in Jefferson Circuit Court.

In addition to its lien claims against Delor and various other lienholders, EH sued Presnell for negligence. EH alleged that "Presnell negligently supplied information to it, that it relied on those misrepresentations in the performance of its contracted service, and that it thereby incurred damages." EH further alleged

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1 Thomas R. Yocum is a principal in the law firm of Benjamin, Yocum & Heather, LLC, where he practices in the areas of law relating to construction, business, corporate, insurance, creditor's rights, commercial litigation, and arbitrations. Mr. Yocum has published more than 160 articles on construction and business law.

2 Charles F. Hollis, III is an associate attorney in the law firm of Benjamin, Yocum & Heather, LLC, where he practices in civil litigation, insurance defense and subrogation, construction law, international law, and corporate and business entity law. Mr. Hollis has been published several times in Municipal Law News.


6 Id.

7 Id.

8 Id.

9 Id.

10 Id.

that Presnell "was negligent in its coordination and supervision of the contractors." According to EH, due to improper scheduling by Presnell, "which led other contractors and subcontractors to destroy work that EH had already finished," EH had to restore much of the work that it had already completed.

Presnell filed a motion to dismiss, contending that the negligence claims were barred for lack of any duty owned to EH. The trial court agreed, granting the motion.

Presnell's duties and responsibilities under its contract were to Delor. It had no duty to EH Construction. No legal liability can arise, since no duty existed between Presnell and EH Construction. Relief, if any, for EH Construction would be against Delor.

EH appealed the decision, alleging that the trial court erred in dismissing its negligence claim. On appeal, EH contended that privity of contract with Presnell was not required for a duty to arise. In making this argument, EH urged the court of appeals to adopt section 552 of the Restatement (Second) of Torts, "which imposes liability for those who, in the course of business, negligently gather and distribute information intended for reliance by others."

Section 552, which is captioned "Information Negligently Supplied for the Guidance of Others," states:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the

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12 Id.
13 Id.
14 See id.
15 Id.
16 Id.
18 Id.
19 Id.
duty is created, in any of the transactions in which it is intended to protect them. 20

In its opinion, the court of appeals cited cases from twelve states adopting section 552 as law. 21 The court noted that although section 552 was previously cited favorably, the issue of whether Kentucky would adopt it as law was "an issue of first impression ..." 22 However, the court also noted that Kentucky courts had previously "recognized that privity is not a prerequisite for tort actions." 23 Moreover, the court recognized that in Ingram Industries v. Nowicki, 24 a federal case from the Eastern District of Kentucky, the court predicted that the Supreme Court of Kentucky would adopt the standards of section 552. 25

Adopting section 552, the court relied in large part on John Martin Co. v. Morse/Diesel, Inc., 26 a Tennessee case. 27 The facts of Morse/Diesel are similar to those in EH Construction. 28 A subcontractor sued a construction manager for damages caused by negligent misrepresentation. 29 The project owner hired Morse/Diesel as the construction manager, and then hired Martin separately to provide concrete work and rough carpentry. 30 When a dispute arose over the quantity of concrete required for Martin to complete its work, Martin sued Morse/Diesel, alleging negligent misrepresentation, notwithstanding the fact that no privity existed between these two parties. 31 The Supreme Court of Tennessee adopted section 552:

Because this Court has previously dispensed with privity as a prerequisite for actions in tort based upon negligent misrepresentation against title examiners, surveyors, and attorneys, the rule must extend to other professions whose business is to supply technical information for the guidance of others . . . . The Restatement makes no distinction based upon the nature of the profession. Neither do we. 32

20 Id. at *2.
21 Id. The states are Hawaii, Tennessee, Texas, North Carolina, Pennsylvania, Minnesota, Delaware, Washington, Alabama, Louisiana, Michigan, and Wyoming. Id.
22 Id. (citing Seigle v. Jasper, 867 S.W.2d 476, 482 (Ky. Ct. App. 1993)).
23 EH Constr., 2000 WL 339939, at *2 (citing e.g., Tabler v. Wallace, 704 S.W.2d 179, 186 (Ky. 1985) (recognizing the error in requiring privity of contract as a prerequisite for tort liability); Hill v. Willmott, 561 S.W.2d 331, 334 (Ky. Ct. App. 1978) (addressing attorney liability to parties who lack privity); Sparks v. Craft, 75 F.3d 257, 261 (6th Cir. 1996) (addressing attorney liability to parties who lack privity under Kentucky law)).
26 819 S.W.2d 428 (Tenn. 1991).
27 See EH Constr., 2000 WL 339939, at *3 (citing John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991)).
29 Id.
30 Id. at 429-30.
31 Id. at 430.
32 Id. at 433-34.
Employing the reasoning of Morse/Diesel, the EH Construction court concluded that "Presnell's duty to EH [did] not rest on [its] contractual duties to Delor." The court held:

Under § 552 of the Restatement, Presnell had a duty to EH to exercise reasonable care or competence in its supervision, collection, and distribution of information and directions that it provided to EH for guidance. Although Presnell argues that its duties were strictly those set forth in its contract with Delor and that no duty was owed to EH, we conclude that it had additional, independent duties pursuant to § 552.

Surprisingly, Presnell conceded that it did not oppose the court's adoption of section 552, declaring that section 552 "might apply to a construction manager under other circumstances." Rather than argue that section 552 should never apply to a construction manager, Presnell presented the more light-handed argument that the section simply should not apply under the particular circumstances of its case.

Perhaps more tragically, nothing in the court of appeals' decision indicates that Presnell presented arguments asserting that Kentucky's Economic Loss Rule should preclude EH from asserting tort claims against it. As examined infra, Kentucky's Economic Loss Rule has historically recognized that when there is no privity of contract between a plaintiff and defendant, the defendant should not be held liable in tort for the plaintiff's economic losses where the plaintiff has not sustained any personal injury or property loss. It recognizes a mutual exclusivity between claims sounding in contract and tort, encouraging sophisticated parties entering into contracts to bargain now rather than sue in tort later. As a result of the court of appeals' decision in EH Construction, the future utility of this well-reasoned rule of law is placed in grave jeopardy.

Most of the cases addressing Kentucky's Economic Loss Rule are product liability cases. However, the astute defense attorney knows that the doctrine is not only useful in these cases, but in others as well. Although the rule was not addressed in EH Construction, Kentucky courts have also recognized the rule's applicability in other types of cases as well.

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34 Id.
35 Id.
36 See id.
37 It should also be noted that although Presnell alludes to the economic loss doctrine where the questions of law are framed in its motion for discretionary review, absolutely none of the case law adhering to the doctrine are presented as authorities. See Motion for Discretionary Review at 8-13, Presnell Constr. Managers, Inc. v. EH Constr., LLC (2000-SC-571).
38 See generally Bowling Green Mun. Util. v. Thomasson Lumber Co., 902 F. Supp. 134, 136 (W.D. Ky. 1995) (explaining that the rule "mandates that the contracting party seek remedy pursuant to warranty law and precludes recovery via a tort claim.").
39 Id. at 136.
40 See infra notes 42-158 and accompanying text.
41 See infra notes 159-72 and accompanying text.
The Product Liability Cases

The recurring theme in all of Kentucky's product liability cases addressing the Economic Loss Rule is the issue of whether a plaintiff can state a claim for negligence against a retailer or manufacturer when the only damage sustained was to the product itself. Kentucky courts have wrestled with this issue for decades, and federal courts have surmised how the Supreme Court of Kentucky might rule in such cases. The result has been a roller-coaster ride of conjecture, inconsistency and uncertainty.

As previously discussed, the key premise behind the Economic Loss Rule is that when there is no contractual privity between a plaintiff and defendant, the defendant should not be held liable in tort for the plaintiff's economic losses where there is no personal injury or property damage. In the product liability arena, this was the law in Kentucky until 1956, when the court of appeals issued its decision in C.D. Herme, Inc. v. R.C. Tway Co. In Herme, the plaintiff purchased a semi-trailer manufactured by the defendant. The plaintiff purchased the semi-trailer from an independent dealer. Therefore, no privity of contract existed between the plaintiff and the defendant manufacturer. The first time the plaintiff used the semi-trailer, the king-pin connecting the tractor with the semi-trailer broke, causing the semi-trailer to come loose and tip over into a ditch. This resulted in damage to both the semi-trailer and its cargo. The plaintiff sued the manufacturer, alleging that the king-pin was made of defective steel.

The court of appeals reversed the trial court's directed verdict for the defendant. In doing so, the court held that the plaintiff had a cause of action against the defendant for the damage caused not only to the semi-trailer’s cargo, but also to the semi-trailer itself. The court based its conclusion upon its liberal

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43 Id.
45 294 S.W.2d 534 (Ky. Ct. App. 1956) (overruling Olds Motor Works v. Shaffer, 140 S.W. 1047 (Ky. Ct. App. 1911)).
46 See id. at 536.
47 Id.
48 Id.
49 Id.
50 Id.
51 See Herme, 294 S.W.2d at 536.
52 Id. at 539.
53 Id. at 538.
interpretation of section 395 of the First Restatement of Torts. Although the language of the Restatement limited a manufacturer's liability to situations where bodily harm was foreseeable, the Herme court concluded that "the mere fact that the actual injury in the particular case happens to be to property only, does not relieve the offender from liability."  

Nine years later, the Kentucky Court of Appeals issued its opinion in Dealers Transport Co. v. Battery Distributing Co. In this case, the plaintiff purchased acetylene tanks which ignited and exploded, causing extensive property damage. The plaintiff sued the defendant manufacturer, alleging that the tanks were defective, even though there was no privity of contract between these parties. The court reversed the trial court's award of summary judgment in favor of the manufacturer, recognizing the holding in Herme that a consumer may sue the manufacturer of a defective product in tort notwithstanding a lack of contractual privity.

The most significant aspect of the Dealers Transport decision, however, is the court's adoption of section 402A of the Restatement (Second) of Torts. Citing the Restatement, the court recognized the manufacturer's liability for physical harm caused by a defective product "to the ultimate user or consumer, or to his property . . ." However, the court failed to indicate whether "his property" included damage caused to the product itself. If it did, then the Economic Loss Rule was essentially a nullity in the field of product liability litigation, because such a construction would enable a plaintiff to recover a purely economic loss, namely the purchase price of the product. If it did not, then the rule remained a viable tool for defense lawyers in product liability cases. This ambiguity steered Kentucky's courts into a fog of conjecture that continually thickened for many years to come.

In other words, depending on how "his property" is defined for the purpose of interpreting section 402A of the Restatement, the rule might be rendered a nullity. If the definition recognizes a cause of action in tort where only the subject product itself is damaged, it allows a plaintiff to recover for economic loss on a tort claim, thus eliminating the rule's application. However, if the definition only recognizes such a cause of action in tort where property other than the product itself is damaged, the rule's application is preserved.

54 Id. at 537.
55 Id. (emphasis in original).
56 402 S.W.2d 441 (Ky. Ct. App. 1965).
57 Id. at 443-44.
58 Id. at 442-44.
59 Id. at 445.
60 Id. at 446.
61 Id. (emphasis added).
62 See Dealers Transport, 402 S.W.2d at 446. The court held simply that "the law in this jurisdiction is that privity is not a prerequisite to maintenance of an action for breach of implied warranty in products liability cases . . . ." Id. (emphasis in original). The court ruled the evidence sufficient for a jury to consider "whether the fire and consequent damages proximately resulted from a defect in an acetylene tank . . . ." Id. at 447-48.
In 1980, a federal court in Illinois applied Kentucky law in Hardly Able Coal Co. v. International Harvester Co.63 In Hardly Able, the plaintiff sued the manufacturer of an allegedly defective bulldozer.64 The plaintiff sued for the costs incurred in removing, repairing, demolishing, and ultimately replacing the bulldozer.65 Using Illinois choice of law principles, the court concluded that Kentucky's substantive law should determine if the plaintiff could recover these economic losses.66 Citing Herme, the court concluded that the plaintiff was entitled to recover damages associated with the destruction of the bulldozer itself.67 Curiously, the court's opinion did not address Dealers Transport or the "to his property" language from the Restatement (Second) of Torts that was adopted in that decision.

In C&S Fuel, Inc. v. Clark Equipment Co.,68 decided the following year by the federal court in the Eastern District of Kentucky, the plaintiff sued the manufacturer of a tractor that was destroyed by fire due to an alleged defect.69 The plaintiff's damages were limited solely to the loss of the tractor.70 The court concluded that "Kentucky [law] would permit recovery for a defective product in tort . . . ."71 The court further noted that Kentucky law "would permit the tort recovery to augment contractual remedies available to buyer and seller."72 In other words, the court concluded that under Kentucky law, the plaintiff could recover for his purely economic loss under theories sounding in either tort or contract.73

The most intriguing aspect of the C&S decision is not the court's holding, but rather the reasoning that led to its holding.74 As in Hardly Able, the C&S court relied on Herme in allowing plaintiff's recovery of purely economic losses.75 The court also cited the Hardly Able decision.76 Once again, however, the Dealers Transport decision was not cited in the portion of the court's opinion addressing recoveries for economic losses.77

The C&S court also relied on another federal case, Rudd Construction Equipment Co. v. Clark Equipment Co.78 Rudd, which was decided in the

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63 494 F. Supp. 249, 251 (E.D. Ill. 1980).
64 See id. at 250.
65 Id.
66 Id. at 250-51.
67 Id. at 251.
69 See id. at 950-51.
70 Id. at 952.
71 Id. at 951.
72 Id. (emphasis added).
73 Id.
75 Id. at 951.
76 Id. at 952.
77 Id.
78 Id. (citing Rudd Constr. Equip. Co. v. Clark Equip. Co., No. CIV.A.C79-0314L(A), 1982 WL 1400 (W.D. Ky. Mar. 30, 1982), aff'd in part, rev'd in part, 735 F.2d 974 (6th Cir. 1984) (finding it unnecessary to address the issue of whether tort damages could be recovered if the only injury was
Western District of Kentucky, addressed the recovery of economic losses caused by the same product and defect as in C&S—an identical tractor destroyed by fire. In Rudd, the trial court initially refused to recognize the plaintiff's recovery in tort for economic losses, as the remedies were already available under contract law. The judge then reversed himself, recognizing that in a situation where privity of contract is lacking, a tort claim under section 402A requires proof of an unreasonably dangerous defect, an element that was not required under a Uniform Commercial Code warranty claim.

The C&S court agreed with the Rudd court, concluding that "because the elements of a cause of action in tort for property damage loss differ from the elements in [a] contract [cause of action]," the plaintiff was entitled to recover purely economic losses. In dicta, however, the court made some peculiar comments that arouse suspicion as to the real foundation for its holding:

In joining with the Western District of Kentucky, the Court is not unmindful of the defendant's forceful policy arguments in refusing to recognize a cause of action in tort. However, at this juncture, the superseding policy of uniform application of the law compels only one result. Were this Court to grant the defendant's motion [for summary judgment], it would result in declaring the same defendant for the same conduct not liable in half of this Commonwealth, and liable in the other half. Obviously, there is no justification for such a result. To end the uncertainty for the defendant, the parties should eventually certify this question to the Kentucky Supreme Court for a dispositive ruling.

The court never certified the question to the Supreme Court of Kentucky. Moreover, the C&S court's failure to construe the "to his property" language of Dealers Transport and its overwhelming concern for uniformity in the law between Kentucky's two federal districts engendered further questions of whether Kentucky's high court would acknowledge the Economic Loss Rule.

In 1984, the Sixth Circuit Court of Appeals modified the Rudd decision. In so doing, the court noted that "[a] number of recent cases support [the defendant's] argument that no recovery in tort may be had [for damage to the suspect product itself], especially when both of the contracting parties are large commercial entities." The court also acknowledged Herme, C&S, and Hardly Able, recognizing their support for allowing a tort claim in such instances.
The court concluded that under tort law, the plaintiff was entitled to recover his economic loss, the replacement value of the machine. However, the court also concluded that the same recovery could be had under breach of warranty theory. The court also had the opportunity to determine whether Kentucky tort law allowed the plaintiff to recover lost profits associated with the destruction of the tractor. Concluding that the plaintiff failed to prove the existence of facts supporting a lost profits claim, the court did not rule on this issue. Once again, mysteriously absent from this court's decision was the "to his property" language of Dealers Transport. This rendered the case law even more nebulous, as it now begged the question of whether Kentucky tort law enabled product liability plaintiffs to recover consequential damages associated with the destruction of the product itself.

In 1990, the court of appeals issued its opinion in Falcon Coal Co. v. Clark Equipment Co. This decision countered the trend of the federal courts to circumvent the Economic Loss Rule, as instituted in Dealers Transport. In Falcon Coal, the plaintiff sued the defendant manufacturer-retailer on a theory of strict liability in tort for the destruction by fire of a front-end loader. The damage was limited to the product itself. The trial court awarded summary judgment for the defendant.

The court rejected the reasoning of the federal courts, which relied heavily on Herme. The court concluded that Herme was inapposite because: (1) it was not a strict liability case; (2) it did not involve an injury only to the product itself; (3) it predated Kentucky's adoption of section 402A of the Restatement (Second) of Torts; (4) it did not consider the meaning of "property" as used in that section; and (5) it predated the adoption of Kentucky Revised Statutes sections 355.2-314 and 355.2-315, the statutes governing implied warranties of merchantability and fitness for a particular purpose, respectively. For the first time in decades, this court devoted close attention to the "to his property" language adopted in Dealers Transport. The court concluded:

Our reading of this section, as well as the official comment to it, convinces us that Section 402A is aimed at imposing liability for physical harm caused by an unreasonably dangerous product to the user or his other property, but not for harm caused only to the product itself. The term "his property" simply does not appear to be intended to embrace within its meaning the term "any
product" as those terms are used in Section 402A. Inasmuch as this section now has been adopted by our highest court as the standard for recovery in strict liability tort cases, and from our reading of this section, it would not permit such recovery in a case like this, we are left to conclude that as it now stands the common law in this jurisdiction does not support the [plaintiff's] position.99

The court also noted the trial court's reliance on *East River Steamship Corp. v. Transamerica Delaval, Inc.*, a U.S. Supreme Court decision, in awarding the defendant summary judgment.100 In *East River*, an admiralty case, the Court decided that "the better policy where injury is to the product alone is to leave the purchaser with only his contractual remedy."101 However, the *Falcon Coal* court noted:

> We need not consider which is the better policy because our highest Court has adopted Section 402A as the policy in this jurisdiction, and until changed by that Court or the General Assembly, there is no remedy based upon strict liability in tort in a case such as this.102

The Supreme Court of Kentucky denied discretionary review of the court's decision.103

Only a few months after the *Falcon Coal* decision, the Sixth Circuit Court of Appeals issued its decision in *Scott v. Stran Buildings*.104 In *Scott*, the plaintiff purchased two large metal buildings for the purpose of housing cattle.105 Four to five years later, large portions of both buildings collapsed due to corrosion.106 The plaintiff then sued the manufacturer in tort, seeking recovery for the damage to the buildings.107

Citing *East River*, the court upheld the trial court's award of summary judgment for the defendant.108 In so holding, the court observed:

> Since Kentucky has generally been willing to follow the advancing developments of products liability law as stated by the majority view [citing *Dealers Transport's* adoption of Section 402A], and since *East River* adopts and adds credence to the majority view, we believe that Kentucky would follow the *East River* approach and deny an action in tort on these facts.109

The court further distinguished *Herme* and *C&S* based on "the fact that those cases presented a danger to persons and/or other property whereas the complaint

99 *Falcon Coal*, 802 S.W.2d at 948 (emphasis added).
100 See id. at 948-49 (citing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)).
101 Id. at 949.
102 Id.
103 Id. at 947.
105 Id. at *3.
106 Id.
107 Id. at *2.
108 Id. at *10-12.
109 Id. at *11-12.
in this case did not allege danger to persons or other property." The court also noted that its conclusion was "bolstered" by its deference to the district judge's interpretation of state law in a diversity case.

The next case in the chronology is Miller's Bottled Gas, Inc. v. Borg-Warner Corp., a Sixth Circuit case decided in 1992. Again, the court affirmed the trial court's award of summary judgment in favor of a defendant manufacturer where the plaintiff sought recovery for damage to the product itself. This time, the product in question was a purportedly defective carburetor, and the plaintiff sought recovery on grounds of negligence.

Rather than relying on Falcon Coal as the guiding authority for its decision, the court relied heavily on East River. Unlike the prior Kentucky decisions, however, the court devoted considerable attention to the policy concern in East River:

The Court determined that a commercial product injuring itself and inflicting only economic injury is "not the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation." According to the Court, the minority view among state courts that recovery for negligence is available under such circumstances "fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages."

The Court explained the policy rationale for its conclusions:

[W]hen a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured. . . . Contract law, and the law of warranty in particular is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. . . . Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product [or suffer losses resulting from other parties' contact with the product].

Agreeing with the high Court, the Sixth Circuit averred:

We agree with the Court's suggestion that for every party suffering personal or property damages, there generally exist many more parties suffering some degree, however slight, of economic injury. The public subsidizes the judicial system and thus stands to lose a great deal if all such parties suffering only

111 Id.
112 955 F.2d 1043 (6th Cir. 1992).
113 See id.
114 Id. at 1053.
115 Id. at 1044.
116 Id. at 1049-50.
117 Id. at 1050 (quoting East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 866, 871-74 (1986)).
economic injury may maintain negligence actions against manufacturers and suppliers of defective products. While some might argue that a party should be answerable in tort whenever that party causes any type of injury through its own negligence, reasons of judicial practicality foreclose such indeterminate liability.\footnote{See Millers Bottled Gas, 955 F.2d at 1050 (emphasis in original).}

The most thoroughly reasoned opinion addressing Kentucky's Economic Loss Rule in the product liability context is Bowling Green Municipal Utilities v. Thomasson Lumber Co.\footnote{902 F. Supp. 134 (W.D. Ky. 1995).} Indeed, this case is the first in Kentucky to use the specific phrase "Economic Loss Rule."\footnote{Id. at 135.} In Thomasson Lumber, a municipal electric utility sued a utility pole manufacturer, seeking recovery in tort for compensatory and economic damages to pay for the identification, removal, and replacement of defective poles.\footnote{Id. at 136.} Reluctant to predict whether Kentucky courts would apply the rule to these facts, the federal court for the Western District of Kentucky certified the question to the Supreme Court of Kentucky, which declined to hear the matter.\footnote{Id. at 135.}

Addressing the issue on its own, the court examined the three varying schools of thought found among the states.\footnote{Id. at 136.} The court first examined the "majority position" – the Economic Loss Rule.\footnote{Id. at 136-37.} From the outset, the court noted that the rule "applies only in a commercial context," explaining that "[t]he policy reasons which courts have articulated in support of the economic loss doctrine reflect the perceived realities of commercial transactions."\footnote{Id. at 136.} The court cited three such policy reasons.\footnote{Id.}

The first policy reason addressed by the court was that the contracting parties, during the course of their negotiations, should address any damage that might occur to the product itself.\footnote{Id. at 135.} This reason stresses that arm's length bargaining should be implemented to determine the allocation of risks that products will not work properly.\footnote{Id. at 136.}

The second policy reason is that the rule "serves to preserve warranty law in the commercial setting."\footnote{Thomasson Lumber, 902 F. Supp. at 136.} Quoting East River, the court noted that the rule is premised, in part, on the notion that "[i]f products liability law permitted recovery for economic losses, there is a risk that 'contract law would drown in a sea of tort.'"\footnote{See id.}

\footnote{See id. (citing Detroit Edison Co. v. NABCO, Inc., 35 F.3d 236, 240 (6th Cir. 1994)).}

\footnote{Id. (quoting East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872 (1986)).}

\footnote{Id. (quoting East River, 476 U.S. at 866).}
The third policy reason is that the rule "limits liability in an appropriate manner." The court noted that without the rule, a product liability plaintiff could recover in tort from a defendant despite a lack of privity as long as the loss is foreseeable. Quoting *East River*, the court underscored the rule's utility by noting:

> Permitting recovery for all foreseeable claims of economic loss would require a manufacturer to account for the expectations of all persons in the stream of commerce who may encounter its product. Persons many steps removed from the initial transaction could claim economic loss. This could open the door to tremendous liability on the part of the manufacturer.

The court then cited jurisdictions that had rejected the rule. Examining the policy behind the rule's rejection, the court observed:

> These courts view the manufacturer's duty not to make a defective product as encompassing injury to the particular product itself. The rationale behind this view is that the policies supporting strict liability are equally applicable to economic losses. It is arbitrary, courts adopting this view contend, to allow a plaintiff to recover for injury to body or other property, but not to the product itself. Whether a manufacturer may be liable for vast sums is not an appropriate consideration.

Finally, the court examined the third position among the states:

> The third and final view takes the middle ground, permitting a products liability action in certain circumstances when the product injures itself. This view distinguishes the "disappointed users" from the "endangered ones." Only the endangered users are permitted to sue in tort and only if the product produces loss through a situation potentially dangerous to persons or property.

Recognizing the significance of the *Falcon Coal* decision, the court concluded that the Supreme Court of Kentucky would adopt the first position, recognizing the Economic Loss Rule. Citing *Falcon Coal*, the court noted that the "UCC provides specific remedies for damage to a product itself," but section 402A does not. Going further, the court noted that applying the rule to *Thomasson Lumber* was particularly appropriate, as "the parties were on equal footing in terms of bargaining power and sophistication."

The court then provided an eloquent, detailed explanation for why the rule is so practical:

> What would be so wrong, Plaintiff suggests, with providing another remedy

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132 See id. at 137.
133 Id. (quoting *East River*, 476 U.S. at 874).
135 Id. (citations omitted).
136 Id. (citations omitted).
137 See *Thomasson Lumber*, 902 F. Supp. at 137-38.
138 Id.
139 Id. at 138.
under these circumstances? Why make such an arbitrary distinction between tort and contract remedies? The distinction, however, is not an arbitrary one. It is supported by solid common law concepts and practical considerations. The economic loss rule preserves the ability of commercial parties to negotiate their own deal under the U.C.C.’s commercially reasonable rules. To ignore it would severely disrupt normal commercial relationships. Without such a rule, the law of warranty would be obviated. If a commercial purchaser could recover in tort for damage to the product itself, contracting parties would no longer have the ability to negotiate certain terms of a sale. Instead, the law of warranty, with its flexibility, would be completely displaced by the strict application of tort law.

Contract and warranty law foster stability in the commercial setting. The certainty that comes with negotiating the terms of a bargain allows parties to act in accordance with their expectations. Permitting recovery for economic losses in tort destroys this certainty and, in essence, extricates the parties from their negotiated bargain. There is no legal or practical justification for this result in an arm’s length commercial transaction.

Plaintiff’s suggestion that it must then wait for personal injury to occur before taking action completely misses the important distinction between Plaintiff’s right of recovery under contract or warranty and its independent obligation to third parties using a product known to be dangerous. Plaintiff’s obligation to prevent injury to others is an independent one.

The most recent Kentucky product liability case addressing the Economic Loss Rule is Gooch v. E. I. Du Pont De Nemours & Co., decided in 1999. In Gooch, the plaintiff, a farmer, sued the manufacturer of a product called “Accent” which he used in an attempt to protect his corn crop from rhizome johnson grass. When the plaintiff’s crop was damaged following the application of the product, he sued the manufacturer, bringing strict liability and negligence claims. The manufacturer moved for summary judgment, contending that the plaintiff was precluded from recovering purely economic damages in tort by virtue of the Economic Loss Rule. The manufacturer asserted that the rule not only precluded tort claims for damages to the product purchased, but also for consequential damages based on “lost commercial expectations.” The plaintiff asserted that the rule did not apply because he was not seeking to recover for damage to the product sold, but rather for damage to the crop to which the product was applied. Thus, the issue was whether the corn constituted “other property.”

140 Id.
142 See id. at 867.
143 Id.
144 Id. at 874.
145 Id.
146 Id.
147 See Gooch, 40 F. Supp.2d at 875.
The court awarded summary judgment, dismissing the tort claims and concluding that the corn did not constitute "other property." The court concluded that "the thrust of the Plaintiff's complaint is to recover for economic losses suffered as a result of a failed commercial transaction . . . ." Moreover, the court observed that the plaintiff's claims "ultimately seek to recover for consequential damages resulting from a commercial transaction."

In reaching its decision, the court relied on a Sixth Circuit case that interpreted Michigan law, Bailey Farms, Inc. v. NOR-AM Chemical Co. The facts of Bailey Farms were similar to those of Gooch. In Bailey Farms, a farmer asserted a tort claim against the manufacturer of a soil fumigant that destroyed his watermelon crop. The Bailey Farms court stated:

Although the watermelon crops at issue in this case also are technically "other property" than the purchased product, a successful crop was part of the commercial expectations for the fumigant, and the loss of that crop allegedly the result of a defect of the use of the purchase of the product . . . .

The Bailey Farms court reached its conclusion relying on Neibarger v. Universal Cooperatives, Inc., which was decided by the Michigan Supreme Court. In Neibarger, two dairy farmers sued the defendant-manufacturers of a milking system, alleging that it caused their cows to suffer physical harm as well as decreased milk production, which required the farmers to sell much of their herds. The Supreme Court of Michigan recognized that the property damaged was different than the suspect product itself, but concluded that the rule applied anyway because the damages sought were economic losses:

In many cases, failure of the product to perform as expected will necessarily cause damage to other property; such damage is often not beyond the contemplation of the parties to the agreement. Damage to property, where it is the result of a commercial transaction otherwise within the ambit of the UCC, should not preclude application of the economic loss doctrine where such property damage necessarily results from the delivery of a product of poor quality.

In like fashion, the Gooch court thus concluded that the Uniform Commercial Code provided a more appropriate remedy.
REAL ESTATE MARKETING INC. v. FRANZ

The Kentucky Supreme Court has issued an opinion on the Economic Loss Rule in a construction case. In Real Estate Marketing, Inc. v. Franz, the second purchasers of a home sued the original builder for structural defects, alleging negligence. Holding that the builder did not owe any duty to the plaintiffs based on a contract or implied warranty, the court then addressed the negligence issue. Citing Saylor v. Hall, the court recognized "a legal obligation to respond in damages for negligent construction despite the absence of privity." In Saylor, a fireplace and mantle collapsed due to defective construction, killing one of the tenants' children and injuring the other. Citing Saylor, the plaintiffs in Franz argued:

"[I]t seems capricious to deny recovery to a vigilant property owner who discovers a latent defect, which "only" diminishes the value of his property, and allow recovery if he had "waited" for a member of his family to be injured as a result of the defect."

The court disagreed. Citing Dealers Transport, the court stated:

"[T]his Court recognizes that tort recovery is contingent upon damage from a destructive occurrence as contrasted with economic loss related solely to diminution in value, even though, as to property damage, both may be measured by the cost of repair."

However, the court did distinguish the rule's applicability in construction cases from that in product liability cases:

"We do not go so far as the Court of Appeals' opinion in Falcon Coal Co. v. Clark Equipment Co., limiting recovery under a products liability theory to damage or destruction of property "other" than the product itself. But we do recognize that to recover in tort one cannot prove only that a defect exists; one must further prove a damaging event."

It is worth noting that both Thomasson Lumber and Gooch cited Franz. However, Thomasson Lumber noted that Franz, an unpublished opinion, was not binding precedent. Moreover, both Thomasson Lumber and Gooch distinguished Franz based on the fact that the former cases involved commercial

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159 885 S.W.2d 921 (Ky. 1994).
160 See id. at 923.
161 Id. at 926.
162 Id. (citing Saylor v. Hall, 497 S.W.2d 218 (1973)).
163 Id.
164 Id.
165 See Franz, 885 S.W.2d at 926.
166 Id. (emphasis added).
167 Id. (emphasis added) (citations omitted).
transactions and the latter did not. At first blush, it might appear that the *Franz* decision is inequitable because unlike the plaintiffs in *Thomasson Lumber* and *Gooch*, the Franzes were unsophisticated, non-commercial buyers. However, it should be stressed that the court ruled that the Franzes did have a statutory remedy that entitled them to damages, recognizing that they had a private cause of action against the builders for violation of the building code.

**POLICY ANALYSIS**

The *Franz*, *Gooch*, and *Thomasson Lumber* opinions recognize the distinction between how the Economic Loss Rule is tailored to product liability cases versus others. In *Franz*, the Supreme Court of Kentucky notes that while the section 402A product liability cases require damage to property other than the product itself, non-product liability cases should be governed by other standards, such as the "destructive occurrence" standard. This remains true in the context of *EH Construction*, as yet another differing area of law is called into play. The *Franz* court's opinion gives considerable deference to the Economic Loss Rule, noting that some form of tangible damage must be sustained by the tort claimant:

> [T]his Court recognizes that tort recovery is contingent upon damage from a destructive occurrence as contrasted with economic loss related solely to diminution in value, even though, as to property damage, both may be measured by the cost of repair.

By citing *Dealers Transport*, a product liability case, to support this contention in a real estate/construction case, it is clear that the Supreme Court of Kentucky intended for the Economic Loss Rule to have a broader application that is not solely conducive to the area of product liability law.

This is particularly so in *EH Construction*. The general contractor, EH Construction, could have included provisions in its contract that would have provided it with a right to be compensated by the owner for any delays or other damages caused by the construction manager, Presnell. Delor, in turn, should have included an indemnification clause in its contract with Presnell that would require Presnell to reimburse Delor for any such damages.

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170 See id.; see also *Gooch*, 40 F. Supp. 2d at 875 n.5.
171 See generally *Real Estate Mktg., Inc. v. Franz*, 885 S.W.2d 921, 923 (Ky. 1994).
172 Id. at 927-28.
173 Id. at 926.
174 Id.
175 See generally id.
176 See Motion for Discretionary Review at 2-4, *Presnell Constr. Managers v. EH Constr.*, LLC (2000-SC-371) (seeking reversal of *EH Constr.*, LLC v. *Delor Design Group, Inc.*, No. 1998-CA-001476-MR, 2000 WL 339939 (Ky. Ct. App. Mar. 31, 2000)). The contract between EH Construction and Delor, the project owner, stated that EH Construction's sole remedy for delays beyond the control of EH Construction and Delor would be an extension of contract time. *Id.* at 4. However, that contract provision would not apply if the delays were the result of Delor's breach of contract; Delor's bad faith; Delor's willful, malicious, or grossly negligent conduct; or if the delay was contemplated by the parties. *Id.* Thus, EH Construction's remedy was against Delor. *Id.* at 8.
177 Id. at 5-6 (stating contract terms specifying Presnell's duties as construction manager but not including an indemnification clause). However, Presnell argued, "If liability accrues, indemnity
By concluding that Presnell has "additional, independent duties pursuant to § 552," the *EH Construction* court adds terms to Presnell's contract with Delor.\(^{178}\) These terms are effectively a promise to pay Delor's general contractor for any damages he might incur due to scheduling problems. This poses a dire threat to the freedom of parties to contract because it allows unforeseen terms, such as those espoused by the Restatement, to be added later. What otherwise might have been used as a bargaining tool for either side of the deal becomes a mandatory provision in all contracts between owners and construction managers.

The *EH Construction* court's adoption of section 552 threatens the integrity of contract law and the freedom to bargain far beyond the ambit of construction law. In *Morse/Diesel*, the Supreme Court of Tennessee concluded that the rule should extend to any profession that supplies technical information.\(^{179}\) Therefore, the *EH Construction* decision portends to rewrite the terms of many other types of contracts and is likely to be applied to other professionals, such as architects and engineers. But who is to say that the specter of tort liability abates here? Theoretically, such liability could be imposed upon almost any form of professional service provider. It follows that if the Supreme Court of Kentucky accedes to the adoption of Section 552, even the rudimentary legal imagination required for drafting contracts, which is encouraged by the Economic Loss Rule, will be undermined and supplanted by excessive litigation.

As colorfully articulated in the *East River* decision of the U.S. Supreme Court, contract law should not be drowned in a sea of tort.\(^{180}\) For many years, the Economic Loss Rule has served as a veritable lifeboat, preserving the freedom of parties to bargain and warrant their conduct as they see fit. Unless the Supreme Court of Kentucky opts to reverse the court of appeals' decision in *EH Construction*, the lifeboat may be hopelessly submerged by a deluge of tort litigation.

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\(^{179}\) See *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 433 (Tenn. 1991).