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To the memory of

Gentry Aubrey

a fellow law student at Chase
who impacted us all.

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Balancing Private Property Rights with “Public Use”: A Survey of Kentucky Courts’ Interpretation of the Power of Eminent Domain

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A SURVEY OF KENTUCKY PRODUCTS LIABILITY LAW

by Derek Humfleet* and Amy Miller-Mitchell†

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I. INTRODUCTION

The Kentucky Products Liability Act was enacted to protect consumers and provide them with an avenue for compensation when injured by defective products. Recently, however, Kentucky courts have decided numerous cases limiting the liability of manufacturers to the detriment of injured plaintiffs. Nevertheless, given the right circumstances, an injured plaintiff can still hold a manufacturer liable when a defective product causes an injury. The purpose of this survey is to provide practitioners with an overview of the recent cases in the area of products liability. While plaintiffs ordinarily bring claims against both sellers and manufacturers, this survey will not discuss issues relating to the liability of sellers. Section II of this survey is divided into two subsections, with Subsection A discussing the cases restricting the liability imposed upon manufacturers and Subsection B discussing the obstacles plaintiffs face when it comes to damages. Subsection A covers six different topics, which include the requirement of physical injury, a plaintiff’s burden of proof in design defect cases, the learned intermediary doctrine, successor-in-interest liability, lack of a duty to retrofit, and the component parts doctrine. Subsection B covers the topics of comparative fault and punitive damages. Section III, also divided into two subsections, will discuss new challenges for both plaintiffs and defendants in light of these recent product liability decisions, as well as analysis of how to approach damages in such cases.

II. CASE SUMMARIES

A. Restricting the Liability of Manufacturers

There are an array of claims plaintiffs can bring when it comes to products liability. Under Kentucky products liability law, plaintiffs can bring a claim for failure to adequately warn, defective design, and manufacturing defects.  


2 KY. REV. STAT. ANN. § 411.300 (Banks-Baldwin 2004). This section provides, in pertinent part:
Ordinarily, manufacturers will be primarily liable to a plaintiff. However, a seller will be liable for a plaintiff’s injuries only if the manufacturer is unidentifiable or if the seller knew the product was in a defective condition at the time it was sold. While restrictions on the liability of sellers have been in force since the enactment of K.R.S. § 411.340, restrictions on the liability of manufacturers have started to form despite the general purpose of Kentucky’s Products Liability Act.

1. The Requirement of Present Physical Injury

Wood v. Wyeth-Ayerst Laboratories Division of American Home Products, 82 S.W.3d 849 (Ky. 2002). In an effort to lose weight, the Appellant, Erma Wood (hereinafter “Wood”) took the drug fenfluramine. Shortly thereafter, Wood learned that patients taking fenfluramine had an increased risk of developing heart valve abnormalities, including pulmonary hypertension. Therefore, Wood filed a claim against Wyeth-Ayerst Laboratories for strict products liability asking the court for damages in the form of medical monitoring, funds for medical monitoring expenses, compensation for medical bills, and punitive damages. As of the date Wood filed her claim, she had not

[A] “product liability action” shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacturer, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.

3 Id. § 411.340.
4 Id.
5 Id. This section provides:

In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

6 Wood v. Wyeth-Ayerst Lab., Div. of Am. Home Prod., 82 S.W.3d 849, 851 (Ky. 2002). Wyeth-Ayerst Laboratories is a division of American Home Products Corporation, who marketed the weight loss drugs “Fen Phen” and “Redux,” which both contain the drug fenfluramine. Id. at 850-51.
7 Id. at 851. Erma also filed claims for negligence, concert of action and enterprise liability. Id.
8 Id. Subsequently, Erma made a motion to certify her claim as a class action. Id. Erma had opted out of a previous class action against American Home Products Corporation because the suit failed to include claims for pulmonary hypertension. Id.
experienced any physical or psychological injuries as a result of taking the drug.\(^9\)

The trial court dismissed Wood’s complaint after concluding that a plaintiff must suffer from an actual injury in a products liability action.\(^10\) The court of appeals affirmed the trial court’s decision reasoning that Wood failed to allege and present evidence that she suffered an actual injury as a result of taking fenfluramine.\(^11\) Wood subsequently sought discretionary review in the Supreme Court of Kentucky.\(^12\)

The supreme court began its analysis by examining the following proposition: “a cause of action in tort requires a present physical injury to the plaintiff.”\(^13\) The majority of cases continue to follow this proposition.\(^14\) The court relied extensively on the existing precedent established in *Capital Holding v. Bailey*.\(^15\) In *Capital Holding*, the Kentucky Supreme Court held that even where a plaintiff is exposed to toxic substances as a result of the defendant’s actions the cause of action can only exist if a present physical injury is proven.\(^16\) Wood maintained that while she had not experienced any illness from taking the drug she had suffered injuries, including an increased risk of pulmonary hypertension and future medical expenses to monitor her condition.\(^17\) Wood contended that her injuries fell under a broadly construed holding of *Capital Holding*.\(^18\) However, the supreme court determined the necessary injuries for a products liability cause of action had to constitute physical change to one’s body, therefore Wood’s injuries did not fall under this characterization.\(^19\)

While noting that some states have adopted a separate cause of action for medical monitoring, the supreme court refused to do the same, arguing that burdens of a medical monitoring cause of action outweighed its benefits.\(^20\) In considering the various benefits, including early detection, imposing moral

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\(^9\) *Id.*

\(^10\) *Id.*

\(^11\) *Id.*

\(^12\) *Wood*, 82 S.W.3d at 851.

\(^13\) *Id.* at 852. See *Radcliff Homes, Inc. v. Jackson*, 766 S.W.2d 63, 68 (Ky. Ct. App. 1989) (citing *RESTATEMENT (SECOND) OF TORTS § 402(A) (1965)*) (stating that in order “to prevail in an action based upon strict products liability, a plaintiff must establish: (1) that there is a ‘product,’ which . . . (5) results in physical harm to the user or consumer or his property”). See also *Saylor v. Hall*, 497 S.W.2d 218, 225 (Ky. 1973) (stating that in order for a cause of action to exist the plaintiff must prove some type of actual damage or loss).

\(^14\) *Wood*, 82 S.W.3d at 852.

\(^15\) 873 S.W.2d 187, 195 (Ky. 1994). In *Capital Holding*, the plaintiff was exposed to asbestos during the course of his employment, and the court held that his cause of action had not accrued because he only had an increased risk of injury and no present physical injury. *Id.* at 195.

\(^16\) *Wood*, 82 S.W.3d at 852.

\(^17\) *Id.* at 851.

\(^18\) *Id.* at 854.

\(^19\) *Id.* at 855. The court relied on *RESTATEMENT (SECOND) OF TORTS § 7*, which provides that “the words ‘physical harm’ are used to denote physical impairment of the human body, or of tangible property . . .” *Id.*

\(^20\) *Id.* at 856-57.
obligations, providing accessible medical care, and preventing future litigation, the supreme court cautioned that a medical monitoring cause of action would be detrimental to those plaintiffs who later developed physical injuries, because those plaintiffs would be precluded from bringing another cause of action against the defendant. The supreme court further noted that most defendants do not have the resources to provide ongoing medical monitoring and the majority of those resources that are provided will go to the plaintiff’s lawyers. Accordingly, the Kentucky Supreme Court failed to adopt a separate cause of action for medical monitoring. Thus, under Kentucky law, an injured plaintiff must prove that he or she has an actual injury in order to recover.

2. The Learned Intermediary Doctrine

_Larkin v. Pfizer, Inc._, 153 S.W.3d 758 (Ky. 2004). Robert Larkin (hereinafter “Larkin”) received a prescription for two drugs, Zithromax and Daypro, both with a known side effect of toxic epidermal necrolysis. Larkin’s doctor prescribed these drugs to help with the sinus and paraplegia pain from which Larkin suffered. However, despite this known side effect, the doctor failed to inform Larkin of his risk of contracting the disease. The packaging also did not inform Larkin of any dangers or side effects that could occur as result of taking the drugs. Shortly after filling his prescription, Larkin developed blisters over his entire body and was placed in the burn unit at the hospital. Larkin’s condition became so severe that it became necessary for him to rely upon a wheelchair for mobility.

Larkin subsequently filed a products liability action against the two drug manufacturers, Pfizer, Inc. and G.D. Searle & Co. The district court noted that prescription drugs are products that are unavoidably dangerous; however, their...
benefits outweigh their dangerousness. Ordinarily, the only issue to address in a products liability action involving prescription drugs involves “whether the manufacturer provided an adequate warning.” The manufacturers argued that Kentucky should adopt the learned intermediary doctrine, exempting prescription drug manufacturers from liability if they provide physicians with adequate warnings. The Sixth Circuit Court of Appeals certified the question to the Kentucky Supreme Court as to whether Kentucky should adopt the learned intermediary doctrine.

On review, the Supreme Court of Kentucky followed the lead of many other states and adopted the learned intermediary doctrine from the Restatement (Third) of Torts. Under the provisions of the Restatement, a manufacturer is relieved from liability if it provides adequate warnings to physicians and health care providers about the side effects of the drugs it manufactures. The supreme court stated that the reasoning behind the learned intermediary doctrine is that health care professionals are in a better position than the manufacturers to provide adequate warnings to patients. The supreme court noted that, unlike physicians, manufacturers do not have sufficient avenues to convey warnings to patients. Moreover, the supreme court reasoned that “imposing a duty to warn upon the manufacturer would unduly interfere with the physician-patient relationship.” The supreme court recognized that manufacturers had to continue providing adequate warnings to physicians in order to avoid liability.

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32 Id. See also Restatement (Second) of Torts § 402(A) cmt. k (1965).
34 Id.
35 Id.
36 Id. at 770. Restatement (Third) of Torts-Products Liability § 6 (1998) provides, in pertinent part:

(d) A prescription drug or medical device is not reasonably safe due to inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks of harm are not provided to: (1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

37 Larkin, 153 S.W.3d at 762.
38 Id. at 763.
39 Id. at 764. See also Reaves v. Ortho Pharm. Corp., 765 F. Supp. 1287, 1290 (E.D. Mich. 1991) (“[A]s with other prescription drugs, patients are unlikely to understand technical medical information regarding the nature and propensities of oral contraceptives.”); Gravis v. Parke-Davis & Co., 502 S.W.2d 863, 870 (Tex. Civ. App. 1973) (holding that “it is unreasonable to demand that the manufacturer of drugs specifically warn each and every patient that receives drugs prescribed by the physician or other authorized persons.”).
40 Larkin, 153 S.W.3d at 764 (citing West v. Searle & Co., 806 S.W.2d 608, 613 (Ark. 1991)).
41 Id.
However, while failing to specify what they would consider an adequate warning, the supreme court acknowledged that other courts had found package inserts and publications in the Physician’s Desk Reference to be sufficient.  

Larkin “argue[d] that Kentucky should reject the learned intermediary rule primarily on the basis” of *Montgomery Elevator Co. v. McCullough*, which held that a manufacturer’s duty to warn the ultimate consumer is “non-delegable.” In rejecting Larkin’s argument, the supreme court stated *Montgomery* was distinguishable from the case at bar because it did not involve prescription drugs and because a manufacturer’s duty to warn against the dangers of ordinary consumer products is incomparable to that of prescription drugs. Larkin further argued that the adoption of the learned intermediary doctrine should be left to the legislature; however, the supreme court rejected this argument as well. Thereafter, the court “reject[ed] the argument that adopting the learned intermediary rule would immunize manufacturers of prescription drugs from products liability claims” and adopted the doctrine as Kentucky law.

Three justices, Justice Wintersheimer, Lambert, and Stumbo dissented in the opinion and argued against the court’s adoption of the learned intermediary doctrine. The dissenting judges argued that the court should not adopt a common law exception to the statutory products liability law and such decisions should be left to the legislature. The dissent further argued that the increasing number of pharmaceutical manufacturers marketing directly to consumers only

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42 Id. at 764-65. *See* Wyeth Labs, Inc. v. Fortenberry, 530 So. 2d 688, 692-93 (Miss. 1988) (stating that package inserts may be sufficient warnings); Wolfgruber v. Upjohn Co., 72 A.D.2d 59, 61 (N.Y. App. Div. 1979) (stating that postings in the Physician’s Desk Reference may be sufficient).
43 676 S.W.2d 776 (Ky. 1984).
44 *Larkin*, 153 S.W.3d at 768. *See McCullough*, 676 S.W.2d at 782.
45 *Larkin*, 153 S.W.3d at 768. The supreme court reasoned that:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier . . . fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

*Id.* *See also* Lloyd v. Lloyd, 479 S.W.2d 623, 625-26 (Ky. Ct. App. 1979) (adopting *RESTATEMENT (SECOND) OF TORTS § 388 (1965)*).
46 *Larkin*, 153 S.W.3d at 769.
47 *Id.* at 770. The supreme court acknowledged three exceptions to the learned intermediary doctrine, including those cases involving mass immunizations, oral contraceptives, and those drugs directly advertised to consumers; however, the court did not give an opinion on whether Kentucky would recognize these exceptions. *Id.* at 765-76.
48 *Id.* at 770.
49 *Id.*
proves that the manufacturers “are in the best position to ensure that adequate warnings are provided to customers.”

3. The Plaintiff’s Burden of Proof in Design Defect Cases

Leslie v. Cincinnati Sub-Zero Products, Inc., 961 S.W.2d 799 (Ky. Ct. App. 1998). During Isabelle Stanley’s (hereinafter “Stanley”) coronary bypass surgery, the hospital used a thermal unit to control her body temperature. The thermal unit was equipped with two safety devices, one known as a temperature probe, which was supposed to be placed near the patient so that the unit could detect her body temperature and the other known as a safety switch, which was designed to shut off the unit if the temperature got too high. Unfortunately, the safety switch malfunctioned during Stanley’s surgery. This malfunction caused severe burns from which Isabelle eventually died. Stanley’s estate subsequently filed suit against Cincinnati Sub-Zero Products, Inc., the manufacturer of the thermal unit, claiming that the unit was defective and unreasonably dangerous. Cincinnati Sub-Zero filed a motion for summary judgment. The trial court granted the motion because the estate failed to overcome the presumptions set forth in K.R.S. § 411.310. The estate timely appealed.

The court of appeals held that the estate had presented sufficient evidence to overcome the presumptions set forth in K.R.S. § 411.310, which established a

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50 Id. at 772.
51 Leslie v. Cincinnati Sub-Zero Prod., Inc., 961 S.W.2d 799, 800 (Ky. Ct. App. 1998). The thermal unit is a heating/cooling blanket that hospitals use when it is necessary to regulate a patient’s body temperature. Id.
52 Id.
53 Id.
54 Id. The hospital also failed to use a temperature probe. Id.
55 Id. The estate also filed claims against the hospital whose employees operated the thermal unit and the claims settled out of court. Id.
56 Id.
57 Leslie, 961 S.W.2d at 800, 804. The trial court also held the estate’s claims were preempted by the Federal Medical Device Act and the court of appeals reversed. Id. See also Niehoff v. Surgidev Corp., 950 S.W.2d 816, 822 (Ky. 1997) (holding that the Medical Device Act does not preempt state law unless the state law goes specifically against the Act); Oja v. Howmedica, Inc., 111 F.3d 782, 788 (10th Cir. 1997) (holding that there is a two part test to determine if the Medical Device Act preempts state law: first, the court must determine whether a federal act/law exists that involves the medical device; and second, the court must determine whether the state law relates directly to the medical device). In Oja, the court held that products liability law provides plaintiffs with a cause of action against manufacturers and sellers and is in no way determinative upon the particular product. Oja, 111 F.3d at 788.
58 Leslie, 961 S.W.2d at 800.
59 Ky. REV. STAT. ANN. § 411.310 (Banks-Baldwin 2004). This section provides:

(1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was
rebuttable presumption that a product is not in a defective condition.\textsuperscript{60} The estate presented expert testimony which established that the thermal unit was in a defective condition at the time it was manufactured and that a feasible alternative design did exist at the time it was manufactured.\textsuperscript{61} Furthermore, the estate’s expert testified, “that ‘fail-safe’ technology regarding different circuitry for the machine, which would have prevented the thermal unit from overheating and burning Stanley, had existed for over 60 years.”\textsuperscript{62} Cincinnati Sub-Zero argued that the estate had to prove that the feasible alternative design was used in similar medical devices in 1980.\textsuperscript{63} Rejecting this notion, the court held that under K.R.S. § 411.310 the estate only had to prove by a preponderance of the evidence that the thermal unit was defective and that there was an alternative design that should have been utilized.\textsuperscript{64} Therefore, the court reversed the trial court’s decision and remanded the case for trial.\textsuperscript{65}

In \textit{Toyota Motor Corp. v. Gregory},\textsuperscript{66} the supreme court placed a heavier burden of proof upon the plaintiff than the court did in \textit{Leslie}.\textsuperscript{67} The trial court instructed the jury that in order to succeed in a defective design cause of action the plaintiff must “propose[] a feasible safer alternative design.”\textsuperscript{68} In \textit{Gregory}, Yu Hsia Gregory (hereinafter “Gregory”) was injured in a car accident.\textsuperscript{69} The impact of the accident caused the air bag to inflate, which amplified Gregory’s injuries.\textsuperscript{70} Gregory subsequently brought a products liability claim against Toyota for defective design.\textsuperscript{71} Gregory based her theory of liability on expert testimony comparing the Corolla’s airbag deployment rate with that of a car manufactured by Honda.\textsuperscript{72} The expert testimony revealed Honda’s airbag system not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

\textit{Id.} 60 \textit{Leslie}, 961 S.W.2d at 803.
61 \textit{Id.} at 804.
62 \textit{Id.}
63 \textit{Id.}
64 \textit{Id.} at 803-04.
65 \textit{Id.} at 804-05.
66 136 S.W.3d 35 (Ky. 2004).
68 \textit{Id.} at 37.
69 \textit{Id.}
70 \textit{Id.}
71 \textit{Id.} In addition, Gregory brought claims for “manufacturing defects, misrepresentation, failure to warn, and breach of warranty.” \textit{Id.}
72 \textit{Id.}
had a notably lower deployment rating. Toyota countered Gregory’s argument with a study performed by Toyota’s expert illustrating that a number of cars made by different manufacturers had faster deployment ratings than the Corolla. The jury returned a verdict in favor of Toyota. On appeal, Gregory argued that the trial court erred by instructing the jury that she had to prove a feasible alternative design. The court of appeals reversed the trial court’s findings and Toyota petitioned for discretionary review.

Gregory argued that proof of a feasible alternative design was only necessary to overcome the presumptions of K.R.S. § 411.310. However, the supreme court found that proof of a feasible alternative design was also a necessary element of Gregory’s prima facia case. The supreme court stated “the test is whether an ordinary prudent company . . . being fully aware of the risk, would not have put [the product] on the market.” This concept is known as the risk utility test. Thus, merely illustrating that an injury would have been less severe or would not have occurred had an alternative design been utilized is not sufficient.

4. Successor-In-Interest Liability

Pearson v. National Feeding System, Inc., 90 S.W.3d 46 (Ky. 2002). Helping on the farm is common practice for many children in Kentucky, but for Justin Pearson (hereinafter “Pearson”) it was a life-changing experience. Pearson’s leg was severed when he attempted to unclog a silo unloader. Justin’s mother, Carolyn Trent (hereinafter “Trent”), subsequently filed a

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73 Toyota, 136 S.W.3d at 37.
74 Id. at 38.
75 Id. at 37.
76 Id. Gregory argued that the trial court erred when it allowed Toyota’s expert’s report in evidence because the study was not based on adequate statistical data. Id. The supreme court held that the report was admissible and the jury could determine its weight. Id. See also Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69 (Ky. 1973) (stating that evidence of industry practice and designs utilized by other manufacturers can be used to prove reasonableness in product liability cases).
77 Toyota, 136 S.W.3d at 37.
78 Id. at 41.
79 Id. The court acknowledged Gregory’s case was a crashworthiness claim, meaning the defect did not cause the accident, it only amplified the injuries. Id. There are three elements that must be proven in a crashworthiness claim: “(1) an alternative safer design, practical under the circumstances [this element is required in all design defect cases]; (2) proof of what injuries, if any, would have resulted had the alternative, safer design been used; and (3) some method of establishing the extent of enhanced injuries attributable to the defective design.” Id.
80 Id. at 42 (citing Nichols v. Union Underwear Co., 602 S.W.2d 429, 433 (Ky. 1980)).
81 Id.
82 Id.
84 Id.
products liability suit based on successor-in-interest liability against National Feeding System, Inc. (hereinafter “National Feeding”), the purchasing company of Dynamatic Feeding Systems, Inc. (hereinafter “Dynamatic”), the original manufacturer of the silo.\(^{85}\) The trial court granted National Feeding’s motion for summary judgment, ruling that successors-in-interest are not liable for the debts of the selling company and that Kentucky has never adopted the product-line exception to successor-in-interest liability.\(^{86}\) After the court of appeals affirmed the trial court’s decision, Trent appealed to the Supreme Court of Kentucky.\(^{87}\)

On review, the supreme court stated that under the general rule in Kentucky, National Feeding was not liable for injuries caused by Dynamatic’s products.\(^{88}\) The supreme court noted that a successor-in-interest is only liable for the debts of the selling company:

(1) where the purchaser expressly or impliedly agrees to assume such debts or other liabilities; (2) where the transaction amounts to a consolidation or merger of the seller and purchaser; (3) where the purchasing corporation is merely a continuation of the selling corporation; or (4) where the transaction is entered into fraudulently in order to escape liability for such debts.\(^{89}\)

Trent contended that the purchase agreement between National Feeding and Dynamatic fell under the first three exceptions.\(^{90}\) As to the first exception, the supreme court, after analyzing the purchasing agreement found that National Feeding never expressly assumed liability for products liability debts.\(^{91}\) Therefore, the agreement did not satisfy the first exception.\(^{92}\) Next, Trent presented evidence that National Feeding used Dynamatic’s trade names and records.\(^{93}\) She argued that the evidence proved that the companies had either merged or that National Feeding was a mere continuation of Dynamatic.\(^{94}\) The supreme court determined that because National Feeding purchased Dynamatic in

\(^{85}\) Id.
\(^{86}\) Id.
\(^{87}\) Id.
\(^{88}\) Id. at 49; Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145, 148 (6th Cir. 1987) (holding an employee who was injured during the course of his employment could not hold the successor corporation liable for his injuries). See also Am. Ry. Express Co. v. Commonwealth, 228 S.W. 433, 437 (Ky. 1920) (imposing successor-in-interest liability on a company who merely purchased another by buying stock in the selling company).
\(^{89}\) Pearson, 90 S.W.3d at 49 (citing Conn, 835 F.2d at 146).
\(^{90}\) Id. at 50. Carolyn conceded the issue of fraud under the fourth exception. Id. at 51.
\(^{91}\) Id.
\(^{92}\) Id.
\(^{93}\) Id.
\(^{94}\) Id. National Feeding used Dynamatic’s trademark Silo-Matic, the same trademark on the silo that injured Justin. Id.
a bankruptcy sale, the transaction could not be considered a merger or a continuation.

In the alternative, Trent petitioned the court to follow the minority of states and adopt the product line exception to successor-in-interest liability. Under the product line exception, where a purchasing company continues to manufacture the same product line under the same circumstances as the selling company then the purchasing company is strictly liable to all plaintiffs injured by the defective products manufactured by both companies. Following the analysis in Jones v. Johnson Machine & Press Co., the supreme court declined to adopt the product line exception, reasoning that typically a successor-in-interest never participates in the development of the selling company’s products. Further, the supreme court reasoned that “the corporate assets purchaser, as a successor of the manufacturer of a defective product, cannot be said to have created the risk of a product manufactured by its predecessor . . .”

5. Lack of a Duty to Retrofit

Ostendorf v. Clark Equipment Company, 122 S.W.3d 530 (Ky. 2003). While working for Delta in 1994, an employee transporting luggage crashed into a forklift operated by Michael Ostendorf (hereinafter “Ostendorf”). Ostendorf’s foot was crushed when the collision caused the forklift to tip over. The forklift was manufactured in 1980 by Clark Equipment Company (hereinafter “Clark”), and despite Clark’s knowledge of the safety hazards, the forklift was not equipped with safety restraints. It was not until one of its own employees died in a forklift accident that Clark began installing safety restraints. Additionally, Clark also started a voluntary retrofit campaign that would inform owners of previously sold forklifts that Clark would install safety restraints at no cost. Therefore, Ostendorf filed suit against Clark claiming breach of a duty to retrofit, negligent enactment of a voluntary retrofit campaign as well as other claims.
based on a theory of products liability. The trial court granted Clark’s motion for summary judgment and the court of appeals affirmed and reversed in part, holding that Clark had no common law duty to retrofit the forklift. Ostendorf timely appealed.

Generally, “[a] duty to retrofit is a duty to upgrade or improve a product.” On appeal, Ostendorf argued that Clark had a common law duty to retrofit the forklift. Agreeing with the court of appeals, the Supreme Court of Kentucky held that Kentucky had never adopted the common law duty to retrofit products. The duty to retrofit ordinarily occurs when products have design defects or when technology advances after the manufacturing of the product. However, the supreme court determined that the burdens of adopting a duty to retrofit in these circumstances outweighed the benefits. The supreme court noted that adopting a duty to retrofit would unreasonably burden manufacturers by imposing excessive monetary burdens upon them. Additionally, the supreme court stated that current products liability law already provides plaintiffs with an adequate form of recovery through the risk utility doctrine. As such, any changes should be left up to the legislature. The only benefits of the doctrine acknowledged by the supreme court were procedural.

With regard to Ostendorf’s claim for negligent operation of a voluntary retrofit campaign, Ostendorf argued that by operating the campaign Clark voluntarily assumed a duty and, when a duty is assumed it must be assumed in a manner that is not negligent. The supreme court determined that Clark’s

106 Id. at 532.
107 Ostendorf, 122 S.W.3d at 532.
108 Id.
109 Id. at 533.
110 Id.
111 Id. But see Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451, 453 (2d Cir. 1969) (“[A]fter such a product has been sold and dangerous defects in design have come to the manufacturer’s attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger”); Noel v. United Aircraft Corp., 342 F.2d 232, 242 (3d Cir. 1964) (adopting a duty to retrofit parts of a helicopter that prevented known flight hazards); Hernandez v. Badger Const. Equip. Co., 34 Cal. Rptr. 2d 732, 754-55 (1994) (imposing a duty to adequately retrofit a crane defectively manufactured when sold).
113 Ostendorf, 122 S.W.3d at 536.
114 Id. at 534.
115 Id. at 535.
116 Id. The court stated that in a design defect case, “the trier of fact must employ a risk-utility balancing test that considers alternative safer designs and the accompanying risk pared against the risk and utility of the design chosen ‘to determine whether . . . the manufacturer exercised reasonable care in making the design choices it made.’” Id. (citing Gregory, 538 N.W.2d at 329-30).
117 Id. at 537.
118 Id.
campaign did not fulfill the necessary elements for assumption of a duty.\textsuperscript{119} Relying on the Restatement (Second) of Torts § 324A,\textsuperscript{120} the supreme court held that Clark did not negligently assume a duty because Ostendorf’s risk of harm was not increased by the campaign, Clark did not voluntarily assume a duty of another, and Ostendorf never relied on Clark’s campaign.\textsuperscript{121} As such, the court refused to adopt a common law duty to retrofit and remanded the case back to the trial court.\textsuperscript{122}

6. The Component Parts Doctrine

\textit{Worldwide Equipment, Inc. v. Mullins,} 11 S.W.3d 50 (Ky. Ct. App. 1999). Darin Thornsberry (hereinafter “Thornsberry”) suffered a severe spinal injury and Tommy Mullins (hereinafter “Mullins”) died, as a result of a rear-end collision with a dump truck.\textsuperscript{123} Claims were then filed against the dump truck driver, Charles Taylor, and the manufacturers of the dump truck.\textsuperscript{124} The two plaintiffs claimed that Charles Taylor caused the accident by failing to use his turn signal and that the dump truck was defective thereby exacerbating their injuries.\textsuperscript{125} The dump truck in question was manufactured in three separate parts, with Mack Trucks, Inc. (hereinafter “Mack”), Worldwide Equipment, Inc (hereinafter “Worldwide”), and R & S Truck Body, Inc. (hereinafter “R&S”) all participating in its construction.\textsuperscript{126} Mack started the construction by manufacturing what is known as a cab-chassis.\textsuperscript{127} Worldwide then purchased the cab-chassis and sold it to R&S who put the final touches on the vehicle.\textsuperscript{128} However, despite federal mandate, an underride guard was never installed on the dump truck, and the plaintiffs claimed that the failure to install the underride

\textsuperscript{119} Ostendorf, 122 S.W.2d at 538.
\textsuperscript{120} \textsc{Restatement (Second) of Torts} § 324A (1965) states in pertinent part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if: (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is sufficient because of reliance of the other or the third person upon the undertaking.

\textsuperscript{121} Ostendorf, 122 S.W.3d at 538. There was contradictory evidence whether Clark actually sent notice to Delta regarding the retrofitting campaign. \textit{Id.}
\textsuperscript{122} \textit{Id.} The case was remanded for trial on Ostendorf’s other product liability claims. \textit{Id.}
\textsuperscript{123} Worldwide Equip., Inc. v. Mullins, 11 S.W.3d 50, 52 (Ky. Ct. App. 1999).
\textsuperscript{124} \textit{Id.} at 53.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 52-53.
\textsuperscript{127} \textit{Id.} at 52. “A cab-chassis is considered an ‘incomplete vehicle’ . . . under the Federal Motor Vehicle Safety Standards.” \textit{Id.}
\textsuperscript{128} \textit{Id.} at 52-53.
guard enhanced their injuries. Only the claims against Mack will be discussed in this article. The jury apportioned five percent of the fault to Mack even though the jury determined the cab-chassis was not defective and that Mack had no duty to warn. Accordingly, Mack appealed.

On appeal, the plaintiffs argued that Mack breached a duty of care by failing to warn against the hazards of failing to install an underride guard. Relying on persuasive precedent from Field v. Omaha Standard, Inc., the court of appeals stated that to require “... Mack to monitor a cab-chassis throughout its useful life imposes too great a burden on a manufacturer.” In Field, the plaintiff was injured after a rear end collision with a vehicle missing an underride guard and the plaintiff claimed the cab-chassis was defective. The Field court examined three factors in determining whether the manufacturer was liable: (1) whether the vehicle was constructed in stages; (2) whether the cab-chassis could be used to make various vehicles; and (3) whether the final-stage manufacturer was always the one who installed the underride guard. The court of appeals found that Mack fit within all three of these factors.

The court of appeals acknowledged that ordinarily component parts manufacturers, like Mack, do not have a duty to warn against dangers with regard to completed products. Holding in favor of Mack, the court of appeals stated that when a component part complies with the current safety standards and is then used in a finalized product the component part manufacturer is under no duty to warn.

B. Damages

129 Worldwide, 11 S.W.3d at 53.
130 Id.
131 Id. at 56.
132 Id. at 54.
133 Id.
135 Worldwide, 11 S.W.3d at 57.
137 Id. at 326-27.
138 Worldwide, 11 S.W.3d at 56. Mack also argued that at the time the cab-chassis in question was manufactured no other manufacturers of cab-chassises provided warnings regarding the hazards of failing to install underride guards. Id. at 57.
139 Id.
140 Id.
The barriers of imposing liability upon manufacturers are not the only obstacles for injured plaintiffs to overcome in order to obtain adequate compensation for their injuries. Plaintiffs must also consider the obstacles imposed upon them when it comes to damages. Thus, plaintiffs must be prepared to defend their own actions. This because Kentucky imposes comparative fault. If the manufacturer’s actions warrant punitive damages the plaintiff must prove the manufacturer’s conduct rises to the level of outrageousness as well as satisfy the dictates of *State Farm v. Campbell* and *BMW of North America v. Gore*.

1. Comparative Fault

*Owens Corning Fiberglas Corporation v. Parrish*, 58 S.W.3d 467 (Ky. 2001). Walter Parrish (hereinafter “Parrish”) and James Coyle (hereinafter “Coyle”) contracted asbestosis while working for Louisville Water Company (hereinafter “LWC”). Asbestosis is a “respiratory disease caused by the inhalation of asbestos fibers.” Parrish and Coyle filed products liability actions against Owens Corning Fiberglas Corporation (hereinafter “Owens”), the asbestos manufacturer, claiming they had contracted asbestosis, experienced regular shortness of breath, and thereby had a greater risk of contracting cancer. The trial court combined the two cases. At trial, Owens presented evidence that Parrish and Coyle were regular smokers and that Parrish did not wear a mask while working with the asbestos. The trial court ordered the jury to apportion fault based on this evidence and the jury found Parrish and Coyle fifty percent at fault. Additionally, although Parrish and Coyle settled out of court with LWC prior to trial, the court instructed the jury to apportion the remaining fifty percent of fault between LWC and Owens. The jury found LWC ten percent at fault and Owens forty percent at fault. The jury determined that “Parrish and Coyle each violated his general duty ‘to exercise that degree of care for his own health and safety as expected of a reasonably prudent person.’”

Both Parrish and Coyle appealed the trial court’s decision and the court of appeals reversed, holding that the trial court erred by apportioning fault based on the plaintiff’s smoking habit, failure to wear a safety mask, and by taking the

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143 *Owens Corning Fiberglass Corp. v. Parrish*, 58 S.W.3d 467, 470 (Ky. 2001).
144 Id.
145 Id.
146 Id.
147 Id.
148 Id.
149 Id.
150 *Owens*, 58 S.W.3d at 470.
151 Id.
fault of LWC into account.\textsuperscript{152} Owens subsequently sought review from the Supreme Court of Kentucky.\textsuperscript{153} On appeal, Owens argued that the supreme court should uphold the decision of the trial court.\textsuperscript{154} However, Parrish and Coyle argued that the trial court erred in taking into consideration their smoking and failure to wear a facemask because Kentucky’s Product Liability Act allows the factfinder to consider in comparative fault only a plaintiff’s use or misuse of a product.\textsuperscript{155} Therefore, because neither smoking nor failure to use a mask constituted misuse of Owens’ asbestos products, the conduct should not have been considered in apportioning fault.\textsuperscript{156} Plaintiffs also argued that apportionment of fault should not include LWC, because LWC was not made a party to the suit.\textsuperscript{157}

The Kentucky legislature adopted comparative fault statutorily when it enacted K.R.S. § 411.182\textsuperscript{158} on July 15, 1988.\textsuperscript{159} However, the Supreme Court

\begin{itemize}
\item[(1)] In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating: (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
\item[(2)] In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
\item[(3)] The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each claimant's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
\item[(4)] A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.
\end{itemize}
of Kentucky had previously adopted comparative fault in its *Hilen v. Hays* decision. The supreme court maintained that the codification of comparative fault in Kentucky thereby rescinded K.R.S. § 411.320 which barred liability in products liability cases when a plaintiff was contributory negligent. Furthermore, the supreme court stated that if the legislature had intended to exempt products liability cases from comparative fault it would have done so expressly. Thus, under current Kentucky law, a plaintiff’s negligent actions do not completely bar recovery in a products liability claim. The plaintiff’s actions are only taken into consideration when apportioning fault.

After determining that comparative fault applied, the supreme court concluded that smoking and failure to wear a safety mask could be taken into account when apportioning fault in an asbestos case. Because the legislature failed to establish a definition for fault, the supreme court relied on *Wemyss v. Coleman*. In *Wemyss*, the court relied on “the terms ‘negligence’ and ‘fault’ for purposes of determining comparative negligence as equivalent and interchangeable terms.” The supreme court also examined the Uniform Comparative Fault Act which establishes fault when there is a correlation

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160 673 S.W.2d 713, 720 (Ky. 1983).

161 *Owens*, 58 S.W.3d at 473 n.14 (citing Wemyss v. Coleman, 729 S.W.2d 174, 177 (Ky. 1987)).


1. In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.

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

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

163 *Owens*, 58 S.W.3d at 474.

164 Id. at 475.

165 Id. at 474.

166 Id.

167 Id. at 479.

168 Id. at 473.

169 *Owens*, 58 S.W.3d at 473 (citing Wemyss v. Coleman, 729 S.W.2d 174, 177 (Ky. 1987)).
between a person’s own negligence or recklessness and the injury.\textsuperscript{170} As a result, the supreme court stated that a plaintiff’s comparative fault is not based solely on use of the product.\textsuperscript{171} Accordingly, the supreme court held that the trial court was correct in taking Parrish and Coyle’s smoking and failure to wear a safety mask into account when apportioning liability.\textsuperscript{172}

Furthermore, Parrish and Coyle argued that only exposure to asbestos causes asbestosis and thus smoking should not be taken into consideration.\textsuperscript{173} However, the supreme court disagreed with this argument stating that neither Parrish nor Coyle presented evidence establishing what proportion of the smoking or asbestos actually caused the shortness of breath.\textsuperscript{174} Because both actions have the potential to cause shortness of breath it was up to the plaintiffs to prove that the asbestoses was the sole cause of harm.\textsuperscript{175} Only then, according to the court, would comparative fault be inapplicable.\textsuperscript{176} On the remaining issue of whether LWC, a nonparty, should be taken into account when apportioning fault, the supreme court held that “a tortfeasor who is not actually a defendant is construed to be one for purposes of apportionment if he has settled the claim against him.”\textsuperscript{177} Accordingly, the supreme court reversed the decision of the court of appeals and reinstated the judgment of the trial court.\textsuperscript{178}

2. Punitive Damages

\textit{Sufix, U.S.A., Inc. v. Cook}, 128 S.W.3d 838 (Ky. Ct. App. 2004). In May 1998, Tommy Cook [hereinafter “Cook”] was a landscaper for a real estate developer.\textsuperscript{179} The developer provided Cook with equipment, including a weed trimmer called the Pro-Edge, manufactured by Sufix U.S.A., Inc., [hereinafter “Sufix”].\textsuperscript{180} The Pro-Edge used blades to cut tall grass and was an upgrade from

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\textsuperscript{170} Id. at 475.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 479.
\textsuperscript{173} Id. at 476.
\textsuperscript{174} Id. at 476-77.
\textsuperscript{175} Owens, 58 S.W.3d at 479.
\textsuperscript{176} Id. The supreme court stated:

\[\text{[If distinct causes produce distinct harms, or if distinct causes produce a single harm and the evidence presented at trial provides a reasonable basis for determining the contribution of each cause to the single harm, a trial court should instruct the jury to apportion the damages to the distinct causes without resorting to comparative fault.}\]

\textit{Id.}
\textsuperscript{177} Id. at 481 (citing Dix & Assoc. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 28 (Ky. 1990) (apportioning fault between a defendant and the plaintiff’s employer).
\textsuperscript{178} Id. at 482.
\textsuperscript{180} Id.
the older models that used string.\textsuperscript{181} However, the Pro-Edge malfunctioned when Cook was using it and one of its blades flew into Cook’s leg.\textsuperscript{182} According to the court, Cook was never without pain while confined to a wheelchair.\textsuperscript{183} He was also forced to give up the landscaping job he loved.\textsuperscript{184} Cook filed a defective design suit against Sufix and the jury awarded him 2.8 million dollars in compensatory damages and 3 million dollars in punitive damages.\textsuperscript{185}

On appeal, the court of appeals established the requirements for a punitive damages award.\textsuperscript{186} Sufix argued that Cook failed to prove it acted with outrageous conduct.\textsuperscript{187} Sufix also argued in the alternative that the punitive damages award was excessive.\textsuperscript{188} The court of appeals agreed with Sufix, stating that mere negligence is not enough for an award of punitive damages.\textsuperscript{189} The court of appeals also found that a plaintiff must prove the defendant’s actions “amounted to gross negligence or reckless disregard for the lives and safety of others.”\textsuperscript{190} At trial Cook introduced expert testimony stating that Sufix tested the Pro-Edge for defects in a grossly negligent manner and that adequate testing would have revealed that it was not sturdy enough to withstand metal blades.\textsuperscript{191} Sufix presented no evidence to counter Cook’s argument and, in fact, failed to provide evidence of the actual tests it said it conducted.\textsuperscript{192} The only tests entered into evidence revealed the Pro-Edge was defective and that Sufix continued to market the Pro-Edge despite the defect.\textsuperscript{193} Cook argued that Sufix’s failure to adequately test the Pro-Edge amounted to gross negligence and outrageous conduct.\textsuperscript{194} The court of appeals noted that “... a manufacturer’s failure to test for defects that pose a risk of serious injury and that are susceptible to adequate pre-release testing can amount to a conscious or reckless disregard for the rights and safety of others and thus can justify an award of punitive damages.”\textsuperscript{195} The

\textsuperscript{181} Id.  
\textsuperscript{182} Id.  
\textsuperscript{183} Id.  
\textsuperscript{184} Id.  
\textsuperscript{185} Sufix, 128 S.W.3d at 840.  
\textsuperscript{186} Id. at 840-41.  
\textsuperscript{187} Id. at 842.  
\textsuperscript{188} Id. at 840.  
\textsuperscript{189} Id.  
\textsuperscript{190} Id. See Phelps v. Louisville Water Co., 103 S.W.3d 46, 52 (Ky. 2003) (stating that a punitive damages award requires gross negligence on the part of the defendant); Masaki v. Gen. Motors Corp., 780 P.2d 566, 569 (Haw. 1989) (upholding that punitive damages should be allowed in products liability actions when there is clear and convincing evidence that the defendant’s conduct was outrageous).  
\textsuperscript{191} Sufix, 128 S.W.3d at 841.  
\textsuperscript{192} Id.  
\textsuperscript{193} Id.  
\textsuperscript{194} Id.  
\textsuperscript{195} Id. at 842. See Shurr v. A.R. Siegler, Inc., 70 F. Supp. 2d 900, 938 (E.D. Wis. 1999) (holding that punitive damages were justified when the evidence revealed the manufacturer of a fuel pump knowingly performed and concealed inadequate testing); Leichtamer v. Am. Motors Corp., 424
court of appeals found that the evidence at trial was sufficient for the jury to determine Sufix tested the Pro-Edge in a grossly negligent manner and affirmed the award of punitive damages.\(^{196}\) Additionally, the court of appeals held that the 3 million dollar punitive damages award was not excessive.\(^{197}\) In reviewing the punitive damages award, the court of appeals acknowledged *BMW of North America, Inc. v. Gore*,\(^{198}\) and stated that for an award to be acceptable the award must correlate with the defendant’s blame-worthiness, the actual injuries the plaintiff suffered, and the actual awards given in other cases.\(^{199}\) There was a correlation of all three factors in *Sufix*.\(^{200}\) While Sufix did not intentionally cause Cook’s injuries, its deliberate failure to adequately test the Pro-Edge ranked the same as if its actions had been intentional.\(^{201}\) Furthermore, the ratio between the punitive damages award of 3 million dollars and the 2.8 million dollar compensatory damages award was well within the required ratio.\(^{202}\) The award also correlated with punitive damage awards in other cases.\(^{203}\) Therefore, the court found Cook’s award was an adequate and acceptable punitive damages award.\(^{204}\)

_Sand Hill Energy, Inc. v. Smith_, 142 S.W.3d 153 (Ky. 2004). Unlike in *Sufix*, the Supreme Court of Kentucky in _Sand Hill Energy_ limited the plaintiff’s punitive damages award.\(^{205}\) While this case involved an extensive factual and procedural posture, only the proceedings relating to whether the punitive damages award was excessive will be discussed.\(^{206}\) The facts outlined in the

\(^{196}\) *Sufix*, 128 S.W.3d at 842.
\(^{197}\) Id.
\(^{198}\) 517 U.S. 559 (1996). In *BMW v. Gore*, the Supreme Court of the United States established that when determining whether a punitive damages award is excessive three “guideposts” must be analyzed: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio between the actual harm suffered by the plaintiff and the award; and (3) the ratio between the damages award and potential criminal sanctions. _Id._ at 574-75.
\(^{199}\) *Sufix*, 128 S.W.3d at 842.
\(^{200}\) Id.
\(^{201}\) Id.
\(^{202}\) Id. The court’s footnotes cited State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) for the following proposition: “when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Sufix*, 128 S.W.3d at 842 n.7.
\(^{203}\) *Sufix*, 128 S.W.3d at 842. _See Phelps v. Louisville Water Co., 103 S.W.3d 46, 49 (Ky. 2003)_ (upholding a punitive damages award more than eleven times that of compensatory damages).
\(^{204}\) *Sufix*, 128 S.W.3d at 843.
\(^{206}\) Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002) [hereinafter Sand Hill I]. _Sand Hill I_ and _Sand Hill II_ both acknowledge the requirements for a punitive damages instruction. _Sand Hill I_, 83 S.W.3d at 493; _Sand Hill II_, 142 S.W.3d at 165-67. However, these requirements were also discussed in *Sufix*, so they will not be examined again in the _Sand Hill II_ discussion.
original case were set out in *Sand Hill Energy, Inc. v. Ford Motor Co.*\(^{207}\) [hereinafter “*Sand Hill I*”]. While working for Sand Hill Energy in 1993, Tommy Smith [hereinafter “Smith”] drove a 1977 Ford truck.\(^{208}\) One of Smith’s duties included unloading ammonium nitrate from his truck into a storage facility located on a hill, forcing Smith to park his truck facing down the hill.\(^{209}\) One day while Smith was unloading the truck, the transmission shifted from park to reverse.\(^{210}\) The vehicle moved backwards and up the hill, crushing Smith to death against the storage shed.\(^{211}\)

In turn, Smith’s estate filed a products liability action against Ford Motor Company claiming the truck was defectively designed.\(^{212}\) At trial, Smith’s estate presented evidence that Ford knew about the transmission problems in the 1977 model and that, through the years, it had received numerous complaints of the truck automatically shifting gears.\(^{213}\) Ford contended that the following factors caused the accident: the truck’s condition, the older model of the truck, the fact that the truck needed numerous mechanical repairs, and the fact that the truck had previously been almost completely rebuilt.\(^{214}\) Ford also maintained that while the 1977 truck met the adequate safety standards in existence at the time it was manufactured, it did send out letters to all purchasers of the truck, regarding its potential to shift gears automatically.\(^{215}\) The trial court determined that Smith’s estate presented sufficient evidence to establish that Ford acted with malice and therefore, the estate was entitled to a punitive damages instruction.\(^{216}\) The jury returned a verdict of three (3) million dollars in compensatory damages and twenty (20) million in punitive damages.\(^{217}\) Ford appealed and the court of appeals reversed on procedural grounds.\(^{218}\) Smith’s estate was granted discretionary review by the Supreme Court of Kentucky.\(^{219}\)

On review, the Supreme Court of Kentucky, in what is known as *Sand Hill I*, held that the punitive damages award of twenty (20) million dollars should be reduced to fifteen (15) million dollars.\(^{220}\) Like the court in *Sufix*, the supreme

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\(^{207}\) *Sand Hill I*, 83 S.W.3d 483 (Ky. 2002).
\(^{208}\) *Id.* at 485.
\(^{209}\) *Id.* at 485-86.
\(^{210}\) *Id.* at 486.
\(^{211}\) *Id.*
\(^{212}\) *Id.* Ford Motor Company impleaded Tommy’s employer, Sand Hill, hoping to fault apportion between them. *Id.*
\(^{213}\) *Sand Hill I*, 83 S.W.3d at 486.
\(^{214}\) *Id.*
\(^{215}\) *Id.*
\(^{216}\) *Id.* The trial court followed KY REV. STAT. § 411.184(1)(c) in determining that a punitive damages instruction was necessary. *Id.* at 491. While the statute was found unconstitutional in *Williams v. Wilson*, 972 S.W.2d 260, 269 (Ky. 1998), the court used the statute because neither party challenged its constitutionality. *Id.*
\(^{217}\) *Sand Hill I*, 83 S.W.3d at 485.
\(^{218}\) *Id.*
\(^{219}\) *Id.*
\(^{220}\) *Id.* at 496.
court relied on BMW’s guideposts for determining excessiveness of the punitive damages awards.\textsuperscript{221} The supreme court established that Ford had an excessive level of reprehensibility because it knew about the transmission’s capacity to automatically shift gears yet it continued to market the 1977 truck and never instituted a recall.\textsuperscript{222} Furthermore, the court found the fact that Smith died as a result of Ford’s actions illustrated a tight ratio between the harm he suffered and the award.\textsuperscript{223} Finally, in looking at damages awarded in other cases, the supreme court found the award fit well within the ratio.\textsuperscript{224}

Believing the reduction of only 5 million dollars was insufficient and that the award was unconstitutional, Ford petitioned the Supreme Court of the United States for a writ of certiorari.\textsuperscript{225} The Supreme Court granted Ford’s petition, vacated the decision and remanded it back to the Kentucky Supreme Court for consideration in light of it’s decision in \textit{State Farm v. Campbell}.\textsuperscript{226} In \textit{State Farm}, the United States Supreme Court directed appellate courts to consider:

\begin{quote}
“[whether] the harm caused was physical as opposed to economic; [whether] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [whether] the target of the conduct had financial vulnerability; [whether] the conduct involved repeated actions or was an isolated incident; and [whether] the harm was the result of intentional malice, trickery, or deceit, or mere accident.”\textsuperscript{227}
\end{quote}

The court in \textit{State Farm} found it problematic that much of the evidence presented to the jury involved out of state conduct that had no relationship to the type of harm the Campbells suffered.\textsuperscript{228} The Court went on to state that “[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the [s]tate where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.”\textsuperscript{229}

\textsuperscript{221} Id. at 494. See Cooper Indust., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 438-43 (2001) (finding a 4.5 million dollar punitive damages award constitutional using the three guideposts from BMW even though the compensatory damages were only $50,000).
\textsuperscript{222} Id. at 495. Ford argued that a 5 million dollar punitive damages award is the maximum a higher court has upheld; however, the supreme court said that they should look to other states as well. See Hanson v. Am. Bank, 865 S.W.2d 302, 311-12 (1993) (upholding a 5 million dollar punitive damages award in Kentucky).
\textsuperscript{223} Id. at 495. Ford Motor Co. v. Smith, 538 U.S. 1028 (2003).
\textsuperscript{224} Id. See \textit{State Farm v. Campbell}, 538 U.S. 408, 425 (2003) (holding that where compensatory damages are substantial, a lesser ratio of compensatory to punitive damages is required).
\textsuperscript{225} \textit{State Farm}, 538 U.S. at 419.
\textsuperscript{226} Id. at 422.
\textsuperscript{227} Id.
On remand, the Supreme Court of Kentucky found that, like State Farm, the trial court had allowed the jury to award punitive damages to punish Ford for its actions throughout the country. According to the court, the jury should have only considered Ford’s out of state conduct to determine blameworthiness since there was a nexus between Ford’s actions and Smith’s injury. Therefore, in Sand Hill II, the supreme court “vacate[d] the punitive damages award and remand[ed] the case for a new determination of the amount of punitive damages because the trial court’s jury instructions failed to include a limiting instruction concerning extraterritorial punishment.”

III. ANALYSIS

A. Liability Challenges for Plaintiffs and Defendants in Products Liability Cases in Kentucky

The recent cases noted above change the way that both plaintiff and defense attorneys approach product liability cases. The Supreme Court has made it more difficult for people injured by defective products to recover from manufacturers. The Court spoke specifically on cases involving design and warning defects. The Supreme Court also clarified the scope of a manufacturer’s duties once a product leaves its control. These issues and how they affect Kentucky practitioners are analyzed below.

1. Design Defects

Toyota Motor Corporation v. Gregory specifically held that Kentucky law implicitly requires plaintiffs alleging defective design to prove that there is some

231 Id. at 157. On remand, the estate argued that Ford failed to preserve for appeal the adequacy of the jury instructions. Id. Pursuant to Rule 51(3) of the Kentucky Rules of Civil Procedure:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

KY. CIV. R. 51(3). The supreme court determined that Ford fairly and adequately presented its position through its proposed jury instructions and its objection to the trial court’s refusal to use any of Ford’s instructions. Sand Hill II, 142 S.W.3d at 165. Therefore, the supreme court found the issue was preserved for review and the case should be remanded for a new determination of damages. Id. at 168.
232 Id. at 156.
233 See supra Part II.A.3. for a detailed explanation of this case.
feasible alternative design. Stated another way, any risk of death or serious injury from the use of a product is always unreasonable and always unacceptable if reasonable engineering can eliminate it. If it is technologically and economically feasible to eliminate the danger of the product to the general public, and the manufacturer fails to eliminate the danger, the product is defective. Any attorney considering a defective design case must keep this in mind. This will not only get a case past summary judgment, but it will also make perfect sense when a case is presented to the jury.

In Gregory, the plaintiff produced evidence that if Toyota had used an airbag system similar to Honda then she would not have been injured. From this her expert extrapolated that Toyota had technology available to it at the time of manufacture that would have prevented plaintiff’s injuries. Toyota countered with evidence of thirty-five other airbags that had similar characteristics to the Toyota airbag. Given the conflicting expert accounts, the jury understandably sided with Toyota. While Gregory was able to make out a prima facie case for crashworthiness, she was unable to convince the jury that the Toyota airbag system was defective. Basically, the idea is that, just because one manufacturer makes a safer product does not make the defendant’s product defective and unreasonably dangerous. On the other hand, if Gregory could have proven that Toyota’s airbag system was significantly different from and more dangerous than the majority of other manufacturers’ air bag systems, and that Toyota could have fixed the defect with little expense, the jury may have found differently.

Leslie v. Cincinnati Sub-Zero Products, Inc. arrived at the court of appeals in a different procedural posture. The trial court granted summary judgment to Sub-Zero, holding that the Medical Device Amendment to the Federal Food,
Drug and Cosmetic Act preempted the claim.\textsuperscript{246} The trial court alternatively found that the Kentucky Products Liability Act precluded the plaintiff’s claim.\textsuperscript{247} The court of appeals reversed the trial court on both counts.\textsuperscript{248} With regard to an alternative safer design, the plaintiff offered expert testimony that technology had existed for over sixty years that would have prevented the thermal unit from causing the plaintiff’s injuries.\textsuperscript{249} In other words, the plaintiff offered a reasonable alternative design that was economically feasible.\textsuperscript{250} As a result, it was sufficient to overcome summary judgment.\textsuperscript{251}

These two cases illustrate that plaintiffs seeking to hold manufacturers liable for defective design must show through expert testimony that there was a reasonable alternative design based on solid engineering principals, which would have reduced or eliminated plaintiff’s injuries.\textsuperscript{252} The cost of the alternative design should also be considered.\textsuperscript{253} In other words, if it is technologically and economically feasible for the manufacturer to greatly reduce or eliminate the danger, and it fails to do so, then the product is defective.

2. Defective Warning

In \textit{Larkin v. Pfizer, Inc.},\textsuperscript{254} the Kentucky Supreme Court adopted the learned intermediary doctrine.\textsuperscript{255} The court held that a pharmaceutical manufacturer has a duty to adequately warn health care providers.\textsuperscript{256} If a manufacturer provides an adequate warning then its duty is discharged with no responsibility for warning the ultimate consumer.\textsuperscript{257} Because none of the exceptions were before the court, it refused to address whether or not any of the exceptions applied.\textsuperscript{258}

While the supreme court’s reasoning can be debated, in cases involving prescription drugs, the plaintiff must focus on the adequacy of the warning given to the physician.\textsuperscript{259} Was the manufacturer aware of specific side effects that it did not warn the health care provider about?\textsuperscript{260} Did the manufacturer use

\begin{itemize}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.} at 801.
\item \textsuperscript{248} \textit{Id.} at 801, 805.
\item \textsuperscript{249} \textit{Id.} at 804.
\item \textsuperscript{250} \textit{Id.} at 803-04.
\item \textsuperscript{251} \textit{Leslie}, 961 S.W.2d at 805.
\item \textsuperscript{252} Toyota Motor Corp. v. Gregory, 136 S.W.3d 35, 42 (Ky. 2004); \textit{Leslie}, 961 S.W.2d at 803-04.
\item \textsuperscript{253} \textit{Leslie}, 961 S.W.2d at 803-04.
\item \textsuperscript{254} See supra Part II.A.2. for a detailed explanation of this case.
\item \textsuperscript{255} \textit{Larkin v. Pfizer, Inc.}, 153 S.W.3d 758, 770 (Ky. 2004).
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{Id.} The court ignored the fact that a duty to warn is statutorily imposed under \textbf{KY. REV. STAT.} § 411.320 and the fact that the so-called theoretical base of the learned intermediary doctrine do not comport with modern health care, especially with the advent of managed health care and direct-to-consumer advertising. \textit{Id.} at 769.
\item \textsuperscript{258} \textit{Id.} at 770.
\item \textsuperscript{259} \textit{Id.} at 764-65.
\item \textsuperscript{260} \textit{Id.}
language that would mislead health care providers? Was the warning adequate enough to appraise the health care provider about the specific dangers? Under Larkin, questions like these must be asked to determine whether the plaintiff can survive summary judgment.

3. Manufacturer’s Duties Once the Product Leaves its Control

*Worldwide Equipment, Inc. v. Mullins* and *Ostendorf v. Clark Equipment Company* both deal with a manufacturer’s duties once a product leaves its control. In *Mullins*, Mack Trucks, Inc. manufactured the cab-chassis component of a coal dump truck in 1981. Worldwide Equipment, Inc. and R & S Truck Body, Inc. used the cab-chassis component to build a coal dump truck. The jury found that the coal dump truck was defective and unreasonably dangerous because it was not equipped with a rear underride guard as required by federal law. Further, the jury found that the cab-chassis component manufactured by Mack was not defective or unreasonably dangerous. Therefore, Mack did not breach its duty of ordinary care. Nevertheless, the jury apportioned fault to Mack and even awarded punitive damages against Mack.

As an initial matter, the jury’s verdict was clearly inconsistent. The jury found that the cab-chassis was not defective, yet still apportioned fault to Mack. Regardless of the inconsistent verdict, the Kentucky Supreme Court held that where a manufacturer makes a component part that by law cannot be placed into service, but comported with state of the art industry standards at the time of its manufacture, it will not be strictly liable. The court relied primarily on Mack’s expert witnesses, who testified that the design of the cab-chassis complied with general industry practices at the time of manufacture and that other cab-chassis manufacturers did not, and were not, required to, notify subsequent purchases of the underride guard requirement.

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261 Larkin, 153 S.W.3d at 764-65.
262 Id.
263 See supra Part II.A.6. for a detailed explanation of this case.
264 See supra Part II.A.5. for a detailed explanation of this case.
266 Worldwide, 11 S.W.3d at 52.
267 Id. at 52-53
268 Id. at 54.
269 Id.
270 Id.
271 Id.
272 Worldwide, 11 S.W.3d at 54.
273 Id. at 57-58.
274 Id.
Under *Mullins*, if a component part plays no part in causing the plaintiff’s injuries, then no liability will attach to the manufacturer of that component part. Nevertheless, only a judge on summary judgment, or jury through its verdict, can absolve the component part manufacturer of liability. Thus, if a component part manufacturer has potential liability one must be carefully consider the benefits of bringing in this manufacturer versus the risks involved with litigating the case against another party.

*Ostendorf v. Clark Equipment Company* held that a manufacturer has no independent duty to retrofit its products. The court also found that by initiation of a voluntary retrofit campaign, a defendant does not assume a duty absent reliance by the plaintiff. This case went to the supreme court following summary judgment in favor of the manufacturer. The court of appeals reversed the trial court on the plaintiff’s strict liability, negligent design, and punitive damage claims. The issue before the supreme court was the manufacturer’s duty to retrofit its product. The supreme court determined that while the defendant had no independent duty to retrofit its product, the fact that it did so was evidence the plaintiff could use in proving the product’s defective design. Evidence of subsequent remedial measures is admissible in Kentucky products liability claims under chapter 407 of the Kentucky Rules of Evidence. Because the plaintiffs had adequate avenues of recovery under existing products liability theories, the supreme court found it unnecessary to create a new cause of action.

While the court in *Ostendorf* refused to create a new cause of action for failure to retrofit, it allowed the plaintiff’s claims to go forward. Evidence of a defendant’s efforts to retrofit can be used against it pursuant to KRE 407, which allows evidence of subsequent remedial measures in products liability claims.

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275 *Id.*
276 122 S.W.3d 530 (Ky. 2003).
277 *Id.* at 532.
278 *Id.*
279 *Id.*
280 *Id.*
281 *Id.* at 533-37.
282 *Ostendorf*, 122 S.W.3d at 537.
283 *Id.*. KENTUCKY RULES OF EVIDENCE (K.R.E.) chapter 407 provides that:

> When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence in connection with the event. This rule does not require the exclusion of evidence of subsequent measures in products liability cases or when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

284 *Ostendorf*, 122 S.W.3d at 535.
285 *Id.* at 537.
286 *Id.*
A strict liability claim focuses on the defectiveness of the product whereas a negligence claim focuses on the conduct of the manufacturer.\textsuperscript{287} The fact that a particular manufacturer decides to retrofit its product is evidence that the particular product is defective and that the manufacturer may have acted unreasonably in designing the product.\textsuperscript{288} The manufacturer’s decision to retrofit can be used to prove either strict liability or negligence.\textsuperscript{289} The supreme court indicated that a manufacturer may be subject to a post sale duty and, thus, liable for a violation of that duty based on the nature of the defect.\textsuperscript{290}

4. Successor-in-Interest Liability

In Kentucky, the successor-in-interest rule is alive and well. It provides that a corporation that purchases another corporation in a legitimate transaction does not assume the payment of debts or liability of the corporation it purchased.\textsuperscript{291} There are exceptions to the rule: (1) if the purchasing corporation agrees to assume the debts or liabilities; (2) if the transaction is a consolidation or merger of the seller and purchaser; (3) if the purchaser is a continuation of the seller; or (4) if the transaction is a fraudulent transaction used to escape liability.\textsuperscript{292}

Successor-in-interest liability was the issue in \textit{Pearson v. National Feeding Systems, Inc.}.\textsuperscript{293} In \textit{Pearson}, the plaintiff argued that the first three exceptions to the successor-in-interest rule applied.\textsuperscript{294} According to the court in Pearson, however, the actual language of the purchasing contract precluded application of the first and third exceptions because it plainly excluded “claims, actions, or suits arising out of events occurring prior to closing.”\textsuperscript{295} Also, the court found that the second exception did not apply because the purchase agreement was consummated at a bankruptcy sale.\textsuperscript{296} It is not apparent that the plaintiff ever argued that the fourth exception to successor-in-interest liability applied.

As a result of \textit{Pearson}, claims against manufacturers that are no longer in existence must be given careful consideration. It is important to obtain the sales contract early on in the litigation. If the purchasing company does not expressly assume liabilities the successor-in-interest rule may apply.\textsuperscript{297} Additionally, the sales contract may state whether the purchasing corporation is a continuation of the selling corporation. Also look at a continuation of shareholder or

\textsuperscript{287} Id. at 535.
\textsuperscript{288} Id. at 537.
\textsuperscript{289} Id.
\textsuperscript{290} Ostendorf, 122 S.W.3d at 536.
\textsuperscript{291} Pearson v. Nat.’l Feeding Sys., Inc., 90 S.W.3d 46, 49 (Ky. 2002).
\textsuperscript{292} Id.
\textsuperscript{293} See supra Part II.A.4. for a detailed explanation of this case.
\textsuperscript{294} Pearson, 90 S.W.3d at 48.
\textsuperscript{295} Id. at 50.
\textsuperscript{296} Id. at 51.
\textsuperscript{297} Id. at 50.
management. The type of sale is also an important factor in determining whether or not the second exception applies. If a bankruptcy is involved the second factor will probably not apply.

B. Injuries and Damages in Kentucky Products Liability Cases

Several recent cases have dealt with the nature of the plaintiff’s injury and the amount and types of damages an injured plaintiff can recover. This subsection will address both topics.

1. The Nature of the Plaintiff’s Injury

In Wood v. Wyeth-Ayerst Laboratories, Division of American Home Products, the court analyzed the requirement of present physical injury where the plaintiff ingested a potentially harmful and toxic substance but could not offer proof that she suffered from any injury at the present time. Her primary claim was for damages related to medical monitoring. The court rejected her novel theory because she could not prove that she had a present injury. The court specifically stated “[a]ppellant’s body has not yet been impaired by her ingestion of fenfluramine and the only tangible property in question is [a]ppellant’s money, which likewise has not been expended.”

Wood instructs that in order to recover against a product manufacturer the plaintiff must prove some present tangible damage. Potential damages in the future without a showing of a present injury will not suffice. Plaintiffs can still recover for an increased risk of future harm where there is a present tangible injury. Similarly, a plaintiff can recover for emotional distress when there is physical contact, no matter how minute. Simply put, the plaintiff must be able to prove that she has sustained a present tangible injury.

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298 Id.
299 Id. at 51.
300 Pearson, 90 S.W.3d at 51.
301 See supra Part II.A.1. for a detailed explanation of this case.
303 Id.
304 Id.
305 Id. at 855.
306 Id. at 859.
307 Id.
308 Wood, 82 S.W.3d at 858. See Davis v. Graviss, 672 S.W.2d 928, 931-33 (Ky. 1984) (allowing a plaintiff to recover for increased risk of future harm and mental suffering stemming from head injuries the plaintiff suffered in an automobile collision).
309 Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980) (allowing a pregnant plaintiff to recover for emotional distress where she had been negligently exposed to x-rays by her doctor and chose to undergo an abortion rather than risk abnormal birth).
to prove some present tangible injury, by expert testimony or otherwise, in order to recover.\textsuperscript{310}

In \textit{Owens Corning Fiberglas Corporation v. Parrish},\textsuperscript{311} an asbestos case, the trial court allowed the jury to consider the plaintiffs’ smoking in determining comparative fault.\textsuperscript{312} The jury allocated fifty (50) percent of total fault to plaintiffs’ smoking.\textsuperscript{313} The Kentucky Supreme Court relied on evidence that smoking along with the inhalation of asbestos fibers combined to produce a single indivisible harm and that the jury was properly instructed.\textsuperscript{314} Had the plaintiffs been able to show a distinct harm caused by smoking and another harm caused by inhalation of asbestos fibers, the supreme court would have come to a different conclusion.\textsuperscript{315} Thus, if possible, it is important to clearly show the exact causal connection between the plaintiff’s harm and the product defect or the manufacturer’s actions.\textsuperscript{316}

2. Punitive Damages

Recently, both the Kentucky Court of Appeals and Kentucky Supreme Court dealt with punitive damages in the products liability arena. In \textit{Sufix, U.S.A., Inc. v. Cook},\textsuperscript{317} the court of appeals upheld a nearly 3 million dollar punitive damages award against the manufacturer of a plastic trimmer head.\textsuperscript{318} The court of appeals relied on the following evidence: (1) that expert testimony concerning the defendant’s testing of the product was grossly inadequate; (2) that there was a lack of documentary evidence regarding product testing; (3) that there was production of a stronger metal-capped version available for distribution in Italy where the plastic version was rejected; (4) that there was customer notice of product failures; and (5) that there was a field test where the head shattered.\textsuperscript{319}

Based on this evidence, the court of appeals not only said that a punitive damages instruction was appropriate, it also said that the actual award was not excessive.\textsuperscript{320} Importantly, the plaintiff was able to show that the defendant’s wrongdoing was clearly linked to the plaintiff’s injury, \textit{i.e.} if it had tested the product it would not have been on the market.\textsuperscript{321} The defendant’s unreasonable behavior was emphasized to the jury.\textsuperscript{322} Also, it is important to note that in \textit{Sufix}...
the plaintiff suffered a debilitating injury. Based on the language in State Farm v. Campbell, cases involving wrongful death or severe personal injury justify a higher punitive damage award than a mere economic loss.

Nevertheless, in Sand Hill Energy, Inc. v. Smith, the supreme court reversed itself, striking the 15 million dollar punitive damages award it previously upheld. The supreme court was troubled that the jury was allowed to consider evidence of the defendant’s out-of-state conduct in order to punish the defendant for actions in-state. According to the supreme court, the trial court should have instructed the jury not to take into consideration “out-of-state evidence to award the [plaintiff] punitive damages against [the defendant] for conduct that occurred outside of Kentucky.” However, the supreme court did hold that the jury may evaluate evidence of out-of-state conduct that was similar in nature when determining the defendant’s culpability. In essence, what the supreme court said is that a plaintiff can present evidence of out-of-state conduct, similar in nature, to the jury for the purpose of determining whether punitive damages are appropriate, but the jury must be instructed that it cannot use that same out-of-state conduct to set the amount of punitive damages it awards. Jurors should also be instructed that if punitive damages are awarded, the damages “must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.” The court also cautioned that evidence of the defendant’s net worth should not be admitted at trial. The court remanded the case for a trial on punitive damages.

V. CONCLUSION

323 Id. at 840.
324 See supra Part II.B. for a detailed explanation of this case.
325 See State Farm v. Campbell, 538 U.S. 408, 426 (2003) (“The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries . . . ”).
326 See supra Part II.B. for a detailed explanation of this case.
328 Id. at 164-65.
329 Id. at 167.
330 Id.
331 Id.
332 Id.
333 Sand Hill II, 142 S.W.3d at 159.
334 Id. at 168. The instruction on remand gave the jury permission to award or reject punitive damages. Id. at 167. According to the Kentucky Trial Court Review, Sand Hill II may be the first jury trial in Kentucky’s history whose sole subject is punitive damages. See 8 KY. TRIAL CT. REV. 1, 11 (Sept. 2004).
Over the last few years, products liability law in Kentucky has, for the most part, benefited manufacturers. Injured plaintiffs face new hurdles in holding manufacturers liable for defective products. Attorneys must always be ready to question the product’s design and warning. Is it technologically and economically feasible to eliminate the danger of the product to the general public? If it is, and the manufacturer fails to eliminate the danger, then the product is defectively designed. Does the warning clearly and adequately convey to the appropriate users the hazards associated with a particular product? If it does not, then the manufacturer’s warning is defective.

When analyzing an injured party’s damages an attorney must consider whether the party has an actual injury that presently exists as a result of some harmful contact. In order to do so, one must look specifically at the plaintiff’s own conduct or other causes that may have led to the plaintiff’s injury. If the manufacturer’s conduct is grossly negligent, it can be held liable for punitive damages. Furthermore, while plaintiffs can introduce evidence of the manufacturer’s conduct outside of Kentucky to show that punitive damages are appropriate, the jury must be instructed that it cannot use that same extraterritorial conduct in considering the amount of punitive damages to award.

Unfortunately, successor-in-interest liability has been precluded in Kentucky, which leaves some injured plaintiffs without a remedy. Additionally, liability will not attach to a component part manufacturer when its product and its actions do not contribute to the plaintiff’s injury. Nevertheless, so long as manufacturers continue to make defective products, attorneys representing those who are injured will continue to seek justice for their clients.

336 Owens Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467, 479 (Ky. 2001).
338 Sand Hill II, 142 S.W.3d at 167.
THE FAIR LABOR STANDARDS ACT, “WHITE COLLAR” EXEMPTIONS, & FAIRPAY 2004: A SURVEY OF RECENT DECISIONS WITH EMPHASIS ON THE SIXTH CIRCUIT

by David K. Montgomery * M. Scott McIntyre** and Brian K. Powell †

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I. *INTRODUCTION*

Several well-publicized and large verdicts have resulted in a renewed interest in wage and hour litigation by employees, employers, and their attorneys. For example, claims adjusters misclassified as exempt from overtime as “administrative employees” were recently awarded a judgment of over $90 million against their employer, Farmers Insurance Exchange.\(^1\) In September 2004, Farmers agreed to settle the class action lawsuit by paying the entire judgment, attorneys fees, accumulated interest, and overtime pay accrued since trial—a sum expected to exceed $200 million.\(^2\)

Technically, the *Farmers* verdict was based on California state law.\(^3\) However, the applicable California wage order essentially mirrored the federal exemption, and the California court of appeals relied heavily on federal law in reaching its decision. Moreover, from the practitioner’s perspective, any theoretical distinction between the California and federal exemptions is overshadowed by the startling size of the verdict and resulting settlement.

The *Farmers* verdict and settlement is far from an aberration. Plaintiff attorneys throughout California have filed high-profile class actions challenging the exempt classification of almost every insurance adjuster in the state as well as store managers at Starbucks, Rite-Aid, and Taco Bell, among other employers.

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\(^3\) Bell, 9 Cal. Rptr. 3d at 549.
Starbucks agreed to a settlement of $18 million to resolve two class action lawsuits brought by its managers and assistant managers. Rite Aid agreed to pay $25 million to settle overtime claims by about 3,000 store managers, assistant managers, and managers-in-training in its California stores. After three weeks of trial, Taco Bell agreed to pay its general managers and assistant general managers $9 million, plus attorneys’ fees and litigation expenses.

Predictably, this renewed interest in wage and hour laws and litigation has spread beyond California to the heartland and has been spurred even further by publicity associated with the Department of Labor’s new overtime regulations. Attorneys and Human Resource Professionals throughout Kentucky, Ohio, and Indiana are now re-examining the Fair Labor Standards Act (“FLSA”) and its supporting regulations to determine whether employees are properly classified.

This Survey provides a basic overview of key provisions of the FLSA—specifically, for executives, administrative employees, and professionals, with an emphasis on cases from the United States Court of Appeals for the Sixth Circuit. In addition, it analyzes the recent changes implemented in the new overtime regulations, FairPay 2004, effective August 23, 2004. The Survey focuses on federal law because, in Kentucky (as well as in Ohio and Indiana) state law defers to the FLSA with regard to the relevant exemptions.

II. THE FAIR LABOR STANDARDS ACT OF 1938

A. Key Provisions of the FLSA

The major provisions of the FLSA are fourfold: (1) to establish a federal minimum wage; (2) to allocate the maximum number of working hours within a workweek and to regulate the amounts workers are paid when exceeding the

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7 Specifically the nation’s southern and western states.
8 See David K. Haase & Ross H. Friedman, Overtime Requirements, NAT’L L.J., Mar. 29, 2004, at 13. Haase cites the Department of Labor (DOL) statistics which show that “the number of federal wage and hour class actions filed per year now exceeds the number of employment discrimination class actions filed under all the federal discrimination statutes combined.” Id.
allotted hours;\textsuperscript{12} (3) to expressly assign to employers the duty of payroll record production and storage;\textsuperscript{13} and (4) to control the means and conditions under which children may labor.\textsuperscript{14} Achievement of these objectives is made possible by the enforcement mechanisms\textsuperscript{15} articulated within the Act, which, in turn, are administered by the U.S. Secretary of Labor;\textsuperscript{16} however, the FLSA is not universally binding on employers and allows for the exemption of certain laborers and industries.\textsuperscript{17}

B. \textit{Purpose of the FLSA}

1. Concise Statement

As construed by the Supreme Court, the FLSA was designed primarily to effectuate two simultaneous goals: (1) to improve the quality of life and standard of living for laborers; and (2) to eliminate from unfair competition those goods (a) produced under conditions of substandard wages and oppressive hours and (b) subsequently injected into the stream of commerce.\textsuperscript{18}

2. Detailed Examination

Following its enactment in 1938, the FLSA faced immediate challenges to its constitutionality in the courts. The Supreme Court quickly settled this debate in the 1941 watershed case, \textit{United States v. Darby}.\textsuperscript{19} Fred Darby (“Darby”), the defendant, operated a manufacturing facility in Georgia, where he acquired raw materials and processed them into finished lumber.\textsuperscript{20} This material was subsequently sold and distributed to purchasers across the State and across the country.\textsuperscript{21} In the course of this production, Darby failed to maintain payroll records while he employed laborers at less than the prescribed minimum wage

\textsuperscript{12} \textit{Id.} § 207.
\textsuperscript{13} \textit{Id.} § 211.
\textsuperscript{14} \textit{Id.} § 212.
\textsuperscript{15} \textit{Id.} § 216.
\textsuperscript{16} \textit{Id.} § 204.
\textsuperscript{17} \textit{29 U.S.C. §§ 206, 207, 211, 212, 213, 216 (2004).}
\textsuperscript{18} \textit{See} Chao v. Double JJ Resort Ranch, 375 F.3d 393, 396 (6th Cir. 2004) (stating that the purpose of the FLSA was “to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers”); \textit{Ale v. Tennessee Valley Auth.}, 269 F.3d 680, 683 (6th Cir. 2001) (stating that the FLSA was enacted “to induce employers to employ more workers and to compensate them for the burden of a long workweek”); \textit{United States v. Darby}, 312 U.S. 100, 103, 109-10 (1941) (holding that Congress has the enumerated authority to regulate employee wage and hour law under the Commerce Clause).
\textsuperscript{19} \textit{312 U.S. 100}, 125 (1941).
\textsuperscript{20} \textit{Id.} at 111.
\textsuperscript{21} \textit{Id.}
and in excess of the prescribed maximum hours as required by the FLSA.\textsuperscript{22} In response, the United States charged Darby with violating the federal statute.\textsuperscript{23} The United States District Court for the Southern District of Georgia sustained Darby’s demurrer and quashed the indictment, finding the FLSA unconstitutional.\textsuperscript{24}

The Supreme Court granted certiorari and reversed the district court’s decision, holding that the FLSA was a permissible exercise of congressional authority as provided by the Commerce Clause of the United States Constitution.\textsuperscript{25} The Court reasoned that the purpose of the FLSA was to exclude from interstate commerce those goods produced under conditions “detrimental to the maintenance of the minimum standards of living necessary for health and general well-being.”\textsuperscript{26} Furthermore, Congress believed that to allow otherwise would result in the “dislocation of the commerce itself caused by the impairment or destruction of local businesses by [unfair] competition made effective through interstate commerce.”\textsuperscript{27} As such, the Court concluded that the FLSA was a reasonable response to this threat and an appropriate exercise of Congress’s plenary power.\textsuperscript{28}

Courts have routinely restated the Darby Court’s explanation of the underlying validity and purpose of the FLSA.\textsuperscript{29} The Sixth Circuit Court of Appeals has recently echoed this sentiment in two notable cases. First, in \textit{Chao v. Hospital Staffing Services, Inc.},\textsuperscript{30} the U.S. Secretary of Labor requested injunctive relief, prohibiting the transportation of hospital records that the Secretary believed were produced by unpaid workers in violation of the FLSA.\textsuperscript{31} While ultimately denying the Secretary’s request on other grounds, the Sixth Circuit invoked Darby and reiterated the underpinnings of the FLSA.\textsuperscript{32} The court emphasized congressional findings that the FLSA reflects Congress’s desire to root out conditions detrimental to the “health, efficiency, and general

\textsuperscript{22} Id.
\textsuperscript{23} Id. at 108.
\textsuperscript{24} Id. at 111-12.
\textsuperscript{25} \textit{Darby}, 312 U.S. at 123-24.
\textsuperscript{26} Id. at 109.
\textsuperscript{27} Id. at 122 (emphasis added).
\textsuperscript{28} Id. at 116, 121-22.
\textsuperscript{29} See United States v. Faasse, 265 F.3d 475, 490 (6th Cir. 2001) (noting that Darby illustrated a valid exercise of Congressional power to prevent the interstate shipment of goods manufactured wholly intrastate by laborers whose wages did not comport with the FLSA); Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 281 (1981) (noting that wage and hour regulations may be wholly intrastate, but the product of that work is essentially interstate in nature and a valid exercise of Congressional power under the Commerce Clause).
\textsuperscript{30} 270 F.3d 374 (6th Cir. 2001).
\textsuperscript{31} Id. at 379.
\textsuperscript{32} Id. at 387.
well-being of workers” and to “eliminate the competitive advantage enjoyed by goods produced under substandard conditions.”

In *Chao v. Double JJ Resort Ranch*, the U.S. Secretary of Labor appealed a ruling by the U.S. District Court for the Western District of Michigan. Here, defendant-Double JJ Resort Ranch (“Ranch”) operated a western-themed resort that offered guests lodging and dining facilities, a conference center, a general store, a gift shop, a gas station, a barbershop, and a variety of recreational activities (i.e. swimming, camping, hay rides, horseback riding, fishing, and water slides). The district court accepted the Ranch’s argument that it qualified as an “amusement or recreational facility” within the meaning of the FLSA and was, therefore, exempt from the FLSA provisions. The Sixth Circuit reversed and remanded, finding the exemption ambiguous and holding that the district court’s reasoning defied the goal of Congress and the underlying purpose of the FLSA. According to the Sixth Circuit, “[the] Act was designed to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers.” The court concluded that to accept the Ranch’s argument “would result in the exemption swallowing the rule,” which was clearly not the intent of Congress when drafting the FLSA.

Accordingly, it is well-established by the Sixth Circuit that employers have the burden of proving that a classification qualifies under the terms of a specific exemption. As explained throughout this Article, in the event of ambiguity, employers relying on exemptions are forced to predict how courts will construe legislative history and/or administrative opinions.

C. Delimiting and Applying FLSA Exemption Status


Workers employed in bona fide executive, administrative, or professional capacities are exempt from the minimum wage and maximum hour provisions of

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33 *Id.* at 390.
34 *Id.* at 387 (quoting Citicorp Ind. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987)).
35 *375 F.3d 393 (6th Cir. 2004).*
36 *Id.* at 394.
37 *Id.*
38 *Id.* at 395 (citing 29 U.S.C. §§ 206(a), 207(a) (2004)).
39 *Id.* at 396-97.
40 *Id.* at 396 (citing Brock v. Louvers & Dampers, Inc., 817 F.2d 1255, 1256 (6th Cir. 1987)).
41 *Double JJ Resort Ranch*, 375 F.3d at 396.
42 *Id.* at 396-97.
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2005] FAIR LABOR STANDARDS ACT

2. Deference to the Secretary of Labor’s Broad Interpretive Discretion

a. Concise Statement

The FLSA grants the U.S. Secretary of Labor broad authority to define and delimit the scope of the executive, administrative, and professional exemptions, and the Secretary will receive Chevron deference from the courts in promulgating these regulations.

b. Detailed Examination

Section 213 of the FLSA defines those categories of employees exempted from the minimum wage and maximum hour provisions found in other sections of the Act. However, the FLSA does not explicitly provide bright-line rules or

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44 In addition, the FLSA exempts the following laborers from both the minimum wage and overtime pay requirements: (1) employees of select seasonal amusement or recreational establishments, 29 U.S.C. § 213(a)(3) (2004); (2) fishermen, id. § 213(a)(5); (3) small farm workers, id. § 213(a)(6); (4) newspaper publishers and delivery persons, id. § 213(a)(8); (5) select switchboard operators of publicly owned telephone companies, id. § 213(a)(10); (6) seamen aboard foreign vessels, id. § 213(a)(12); and (7) casual babysitters, id. § 213(a)(15). The following employees are exempt from the overtime pay requirements only: (1) common carrier employees, id. § 213(b)(2),(3), & (17); (2) outside poultry buyers, id. § 213(b)(5); (3) seamen on American vessels, id. § 213(b)(6); (4) non-metropolitan broadcast station announcers, news editors, and chief engineers, id. § 213(b)(9); (5) vehicular salespersons employed by non-manufacturing businesses, id. § 213(b)(10); (6) deliverymen paid on the basis of trip rates, id. § 213(b)(11); (7) irrigation construction workers, id. § 213(b)(12); (8) farm workers paid in connection with livestock auctions, id. § 213(b)(13); (9) maple sap processors, id. § 213(b)(15); (10) public firefighters and law enforcement officials employed by an agency that has less than five officers or firefighters, id. § 213(b)(20); (11) domestic service employees who receive room and board, id. § 213(b)(21); (12) motion theater employees, id. § 213(b)(27); (13) small business lumberjacks, id. § 213(b)(28); and (14) criminal investigators paid under 5 U.S.C. § 5545(a), 29 U.S.C. § 213(b)(30).


criteria to be used in determining an employee’s qualifications; instead, it vests in
the U.S. Secretary of Labor the authority and responsibility of defining and
delimiting the terms found within the statute. In *Chevron, U.S.A., Inc. v.
Natural Resources Defense Council, Inc.*, the Supreme Court articulated what
has become known as the “*Chevron deference*” rule. Under *Chevron*, when a
federal statute that is ambiguous or silent on a precise question at issue vests
interpretive power in a federal agency, the Court will defer to that agency’s
approach (*i.e.* the Secretary’s approach) so long as it is reasonable and “based on
a permissible construction of the statute.”

Both the Supreme Court and the Sixth Circuit Court of Appeals have
extended *Chevron* deference to the U.S. Secretary of Labor when promulgating
regulations regarding the FLSA. In *Auer v. Robbins*, a dispute arose over the
bona fide professional exemption status of plaintiff-police officers who received
wages that were subject to the potential of reductions as a disciplinary measure.
The police officers sued defendant-police commissioners for back overtime pay,
arguing that the policy violated the FLSA. The U.S. District Court for the
Eastern District of Missouri held that only certain plaintiffs were bona fide
professionals within the meaning of the statute. The Eighth Circuit Court of
Appeals reversed, concluding that all of the police officers were bona fide
professionals and, thus, exempt from the overtime pay provisions of the FLSA.

The Supreme Court granted certiorari and affirmed the ruling of the Eighth
Circuit Court of Appeals. The Court explained that the FLSA grants the U.S.
Secretary of Labor broad authority to define and delimit the scope of the Act’s
exemptions. In exercising that authority, the Secretary required that exempted
bona fide professionals be paid on a salary basis for the “quality and quantity of
the work performed.” In applying this rule, the Secretary prohibited the
utilization of pay reductions as a disciplinary tool, reasoning that employees
disciplined in this manner are not true professionals within the meaning of the
statute and, therefore, undeserving of exemption status. However, at the
Secretary’s discretion, this rule was not to be applied categorically. As such,
(1) gross employee violations of significant safety regulations can be subjected to

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48 Id.
50 Id. at 842-43.
51 Id.
52 519 U.S. 452 (1997).
53 Id. at 455.
54 Id.
55 Id. at 455-56.
56 Id. at 456.
57 Id. at 464.
58 *Auer*, 519 U.S. at 456.
59 Id. (quoting 29 C.F.R. § 541.118(a) (1996)).
60 Id.
61 Id.
pay reductions, and (2) isolated, stand-alone employer violations will not destroy exemption status where there is no recorded practice of actual reductions or where the employer corrects the reduction and complies with the Secretary’s regulations going forward. In *Auer*, the Court concluded that the Secretary’s salary basis and disciplinary-deduction rules were reasonable constructions of the FLSA and not subject to questioning by the Court unless clearly erroneous, a standard of deferential review consistent with the Court’s direction in *Chevron*.

The Sixth Circuit Court of Appeals has construed *Auer* expansively, and applied it on a consistent basis. Recently in *Takacs v. Hahn Automotive Corp.*, the Sixth Circuit was presented with a fact pattern very similar to that of *Auer*. Hahn Automotive Corporation (“Hahn”) acquired the Autoworks

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62 Id.
63 Id. at 460.
64 *Auer*, 519 U.S. at 462.
65 See *Wilson v. Comm’r of Soc. Sec.*, 378 F.3d 541, 549 (6th Cir. 2004) (concluding that *Auer* controlled and that the Social Security Administration was entitled to *Chevron* deference); United States v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir. 2003) (following *Auer* and extending *Chevron* deference to the Department of Justice, barring plain error in its interpretation of the Americans with Disabilities Act); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002) (noting that *Auer* required the Sixth Circuit to extend *Chevron* deference to the Department of Health, Education, and Welfare’s Policy Interpretation of Title IX).
66 Two recent rulings by the U.S. Supreme Court have caused some circuit courts to question the continuing viability of *Auer*: United States v. Mead Corp., 533 U.S. 218 (2001) and *Christensen v. Harris County*, 529 U.S. 576 (2000). Prior to these decisions, *Chevron* deference was extended to an agency’s interpretation of an ambiguous statute so long as that interpretation was deemed reasonable. *Auer*, 519 U.S. at 462. Collectively, *Mead* and *Christensen* reformulated *Chevron* deference (or “*Auer* deference,” as referenced by the *Christensen* Court) to apply only when agency interpretations result from formal adjudication, notice-and-comment rulemaking or through some other method by which Congress intended to grant comparable law-making authority (as opposed to informal agency action, such as amicus briefs and opinion letters). *Christensen*, 529 U.S. at 578 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). As a result, the Seventh Circuit Court of Appeals openly questioned the remaining viability of *Auer* when it stated that “[p]robably there is little left of *Auer*. “ Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003). Post-*Mead* and *Christensen*, the District Court for the District of Columbia has refused to apply the highly deferential standards found in *Chevron* and *Auer*. Hawaii Longline Ass’n v. Nat’l Marine Fisheries Serv., No. 01-765 (CKK/JMF), 2002 U.S. Dist. LEXIS 7263, at *16 (D.D.C. Apr. 25, 2002). The Sixth Circuit Court of Appeals itself has predicted a likely flood of litigation aimed at limiting the reaches of *Chevron* and *Auer*. *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 642 (6th Cir. 2004). The Sixth Circuit stated, “Cases will arise involving informal agency actions that once received, but no longer receive, *Chevron* deference in the aftermath of *Mead* and *Christensen*.” *Id*. This prediction aside, *Auer* remains good law within the Sixth Circuit, as recently reaffirmed in *Wilson v. Comm’r of Soc. Sec.*, concluding that “[a]n agency’s interpretation of its own regulation is entitled to substantial deference and will be upheld unless plainly erroneous or inconsistent with the regulation.” 378 F.3d 541, 549 (6th Cir. 2004) (emphasis added).
67 246 F.3d 776 (6th Cir. 2001).
68 Id. at 778.
Company, comprised of 159 stores, on November 29, 1993.\(^6^9\) In doing so, Hahn maintained all previous policies regarding compensation, discipline, and benefits.\(^7^0\) One pre-existing provision allowed for the employer to subject all employees (including the management staff) to unpaid disciplinary suspension for any on-the-job misconduct.\(^7^1\) The plaintiffs in this action were managers subject to the disciplinary policy, but were classified by Hahn as bona fide executive personnel and, thus, exempt from FLSA overtime provisions.\(^7^2\) The managers filed suit, seeking unpaid overtime compensation for Hahn’s violation of the FLSA.\(^7^3\) The managers argued that the policy was highly circulated and perceived by all employees as a readily available company disciplinary option.\(^7^4\) Furthermore, they introduced post-acquisition examples of the policy’s implementation, which occurred between November 1993 and June 1995, when seven members of the management team were disciplined while an additional twelve members were threatened with unpaid suspension.\(^7^5\) In 1995, in response to a separate lawsuit, Hahn renounced the policy and issued back pay to all managers that had been disciplined in this way, stating that it was completely unaware of the disciplinary policy in effect by its predecessor.\(^7^6\)

The Sixth Circuit found \textit{Auer} controlling and analogized the fact patterns.\(^7^7\) It found that (1) both sets of plaintiffs claimed to be non-exempt employees for purposes of the FLSA;\(^7^8\) (2) both plaintiffs were paid on a salary basis by their employer; and (3) both sets were subjected to salary pay deductions for violations of company policy.\(^7^9\) The two cases diverged, however, regarding the likelihood that the employer would utilize the disciplinary deductions.\(^8^0\) In \textit{Auer}, the defendant-company invoked the policy only once and then, within reasonable time, restored the employee’s back pay, dismantled the policy, and proceeded to comply with the Secretary’s regulations.\(^8^1\) In \textit{Takacs}, both the district court and the Sixth Circuit found multiple implementations of the employer’s policy, which created “a significant likelihood of pay deductions from managers due to disciplinary infractions.”\(^8^2\)

Hahn argued that it should be allowed to assert a window of correction defense and to preserve the exempt status of its managers, an action permissible

\(^{69}\) Id.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id.
\(^{73}\) \textit{Takacs}, 246 F.3d at 778.
\(^{74}\) Id. at 778.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id. at 781-82.
\(^{78}\) Id. at 780.
\(^{79}\) \textit{Takacs}, 246 F.3d at 780.
\(^{80}\) Id.
\(^{81}\) \textit{Auer} v. Robbins, 519 U.S. 452, 460-61 (1997).
\(^{82}\) \textit{Takacs}, 246 F.3d at 780.
under the *Auer* paradigm of the Supreme Court. In response, the Sixth Circuit defined the so-called window of correction defense as a creation of the Secretary of Labor that allows the employer to maintain its exemption status if it reimburses the wronged employee for any deduction and promises to comply with the FLSA in the future. The Sixth Circuit, again invoking *Auer*, stated that such regulations of the Secretary of Labor will be given *Chevron* deference unless “plainly erroneous or inconsistent with the regulation.” At this point, the court deferred to the Secretary’s amicus brief for interpreting the window of correction defense (use of this defense is determined by the employer’s objective intent to pay the employee on a salary basis). The Secretary argued in her brief that, because Hahn maintained a policy that created an actual pattern of disciplinary deductions and a future significant likelihood that such deductions would continue, then it had not manifested an objective intent to pay its employees on a salary basis. The court agreed with the Secretary’s reasoning that, if employers could simply comply with the Secretary of Labor’s regulations retroactively, then the Secretary’s interpretations of the FLSA would be meaningless. The Sixth Circuit concluded that the Secretary’s interpretation was reasonable. Accordingly, it deferred to the Secretary’s interpretation and affirmed the district court’s judgment.

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83 Id. at 781-84.
84 Id. at 781-82 (citing 29 C.F.R. § 541.118(a)(6)(2001)).
85 Id. at 782 (citing *Auer*, 519 U.S. at 461).
86 Id.
87 Id.
88 *Takacs*, 246 F.3d at 783 (citing *Klem v. County of Santa Clara*, 208 F.3d 1085, 1092 (9th Cir. 2000)).
89 Id. at 783-84.
90 Id.
3. Narrow Construction of the Secretary’s Discretionary Interpretations

a. Concise Statement

Exemptions under the FLSA will be narrowly construed against the party seeking to assert the status (usually the employer), and this party bears the burden of proof. If a party is unable to meet this burden, summary judgment on behalf of the opposing party (usually the employee) must be granted.91

b. Detailed Examination

In *Arnold v. Ben Kanowsky, Inc.*,92 the Supreme Court outlined the construction guidelines that the Sixth Circuit has since followed.93 The defendant, Ben Kanowsky (“Kanowsky”) conducted an interior decorating and custom furniture business in Dallas.94 Kanowsky also produced aircraft parts from phenolic, a cloth-impregnated phenol resin (*i.e.*, plastic) that is used in aircraft and automotive parts, which accounted for approximately 40% of Kanowsky’s total sales.95 John Arnold (“Arnold”), the plaintiff, was employed by Kanowsky from October 17, 1954 until September 2, 1955, working primarily in the phenolic business division.96 During this time, Kanowsky did not pay Arnold for overtime wages, claiming industry exemption as a “retail or service establishment” under the FLSA.97

The district court found that Kanowsky was engaged in the production of goods for interstate commerce and, thus, subject to the overtime provisions of the FLSA.98 On appeal, the Fifth Circuit Court of Appeals reversed, holding that Arnold was not entitled to overtime wages because Kanowsky was exempted

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91 See *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (holding that FLSA exemptions will be narrowly construed against the employers seeking to assert them). *Accord* *Martin v. Indiana Mich. Power Co.*, 381 F.3d 574, 578 (6th Cir. 2004) (holding that the FLSA exemptions would be narrowly construed against the defendant power company and placing the burden of production on the defendant); *Renfro v. Indiana Mich. Power Co.*, 370 F.3d 512, 515 (6th Cir. 2004) (applying *Arnold*, narrowly construing the FLSA exemptions against the defendant power company and placing upon the defendant the burden of proof); *Schaefer v. Indiana Mich. Power Co.*, 358 F.3d 394, 399-400 (6th Cir. 2004) (applying *Arnold*, narrowly construing the FLSA exemptions against the defendant power company and placing upon the defendant the burden of proof). *See also* *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 837 (6th Cir. 2002) (noting that the employer has the burden of proving that an employee satisfies any FLSA exemptions that are narrowly construed against the employer); *Takacs*, 246 F.3d at 779 (citing the *Arnold* rule that FLSA exemptions are narrowly construed against the employer).
93 *Id.* at 390.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Arnold*, 361 U.S. at 391.
from the overtime requirements because it was considered a retail or service establishment as afforded under § 13(a)(2) of the FLSA (as amended in 1949).\footnote{Id.}
The Supreme Court reversed the Fifth Circuit’s judgment and held that Kanowsky’s business did not satisfy the requirements of FLSA § 213, and was not entitled to overtime exemption.\footnote{Id. at 394.}

As the Supreme Court reasoned, the original language of the FLSA exempted employees who worked at retail or service establishments if the greater part of that business’s product was wholly intrastate.\footnote{Id. at 391.} The Act was amended in 1949, at which time Congress substituted a three-step process by which one could qualify for this exemption.\footnote{Id.} An employee at a retail or service establishment is exempt from FLSA overtime requirements if: (1) more than 50% of the business’s annual dollar volume of sales is made intrastate; (2) if 75% of its annual sales volume is not for resale; and (3) if 75% of its annual sales volume is recognized within the industry as retail sales.\footnote{Id.}

In \textit{Mitchell v. Kentucky Finance Co.},\footnote{359 U.S. 290 (1959).} the Supreme Court held that FLSA exemptions are to be narrowly construed against employers seeking to assert them and that their application will be limited to those establishments “plainly and unmistakably within the terms and spirit” of the FLSA.\footnote{Arnold, 361 U.S. at 392 (citing Mitchell v. Kentucky Fin. Co., 359 U.S. 290, 295 (1959)). Mitchell originally arose out of the United States District Court for the Western District Court of Kentucky, where the district court held that Kentucky Finance was not exempted from FLSA overtime requirements. Mitchell v. Kentucky Fin. Co., 150 F. Supp. 368, 369-70 (W.D. Ky. 1957). The Sixth Circuit Court of Appeals reversed, holding that Kentucky Finance was exempted under the provisions of § 13 of the FLSA. Mitchell v. Kentucky Fin. Co., 254 F.2d 8, 11 (6th Cir. 1958). The U.S. Supreme Court reversed the Sixth Circuit, agreeing with the district court that Kentucky Finance was not a retail or service establishment within the meaning of the FLSA; therefore, it was not entitled to overtime exemption under the FLSA. Mitchell, 359 U.S. at 295.} Here, the Court noted that no dispute existed as to whether Kanowsky was engaged in the making or processing of the goods that it sold; therefore, to gain FLSA exemption, Kanowsky had to strictly comply with the criteria of § 213(a)(2) and § 213(a)(4).\footnote{Id.} Kanowsky admitted that 40% of its annual sales came from the manufacture and sale of phenolic products.\footnote{Id.} FLSA § 213(a)(2) requires that these sales account for less than 25%, or alternatively, that 75% of its sales be regarded by the industry as retail.\footnote{Id.} Under its rules of narrow construction, the Court concluded that Kanowsky failed to establish its burden of production of proving that 75% of its sales volume was not for resale,
and was recognized in the industry as being retail.\textsuperscript{109} As such, the court of appeals was reversed, and the judgment of the district court was reinstated.\textsuperscript{110}

The Sixth Circuit strictly adheres to the \textit{Arnold} standard for narrow construction of administrative regulations.\textsuperscript{111} In \textit{Takacs v. Hahn Automotive Corp.},\textsuperscript{112} the Sixth Circuit invoked the narrow construction rule of \textit{Arnold} in determining the inadequacy of the defendant-employer’s proof and the validity of the district court’s award of summary judgment for the plaintiff-employees.\textsuperscript{113} The following year, the Sixth Circuit applied the \textit{Takacs} and \textit{Arnold} courts’ reasoning when it heard arguments in \textit{Elwell v. University Hospitals Home Care Services}.\textsuperscript{114} The plaintiff, Wendy Elwell (“Elwell”) began working for University Hospitals Home Care Services (“Hospital”) on May 22, 1995, as a home health care nurse.\textsuperscript{115} Elwell traveled to the homes of patients and provided in-home nursing services.\textsuperscript{116} She began her employment on a fee basis, receiving the following compensation program: (1) $30 for each visit; (2) $42 for each intravenous (“IV”) infusion visit; (3) $10 for admissions paperwork for each patient; (4) $17 per hour for the time spent completing the necessary documentation for each visit; and (5) if an IV infusion visit went beyond two hours, she received an hourly rate for the allotted time.\textsuperscript{117} On July 16, 1996, the Hospital changed its compensation program by eliminating hourly pay for documentation completion.\textsuperscript{118}

On February 10, 1997, the Hospital further cut its compensation program by (1) reducing visits to $28 per visit; (2) paying only $38 for each IV infusion visit; (3) paying $8 for any newly acquired patient; (4) requiring employees to remain on-call one day per week at a rate of $3 per hour; and (5) requiring employees to attend regular staff meetings at a rate of $17.65 per hour.\textsuperscript{119}

\begin{thebibliography}{9}
\bibitem{109} Id. at 394.
\bibitem{110} Id.
\bibitem{111} Martin v. Indiana Mich. Power Co., 381 F.3d 574, 578 (6th Cir. 2004) (holding that the FLSA exemptions would be narrowly construed against the defendant power company and placing the burden of production on the defendant); Renfro v. Indiana Mich. Power Co., 370 F.3d 512, 515 (6th Cir. 2004) (applying \textit{Arnold}, narrowly construing the FLSA exemptions against the defendant power company and placing upon the defendant the burden of proof); Schaefer v. Indiana Mich. Power Co., 358 F.3d 394, 399-400 (6th Cir. 2004) (placing the burden of proof on the defendant); Elwell v. Univ. Hosps. Home Care Servs., 276 F.3d 832, 837 (6th Cir. 2002) (noting that the employer has the burden of proving that an employee satisfies any FLSA exemptions, which are narrowly construed against the employer); Takacs v. Hahn Auto. Corp., 246 F.3d 776, 779 (6th Cir. 2001) (citing the \textit{Arnold} rule that FLSA exemptions are narrowly construed against the employer).
\bibitem{112} 246 F.3d 776 (6th Cir. 2001).
\bibitem{113} Id.
\bibitem{114} \textit{Id.}, 276 F.3d at 832.
\bibitem{115} Id. at 835.
\bibitem{116} Id.
\bibitem{117} Id.
\bibitem{118} Id.
\bibitem{119} Id.
\end{thebibliography}
estimated that each employee would need to complete twenty-five visits per week in order to remain a fulltime employee, and it estimated that it would take an employee approximately thirty-nine hours per week to complete these visits. However, Elwell regularly spent sixty hours per week to complete twenty-five visits. On September 12, 1997, she resigned from the Hospital, and on October 29, 1998, filed suit against the Hospital alleging FLSA violations. The United States District Court for the Northern District of Ohio denied the Hospital’s motion for summary judgment, and granted Elwell’s motion for summary judgment, finding that she was not a bona fide professional for purposes of FLSA exemption. On appeal, the Sixth Circuit affirmed the district court’s decision.

First, the court restated the maxim that entries of summary judgment are reviewed *de novo*. Then, it invoked the narrow construction doctrine of both *Arnold* and *Takacs* before proceeding to the actual administrative regulations issued by the Secretary of Labor, thereby placing the Hospital on notice that the regulations would be narrowly construed against its professional classification. According to the Secretary’s guidelines, the elements of a bona fide professional employee for purposes of the FLSA exemption were as follows: (1) the employee is paid on a salary or fee basis of more than $250 per week exclusive of board, lodging, or other facilities; (2) the employee’s primary duty consists of work requiring knowledge of an advanced type in a field of science or learning; and (3) the employee’s work required the consistent exercise of discretion and independent judgment.

As applied (with requisite *Chevron/Auer* deference to the Secretary’s promulgations), Elwell did not contest the facts that her work was unique and that it required the consistent exercise of discretion and independent judgment. She contended, however, that the Hospital failed on element number one in that her compensation arrangement did not qualify as a fee basis—a critical element of the Secretary’s interpretation of the FLSA—because it blended fee pay with hourly compensation pay. This ran contrary to the Secretary’s fee basis test, which defines a “fee” as a payment made for the kind of job that is unique as contrasted against a series of repetitive jobs for which payment on an identical

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120 *Elwell*, 276 F.3d at 835-36.
121 *Id.* at 836.
122 *Id.*
123 *Id.* at 845.
124 *Id.* at 837 (citing Aiken v. City of Memphis, 190 F.3d 753, 755 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000)).
125 *Elwell*, 276 F.3d at 837.
126 *Id.* (quoting 29 C.F.R. § 541.315(a) (2002)).
127 *Id.* at 838 (acknowledging that her work was unique with each situation and with each patient).
128 *Id.*
129 *Id.* at 838.
basis is made over and over again. The Sixth Circuit agreed, citing language within the Department of Labor regulations requiring fee basis to be paid per task “regardless of the time required for its completion.” Applying Arnold and Takacs, the court narrowly construed this language against the employer, and the facts most favorable to Elwell showed that she was paid on an hourly basis for some duties and on a fee basis for other duties. Under a narrow construction paradigm, this hybrid compensation plan could not be included in the definition of a fee basis program for purposes of the bona fide professional exemption. As such, the court held that Elwell could not be deemed an exempt professional employee under the FLSA. Therefore, the district court’s award of summary judgment in favor of Elwell was appropriate.

D. Ambiguity and Subsequent Violations

While Takacs and Elwell are illustrative of Chevron deference and narrow judicial construction, the critical issues therein did not turn on the phrase “bona fide executive, administrative, or professional capacity” found in the FLSA. The crux of both Takacs and Elwell was the noncompliant compensation programs administered by the employers. This section begins the examination of this amorphous phrase and the subsequent violations arising as a result of its ambiguity.

1. The Misclassified vs. the Suffered or Permitted Employee

   a. Concise Statement

   “Misclassified” litigation arises when employers mistakenly classify non-exempt employees as exempt, thereby denying them the minimum wage and maximum hour protections and benefits of the FLSA. “Suffered or permitted”
litigation arises when employers are cognizant of the fact that non-exempt employees are performing work-related duties “off the clock” and without proper compensation as required by the FLSA.\footnote{See Chao v. Tradesmen Int'l, Inc., 310 F.3d 904, 912 (6th Cir. 2002) (finding that Tradesmen’s policy of requiring prospective employees to attend safety courses as a prerequisite for employment was not “work” within the meaning of the FLSA and was not subject to compensation); Brock v. City of Cincinnati, 236 F.3d 793, 805 (6th Cir. 2001) (concluding that the City of Cincinnati’s policy of suffering or permitting police officers to work at home when caring for their canine partners—while compensating them for only part of their hours worked—was reasonable because it was difficult or impossible to precisely compute the amount of work involved).}

b. Detailed Examination

i. Misclassified Personnel

Misclassified Executive Personnel. The Sixth Circuit Court of Appeals recently addressed the issue of bona fide executive FLSA classifications in \textit{Ale v. Tennessee Valley Auth.}\footnote{269 F.3d 680, 683 (6th Cir. 2001).} In \textit{Ale}, the Tennessee Valley Authority (“TVA”) had categorized a group of shift supervisors as bona fide executive personnel, not subject to the overtime pay requirements of the FLSA.\footnote{\textit{Ale}, 269 F.3d at 682. The case also dealt with a group of employees classified by TVA as administrative exempt personnel, including training officers, lieutenants, and program and procedures managers. \textit{Id.} at 686. For purposes of this section, discussion will be limited to the bona fide executive personnel exemption, which encompasses only those TVA employees classified as “shift supervisors.”} The employees sued, arguing that they were misclassified by TVA as exempted employees when, in fact, they were non-exempt employees within the meaning of the FLSA and, therefore, entitled to overtime pay in accordance with the statute.\footnote{\textit{Id.} at 683.} A Magistrate Judge for the U.S. District Court for the Eastern District of Tennessee concluded that the employees were non-exempt personnel for purposes of the FLSA, and awarded judgment in their favor.\footnote{\textit{Id.}}

The Sixth Circuit reviewed the Magistrate Judge’s factual findings under the clearly erroneous standard.\footnote{\textit{Id.} at 688.} The court first noted that \textit{Chevron} deference would be extended to the Secretary of Labor’s interpretive regulations regarding bona fide executive personnel, and those regulations would be narrowly construed against the executive classification of the TVA.\footnote{\textit{Id.} at 683.} It then outlined the Secretary’s interpretation of a bona fide executive as follows: (1) the employee is paid on a salary or fee basis in excess of $250 weekly; (2) the employee’s
primary duty consists of the management of the enterprise in which the employee is employed and includes the management of two or more employees; and (3) the employee is regularly required to exercise discretion and independent judgment. Alluding to the ambiguity of this stand-alone three-factor “short test,” the court deferred to additional Department of Labor regulations regarding examples of duties normally performed by FLSA-exempt executive personnel. These duties included: (1) hiring and firing authority; (2) training and appraising staff productivity; (3) allocating and supervising the workload; (4) maintaining production and sales records; and (5) safeguarding staff and property. As a rule of thumb, the performance of these managerial duties should take over 50% of the executive’s time. However, time is not the sole factor, and if less than 50% of the employee’s time is spent in management, then the courts should consider other primary duties that include: (1) the relative importance of the work; (2) the frequency of discretionary powers; (3) the freedom from oversight; and (4) a comparative analysis of the employee’s wages and those paid to non-exempt personnel.

Deferring to the Secretary’s regulations and applying them to the facts, the Magistrate Judge concluded that the TVA had misclassified the shift supervisors as executive personnel. He noted that the shift supervisors spent most of their time conducting routine clerical work as well as calling off-duty employees to cover vacant positions. Although they completed staff performance evaluations, their assessments did not figure into TVA’s recommendation and promotional scheme. Furthermore, the supervisors conducted only minor tasks that did not involve directing the work of others, allocating job responsibilities, or disciplinary and termination decisions. As such, they did not qualify for executive exemption within the meaning of the FLSA because they did not meet the interpretive requirements promulgated by the Secretary of Labor.

On appeal, TVA argued that the findings of the Magistrate Judge were clearly erroneous because the judge did not defer to the Secretary of Labor’s regulations and, instead, deferred to the Office of Personnel Management’s (“OPM”) more exacting standard, which requires employers to demonstrate that the executive employees “frequently exercise discretion and independent judgment.” The Sixth Circuit disagreed with this argument, and found no

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147 Id. at 684 (citing 29 C.F.R. § 541.1(f) (2001)).
148 Ale, 269 F.3d at 684 (citing 29 C.F.R. § 541.102(b) (2001)).
149 Id. (citing 29 C.F.R. § 541.103 (2001)).
150 Id.
151 Id. at 687.
152 Id.
153 Id.
154 Ale, 269 F.3d at 687.
155 Id.
156 Id. at 688 (quoting 5 C.F.R. § 551.206(c) (2001)).
evidence that the Magistrate Judge applied the OPM standard.\footnote{157} Instead, the
court viewed his reference to the OPM guidelines as merely illustrative.\footnote{158}

TVA continued its assertion that the Magistrate Judge clearly erred by citing
\textit{Donovan v. Burger King Corp.},\footnote{159} a First Circuit decision in which Burger
King’s assistant managers (functioning as shift supervisors) qualified for the
bona fide executive exemption.\footnote{160} The First Circuit found the assistant managers
exempt because they were \textit{in charge of} their shifts as they trained employees, skedded employees, oversaw quality control, maintained proper inventories, performed record-keeping, and controlled cash reconciliation.\footnote{161} The Sixth Circuit distinguished \textit{Burger King}, arguing that the Secretary’s regulations require courts to look at specific facts when determining FLSA exemption, and the words “\textit{in charge of}” are not “magical incantation[s]” rendering an employee a bona fide executive.”\footnote{162} In looking at the TVA shift supervisor duties, the
Sixth Circuit was compelled to conclude that the exemption was not satisfied.\footnote{163}

The shift supervisors did not (1) train employees; (2) oversee scheduling; (3) assign posts; nor (4) control those employees they supervised.\footnote{164} The Sixth Circuit agreed with the Magistrate Judge’s conclusion that the shift supervisors’ primary responsibilities were clerical in nature, such as calling staff to work and issuing the payroll.\footnote{165} As such, the district court’s decision to deny bona fide executive exemption status was affirmed.\footnote{166}

\textit{Misclassified Administrative & Professional Personnel: The AEP Trilogy.} A string of cases involving Indiana Michigan Power Company (d/b/a American Electric Power) came before the Sixth Circuit Court of Appeals in 2004, each addressing the bona fide administrative exemption of the FLSA, and one addressing the bona fide professional exemption in the alternative.\footnote{167} The first case, \textit{Schaefer v. Indiana Michigan Power Co.}, was brought by Michael Schaefer (“Schaefer”), an employee of American Electric Power (“AEP”), who began working at AEP as a junior radiation protection technician and was ultimately promoted through the ranks from radiation protection technician to, at the time of

\footnotesize{
\begin{itemize}
\item \footnote{157} Id.
\item \footnote{158} Id.
\item \footnote{159} 672 F.2d 221 (1st Cir. 1992).
\item \footnote{160} Ale, 269 F.3d at 691 (citing Donovan, 672 F.2d at 221).
\item \footnote{161} Id.
\item \footnote{162} Id. (citing 29 C.F.R. § 541.103 (2001)).
\item \footnote{163} Id. at 692.
\item \footnote{164} Id.
\item \footnote{165} Id.
\item \footnote{166} Ale, 269 F.3d at 693.
\end{itemize}
}
litigation, environmental specialist. AEP paid Schaefer at time-and-a-half for FLSA-exempt positions until 1997, when it began paying him only straight time for hours over forty. In 1999, the policy further changed so that no overtime would accrue until after a 45-hour workweek. In order to comply with the FLSA, AEP classified Schaefer as administrative exempt. Schaefer sued AEP for violations of the FLSA, arguing that he was not a bona fide administrative employee for purposes of the FLSA. The U.S. District Court for the Western District of Michigan disagreed and granted summary judgment in favor of AEP.

On de novo review, the Sixth Circuit noted that the FLSA provides exemptions for bona fide administrative personnel (as interpreted by the Secretary of Labor) and stated that it would narrowly construe the Secretary’s regulations against AEP’s classification, requiring it to prove each element of the Secretary’s test as required by Arnold. According to the Secretary of Labor, in order for AEP to prove that Schaefer was a bona fide administrative employee, it must be demonstrated that: (1) Schaefer was compensated on a salary basis of at least $250 per week; (2) Schaefer’s primary duty consisted of office or non-manual work directly related to the management policies or general business operations of AEP; and (3) Schaefer’s primary duty required the regular exercise of discretion and independent judgment.

As applied, the Sixth Circuit concluded that AEP failed its burden of proof on elements two and three, and reversed the district court’s grant of summary judgment and remanded for further proceedings. As required by the Secretary of Labor, determining Schaefer’s primary duty required an analysis of his daily activities as opposed to general job descriptions contained in resumes and performance evaluations. The court grouped Schaefer’s job responsibilities into two groups: (1) tasks relating to actual radioactive shipments; and (2) tasks relating to the maintenance of the waste disposal program. The Department of Labor crafted a 50% rule of thumb in which the primary duty must occupy over 50% of the employee’s time. Schaefer contended that 80% of his time was spent on actual radioactive shipments, and, given the Supreme Court’s instruction

168 Schaefer, 358 F.3d at 398.
169 Id.
170 Id. at 398.
171 Id.
172 Id.
173 Id.
174 Schaefer, 358 F.3d at 399-400 (referencing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)).
175 Id. at 400 (citing 29 C.F.R. §§ 541.2, 541.214 (2003)).
176 Id. at 407.
177 Id. at 400 (citing 29 C.F.R. §§ 541.2(a)(1), (e)(2), 541.214 (2003); Ale v. TVA, 269 F.3d 680, 688-89 (6th Cir. 2001)).
178 Id. at 401.
179 Id. (citing 29 C.F.R. §§ 541.103, 541.206(b) (2003)).
in Arnold, the Sixth Circuit accepted Schaefer’s contention and construed the evidence in the most favorable light on his behalf.\textsuperscript{180} The court did not end its analysis at this point, however, because the Secretary cautioned courts against heavy reliance on a time-alone test when assessing FLSA exemption status.\textsuperscript{181} The Secretary encouraged courts to consider other duties when analyzing element two, provided that they are (1) principally important to the employer; (2) nonmanual; and (3) directly related to the management policies or general business operations.\textsuperscript{182}

Although Schaefer expended time on manual tasks, the court reasoned that this was not enough to disqualify the exemption.\textsuperscript{183} Where AEP failed, the court concluded, was in demonstrating that Schaefer’s primary duty was directly related to its management policies or general business operations.\textsuperscript{184} AEP asked the court to accept an administrative/production dichotomy, which reasons that, because Schaefer was not involved in the production of electricity, he was an administrative employee by default.\textsuperscript{185} The court declined, holding that work related to the disposal of radioactive waste is not necessarily “administrative” in the connotative sense.\textsuperscript{186} Rather, the court deferred to the Secretary of Labor’s examples of administrative work, which included: advising management; planning; negotiating; representing the company; purchasing; promoting sales; business research; and control.\textsuperscript{187} As applied, the court conceded that some of Schaefer’s responsibilities may have fallen within the purview of the Secretary’s guidelines; however, they did not appear to amount to a primary duty as required by those same guidelines.\textsuperscript{188}

The court also found AEP lacking in its burden of proof on element three—discretion and independent judgment.\textsuperscript{189} AEP argued that the Secretary’s test required only occasional exercises of discretion and judgment.\textsuperscript{190} However, the court disagreed, stating that Sixth Circuit precedent bound it to require that the employee “customarily and regularly [exercises] discretion and independent judgment.”\textsuperscript{191} AEP failed under this standard because of the heavy regulation by

\textsuperscript{180} Schaefer, 358 F.3d at 401. See Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) (requiring courts to narrowly construe FLSA exemptions against the employer seeking to assert them).
\textsuperscript{181} Id. at 401 (citing 29 C.F.R. §§ 541.103, 541.206(b) (2003); Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742 (6th Cir. 2000)).
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 402.
\textsuperscript{184} Id. at 402-03.
\textsuperscript{185} Id. at 402 (citing Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990)).
\textsuperscript{186} Schaefer, 358 F.3d at 402.
\textsuperscript{187} Id. at 403 (quoting 29 C.F.R. § 541.205(b) (2003)).
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 403-06.
\textsuperscript{190} Id. at 403.
\textsuperscript{191} Id. (quoting Douglas v. Argo-Tech Corp., 113 F.3d 67, 72 (6th Cir. 1997)).
state and federal agencies. This, combined with infrequent exercises of discretion on minor points, Schaefer’s occasional substitution of memory for in-hand manuals (based on his extensive knowledge of the regulations), and the scant frequency of his benchmarking and quality control studies, left genuine issues of material fact. Thus, summary judgment was inappropriate.

AEP fared better in Renfro v. Ind. Mich. Power Co., the second case in the AEP Trilogy, in which the Sixth Circuit approved AEP’s administrative exemptions. Kurt Renfro and others worked as planners for AEP, which required them to investigate work orders, identify problems, and implement solutions. Although they routinely worked over 40 hours in some weeks, AEP classified its planners as bona fide administrative personnel, thereby exempting them from FLSA overtime pay provisions. The planners objected to this classification, and sued AEP for violations of the FLSA. The U.S. District Court for the Western District of Michigan found that the planners satisfied the FLSA criteria for exempt administrative employees, and entered summary judgment in favor of AEP.

Reviewing de novo the district court’s grant of summary judgment, the Sixth Circuit began by invoking the Arnold rule, which required a narrow construction of the exemption against AEP. When asserting the bona fide administrative exception (as the court noted in Schaefer) the Secretary of Labor required an employer to prove the following three elements: (1) the planners were compensated on a salary basis of at least $250 per week; (2) their primary duty consisted of office or non-manual work directly related to the management policies or general business operations; and (3) their primary duty required the regular exercise of discretion and independent judgment. The planners challenged each element, beginning with their salary basis compensation, which they argued was violated by AEP’s requirement to log hours and to make up absences (or suffer deductions in pay as a result). The planners reasoned that, because AEP controlled their work schedules in this manner and did not allow them to come and go as they pleased, they were not salaried employees as

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192 Schaefer, 358 F.3d at 404-06.
193 Id.
194 Id. at 407.
195 Id. at 515.
196 Id. at 512, 512 (6th Cir. 2004).
197 Schaefer v. Indiana Mich. Power Co., 358 F.3d 394, 400 (6th Cir. 2004) (providing the Secretary’s elements of a bona fide administrative personnel and narrowly construing them against the employer asserting the exemption).
198 Renfro, 370 F.3d at 516 (citing 29 C.F.R. §§ 541.2(a)(1), 541.2(c)(2) (2003)). See, e.g., Schaefer v. Indiana Mich. Power Co., 358 F.3d 394, 400 (6th Cir. 2004) (providing the Secretary’s elements of a bona fide administrative personnel and narrowly construing them against the employer asserting the exemption).
required by element one.\textsuperscript{203} The court, however, rejected these arguments, noting that an employer may require exempt employees to make up time missed, and that AEP had no history of docking salaries for employee time-off.\textsuperscript{204} As such, the district court’s determination that AEP met its burden on the salary basis test was correct.\textsuperscript{205}

Element two required the employer to demonstrate that the employees were engaged in non-manual work directly related to general business operations.\textsuperscript{206} The court rejected each assertion brought by the planners.\textsuperscript{207} Importantly, when the planners pointed out the manual project of snow removal in 1998, the court responded that the one-time performance of snow removal in 1998 did not concern the planners’ primary duty and, thus, did not disqualify the FLSA exemption.\textsuperscript{208} When the planners argued that their work required “field walk-downs” to assess repair projects, thereby taking them out of the office setting and out of FLSA exemption status, the court responded that it was not enough of a manual requirement as needed to defeat the FLSA exemption status.\textsuperscript{209} In fact, this contention bolstered AEP’s argument in that the walk-downs were directly related to their work, requiring the exercise of discretion and independent judgment.\textsuperscript{210} When the planners argued that their work was not administrative but, rather, production in nature, the court conceded that their work was ancillary to AEP’s production of energy; however, the court ruled that it was still within the administrative purview of advising management and, thus, defeated their administrative/production dichotomy argument.\textsuperscript{211} Finally, when the planners argued that their primary duty was not substantially important to the management or operation of AEP’s business, the court pointed to their testimony that their primary work was critical for the maintenance of AEP’s licensing requirements.\textsuperscript{212} As such, the planners’ primary duty could only be viewed as substantially important to AEP’s operations.\textsuperscript{213}

On element three—discretion and independent judgment—the planners argued that they exercised no discretion because of the heavy regulation of the industry and AEP’s standardized guidelines that narrowly circumscribed their

\textsuperscript{203} Id.
\textsuperscript{204} Id. (citing Cowart v. Ingalls Shipbuilding, Inc., 213 F.3d 261, 265-66 (5th Cir. 2000)) (finding that employees who were required to make up time off and suffered no salary deductions for lost time could be compensated on a salary basis); Haywood v. N. Am. Van Lines, Inc., 121 F.3d 1066, 1070 (7th Cir. 1997) (holding that the Secretary’s regulations prohibit only monetary discipline of exempt employees).
\textsuperscript{205} Renfro, 370 F.3d at 516.
\textsuperscript{206} Id. (citing 29 C.F.R. §§ 541.2(a)(1), 541.205(a) (2003)).
\textsuperscript{207} Id.
\textsuperscript{208} Id. (citing Counts v. South Carolina Elec. & Gas Co., 317 F.3d 453 (4th Cir. 2003)).
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Renfro, 370 F.3d at 517-18.
\textsuperscript{212} Id. at 518.
\textsuperscript{213} Id.
In response, the court stated it was required to examine whether, despite the regulations, they still exercised discretion and independent judgment. The court concluded that they did because they independently determined the nature of a repair task and prescribed the appropriate repair plan, which required the daily use of their own skill, expertise, judgment and discretion as required by the Secretary of Labor. Given the above, the court concluded that AEP had met its burden of proof and affirmed the district court’s entry of summary judgment.

The third installment of the AEP Trilogy came in August 2004 in Martin v. Indiana Michigan Power Co., in which the court was asked, not only to review the FLSA administrative exemption, but also the FLSA professional exemption. Anthony Martin, a high school graduate with limited technical training, began working for AEP as an FLSA non-exempt employee. On November 1, 1998, he began working in the IT Support Group, at which time he was reclassified as FLSA exempt under the bona fide professional provision. Martin’s work included retrieving work orders and visiting end-users to fix their personal computers. If unfixable, Martin reported this to his supervisor, who then made determinations regarding either further work or unit replacement (at no time was Martin permitted to make decisions regarding recommendations on purchasing). Aside from this work, Martin was asked to relocate computers, install hardware and cabling, and clean wire closets. A fourth assignment—to review a Windows 2000 operating system and prepare recommendations—was given to Martin after his litigation ensued. Martin routinely worked over 40 hours per week, for which he was not compensated. Also, he was uniformed, and he shared a common area work bench in addition to a common phone line. At trial, both parties filed motions for summary judgment; however, Martin’s motion was denied.

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214 Id.
215 Id. at 519 (citing Schaefer v. Indiana Mich. Power Co., 358 F.3d 394, 404 (6th Cir. 2004)).
216 Id. (citing 29 C.F.R. § 541.207(c)(1) (2003)).
217 Id. at 519.
219 Martin had no college degree and no personal computer certifications. Id. at 577. At the time of litigation, he had attended only one course in micro-computing and only four one-week-long computer training classes. Id.
220 Id. at 576.
221 Id.
222 Id.
223 Id. at 577.
224 Id. at 577-78.
225 Id. at 578.
226 Id. at 578.
227 Id.
228 Id. at 576.
requirements because he was both a bona fide computer professional and a bona fide administrative employee. Thus, the district court granted summary judgment in favor of AEP.

Reviewing the grant of summary judgment de novo, the Sixth Circuit reversed and remanded the district court’s ruling. The court began its evaluation by requiring AEP to prove that Martin fell within one of the claimed FLSA exemptions while applying Arnold’s narrow construction standard. Turning first to the bona fide professional exemption, the court articulated the Secretary of Labor’s definition of a bona fide computer professional, which placed upon AEP the burden of showing that: (1) Martin was compensated on a salary or fee basis at a rate in excess of $250 per week; (2) that Martin was employed as a systems analyst, programmer, or engineer whose primary duty consisted of work requiring theoretical and practical application of highly specialized computer knowledge; and (3) that Martin’s primary duty required the consistent use of discretion and independent knowledge. Construed in a manner most favorable to Martin, the court reasoned that AEP failed its burden of production. None of Martin’s duties required highly specialized computer knowledge. The district court fell into the common trap of perceiving any computer-related job as complex. An examination of Martin’s work demonstrated that his tasks were performed to predetermined specifications designed by his superiors; he exercised no discretion, provided no consultation, and exerted no analytical skills in resolving everyday encounters—all factors listed by the Secretary of Labor as indicative of the professional exemption. The only project that remotely qualified as systems analysis was the Windows 2000 review, but the court, in dicta, limited its significance by noting that it was assigned after Martin’s litigation commenced and, thereby, minimized its importance in the analysis.

As previously mentioned, Martin also afforded the Sixth Circuit the opportunity to address the construction of the bona fide administrative personnel exemption. To establish that Martin was a bona fide administrative employee under the Secretary of Labor’s regulations, the burden was on AEP to prove that: (1) Martin was compensated on a salary or fee basis at a rate in excess of $250 per week; (2) Martin’s primary duty consisted of office, or non-manual, work

229 Id.
230 Martin, 381 F.3d at 576.
231 Id. at 586.
232 Id. at 578.
233 Id. at 579.
234 Id. at 581.
235 Id. at 580.
236 Martin, 381 F.3d at 580.
237 Id. (citing 29 C.F.R. § 541.303(b) (2003)).
238 Id. at 581.
239 Id.
that was directly related to AEP’s management policies or general business operations; and (3) Martin’s primary duty required the consistent use of discretion and independent knowledge. When these requirements were narrowly construed against the interests of AEP, the court concluded that AEP failed its burden of production. Martin’s pay was undisputed, but he exercised no discretion or independent judgment. Thus, AEP’s only argument regarding the administrative exemption related directly to its management policies or general business operations. According to AEP, Martin was not involved with the actual production of the business (i.e., energy); instead, his work was vital to the administrative operations of the business. The court noted that it had rejected similar either-or arguments in its Schaefer and Renfro decisions, and was reticent to address them again. The court reasoned that nothing in the Secretary’s regulations, nor in the FLSA text itself, could leave one to conclude that such an absolute dichotomy exists, thereby allowing the relegation of work into either purely administrative or production in nature. Nor could AEP rely upon the impact that Martin’s performance (more specifically, his failure to perform) could have on the business operations to bolster its argument. The Secretary required that the work itself must be complex and of significant importance—not the failure to perform and the subsequent financial loss that could be incurred. The court was swift to dismiss AEP’s attempt to bootstrap complexity and importance into an otherwise blue-collar position, and criticized its argument as unimaginative and absurd. The court stated that “this argument is the logical equivalent of saying that because a Chihuahua is obviously not a cat, then every animal that is not a Chihuahua is a cat.” It held that AEP failed its burden of production and concluded that the district court’s grant of summary judgment for AEP was not only inappropriate, but that Martin was entitled to summary judgment.

ii. Suffered or Permitted Personnel

240 Id. (citing 29 C.F.R. §§ 541.2, 541.214 (2003)).
241 Id. at 584.
242 Id. at 582.
243 Id. at 582.
244 Id.
246 Id. at 582.
247 Id. at 583.
248 Id. (citing 29 C.F.R. § 541.205(c)(2) (2003)).
249 Id.
250 Id.
251 Id.
252 Martin, 381 F.3d at 584.
Recently, the Sixth Circuit considered claims of plaintiffs who sought compensation for unpaid off-the-clock work that their employers knowingly allowed them to perform. In Brock v. City of Cincinnati, Brock and his fellow eleven plaintiffs were law enforcement officers for the City of Cincinnati (“City”). Eleven of the plaintiffs, including Brock, worked for the City’s Canine Unit. The twelfth plaintiff worked for the City’s drug-control unit. All had canine partners. As a condition of placement within the voluntary canine programs, each officer was charged with the care and maintenance of his or her dog. Under the terms of a collective bargaining agreement (“CBA”) between the City and the Fraternal Order of Police, the canine officers were compensated for seventeen minutes per day for all off-duty care, paid out at straight time. In addition, each was given one day of compensatory time per month, representing additional compensation for their off-duty care. The City also constructed a professional kennel at each officer’s house, allowed the officers to take a patrol car home for around-the-clock use, paid for all food and veterinary expenses, and gave the officers the intangible benefit of a family pet. The officers contended that they spent between one and two hours per day caring for the dogs in excess of the seventeen minutes of pay that they were given under the CBA and for which they received no pay. They sued the City, arguing that it allowed them to work without pay, in violation of the FLSA. Following a bench trial, the trial judge for the U.S. District Court for the Southern District of Ohio issued findings of fact and conclusions of law that the City had violated the provisions of the FLSA in regards to ten of the twelve plaintiffs. All parties appealed. On appeal, the Sixth Circuit reviewed the district court’s underlying findings of fact for clear error, but reviewed de novo the district court’s conclusions of

253 See Chao v. Tradesmen Int’l, Inc., 310 F.3d 904, 905 (6th Cir. 2002) (disputing whether Tradesmen’s policy of requiring prospective employees to attend safety courses as a prerequisite for employment was “work” within the meaning of the FLSA and subject to compensation); Brock v. City of Cincinnati, 236 F.3d 793, 801 (6th Cir. 2001) (disputing whether the City of Cincinnati suffered or permitted police officers to work at home when caring for their canine partners while compensating them for only part of their hours worked).
254 Brock, 236 F.3d at 793.
255 Id. at 795.
256 Id.
257 Id.
258 Id.
259 Id. at 796.
260 Brock, 236 F.3d at 806.
261 Id. at 796.
262 Id.
263 Id.
264 Id. at 797.
265 Id.
266 Brock, 236 F.3d at 799.
To determine if the off-duty care provided by the police officers was compensable, the court first had to determine if it constituted “work” within the meaning of the FLSA. Turning to the text of the FLSA, the court acknowledged “work” as a term of art including “to suffer or permit.” Courts have construed this term to mean that the work is tantamount to physical or mental exertion by an employee, controlled or required by the employer, and pursued for the benefit of the business. The court continued by stating that “even work performed off-duty can qualify as work and entitle an employee to compensation.” Nonetheless, the FLSA does not foreclose the possibility that employers and employees may settle whether a particular activity is “work” through a CBA, so long as it complies with the FLSA. The Sixth Circuit concluded that, to determine whether the officers performed compensable work, the district court had to confront three issues: (1) whether the duties in question were required by the City; (2) the extent to which off-duty exertions were necessarily and primarily performed for the City’s benefit; and (3) whether the off-duty work was a vital component of the primary activities for which the plaintiffs were employed.

In resolving the first issue, the district court noted that the City required the plaintiffs to board and care for the dogs. It found that the City had plenary authority to restrict the amount of time the officers were required to spend with the dogs, but elected not to enforce that right beyond requiring the officers to pen the dogs for two hours per day. Testimony by Captain Cotton demonstrated that the City knew that the officers expended greater than seventeen minutes per day caring for the dogs. At this point, the district court improperly concluded that the CBA was unreasonable. The Sixth Circuit advised that this conclusion was premature and made without considering other important evidence. The district court determined that it was enough that the City satisfied the care and bonding requirements while failing to adequately limit the contact officers had with their canine partners. As such, the City forced the officers to perform

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267 Id. at 800.
268 Id. at 800-01.
269 Id. at 801 (quoting 29 U.S.C. § 203(g) (2001)).
270 Id. (citing Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)).
271 Id. (citing Steiner v. Mitchell, 350 U.S. 247, 256 (1956)).
272 Brock, 236 F.3d at 801 (citing Leahy v. City of Chicago, 96 F.3d 228, 232 (7th Cir. 1996)).
273 Id.
274 Id.
275 Id.
276 Id.
277 Id. at 802.
278 Brock, 236 F.3d at 802-03.
279 Id. at 803.
dog-care activities to the point that the officers, themselves, thought appropriate to maintain their health and well-being.\textsuperscript{280}

In resolving the second issue, the Sixth Circuit required only a determination of the amount of time spent with the dogs.\textsuperscript{281} The court concluded that the district court’s detailed examination of the variety of different tasks performed by the officers was unnecessary, but, for purposes of the discussion, concluded that the officers worked predominantly for the benefit of the City for one to two hours per day.\textsuperscript{282}

In addressing the third issue—whether the off-duty efforts were an integral and indispensable part of the officers’ primary activities of employment—the court acknowledged that the topic was questionable.\textsuperscript{283} This notwithstanding, the court noted that other circuits in similar situations found activities such as the plaintiffs’ to be indispensable parts of the handler’s principle job duties.\textsuperscript{284} Based on this body of case law, the court concluded that the police officers were required to look after the dogs and maintain them in the best condition possible, “ready for recall to active service at a moment’s notice.”\textsuperscript{285} Therefore, the court resolved the third issue in the affirmative.\textsuperscript{286} The court was then able to conclude that the plaintiffs’ dog-care efforts constituted “work” under the FLSA, stating that these efforts amounted to “an exertion not specifically required by but expended (as expected) necessarily and primarily for the benefit of the Cincinnati Police Division, and serving as an integral and indispensable part of the police officers’ duties.”\textsuperscript{287}

However, this conclusion was not dispositive of the overall issue on appeal.\textsuperscript{288} The district court failed to consider whether the \textit{de minimis} doctrine was applicable in this situation, a necessary step according to the Sixth Circuit.\textsuperscript{289} As articulated by the Supreme Court, the \textit{de minimis} doctrine enabled a court to consider FLSA compensable work as non-compensable if the total amount was

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item \textit{Brock}, 236 F.3d at 803 (citing Reich v. New York City Transit Auth., 45 F.3d 646, 651 (2d Cir. 1995)) (holding that walking, feeding, training, grooming, and cleaning were integral parts of the employees’ job); Karr v. City of Beaumont, 950 F. Supp. 1317, 1322-23 (E.D. Tex. 1997) (holding that off-duty time spent caring for dogs was a principal activity); Rudolph v. Metro. Airports Comm’n, 103 F.3d 677, 681-82 (8th Cir. 1996) (holding that dog care met the FLSA definition of work); Andrews v. DuBois, 888 F. Supp. 213, 217 (D. Mass. 1995) (holding (1) that feeding, grooming, and walking were indispensable parts of maintaining dogs as law enforcement tools; (2) that such activities are closely related to the duties of the canine officer; and (3) therefore, such time was work).
\item \textit{Brock}, 236 F.3d at 804.
\item Id.
\item Id.
\item Id.
\item Id. at 804-05.
\end{enumerate}
\end{footnotesize}
The factors to be considered when applying the *de minimis* doctrine include: (1) the problems with recording the additional time; (2) the aggregate size of the claim; and (3) the determination of periodic versus regular performance of the activity. Because these factors were not considered at trial, the court found the record insufficient to conclusively address each one. However, the court determined that, based upon the present record, it could safely be assumed that the *de minimis* doctrine did not apply.

Finally, the court found that, where CBA’s are involved, courts must look to the reasonableness of the agreement before concluding the analysis. The Secretary of Labor acknowledged the difficulty of determining, with precision, the exact amount of time expended when unsupervised employees divided their time between on-duty and off-duty pursuits. In such instances, the Secretary determined that “any reasonable agreement between the parties which takes into account all of the pertinent facts will be accepted.” Because difficulty abounds in determining the amount of time worked, the court regarded the Secretary’s instructions as “doubly appropriate in canine handler cases.” The ultimate issue, therefore, addressed the reasonableness of the agreement. The district court failed to analyze all of the pertinent facts of the CBA. Had the court considered these facts, it would have found that the CBA represented a reasonable agreement for compensating the canine officers. The City’s package was comprehensive. Although it included a relatively small amount of paid time, this fact alone did not render the agreement unreasonable, especially in light of the Secretary of Labor’s support and that of other circuits for

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290 *Id.* at 804 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)).
291 *Brock*, 236 F.3d at 804 (citing Lindow v. United States, 738 F.2d 1057, 1062-63 (9th Cir. 1984) (holding that an average of seven to eight minutes pre-shift is *de minimis*).
292 *Id.* at 804-05.
293 *Id.* at 805.
294 *Id.*
295 *Id.*
296 *Id.* (quoting 29 C.F.R. § 785.23 (2001)).
297 *Brock*, 236 F.3d at 805 (citing Holzapfel v. Town of Newburg, 145 F.3d 516, 527 (2d Cir. 1998) (viewing agreements as the best solution to overtime problems presented by canine handler cases and encouraging their use)). See also Reich v. New York City Transit Auth., 45 F.3d 646, 647 (2d Cir. 1995) (noting the Department of Labor and the Transit Authority reached an agreement to amend the CBA to compensate canine handlers).
298 *Brock*, 236 F.3d at 806.
299 *Id.* The pertinent facts include: (1) the take-home patrol car; (2) the elaborate concrete kennel; (3) the city’s responsibility for all feed and veterinary care; (4) the city’s practice of sending the officers to competitions during on-duty time; (5) the city’s practice of allowing officers one full day every 14 days for on-duty training with the dog; (6) the benefits of having a highly trained dog at the officers’ homes; and (7) the administrative costs and other problems if the city had to measure the time spent by the officers while at home. *Id.*
300 *Id.* at 807.
301 *Id.*
encouraging the use of CBA’s in canine handler cases.\textsuperscript{302} The court concluded that, as drafted, the CBA was reasonable and did not violate the officers’ rights by paying them straight-time compensation.\textsuperscript{303} As such, the court determined that the CBA must be enforced as written.\textsuperscript{304} In reaching this conclusion, the court reversed the district court’s judgment and directed entry of judgment in favor of the City.\textsuperscript{305}

The issue of suffered or permitted arose again in \textit{Chao v. Tradesmen International, Inc.}\textsuperscript{306} Tradesmen International, Inc. (“Tradesmen”) is a leasing company that provided workers to construction contractors upon demand.\textsuperscript{307} As a prerequisite for employment, Tradesmen required prospective employees to complete a 10-hour OSHA Safety Course, over which Tradesmen did not, and could not, regulate the content.\textsuperscript{308} If the prospective employee agreed to the training, Tradesmen hired the prospect and allowed him 60 days to complete the training.\textsuperscript{309} If he failed to complete the training, he was terminated.\textsuperscript{310} These classes were held outside of the office, in the evening, and on the employee’s own time.\textsuperscript{311} The employee could not conduct work while attending and, thus, was not compensated for time spent at the class.\textsuperscript{312} The Secretary of Labor investigated this practice and brought suit, seeking injunctive relief and recovery of unpaid overtime compensation as required by the FLSA.\textsuperscript{313} The Secretary moved for summary judgment, and the U.S. District Court for the Northern District of Ohio granted her motion.\textsuperscript{314}

On appeal, the Sixth Circuit recited the FLSA requirement for the payment of overtime wages for any work done in excess of forty hours.\textsuperscript{315} Although the term “work” was not defined in the statute, the FLSA defined “employ” to mean “to suffer or permit to work.”\textsuperscript{316} Additionally, the Supreme Court defined work to include any time “controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”\textsuperscript{317} The Sixth

\textsuperscript{302} \textit{Id.}
\textsuperscript{303} \textit{Id.} at 811.
\textsuperscript{304} \textit{Brock}, 236 F.3d at 811.
\textsuperscript{305} \textit{Id.} at 812. The court affirmed the district court’s dismissal of Officers Fromhold and Makin’s complaints and remanded Officer Mercado’s claim for further consideration because there was no evidence that he, as the sole canine member of the city’s drug control unit, and the city bargained for off-duty compensation. \textit{Id.} at 797.
\textsuperscript{306} \textit{Chao v. Tradesmen Int’l, Inc.}, 310 F.3d 904 (6th Cir. 2002).
\textsuperscript{307} \textit{Id.} at 905.
\textsuperscript{308} \textit{Id.} at 905.
\textsuperscript{309} \textit{Id.} at 906.
\textsuperscript{310} \textit{Id.}
\textsuperscript{311} \textit{Id.}
\textsuperscript{312} \textit{Tradesmen}, 310 F.3d at 906.
\textsuperscript{313} \textit{Id.} at 906-07.
\textsuperscript{314} \textit{Id.} at 907.
\textsuperscript{315} \textit{Id.} (citing 29 U.S.C. § 207(a)(1) (2002)).
\textsuperscript{316} \textit{Id.} (citing 29 U.S.C. § 203(g) (2002)).
\textsuperscript{317} \textit{Id.} (quoting Tennessee Coal, Iron & R.R. Co. v. Muscoda, 321 U.S. 590, 598 (1944)).
Circuit noted, however, that Congress amended and limited the FLSA, thereby modifying the court’s construction in *Muscoda*, with the Portal-to-Portal Act of 1947, which excluded from compensation activities that occur before or after work.\(^{318}\) Generally speaking, lectures, meetings, and training programs are compensable.\(^{319}\) However, the Secretary of Labor implemented guidelines for defining when such activities are not compensable: (1) attendance outside the regular working hours; (2) attendance that is voluntary; (3) where the course is not directly related to the job; and (4) when the employee does not perform work during the attendance.\(^{320}\)

The key issue in dispute was whether Tradesmen’s requirement was voluntary.\(^{321}\) Tradesmen argued that the determination of whether the OSHA safety course was voluntary should be made at the time that the employee decided to attend the course, which occurred before the job offer was extended.\(^{322}\) While the district court rejected this argument, Tradesmen asserted that the employee’s mindset at the time he agreed to take the course should be controlling.\(^{323}\) The Sixth Circuit, siding with Tradesmen, explained that, where training was not continuing education but, rather, only a precondition for employment, and where the prospective employee agreed to submit to the training in order to obtain a job, such attendance was voluntary and not compensable under the FLSA.\(^{324}\) Therefore, it reversed the decision of the district court and remanded with instructions to enter summary judgment in favor of Tradesmen.\(^{325}\)

2. Ordinary vs. Willful Violations & the Statute of Limitations

a. Concise Statement

\(^{318}\) *Tradesmen*, 310 F.3d at 907 (citing 29 U.S.C. § 254(a)(2) (1998); *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999)).

\(^{319}\) *Id.*

\(^{320}\) *Id.* at 907-08 (citing 29 C.F.R. § 785.27 (2002)).

\(^{321}\) *Id.* at 908.

\(^{322}\) *Id.*

\(^{323}\) *Id.* (citing *DeBraska v. City of Milwaukee*, 189 F.3d 650, 652-53 (7th Cir. 1999) (holding that police officers were not entitled to compensation for attending preliminary hearings because they did not forfeit anything by failing to attend)). *See also* *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 141-46 (4th Cir. 1999) (holding that firefighters who volunteered to provide advanced life support services for the city’s rescue squads were not compensable as the city did not request it); *Price v. Tampa Elec. Co.*, 806 F.2d 1551, 1551-52 (11th Cir. 1987) (holding that an already-employed meterman seeking overtime pay for time spent on a home-study course to attain a promotion was not compensable under the FLSA because the employer did not make it a condition of continued employment); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1159-64 (D.C. Cir. 1975) (holding that employees who accompanied federal safety inspectors during inspections where the employee was not designated by the employer had no claim for overtime pay because his services were voluntary and beyond the employer’s control).

\(^{324}\) *Tradesmen*, 310 F.3d at 910-12.

\(^{325}\) *Id.* at 912.
Ordinary violations of the FLSA are subject to a two-year statute of limitations; however, willful violations of the FLSA are subject to an extended three-year statute of limitation and are proven by a showing that the employer either knew of and/or showed reckless disregard toward the legality of its actions.  

b. Detailed Examination

The Supreme Court outlined the evolution of the ordinary/willful dichotomy and its impact upon the statute of limitations in McLaughlin v. Richland Shoe Company. Richland Shoe Company (“Richland”) was a manufacturer of shoes and boots in eastern Pennsylvania. Ann Dore McLaughlin, the Reagan Administration’s Secretary of Labor, investigated Richland’s payroll practices and subsequently filed a complaint in which she alleged that Richland routinely failed to compensate its employees for overtime hours as mandated by the FLSA. Richland responded to the Secretary’s allegations by invoking the two-year statute of limitations as an affirmative defense. The United States District Court for the Eastern District of Pennsylvania found the three-year statute of limitations applicable, however, and concluded that Richland willfully violated the FLSA provisions under the Jiffy June standard, which holds the employer liable if it knew or suspected its actions implicated the FLSA. As the district court stated, “this standard requires nothing more than that the employer has an awareness of the possible application of the FLSA.” On appeal, the Third Circuit Court of Appeals vacated and remanded the district court’s judgment, concluding that Thurston was the proper standard for analysis, which required a showing of either actual knowledge or reckless disregard of the FLSA on behalf of the employer to prove a willful violation.

327 Id., 486 U.S. at 129.
328 Id.
329 Id.
330 Id.
331 Id. at 129-30. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972) (holding that an employer is liable if he knows the FLSA is involved).
333 McLaughlin, 486 U.S. at 135 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125-30 (1985)).
The Supreme Court granted certiorari and affirmed the Third Circuit’s ruling.\textsuperscript{334} The Court began by saying that when the FLSA was originally passed in 1938, there were no explicit statutes of limitations.\textsuperscript{335} Consequently, civil actions arising from the FLSA were governed by state statutes of limitations.\textsuperscript{336} This practice changed with the Portal-to-Portal Act of 1947, when Congress imposed a two-year statute of limitations for FLSA violations.\textsuperscript{337} However, as originally enacted, the Portal-to-Portal Act did not distinguish between ordinary and willful violations.\textsuperscript{338} It was not until 1966 that Congress, for reasons unexplained in the legislative history, enacted a three-year exception for willful violations of the FLSA.\textsuperscript{339} Evident in this congressional action, the Court reasoned, was a congressional intent to draw a significant distinction between ordinary and willful violations.\textsuperscript{340} The \textit{Jiffy June} standard, which basically asks whether the employer had any knowledge that the FLSA was involved,\textsuperscript{341} essentially terminated any distinction between the two.\textsuperscript{342} As applied, the Court surmised \textit{Jiffy June} as a standard that would protect only the most ignorant of employers—a result that Congress could not have intended.\textsuperscript{343} The Third Circuit recognized that “willful” is synonymous with “deliberate, voluntary, and intentional,” and, because \textit{Jiffy June} does not comport with this reading, the court rejected its applicability.\textsuperscript{344} Rather, the Third Circuit applied the \textit{Thurston} standard, which balanced the goals of Congress in its 1947 and 1966 amendments.\textsuperscript{345} In affirming the Third Circuit’s decision, the Supreme Court expressly adopted \textit{Thurston} as the model for all circuits when evaluating ordinary and willful FLSA violations.\textsuperscript{346}

Since being handed down by the Supreme Court, courts within the Sixth Circuit have implemented the \textit{Thurston} standard as instructed by \textit{Richland Shoe}.\textsuperscript{347} In \textit{Elwell v. University Hospitals Home Care Services}, Wendy Elwell

\textsuperscript{334} Id. at 131.
\textsuperscript{335} Id.
\textsuperscript{336} Id.
\textsuperscript{337} Id. at 131-32.
\textsuperscript{338} Id. at 132.
\textsuperscript{339} McLaughlin, 486 U.S. at 132.
\textsuperscript{340} Id.
\textsuperscript{341} Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971).
\textsuperscript{342} McLaughlin, 486 U.S. at 132-33.
\textsuperscript{343} Id. at 133.
\textsuperscript{344} Id. (referring to ROGET’S INTERNATIONAL THESAURUS §§ 622.7, 653.9 (4th ed. 1977)).
\textsuperscript{345} Id. at 134-35.
\textsuperscript{346} Id. at 135.
(“Elwell”) introduced evidence to substantiate her assertion that University Hospitals Home Care Services (“Hospital”) failed to comply with the record-keeping requirements dictated by the FLSA. During cross-examination, the Hospital supervisor admitted that she was aware of the statutory duty but, nevertheless, failed to allocate space on the reporting forms in which employees could record their times. Based on this evidence and testimony, Elwell requested special instructions, which would have allowed the jury to apply the *Thurston* three-year statute of limitations if it found the Hospital willful, or reckless, in executing its statutory responsibilities. The benefit for Elwell was that she would have recovered an additional year of unpaid overtime. The district court, however, found Elwell’s request improper. Undeterred, Elwell presented her theory of willfulness to the jury during closing arguments. In sustaining two objections by the Hospital, the district court instructed the jury to disregard Elwell’s timekeeping evidence as unrelated to the issue of willfulness. The district court advised that the issue of willfulness turns on the Hospital’s failure to pay overtime and not on its record-keeping habits. Based on these instructions, the jury found the Hospital’s violation to be ordinary, and applied the two-year statute of limitations as required by *Richland Shoe*.

On appeal, Elwell argued that the jury should have been able to consider the timekeeping evidence when determining willfulness. The Sixth Circuit disagreed, first noting that the authority to enforce the FLSA’s record-keeping provisions rested solely in the Secretary of Labor. As such, Elwell had no independent cause of action and was not entitled to damages for the Hospital’s violations of the record-keeping requirement. Elwell’s approach, the court noted, amounted to an inaccurate application of the FLSA because the finding of willfulness turned on the Hospital’s reckless disregard of its duty to pay overtime and not on its shoddy methods of record-keeping. In response, Elwell argued that the Hospital’s objections during closing arguments and the subsequent instructions by the judge confused the jury, causing undue prejudice to her case. The Sixth Circuit disagreed, concluding that the risk of jury confusion

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348 *Elwell*, 276 F.3d at 842. See also 29 U.S.C. § 211(c) (2004) (requiring employers to maintain timekeeping records in order to meet their burden of proof should litigation ensue).
349 *Elwell*, 276 F.3d at 842.
350 *Id.*
351 *Id.*
352 *Id.*
353 *Id.* at 843.
354 *Id.*
355 *Elwell*, 276 F.3d at 843.
356 *Id.*
357 *Id.*
358 *Id.* (referring to 29 U.S.C. § 217 (2002)).
359 *Id.*
360 *Id.* at 843-44.
361 *Elwell*, 276 F.3d at 844.
was not substantial; as a result, it did not prejudice either party because “Elwell never presented the jury with any theory as to how the record-keeping evidence could be probative of the factual question [of willfulness].” Given this, the court concluded that it was unlikely that the jury would have been inclined to make such a causal connection. Consequently, under Federal Rule of Civil Procedure 61, the court was barred from disturbing the proceedings of the district court. The district court’s instructions on willfulness, therefore, were proper.

More recently, the United States District Court for the Southern District of Ohio addressed the subject of ordinary versus willful violations in *Claeys v. Gandalf Ltd.* The original plaintiffs, Ed and Eric Claeys, were former employees of Gandolf Limited (“Gandolph”) who worked on commission as paintless dent removal technicians. Their complaint alleged that Gandalf failed to pay them overtime compensation when they worked over 40 hours in a workweek. Subsequently, Scott Rowland and Justin Pritchard joined the proceedings, which was permissible under the penalties clause of the FLSA. Gandalf moved for partial summary judgment regarding Pritchard’s suit on the basis that his claim was barred by the two-year statute of limitations.

The parties agreed that Pritchard was employed by Gandalf from at least April 4, 1999 through June 20, 2001. To determine if his claims were barred by the statute of limitations, the court had to discern the applicable standard. Specifically, the court had to address whether Gandalf’s actions represented ordinary FLSA violations, thereby invoking the two-year statute of limitations. Or, on the other hand, whether Gandalf’s actions represented willful FLSA violations, requiring the more exacting three-year statute of limitations as afforded by the Supreme Court in *Thurston* and *Richland Shoe*. The district court noted that the Sixth Circuit has long applied the *Thurston* standard for

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362 Id. at 844-45.
363 Id. at 845.
364 Id. at 844.
365 Id. at 845.
367 Id. at 891.
368 Id.
369 Id. (citing 29 U.S.C. § 216(b) (2004)).
370 Id. at 892. Referring to Ohio law, Gandalf pointed to Ohio’s statute of limitations, which mirrored the FLSA and imposed on employers a two-year window of liability for wage and hour violations. *Id.* See *Ohio Rev. Code Ann.* § 2305.11 (West 2004).
371 Id., 303 F. Supp. 2d at 891-92.
372 Id. at 892-93.
373 Id. at 893.
In evaluating the evidence at bar, the district court found that Pritchard presented no genuine issue of material fact to support his contention that Gandalf acted willfully. In fact, the court noted that he did not even address the issue in his Memorandum in Opposition. The only evidence to which Pritchard could point were conversations in which Gandalf stated that he was ineligible for FLSA overtime pay because he was a commission-paid employee exempt from the overtime provision. The court concluded that this evidence alone could not establish willfulness under the *Thurston* standard. The evidence merely showed Gandalf’s reliance on the text of the FLSA, and the court noted that unreasonable reliance is not tantamount to reckless conduct. Based on this conclusion, the district court applied the two-year statute of limitations for ordinary violations of the FLSA.

Before applying the two-year statute of limitations, the district court had to determine when Pritchard’s claims accrued. The court noted that alleged FLSA violations based on a failure to pay overtime created a new cause of action with the receipt of each paycheck. Because of this, a claim based on any paycheck falling outside the statutory period would be barred. As applied, Pritchard’s claim accrued on June 20, 2003—the date on which he filed his consent form to be joined in the action. Any claim for unpaid overtime prior to June 20, 2001, would be barred under the FLSA two-year statute of

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376 *Claeys*, 303 F. Supp. 2d at 893.
377 *Id.*
378 *Id.* at 893-94.
379 *Id.* at 894 (citing Gustafson v. Bell Atlantic Corp., 171 F. Supp. 2d 311, 324 (S.D.N.Y. 2001) (noting that where “[p]laintiff merely concluded that willfulness and recklessness existed, without pointing to any concrete evidence in the record,” the court determined that “plaintiff fail[ed] to prove willfulness sufficient to implicate the three-year statute of limitations of FLSA § 255(a)”)). See also Cox v. Brookshire Grocery Co., 919 F.2d 354, 356 (5th Cir. 1990), noting that:

Other than urging that we adopt a presumption that [the employer] intended the consequences of its deliberate acts, [plaintiff] offers no counter to the district court’s findings [that the employer did not act willfully]. [Plaintiff] presumes too much – [an employer’s] actions will only be deemed willful if they are proved so – and no presumption may circumvent the patent willfulness requirement explicit in § 255.

380 *Claeys*, 303 F. Supp. 2d at 894.
381 *Id.*
382 *Id.* (citing Archer v. Sullivan County, 129 F.3d 1263, 1263 (6th Cir. 1997); Halferty v. Pulse Drug Co., Inc., 821 F.2d 261, 271 (5th Cir. 1987), modified on other grounds, 826 F.2d 1, 2 (5th Cir. 1987); Knight v. Columbus, 19 F.3d 579, 581 (11th Cir. 1994).
383 *Claeys*, 303 F. Supp. 2d at 894.
384 *Id.* at 895.
limitations. Because this date coincided with Pritchard’s last date of work, he had no cause of action. Determining that the doctrines of equitable tolling and equitable estoppel were inapplicable, the district court granted Gandalf’s motion for partial summary judgment and dismissed Pritchard’s claim.

E. Arbitration and Remedies

1. Arbitration under the FAA as a Precursor to Adjudication

   a. Concise Statement

   FLSA actions brought within the Sixth Circuit are subject to the Supreme Court’s *Gilmer* rule, which, in an effort to preserve the integrity of the Federal Arbitration Act (“FAA”), compels arbitration where valid arbitration agreements exist between the employer and employee.

   b. Detailed Examination

   *Gilmer v. Interstate/Johnson Lane Corp.* was the first Supreme Court decision to subject employment discrimination claims to compulsory arbitration. Robert Gilmer (“Gilmer”) sued his employer, Interstate/Johnson Lane Corporation (“Interstate/Johnson”), for alleged violations of the Age Discrimination in Employment Act (“ADEA”). The U.S. District Court for the Western District of North Carolina denied Interstate/Johnson’s motion to compel arbitration, as agreed to by the parties at the time of Gilmer’s hiring and as supported by the FAA. The Fourth Circuit Court of Appeals reversed, and the Supreme Court granted certiorari to resolve the existing conflicts among the appellate courts regarding the arbitrability of ADEA statutory discrimination claims.

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386 *Id.*
387 *Id.* Likewise, Pritchard had no claim under Ohio law, which imposed a two-year statute of limitations as well. *Id.*
388 *Id.* at 896-97.
389 See *Johnson v. Long John Silver’s Rests., Inc.*, 320 F. Supp. 2d 656, 661 (M.D. Tenn. 2004) (holding that pre-dispute arbitration agreements will be enforced to give effect to the Federal Arbitration Act); *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000) (holding that pre-dispute arbitration agreements are binding on FLSA claims provided they are reasonable and not unconscionable); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (holding that employee-employer differences could be submitted to an impartial arbitrator in order to preserve the integrity of the Federal Arbitration Act).
390 *Gilmer*, 500 U.S. at 23.
391 *Id.*
392 *Id.* at 24.
393 *Id.*
The Supreme Court stated that the purpose of the FAA was to “reverse the long-standing judicial hostility to arbitration agreements.”\(^{394}\) Recognizing a string of other federal statutes subject to compulsory arbitration, the Court found no reason to preclude statutory employment discrimination claims.\(^{395}\) As the Court previously held, the FAA manifested a “liberal federal policy favoring arbitration agreements.”\(^{396}\) Additionally, nothing in the text or legislative history of the ADEA precluded arbitration.\(^{397}\) Therefore, the pre-dispute arbitration agreement signed between Gilmer and Interstate/Johnson was binding unless Gilmer could demonstrate an “inherent conflict between arbitration and the ADEA’s underlying purpose.”\(^{398}\) Gilmer raised a host of challenges to the adequacy of arbitration in his setting, all of which the court dismissed.\(^{399}\) In response to his claim that arbitration was inconsistent with the important social policies furthered by the ADEA, the Court noted that numerous other statutes (all with important social policies) were nonetheless subject to the FAA.\(^{400}\) In response to his argument that compulsory arbitration would deprive claimants of an impartial judicial forum, the Court dismissed the argument as speculative.\(^{401}\) In response to his assertion that the pre-dispute arbitration agreement was based on substantially unequal bargaining power, the Court replied that, barring evidence of fraud or coercion, mere inequality in bargaining power alone was insufficient to deny enforcement.\(^{402}\) The Court concluded that Gilmer had not met his burden of proving that Congress intended to preclude arbitration in ADEA actions, and affirmed the ruling of the Fourth Circuit Court of Appeals.\(^{403}\)

Following *Gilmer*, the circuit courts, including the Sixth Circuit, have expanded *Gilmer’s* deference to the FAA and have applied it to FLSA actions.\(^{404}\)

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394 Id.
397 Id. at 26.
398 Id. See also Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 227 (1987).
399 *Gilmer*, 500 U.S. at 27-33.
401 Id. at 29-32.
403 Id. at 35.
404 See Floss v. Ryan’s Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000) (holding that pre-dispute arbitration agreements are binding on FLSA claims provided they are reasonable and not unconscionable); Johnson v. Long John Silver’s Rests., Inc., 320 F. Supp. 2d 656, 661 (M.D. Tenn. 2004) (holding that pre-dispute arbitration agreements will be enforced to give effect to the Federal Arbitration Act).
The Sixth Circuit Court of Appeals recently addressed Gilmer’s applicability to FLSA claims in Floss v. Ryan’s Family Steak Houses, (“Ryan’s”). At the time of hiring, Ryan’s required the plaintiffs, two prospective hires, to sign predispute arbitration agreements, a request to which both consented. Ryan’s hired both plaintiffs shortly thereafter. The terms of the arbitration agreements provided that Employment Dispute Services, Inc. (“EDSI”) would serve as the arbitration forum, and the agreements gave EDSI complete discretion over the rules and procedures, including the unlimited right to modify the rules without the employees’ consent. Both employees had conflicts with Ryan’s and left their posts. Floss then brought suit in the United States District Court for the Eastern District of Kentucky, alleging violations of the FLSA. Daniels brought suit in the United States District Court for the Eastern District of Tennessee, alleging violations of the Americans with Disabilities Act (“ADA”). In both lawsuits, Ryan’s filed motions to compel arbitration. The Eastern District Court for Kentucky found the arbitration agreement enforceable and dismissed Floss’ action. The Eastern District Court for Tennessee found the arbitration agreement unenforceable and allowed Daniels to proceed with his claim.

Decisions regarding the arbitrability of employment disputes are reviewed de novo. The Sixth Circuit first acknowledged the growing acceptance of compulsory arbitration for statutory claims, as upheld in Gilmer. The court then turned to Floss’ argument, in which she asserted that arbitration was not a suitable forum for FLSA claims because arbitration would not sufficiently further the important social policies of the FLSA. The court disagreed, saying it failed to see how broader policies furthered by such a claim are hindered by arbitration. The court reasoned that both judicial and arbitral fora can further the FLSA’s social policies, and one is not mutually exclusive of the other. Nonetheless, the court cautioned that the arbitral forum must provide for the

405 Floss, 211 F.3d at 309.
406 Id.
407 Id.
408 Id. at 309-10.
409 Id. at 310.
410 Id.
411 Floss, 211 F.3d at 310.
412 Id. Analysis of Ryan’s ADA claim will not be considered within the body of this Survey text.
413 Id. at 311.
414 Id. at 310.
415 Id. at 311 (citing Bobbie Brooks, Inc. v. Int’l Ladies’ Garment Workers Union, 835 F.2d 1164, 1170 (6th Cir. 1987); M&C Corp. v. Erwin Behr GmbH & Co., 143 F.3d 1033, 1037 (6th Cir. 1998)).
416 Id. at 312 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).
417 Floss, 211 F.3d at 313.
418 Id.
419 Id. (citing Gilmer, 500 U.S. at 27.)
effective vindication of the employees’ claims.420 Here, the court agreed with Floss (and Daniels) that Ryan’s pre-dispute arbitration agreement allowed for the appointment of biased and incompetent arbitrators, limited discovery opportunities, and allowed EDSI to change the rules of engagement unilaterally at its own discretion.421 On the issue of bias, the court questioned the neutrality of EDSI, a private industry whose interest in maintaining contracts with Ryan’s could affect its neutrality.422 The additional requirement that aggrieved employees must pay one-half of the arbitrator’s fees as prerequisite for arbitration also concerned the court, which foresaw the chilling effect this could have on future claim resolution.423 Additionally, while EDSI promised an arbitral forum, it was fatally indefinite since EDSI had unfettered discretion in choosing the nature of that forum and reserved the right to alter the rules and procedures without notice or consent.424 Such reservations rendered the promise illusory, and as such, the court concluded that both arbitration agreements lacked mutuality of obligation and did not constitute valid contracts.425

The Sixth Circuit’s decision in Floss has been positively received by the district courts, as in Johnson v. Long John Silver’s Restaurants, Inc.426 Kevin Johnson worked in management at one of Long John Silver’s (“LJS”) establishments.427 At the time of his hiring, Johnson was asked to submit any disputes to binding arbitration, a process explained in his employment handbook.428 During his employment, Johnson was classified as a bona fide executive employee, exempt from FLSA overtime requirements.429 However, as a condition of employment, he was required to comply with the LJS Restitution Policy, which subjected the pay of anyone found liable for a monetary or property loss to payroll deductions.430 Johnson sued, alleging that this practice violated the FLSA, and LJS subsequently filed a motion to compel arbitration.431

The United States District Court for the Middle District of Tennessee began by saying that it was well-settled that statutory claims could be subjected to an arbitration agreement.432 The court noted that the FLSA itself did not mandate a judicial forum, and based upon this, at least three other circuits subjected FLSA

420 Id.
421 Id. at 313-14.
422 Id.
423 Floss, 211 F.3d at 313-14.
424 Id. at 314.
425 Id. at 314-16.
427 Id. at 659. Johnson worked as an Assistant General Manager and later as a General Manager of an LJS restaurant. Id.
428 Id. at 667.
429 Id. at 659.
430 Id.
431 Id. at 659-60.
432 Johnson, 320 F. Supp. 2d at 661 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).
claims to arbitration: the Fourth, Eighth, and Ninth Circuits. Moreover, the Sixth Circuit has expressly ordered FLSA claims to arbitration, if mutually agreed upon by the parties. As articulated by the Floss court, once it has been determined that a statutory claim is subject to arbitration, the court must then determine if the contract to arbitrate is valid.

Turning to the arbitration agreement between Johnson and LJS, Johnson argued that he was handed a “stack of paperwork” and did not recall signing an arbitration agreement. While LJS could not produce a signed copy, LJS argued that there was an implied in fact contract, as evidenced by its hiring practices in place at the time of Johnson’s hiring; practices which are still in place. The court accepted this logic, concluding that Johnson must have signed the arbitration contract given the fact that during his employment he had access to—and knowledge of—the agreement because he himself presented it to newly hired employees for signatures. In response, Johnson argued that the pre-dispute resolution was void as unconscionable in that it represented a form contract with unequal bargaining power between the parties. To determine invalidity, the court applied the following standard: a contract is invalid when there is both procedural and substantive unconscionability. The court distinguished the two, saying that procedural unconscionability arises during the contracting process when there existed fine print within the contract or a misrepresentation or unequal bargaining power, whereas substantive unconscionability arises when the terms are unduly harsh. In concluding that the contract was neither unconscionable nor unduly harsh, the court noted that the contract advised employees to consult with an attorney. It was also written in plain language that a lay person could understand, and it contained no fine print. Additionally, the terms were not unduly harsh because LJS agreed to share the expenses, to cap Johnson’s fees, to forgo an attorney (if Johnson did so) and to make only mutually agreed upon modifications in writing.

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433 Id. (citing Adkins v. Labor Ready, Inc., 303 F.3d 496, 506 (4th Cir. 2002) (finding that FLSA claims can properly be resolved in mandatory arbitration proceedings); Bailey v. Ameriquest Mortgage Co., 346 F.3d 821, 822 (8th Cir. 2003); Horenstein v. Mortgage Mkt., Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001)).
434 Id. at 661 (citing Floss v. Ryan’s Family Steak Houses, Inc., 211 F.3d 306, 313 (6th Cir. 2000)).
435 Id. (citing Floss, 211 F.3d at 311-12).
436 Id. at 662.
437 Id. at 663-64.
438 Id. at 665.
439 Id. at 666 (citing Funding Sys. Leasing Corp. v. King Louie Int’l, Inc., 597 S.W.2d 624, 634-35 (Mo. Ct. App. 1979)).
440 Id. at 666 (citing World Enter. Inc. v. Midcoast Aviation Servs., Inc., 713 S.W.2d 606, 610 (Mo. Ct. App. 1986); Lyster v. Ryan’s Family Steak Houses, Inc., 239 F.3d 943, 947 (8th Cir. 2001)).
441 Id. at 666-67.
442 Id.
443 Id.
444 Johnson, 320 F. Supp. 2d at 667.
The court next considered all other possible avenues under which the arbitration agreement could be invalidated. Johnson argued several additional theories against enforcement, all of which were rejected by the court. In response to Johnson’s charge that class arbitrations are prohibited, the court said that the United States Supreme Court left this determination to the arbitrator, not to the courts. In response to his charge that the discovery clause was invalid, the court concluded that although it allowed for only one deposition, it also allowed for the exercise of the arbitrator’s discretion in enforcing this clause. In response to his charge that the discovery clause was invalid, the court concluded that although it allowed for only one deposition, it also allowed for the exercise of the arbitrator’s discretion in enforcing this clause. In response to his charge that the procedures for filing a claim unduly restricted the FLSA statutes of limitation, the court noted that both Johnson and LJS jointly agreed to stay and toll any claims, thereby preserving any FLSA action. Finally, in response to his assertion that he did not knowingly and voluntarily waive his right to a jury trial, the court disagreed, citing to the specificity and plain language in the agreement that gave him adequate notice of the waiver. Having exhausted all possible exceptions, the court granted LJS’s motion to compel arbitration.

445 Id. at 667-70.
446 Id.
447 Id. at 667-68 (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)).
448 Id. at 669. See also Pacificare Health Sys., Inc. v. Book, 538 U.S. 401, 406 (2003) (noting that the Supreme Court has cautioned against the refusal to enforce an arbitration agreement based upon mere speculation of what the arbitrator might do).
449 Johnson, 320 F. Supp. 2d at 669.
450 Id.
451 Id. at 670.
452 Id. at 671.
2. Remedies Available to Employees

a. Concise Statement

Prior FLSA violators who willfully continue to violate the FLSA are subject to fines and/or imprisonment. In most circumstances, however, an employer found to be in violation of the FLSA could be liable for an array of remedies: employee reinstatement, unpaid back pay, unpaid overtime compensation, liquidated damages, reasonable attorney’s fees, and compensatory damages.

b. Detailed Examination

The Sixth Circuit Court of Appeals has addressed and delineated the analytical rubric by which its courts shall interpret and apply § 216(b) of the FLSA. In Elwell v. Univ. Hosps. Home Care Servs., the trial court, in determining that Elwell was not exempted from the FLSA as a bona fide professional, awarded Elwell (1) unpaid overtime compensation in the amount of $25,478; (2) prejudgment interest from the complaint filing date to the judgment entry date; and (3) attorney’s fees and costs in the amount of $49,884.85. The district court, however, refused to award liquidated damages, and Elwell appealed.

On appeal, Elwell argued that the district court abused its discretion by not awarding her liquidated damages as afforded by § 216(b) of the FLSA. The court of appeals noted that liquidated damages are calculated as an additional amount of damages equal to the employee’s back pay or unpaid overtime compensation award. As interpreted by the United States Supreme Court and the Sixth Circuit Court of Appeals, liquidated damages represent compensation,

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453 29 U.S.C. § 216(a) (2004) (limiting the possible fine to $10,000 and the possible prison sentence to six months).
454 Id. See also Moore v. Freeman, 355 F.3d 558, 563 (6th Cir. 2004) (holding that the Sixth Circuit Court of Appeals would join with the Seventh, Eighth, and Ninth Circuits in awarding compensatory damages for an FLSA violation).
455 See Elwell v. Univ. Hosps. Home Care Servs., 276 F.3d 832, 840 (6th Cir. 2002) (holding that liquidated damages must be awarded if the defendant employer cannot demonstrate a good faith effort in reasonably applying the FLSA); accord Martin v. Ind. Mich. Power Co., 381 F.3d 574, 584 (6th Cir. 2004); see also Moore v. Freeman, 355 F.3d 558, 563 (6th Cir. 2004) (holding that compensatory damages were a reasonable and available remedy under a plain language reading of the FLSA).
456 Elwell, 276 F.3d at 836.
457 Id. at 836-37.
458 Id. at 840.
459 Id. (citing 29 U.S.C. § 216(b) (1998) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.") (emphasis added)).
not punishment.\textsuperscript{460} A trial court has at its discretion the ability to waive liquidated damages should the employer demonstrate good faith and reasonable grounds for believing that its actions were in compliance with the FLSA.\textsuperscript{461} The United States Supreme Court has placed the burden upon the employer to prove that its actions comply with the FLSA, and absent such proof, a district court possesses no discretion to waive liquidated damages.\textsuperscript{462} As applied to Elwell, the court concluded that the district court abused its discretion in denying liquidated damages.\textsuperscript{463} According to the court, the FLSA imposed an affirmative duty on employers to ascertain and meet all FLSA requirements; failure to do so—mere negligence—could be deemed neither good faith nor reasonable.\textsuperscript{464} The only evidence submitted by the Hospital was the testimony of its Vice President and its Administrator, who was hired after the compensation plan went into effect.\textsuperscript{465} Therefore, the Hospital could not have reasonably maintained that it relied on the Vice President’s and Administrator’s expertise when crafting its compensation plan.\textsuperscript{466} With no other evidence to demonstrate good faith and reasonable application, the court of appeals concluded that the district court abused its discretion in denying liquidated damages.\textsuperscript{467} Additionally, the court of appeals vacated the district court’s award of prejudgment interest, citing to United States Supreme Court instructions that a plaintiff cannot recover both liquidated damages and prejudgment interest under the FLSA.\textsuperscript{468} Both issues were remanded to the district court for further proceedings on damages, which were to be consistent with these instructions.\textsuperscript{469}

In \textit{Martin v. Ind. Mich. Power Co.},\textsuperscript{470} the Sixth Circuit Court of Appeals cited \textit{Elwell} as authority when it considered Martin’s request for liquidated damages (and those circumstances in which liquidated damages are appropriate).\textsuperscript{471} Noting that liquidated damages are “the norm and have even

\begin{footnotesize}
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\item[\textsuperscript{460}] Id. (citing McClanahan v. Mathews, 440 F.2d 320, 322 (6th Cir. 1971); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583 (1942)).
\item[\textsuperscript{461}] Id. (citing 29 U.S.C. § 260 (1998)). See also Herman v. Palo Group Foster Home, 183 F.3d 468, 474 (6th Cir. 1999) (holding that a good faith showing of reasonableness in applying the FLSA exemptions could thwart a demand for liquidated damages).
\item[\textsuperscript{462}] Elwell, 276 F.3d at 840 (citing McClanahan, 440 F.2d at 322). See also Uphoff v. Elegant Bath, Ltd., 176 F.3d 399, 405 (7th Cir. 1999) (“[The district court’s] discretion must be exercised consistently with the strong presumption under the statute in favor of doubling.” (quoting Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729, 733 (7th Cir. 1998))).
\item[\textsuperscript{463}] Elwell, 276 F.3d at 840.
\item[\textsuperscript{464}] See id. at 840-41.
\item[\textsuperscript{465}] Id.
\item[\textsuperscript{466}] Id. at 841.
\item[\textsuperscript{467}] Id.-
\item[\textsuperscript{468}] Id. (citing Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 715-16; McClanahan v. Mathews, 440 F.2d 320, 324 (6th Cir. 1971); Lilley v. BTM Corp., 958 F.2d 746, 755 (6th Cir. 1992), cert. denied, 506 U.S. 940 (1992)).
\item[\textsuperscript{469}] Id. at 845.
\item[\textsuperscript{470}] 381 F.3d 574 (6th Cir. 2004).
\item[\textsuperscript{471}] Id. at 584-86.
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been referred to as ‘mandatory’

absent a showing of both good faith and reasonable grounds, the Martin court provided employers with a tool by which their burdens of proof could be met. To demonstrate good faith, an employer must demonstrate that it took affirmative steps to ascertain the FLSA’s requirements but nonetheless innocently violated its provisions. Violations need not be intentional for one to recover liquidated damages. Negligence in classification will not pass the good faith test. In the case at bar, Indiana Michigan Power Company (d/b/a/ American Electric Power (“AEP”)) failed to demonstrate good faith. AEP knew that Martin was performing FLSA non-exempt work but cloaked these duties by assigning him the title of “IT Support Specialist I.” However, courts look to duties, not titles, when construing exemption status. Even if the district court could classify AEP’s initial conduct as innocent, Martin complained when AEP reclassified Martin from non-exempt to exempt. Martin’s complaint placed AEP on notice that it should have investigated. AEP abdicated this FLSA-imposed duty, and because of this, the court found AEP liable to Martin for back pay and for liquidated damages.

The Sixth Circuit addressed the availability of compensatory damages under the FLSA in 2004 in Moore v. Freeman. In its decision, the Sixth Circuit joined the Seventh, Eighth, and Ninth Circuits in allowing mental and emotional distress damages for FLSA violations. Charles Moore (“Moore”) was hired by the City of Chattanooga in October 1997 as a housing code inspector with a salary of $20,777. That same day, Mary Hutson (“Hutson”), a white female, was hired for the same position at a starting salary of $26,751. In February 1998, Moore learned of the pay disparity and complained to the department’s administrator, Moses Freeman (“Freeman”). Hutson simultaneously

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472 Id. at 584 (emphasis in the original) (citing Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 907 (3d Cir. 1991)).
473 Id.
474 Id. (citing Cooper, 940 F.2d at 908).
475 Id.
476 Martin, 381 F.3d at 585 (citing Cooper, 940 F.2d at 908).
477 Id. at 585-86.
478 Id.
479 Id. (citing Ale v. TVA, 269 F.3d 680, 689-90 (6th Cir. 2001)).
480 Id. at 586.
481 Id.
482 Martin, 381 F.3d at 586.
483 Moore v. Freeman, 355 F.3d 558, 564 (6th Cir. 2004).
484 Id. at 563. See also Travis v. Gary Cmty. Health Ctr., Inc., 921 F.2d 108, 112 (7th Cir. 1990) (holding that compensatory damages for mental and emotional duress were an appropriate remedy afforded by the FLSA); accord Broadus v. O.K. Indus., Inc., 238 F.3d 990, 992 (8th Cir. 2001); Lambert v. Ackerley, 180 F.3d 997, 1011 (9th Cir. 1999).
485 Moore, 355 F.3d at 590.
486 Id.
487 Id. at 561.
complained of a hostile work environment, alleging that Martin and others were harassing her; however, a subsequent investigation found no evidence of hostility. Nonetheless, by April 1998, the office was so polarized that Freeman decided to fire Moore, Hutson, and other complaining employees. Before being terminated, Hutson tendered her resignation, which Freeman accepted on April 28, 1998. Two days later, Moore was fired and remained unemployed for the following four months.

Moore brought suit asserting six separate causes of action, including the FLSA, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and the Tennessee Human Rights Act. At trial, Moore testified that the experience had been demoralizing, had affected his mental and physical health, and had affected his relationships with family and friends. The United States District Court for the Eastern District of Tennessee rejected all claims except for his FLSA claim. The court concluded that Freeman discharged Moore in retaliation for his complaints in violation of the FLSA and awarded him $10,232 in back pay and $40,000 for mental and emotional distress. Both parties subsequently filed post-judgment motions. Freeman filed a motion for remittitur on the back pay award and asked the court to set aside the emotional damages award, arguing that it was not the kind of award authorized by the FLSA. The district court reduced the back pay award to $7,200 but denied Freeman’s motion to set aside the compensatory damage award of $40,000. The court likewise split on Moore’s requests, denying his motion for liquidated damages but granting him one-sixth of his attorney’s fees because he had prevailed only on one of the six claims brought in the original suit. Both parties appealed.

Freeman argued that Moore failed at trial to meet the burden-shifting requirements set forth by the United States Supreme Court and, therefore, had not established a prima facie case. The court of appeals considered the prima

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488 Id.
489 Id.
490 Id.
491 Moore, 355 F.3d at 561.
493 Id.
494 Id. at 561-62.
495 Id.
496 Id.
497 Moore, 355 F.3d at 562.
498 Id.
499 Id. The court held that an award of damages to employees suffering from retaliation was compensatory in nature and would not be furthered by the addition of liquidated damages. Id.
500 Id.
501 Id. (referring to the burden-shifting paradigm established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). In McDonnell, the court stated that the complainant has the initial burden of establishing a prima facie case. McDonnell, 411 U.S. at 802. If the complainant
facie elements as relevant in reviewing the ultimate question of whether the employer retaliated for the exercise of protected activity. Moore, the court reasoned, was clearly engaged in protected activity since the retaliation provisions of the FLSA can be triggered by informal complaints where consequences include termination of employment. The court concluded that the evidence presented at trial could have led a reasonable jury to conclude that Moore was fired for complaining about his pay because Freeman called him “incorrigible” at trial and because Freeman asked the police to be on standby on the day he was terminated.

On the subject of remedies, Freeman argued that the FLSA did not explicitly allow for damages for mental and emotional distress. In response, the court stated that a plain reading of the text did not preclude these types of damages either. The court determined that the language of the FLSA itself supported the conclusion that “the evident purpose of section 216(b) [of the FLSA] is compensation.” Building upon this, the Seventh Circuit has concluded that the provisions of § 216(b) allow for compensation for emotional distress as an appropriate remedy for intentional torts like retaliatory discharge. The Eighth and Ninth Circuits followed suit, allowing for damages for emotional distress in FLSA actions. The Sixth Circuit, noting the building consensus on the issue of compensatory damages for mental and emotional distress, joined these circuits to allow these damages under the ambit of FLSA § 216(b).

Next, Freeman attacked the size of the award, arguing that the district court abused its discretion in allowing the $40,000 judgment to stand. For the verdict to be undone, the court stated that it must result from bias or prejudice or

502 Moore, 355 F.3d at 562.
503 Id. at 562-63 (citing EEOC v. Romeo Cmty. Sch., 976 F.2d 985, 989-90 (6th Cir. 1992)).
504 Id. at 563.
505 Id. Section 216(b) of the FLSA provides that any employer in violation of the FLSA will be subjected to liability for “such legal or equitable relief as may be appropriate to effectuate the purposes of” the FLSA. 29 U.S.C. § 216(b) (2004).
506 Moore, 355 F.3d at 563 (citing Travis v. Gary Cmty. Health Ctr., Inc., 921 F.2d 108, 112 (7th Cir. 1990) (holding that § 216(b) allows for any relief appropriate to further the purposes of the FLSA)).
507 Id. (quoting Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000), cert. denied, 532 U.S. 975 (2001) (holding that the scheme of the FLSA is to compensate an aggrieved employee)).
508 Id. at 564 (citing Travis, 921 F.2d at 112).
509 Id. (citing Broadus v. O.K. Indus., Inc., 238 F.3d 990, 992 (8th Cir. 2001); Lambert v. Ackerley, 180 F.3d 997, 1011 (9th Cir. 1999)).
510 Id.
511 Id. See Sallier v. Brooks, 343 F.3d 868, 880 (6th Cir. 2003) (holding that the applicable standard of review is abuse of discretion).
otherwise shock the conscience.\textsuperscript{512} The court observed that no claims existed with regard to bias, and nothing in the evidence demonstrated that the jury award was clearly excessive in light of Moore’s emotional turmoil.\textsuperscript{513}

Finally, the court addressed the issue of attorney’s fees, which the district court calculated using the “lodestar” method that took the total number of hours expended by Moore’s attorneys and multiplied that number by a reasonable rate.\textsuperscript{514} The district court awarded Moore one-sixth of his total attorney’s fees as a reflection of the success of his claims.\textsuperscript{515} The court of appeals rejected this model because it concluded that it was an abuse of discretion.\textsuperscript{516} The United States Supreme Court has explicitly rejected simplistic mathematical formulae when considering attorney’s fees, opting instead to aggregate the plaintiff’s claim and to reward his or her overall success.\textsuperscript{517} Accordingly, the Sixth Circuit expressly precluded a ratio test for the award of attorney’s fees.\textsuperscript{518} Thus, the district court’s imposition of its own rule without considering the interrelation of the claims and the overall success of Moore’s case was an abuse of discretion.\textsuperscript{519}

III. FAIRPAY 2004

A. Introduction: A Call for Reform

The Secretary of Labor’s administrative regulations and case law developing around the FLSA have received extensive examination.\textsuperscript{520} This thorough examination resulted in the conclusion that the current FLSA “white collar” exemption scheme was outdated and in need of revision.\textsuperscript{521} Further, noting that the interpretive guidelines were imbued with ambiguity, a consensus was reached that the inherent vagueness within the FLSA has led to employer difficulty in correctly applying the Secretary’s criteria.\textsuperscript{522} This, in turn, has resulted in a

\textsuperscript{512} Moore, 355 F.3d at 564 (citing Sallier, 343 F.3d at 880) (quoting Gregory v. Shelby County, Tenn., 220 F.3d 433, 443 (6th Cir. 2000)).
\textsuperscript{513} Id.
\textsuperscript{514} Id. at 565.
\textsuperscript{515} Id. at 566.
\textsuperscript{516} Id.
\textsuperscript{517} Id. at 565-66 (citing Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)).
\textsuperscript{518} Moore, 355 F.3d at 566 (citing Phelan v. Bell, 8 F.3d 369, 374 (6th Cir. 1993)).
\textsuperscript{519} Id.
\textsuperscript{521} Id.
\textsuperscript{522} Id.
dramatic increase in litigation unrelated to the core policies of the FLSA. The authors called upon the Secretary to review the “white collar” exemption criteria to reflect the overall changes in the workplace since 1938.

B. Heeding the Call: FairPay 2004

On April 23, 2004, Labor Secretary Elaine Chao introduced the revised “white collar” FLSA exemption regulations, known as FairPay 2004, by proclaiming, “Today, workers win[!]” Acknowledging the criticism levied against the Department of Labor’s regulations, which had not been substantially updated for over fifty years, Secretary Chao declared the new rules a restoration of basic FLSA principles: “fair pay for workers, instead of a lawsuit lottery.”

After summarizing the new provisions, the Secretary established an effective date of August 23, 2004.

1. Elimination of the “Long” and “Short” Salary Tests

   a. Concise Statement

   FairPay 2004 eliminates the applicability of the “long” and “short” salary tests by establishing only one salary level for “white collar” exemptions: $455 per week. All workers earning less than $455 per week are guaranteed overtime protection.

   b. Detailed Examination

   In Ale v. TVA, the Sixth Circuit noted the competing “long” and “short” salary tests. If an employee earned less than $250 per week, to satisfy the exemption criteria the employer was subjected to a more rigorous, five-part

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523 Id.
524 Id.
526 Id.
528 Under the new regulations, the following workers are exempted from the salary test: outside sales employees, doctors, lawyers, teachers, and computer professionals earning $27.63 or more per hour. 29 C.F.R. § 541.600 (c)-(e) (2004).
529 Id. § 541.600(a).
530 Id.
531 Ale v. TVA, 269 F.3d 680, 683-84 (6th Cir. 2001). See supra Part II.D.1.b.i for a further discussion of this case.
examination of the employee’s duties (i.e., the “long test”). More commonly applied, where an employee earned more than $250 per week, the employer was subject to a three-part examination of the employee’s duties to satisfy the elements of a bona fide FLSA exempt employee (i.e., the “short” test). The “long” and “short” tests to determine salary level had not been updated since 1975, and as the Secretary alluded to in her April 23, 2004, press conference, inflationary effects of the last quarter century rendered those salary amounts obsolete. FairPay 2004 merges the two subparts into one salary test, establishing the base amount as $455 per week. Those employees earning less than $455 per week are guaranteed overtime pay under the new FairPay regulations. The Secretary reasoned that the new regulations would strengthen the overtime protection for 6.7 million low-wage salaried workers, including 1.3 million “white collar” workers not entitled to overtime pay under the 1975 standards. As such, the Secretary concluded that these workers would gain up to $375 million in additional annual earnings.

2. Modification of the Salary Basis Test

a. Concise Statement

FairPay 2004 expands the Salary Basis Test to permit greater employer flexibility regarding disciplinary pay deductions and the window of correction defense, previously limited by the courts in Auer v. Robbins and Takacs v. Hahn Automotive Corp.

b. Detailed Examination

532 Id. (citing 29 C.F.R. §§ 541.1(a)-(c), 541.2(a)-(e) (2001)).
533 Id. (citing 29 C.F.R. §§ 541.2(c)(2), 541.1(f) (2001)).
535 29 C.F.R. § 541.600(a) (2004).
536 Id.
538 Id.
540 Auer v. Robbins, 519 U.S. 452, 464 (1997) (holding that disciplinary-deduction rules were almost always impermissible under the Secretary of Labor’s salary basis test).
541 Takacs v. Hahn Auto. Corp., 246 F.3d 776, 782 (6th Cir. 2001) (holding that the window of correction defense was inapplicable when there existed an actual or perceived practice of disciplinary deductions, a practice that did not manifest an objective intent to pay employees on a salary basis).
In Auer v. Robbins, the Supreme Court accepted the Secretary of Labor’s view that those employees whose pay was adjusted for disciplinary reasons were undeserving of FLSA exemption.\textsuperscript{542} As the Secretary reasoned, genuine bona fide “white collar” employees should not be subjected to piecemeal deductions from their pay as a disciplinary method when other traditional methods (termination, demotion, and restricted assignment) could be utilized.\textsuperscript{543} Where isolated instances of one-time disciplinary deductions occurred, the Auer court allowed an employer to preserve its FLSA exemption status only if it reimbursed the aggrieved employee (e.g., within a window of correction) and complied with the Secretary’s guidelines going forward.\textsuperscript{544} The Sixth Circuit applied the Auer rationale in Takacs v. Hahn Automotive Corp.\textsuperscript{545} The Takacs court concluded that, where a practice of actual disciplinary deductions existed, and where there existed among the employees the significant likelihood of future deductions, the employer could not manifest an intent to pay employees on a salary basis and, therefore, could not invoke the window of correction defense.\textsuperscript{546}

Revisions within FairPay 2004 allow for greater utilization of disciplinary deductions without loss of exemption status.\textsuperscript{547} Specifically, the Secretary relaxed her disciplinary-deduction rule and allowed for seven exceptions.\textsuperscript{548} First, absence from work for one or more full days for personal reasons (other than sickness or disability) may result in pay deductions.\textsuperscript{549} Second, absence from work for one or more full days for reasons of sickness or disability may result in pay deductions if the employer has a bona fide plan, policy, or practice of providing wage replacement benefits for such absences.\textsuperscript{550} Third, absence from work as a result of jury service, witness duty, or military service may result in pay deductions to offset any pay received by the employee for these services.\textsuperscript{551} Fourth, the violation of significant safety rules may result in good faith disciplinary deductions in pay.\textsuperscript{552} Fifth, unpaid suspension for disciplinary reasons may be imposed in increments of full work days provided that the employer has a written policy applicable to all employees.\textsuperscript{553} Sixth, an employer may prorate the first and last week of an employee’s work and deduct pay proportionately without violating the FLSA.\textsuperscript{554} Seventh, an employer may

\textsuperscript{542} Auer, 519 U.S. at 456.
\textsuperscript{543} Id.
\textsuperscript{544} Id. at 460-61.
\textsuperscript{545} Takacs, 246 F.3d at 780.
\textsuperscript{546} Id. at 782-83.
\textsuperscript{547} 29 C.F.R. § 541.602(b) (2004).
\textsuperscript{548} Id.
\textsuperscript{549} Id. § 541.602(b)(1).
\textsuperscript{550} Id. § 541.602(b)(2).
\textsuperscript{551} Id. § 541.602(b)(3).
\textsuperscript{552} Id. § 541.602(b)(4).
\textsuperscript{553} 29 C.F.R. § 541.602(b)(5) (2004).
\textsuperscript{554} Id. § 541.602(b)(6).
prorate the first and last week of an employee’s unpaid FMLA medical leave and
deduct pay proportionately without violating the FLSA.\textsuperscript{555}

The language of FairPay 2004 echoes the common law explanation of the
window of correction defense but expands its safe harbor provision.\textsuperscript{556} Under
FairPay 2004, an employer will not lose its exemption protections if it: (1) has a
clearly communicated policy against improper deductions; (2) has a complaint
mechanism for resolving disputes; (3) has a practice of reimbursement for
improper deductions; and (4) has a good faith commitment to comply in the
future.\textsuperscript{557} The aggrieved employee must demonstrate that the employer’s
violation was willful, which is done by showing continuous, improper deductions
after receiving employee complaints.\textsuperscript{558} Furthermore, isolated or inadvertent
disciplinary deductions will not result in a forfeiture of the exemption status.\textsuperscript{559}
Additionally, the safe harbor provisions of FairPay 2004 prevent the absolute
forfeiture of exemption status, limiting the impact of improper deductions to the
time period in which the violation occurred and to those employees similarly
classified and under the supervision of the same violating manager.\textsuperscript{560} Similarly
classified employees working for other managers or at other facilities will remain
exempt.\textsuperscript{561}

3. Modification of the Primary Duty Test

a. Concise Statement

FairPay 2004 modifies the Primary Duty Test by dropping the common law
reliance on the fifty percent rule of thumb.\textsuperscript{562} Under the new regulations, the
primary duty is the most important duty, not necessarily the most time-
consuming duty.\textsuperscript{563}

b. Detailed Examination

In determining if an employee is a bona fide executive, administrative, or
professional employee within the meaning of the FLSA, the Sixth Circuit has
adhered to a fifty percent rule of thumb when evaluating the employees’ primary
duty.\textsuperscript{564} According to the Sixth Circuit, as a rule of thumb, the performance of

\textsuperscript{555} Id. § 541.602(b)(7).
\textsuperscript{556} Id. § 541.603.
\textsuperscript{557} Id. § 541.603(d).
\textsuperscript{558} Id. § 541.603(a).
\textsuperscript{559} 29 C.F.R. § 541.603(c) (2004).
\textsuperscript{560} Id. § 541.603(c).
\textsuperscript{561} Id.
\textsuperscript{562} Id. § 541.700.
\textsuperscript{563} Id.
\textsuperscript{564} Ale v. TVA, 269 F.3d 680, 684 (6th Cir. 2001).
these employee’s primary duties should take over fifty percent of the allegedly exempt employee’s time. FairPay 2004 does not dismantle the fifty percent rule; however, it does offer courts additional criteria for consideration. In effect, courts should consider the relative importance of the exempt duties, the amount of time expended, the relative freedom from direct supervision, and the relationship between the employee’s salary in comparison to the salaries of other employees for the same kind of non-exempt work. Under FairPay 2004, the fifty percent rule remains viable in that employees spending more than fifty percent of their time performing exempt work will generally satisfy the primary duty test. However, the Secretary’s regulations no longer require fifty percent as the default analytical mechanism.

4. Revision of the Bona Fide Executive

a. Concise Statement

FairPay 2004 combines elements of the old “long” and “short” tests, requiring an executive to be a manager of the enterprise who customarily directs the work of two or more employees and has authority over hiring, promotions, and terminations. The new definition also includes a new exemption for business owners (at least 20% equity interest) actively engaged in the management of the business.

b. Detailed Examination

As observed in Ale v. TVA, the “short” test for determining whether an employee was properly classified as bona fide executive personnel turned on three factors. First, the employee should be paid on a salary or fee basis in excess of $250 weekly. Second, the employee’s primary duty should consist of the management of the enterprise in which the employee is employed and should include the management of two or more employees. Third, the employee should be required to exercise discretion and independent judgment. To determine an employee’s primary duty, the Sixth Circuit employed the “long”

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565 Id.
566 29 C.F.R. § 541.700(a) (2004).
567 Id.
568 Id. § 541.700(b).
569 Id.
570 Id. § 541.100(a).
571 Id. § 541.101.
572 Ale v. TVA, 269 F.3d 680, 684 (6th Cir. 2001) (citing 29 C.F.R. § 541.1(f) (2001)).
573 Id.
574 Id.
575 Id.
test as well as the Secretary of Labor’s additional factors, which included the employers authority to hire, fire, and promote subordinate staff. 576

FairPay 2004 not only abolished the “long” and “short” tests, it also modified the criteria by which bona fide executive personnel would be determined. 577 First, the bona fide executive employee must be engaged in the management of the entire business enterprise or, alternatively, a customarily recognized department or subdivision of the business enterprise. 578 In order to qualify as “management” under element one, FairPay establishes benchmarking factors to make this determination. 579 Second, the bona fide executive employee must customarily and regularly direct the work of two or more fulltime employees, 580 part-time employees are acceptable if in the aggregate they constitute two or more fulltime employees. 581 However, assistant managers who supervise in the manager’s absence will not qualify. 582 Likewise, shared supervision duties (where two managers share supervision duties of subordinates) will not qualify. 583 Finally, to be FLSA exempt, the bona fide executive employee must possess the authority to hire, promote, and fire other employees. 584

A new introduction by FairPay 2004 is the expanded definition of “executive,” which now covers part owners. 585 To qualify as an owner, co-owner, or part owner, the individual must possess at least a twenty percent equity interest in the business. 586 Additionally, in keeping with the historic interpretation of bona fide executive, the individual must also be actively engaged in the management of the enterprise. 587

5. Alteration of the Administrative Duties Test

a. Concise Statement

576 Id. (citing 29 C.F.R. § 541.102(b) (2001)).
577 29 C.F.R. § 541.100(a) (2004).
578 Id. § 541.100(a)(2).
579 Id. § 541.102. These factors include: (1) interviewing, selecting, and training employees; (2) setting and adjusting the pay and hours; (3) maintaining production or sales records; (4) appraising employee productivity and efficiency; (5) handling employee complaints and grievances; (6) disciplining employees; (7) planning and apportioning the workload; (8) providing for the safety and security of employees and property; (9) planning and controlling the budget; and (10) monitoring or implementing legal compliance measures. Id.
580 Id. § 541.100(a)(3).
581 Id. § 541.104(a).
582 Id. § 541.104(c).
583 29 C.F.R. § 541.104(d) (2004).
584 Id. § 541.100(a)(4).
585 Id. § 541.101.
586 Id.
587 Id.
In order to deter reliance on the production/administrative dichotomy, FairPay 2004 refines the test for bona fide administrative personnel and provides an updated list of job functions that the Secretary deems “administrative” in nature.\textsuperscript{588}

b. Detailed Examination

In the AEP Trilogy, the Sixth Circuit Court of Appeals encountered arguments advanced by AEP that any position which is not production in nature, must be administrative by default.\textsuperscript{589} The Sixth Circuit has consistently held that nothing in the statutory text could lead one to construe the FLSA as imposing a production/administrative dichotomy, yet the argument persists.\textsuperscript{590} In \textit{Schaefer v. Indiana Michigan Power Co.}, the Sixth Circuit stated the pre-FairPay test by which bona fide administrative personnel were determined.\textsuperscript{591} The pre-FairPay test required the presence of office or non-manual work that, as a primary duty, directly related to the management policies or general business operations.\textsuperscript{592} The new FairPay regulations eliminate the word “policies” from the definition of a bona fide administrative employee.\textsuperscript{593} In explaining this deletion, FairPay 2004 differentiates administrative work from production work by requiring the bona fide administrative employee to “directly . . . assist with the running or servicing of the business, as distinguished . . . from working on a manufacturing production line or selling a product in a retail or service establishment.”\textsuperscript{594} FairPay 2004 continues to delimit administrative work, thereby minimizing the production/administrative dichotomy by providing an updated and detailed, but not exhaustive, list of positions that the Secretary has deemed administrative in nature.\textsuperscript{595} All other remnants of the bona fide administrative personnel test—the discretion and independent judgment test—remain unchanged.\textsuperscript{596}

\begin{itemize}
\item \textsuperscript{588} \textit{Id.} §§ 541.200, 541.203.
\item \textsuperscript{589} \textit{See} \textit{Martin v. Indiana Mich. Power Co.}, 381 F.3d 574, 582 (6th Cir. 2004) (arguing that Martin's work must be administrative since it did not relate to AEP’s power production); Renfro v. Indiana Mich. Power Co., 370 F.3d 512, 517 (6th Cir. 2004) (arguing that Renfro's work must be administrative since it did not relate to AEP's power production); \textit{Schaefer v. Indiana Mich. Power Co.}, 358 F.3d 394, 402 (6th Cir. 2004) (arguing that Schaefer's work must be administrative in nature since it did not relate to AEP's power production).
\item \textsuperscript{590} \textit{Id.}
\item \textsuperscript{591} \textit{Schaefer}, 358 F.3d at 400.
\item \textsuperscript{592} \textit{Id.}
\item \textsuperscript{593} 29 C.F.R. § 541.200(a)(2) (2004).
\item \textsuperscript{594} \textit{Id.} § 541.201(a) (emphasis added).
\item \textsuperscript{595} \textit{Id.} § 541.201(b). This list includes: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; and legal and regulatory compliance. \textit{Id.}
\item \textsuperscript{596} \textit{Id.} § 541.200(a)(3).
\end{itemize}
6. Expansion of the “White Collar” Exemptions: The Highly Compensated Employee

It should be noted that FairPay 2004 creates a new exemption for employees making over $100,000 annually, so long as these employees operate in a bona fide executive, administrative, or professional capacity.\textsuperscript{597} Additionally, the $100,000 in compensation may come from salary alone or from a combination of salary, commission, and bonuses.\textsuperscript{598} However, the $100,000 threshold cannot be met through a combination of salary and fringe benefits.\textsuperscript{599} Importantly, if under a hybrid compensation plan the employee falls short of the $100,000 salary total, the employer may preserve the exemption by supplementing the salary to bring it into compliance within one month after the annual pay period ends.\textsuperscript{600}

C. Immediate Reaction to FairPay 2004

FairPay 2004 is in its infancy, but initial reaction has been mixed.\textsuperscript{601} Pro-business groups have generally received the new regulations with reserved praise.\textsuperscript{602} Citing the new rules as long overdue, U.S. Chamber of Commerce Vice President Randel Johnson said, "Although we are disappointed in some of the provisions, these reforms provide clearer guidance to both employers and workers."\textsuperscript{603} Michael Eastman, Labor Law Policy Director for the U.S. Chamber of Commerce, additionally has stated that, “[i]t all comes back to our initial goal, to cut down on lawsuits.”\textsuperscript{604} Retailing giants like Wal-Mart Stores Inc. and RadioShack Corp. heavily lobbied in favor of the revised rules as a result of having been exposed to numerous lawsuits alleging FLSA overtime violations.\textsuperscript{605}

On the other hand, critics counter that the Secretary’s response to the revisions “was akin to using a sledgehammer when a flyswatter was needed.”\textsuperscript{606} John Sweeney, President of the AFL-CIO labor federation, dismissed FairPay

\textsuperscript{597} Id. § 541.601(a).
\textsuperscript{598} Id. § 541.601(b)(1).
\textsuperscript{599} 29 C.F.R. § 541.601(b)(1) (2004).
\textsuperscript{600} Id. § 541.601(b)(3). The annual pay period may consist of a calendar year, a fiscal year, or an anniversary year. Id. If unspecified, the calendar year will apply. Id. § 541.601(b)(4).
\textsuperscript{602} Id.
\textsuperscript{605} Smitherman, supra note 603.
\textsuperscript{606} Workplace Fairness, supra note 601.
2004 as a “huge windfall for large corporations.” He continued, “[t]he new regulation will further discourage job growth” by encouraging businesses “to overwork their existing employees and refrain from hiring new workers.”

Senate Democrats, led by Senator Tom Harkin of Iowa, proposed legislation to bar the Labor Department from enacting the final regulations, but pressure from the White House proved fatal to their efforts. In a statement released after the final rules were published, Senator Harkin chided, “[a]s we say in Iowa, you can put lipstick on a pig, but guess what? It’s still a pig. Given this Administration’s track record, I remain skeptical and will need to read the fine print.”

IV. CONCLUSION

As has been demonstrated by this Survey, the humanitarian ideals that served as the foundation for the Fair Labor Standard Act of 1938 are ever-evolving, with FairPay 2004 being the most recent incarnation. The question remains as to whether the changes will be heralded or vilified by the courts, the legislature, and the public. It cannot reasonably be disputed, however, that increased clarity surrounding overtime and exemptions benefits both workers and employers.

A proper view of FairPay 2004 must be tempered with an understanding of the common-law interpretation of exemptions prior to the new legislation, which will serve as the framework for judicial interpretation of the new regulations. Balancing the consideration one gives to these unresolved issues against the backdrop of today’s FLSA reality will ensure that today’s practitioners are providing their clients both with insightful and foresightful wage and hour counsel.

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607 Smitherman, supra note 603.
608 Id.
609 MSNBC, supra note 604.
610 Id.
A SURVEY OF KENTUCKY MEDICAL MALPRACTICE LAW

by Robert L. Raper* and David M. Evans†

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I. INTRODUCTION

The appellate courts of the Commonwealth have been busy deciding medical malpractice cases since the subject was last surveyed.1 Two issues of first impression, wrongful birth and wrongful life, claims that, but for a doctor’s negligence, an expectant mother would have terminated her pregnancy, made their way in front of the Kentucky Supreme Court in Grubbs v. Barbourville Family Health Center, P.S.C.2 The high court held that a cause of action in tort does not exist as a matter of law for wrongful birth3 or wrongful life.4 However, the court held that parents may still have a cause of action for breach of contract for negligent prenatal screening.5

Turning to juror issues, the high court ruled that the presence or absence of cross-claims among co-defendants is not dispositive of whether their positions are antagonistic for the purpose of granting peremptory challenges.6 Instead, a number of factors must be considered.7 In addition, the court held that a current doctor-patient relationship between a party and a juror is sufficient to presume the possibility of bias.8

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2 120 S.W.3d 682, 684 (Ky. 2003).
3 Id. at 689.
4 Id. at 690.
5 Id. at 691.
7 Sommerkamp, 114 S.W.3d at 815.
8 Bowman, 135 S.W.3d at 402.
Several expert witness issues were decided by the Kentucky Supreme Court: the amount of money paid to an expert witness is always admissible on cross-examination, and evidence that an expert was retained by an opponent is relevant to the credibility of the expert’s testimony. In addition, the high court held that evidence of a settlement is admissible to show bias of an expert witness. Furthermore, the court of appeals held that a defendant’s medical expert may couch his testimony in terms of possibility rather than the reasonable medical probability required of plaintiff’s expert, and that an expert needs only adequate qualifications to testify.

The court of appeals made several rulings with respect to discovery, evidentiary and damages issues. The court affirmed that all evidence of habit and custom are inadmissible in Kentucky to prove conforming conduct, that the absence of pain and suffering damages does not render a jury verdict inadequate as a matter of law, and that the collateral source doctrine does not apply to medical expenses that are written off by the hospital. In addition, the court held that the work product doctrine applied to a pre-litigation consultation letter written by an attorney, that pain and suffering damages may be recovered by a partly conscious plaintiff, and that no relief from final judgment is permitted when events that occur after final judgment obviate the need for damages.

Vicarious liability issues were also decided on appeal. The Kentucky Supreme Court held that the expiration of the statute of limitations for suit against an agent does not bar suit against the principal. Moreover, the court of appeals held that the release of an agent bars recovery against the principal on the theory of vicarious liability.

Several other medical malpractice issues were decided by Kentucky courts. First, the supreme court announced a two-prong test to determine whether revocation of consent is effective when it is attempted during a medical procedure. The high court also held that mere suspicion that chronic pain was due to a defective surgical procedure is not enough to constitute discovery of the injury when plaintiff’s doctors were unable to determine the origin of the pain. Finally, the court of appeals held that the Kentucky Consumer Protection Act
does not apply to the alleged misconduct of a physician in the performance of a medical procedure, instead the Act applies only to the entrepreneurial, commercial, and business aspects of the medical practice.24

Because the Supreme Court of Kentucky was presented with the first impression issues of wrongful birth and wrongful life during this survey period, Part II of this article will present a brief overview of the birth torts: wrongful conception, wrongful birth, and wrongful life. In Part III, this article will examine the Kentucky cases involving the birth torts. Finally, in Part IV, this article will review the aforementioned recent appellate decisions involving important medical malpractice issues decided during this survey period.

II. OVERVIEW OF THE BIRTH TORTS

The birth torts are medical malpractice actions sounding in negligence. The plaintiffs in these actions claim that a child would not have been born but for the negligence of a physician.25 Though courts do not use uniform labels, the birth torts may be classified into three general categories based upon when the alleged negligence occurred and the identity of the plaintiff:26 (1) wrongful conception; (2) wrongful birth; and (3) wrongful life.27 Jurisdictions vary with respect to which causes of action are recognized and the types of damages that are available to successful plaintiffs.28

Wrongful conception involves physician negligence that results in pregnancy, typically involving a surgical procedure such as a tubal ligation or vasectomy.29 The operation is not effective, and the result is the birth of an unwanted (though usually healthy) child.30 The parents bring a medical malpractice action against the physician claiming various damages related to the pregnancy, birth, and cost of rearing the child to the age of majority.31 Some jurisdictions permit damages for the cost of raising a healthy child; many do not.32

Though wrongful conception actions are typically viewed as garden-variety medical malpractice cases,33 wrongful birth and wrongful life are hardly free of

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26 Id. at 1026-28.
27 Id.
30 Id.
31 Id.
32 Sarno, supra note 28, § 3.
33 Wilcoxon, supra note 25, at 1031.
These torts involve alleged acts of negligence that take place after conception, typically involving prenatal screening or counseling.\textsuperscript{34} Wrongful birth actions are brought by the parents, while wrongful life actions are brought by the child.\textsuperscript{35} "In a wrongful birth action, the parents allege that the defendant’s negligence precluded . . . an informed decision about whether to have the child and that they would have avoided conception or terminated the pregnancy had they been properly advised of the risk that the child would be severely unhealthy."\textsuperscript{36} "In a wrongful life action the child alleges that but for the defendant’s negligence . . . the child would not have been born and therefore would not have been forced to endure the suffering caused by his or her unhealthy condition."\textsuperscript{37}

Both wrongful birth and wrongful life claims necessarily involve the claim that, but for the negligence of the doctor, the mother would have had an abortion.\textsuperscript{38} Though the right to choose an abortion is not a legally controversial issue,\textsuperscript{39} the implications of that right with respect to the private relationship between doctor and patient are very much at issue in these cases.\textsuperscript{40} What is the proper remedy when a private actor negligently denies a person the right to choose, resulting in foreseeable economic damages?\textsuperscript{41} Wrongful birth actions are recognized in most jurisdictions,\textsuperscript{42} and parents can usually recover extraordinary medical, educational and living expenses until the child reaches the age of majority.\textsuperscript{43} Only a few jurisdictions permit wrongful life claims, with most courts refusing to recognize life with disabilities as a legally cognizable injury.\textsuperscript{44} When allowed, a successful wrongful life plaintiff may recover damages limited to the extraordinary expenses related to plaintiff’s disability, but not limited to those expenses occurring before the age of majority.\textsuperscript{45}

\textsuperscript{34} Id. at 1023.  
\textsuperscript{35} Id. at 1026-27.  
\textsuperscript{38} Id.  
\textsuperscript{39} Wilcoxon, supra note 25, at 1035.  
\textsuperscript{40} Planned Parenthood v. Casey, 505 U.S. 833, 846 (1994) (holding that the right to choose an abortion is a liberty protected by the Due Process Clause of the Fourteenth Amendment). \textit{See also Grubbs}, 120 S.W.3d at 693 (Keller, J., dissenting) (noting that the United States Supreme Court has held that a woman has a constitutional right to terminate her pregnancy).  
\textsuperscript{41} Wilcoxon, supra note 25, at 1036.  
\textsuperscript{42} Grubbs, 120 S.W.3d at 693 (Keller, J., dissenting).  
\textsuperscript{43} Wilcoxon, supra note 25, at 1031.  
\textsuperscript{44} Grubbs, 120 S.W.3d at 697 (Keller, J., dissenting) (citing Viccaro v. Milunsky, 551 N.E.2d 8, 10 (Mass. 1990)).  
\textsuperscript{45} Wilcoxon, supra note 25, at 1032.  
\textsuperscript{46} Id.
III. KENTUCKY BIRTH TORT CASES

A. Wrongful Conception

In Maggard v. McKelvey, the court of appeals held that damages for the cost of rearing an unwanted child are not permitted in an action for wrongful conception. The Plaintiff, Jerry Maggard, underwent a bilateral vasectomy that was performed by Dr. McKelvey. Mr. Maggard was motivated to undergo the procedure because his wife was unable to tolerate oral contraceptives and the couple had no desire to have more children. After the operation, Maggard submitted several semen samples to Dr. McKelvey to test for the presence of sperm. According to Mr. Maggard, and disputed by Dr. McKelvey, the doctor advised that it was safe for Mrs. Maggard to cease taking the oral contraceptives. Mrs. Maggard became pregnant and gave birth to a healthy boy. The couple brought a negligence claim against Dr. McKelvey and sought damages including $130,000 for the cost of rearing the child. The trial court dismissed the claim for child rearing expenses and subsequently granted summary judgment in favor of Dr. McKelvey. On appeal, the couple argued that the law of negligence supported an award of damages for child rearing costs.

The court agreed that the cost of rearing an unwanted child is a foreseeable result of a defective vasectomy, but nevertheless denied recovery on the basis of public policy. The court held that liability for the support of an unwanted child is far beyond the scope of a physician’s responsibility according to the expectations of both the medical profession and the public at large. Permissible damages include those that are “incidental to the pregnancy and birth, such as, pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages.”

The Supreme Court of Kentucky subsequently visited the issue of damages for child rearing costs in Schork v. Huber. Plaintiffs Sharon and Al Schork sued the Defendant, Dr. Huber, after an unsuccessful sterilization procedure on

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48 Id. at 48.
49 Id. at 45.
50 Id.
51 Id. at 46.
52 Id.
53 Maggard, 627 S.W.2d at 45.
54 Id.
55 Id. at 46.
56 Id. at 47.
57 Id.
58 Id. at 48.
59 Maggard, 627 S.W.2d at 48.
60 Id.
61 648 S.W.2d 861, 862 (Ky. 1983).
Sharon resulted in the birth of a healthy child. In a brief majority opinion by Justice Wintersheimer, the court affirmed Maggard, holding that child rearing damages are contrary to public policy. Though the physician’s negligence is unquestionably a substantial factor in the birth of the child, public policy bars recovery because the child’s existence cannot be considered an injury. The court found especially troubling the prospect that a negligent doctor could be forced to bear the financial burden of child rearing while the parents receive the benefit of having a healthy child. In dicta, Justice Wintersheimer made clear that “wrongful life is a contradiction in terms” and “is contrary to the public policy of this State as expressed by the legislature” and that any cause of action for wrongful life, wrongful birth or wrongful conception would be fashioned by the legislature and not the courts. The issues of wrongful birth and wrongful life, however, would not be heard by any court in the Commonwealth until twenty years after the Schork decision.

B. Wrongful Birth and Wrongful Life

In Grubbs v. Barbourville Family Health Center, P.S.C., the Supreme Court of Kentucky was faced with two issues of first impression in the Commonwealth: wrongful birth and wrongful life. Though Kentucky courts have previously heard wrongful conception cases on several occasions, no Kentucky case had previously involved medical negligence that occurred after conception and in time for a safe and legal abortion. Kentucky courts permit damages for wrongful conception that are related “to the pregnancy and birth, such as, pain and suffering, loss of consortium, medical and hospital expenses, and loss of wages.” The high court held, however, that Kentucky law does not permit tort recovery—by the parents or the child—when the negligent failure to diagnose an incurable fetal medical condition has denied parents the opportunity to choose to terminate the pregnancy. Although no cause of action may lie in tort for wrongful birth, the court in Grubbs nevertheless held that parents may sue for

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62 Id. at 862.
63 Id.
64 Id. at 863.
65 Id. at 862.
66 Id. at 863.
67 Schork, 648 S.W.2d at 863.
68 Id.
69 Id.
71 Id. at 684.
73 Grubbs, 120 S.W.3d at 689.
74 Id. at 690.
75 Id. at 689.
breach of contract for failure to properly diagnose and report an incurable fetal medical condition.\textsuperscript{76}

In \textit{Grubbs}, two cases were joined on appeal, both involving the allegedly negligent failure to diagnose severe fetal birth defects during prenatal ultrasound examinations.\textsuperscript{77} On April 19, 1996, Kimberly Grubbs underwent an ultrasound examination by Dr. B.R. Jung at the Barbourville Family Health Center.\textsuperscript{78} Mrs. Grubbs was approximately twenty-four weeks pregnant.\textsuperscript{79} Dr. Jung reported that the pregnancy was progressing normally.\textsuperscript{80} Approximately two months later, additional ultrasound procedures revealed that the fetus had spina bifida and hydrocephalus.\textsuperscript{81} On June 22, 1996, Mrs. Grubbs gave birth to Carlei Nacole Grubbs, who was born with spina bifida, hydrocephalus, paralysis, misshapen kidneys and poor vision.\textsuperscript{82} The Grubbs brought wrongful birth and wrongful life actions against Dr. Jung and the Barbourville Family Health Center alleging that the defendants negligently failed to detect and report the birth defects during the first ultrasound examination.\textsuperscript{83} The parents alleged that had they been informed of the defects during the first examination, they would have decided to terminate the pregnancy.\textsuperscript{84}

Carlei Grubbs’ wrongful life claim was dismissed on summary judgment.\textsuperscript{85} The trial court ruled that Carlei suffered no injury as a matter of law.\textsuperscript{86} Her parents’ claim for wrongful birth was dismissed on statute of limitations grounds.\textsuperscript{87} The claim was filed within a year of Carlei’s birth, but more than one year from the date that the misdiagnosis was discovered.\textsuperscript{88} The trial court held that the date of misdiagnosis was the date the condition was discovered, and on that date, the one-year statute of limitations began to run.\textsuperscript{89}

The second case involved a single ultrasound examination of Gretchen Bogan, approximately twenty-two weeks into her pregnancy.\textsuperscript{90} Her physician, Dr. Altman, reported that the results were normal.\textsuperscript{91} Several months later, Mrs. Bogan’s son, Nathan, was born prematurely by caesarian section.\textsuperscript{92} Nathan was born with an enlarged head, no eyes and no brain; his cranium occupied by a large cyst, and autonomic functions controlled by an underdeveloped brain
stem. Nathan was unable to speak, sit upright or control his bowels. “The Bogans [argued] in their brief that Nathan ‘cannot do anything but exist.’” The Bogans filed medical malpractice, wrongful birth and wrongful life claims, alleging that Dr. Altman’s negligent failure to detect the defects prevented them from having the opportunity to choose to terminate the pregnancy.

The wrongful birth and wrongful life claims were dismissed on summary judgment. The trial court allowed limited damages for pain, suffering and permanent scarring related to Mrs. Bogan’s caesarian section. The Bogans appealed the summary judgment dismissing their wrongful birth and wrongful life claims.

The two cases were consolidated on appeal. On appeal, the claims were analyzed under the Kentucky law of negligence, in spite of contrary dicta in Schork v. Huber that all birth related torts are matters for the legislature rather than the courts. The court held that all elements of negligence could be established for a wrongful birth claim, but a wrongful life claim must fail as a matter of law because the doctor owes no separate duty to the unborn child that is distinct from his duty to the mother.

Plaintiffs appealed to the Supreme Court of Kentucky. The court analyzed the claims under the traditional law of negligence, and held that neither wrongful birth nor wrongful life claims could support a cause of action in negligence as a matter of law. In order to state a cause of action in negligence in Kentucky, the plaintiff must prove “duty, breach and consequent injury.”

93 Id. at 685-86.
94 Id. at 686.
95 Id.
96 Id.
97 Grubbs, 120 S.W.3d at 686.
98 Id.
99 Id.
100 Id.
101 Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983). In refusing to permit damages for the rearing of a healthy but unwanted child, the court stated:

The establishment of a cause of action based on the matter of wrongful conception, wrongful life or wrongful birth is clearly within the purview of the legislature only. The enunciation of public policy is the domain of the General Assembly. We do not propose to invade their jurisdiction in any respect. The courts interpret the law. They do not enact legislation.

102 Id.
103 Grubbs, 120 S.W.3d at 686.
104 Id. at 687-88.
105 Id. at 684.
106 Id. at 687.
107 Id. at 689.
108 Id. at 690.
109 Grubbs, 120 S.W.3d at 687.
Turning first to wrongful birth, the court held that duty and breach could be established by a plaintiff. In Kentucky, the element of duty in a medical malpractice action requires that a physician exercise the “care and skill expected of a competent practitioner of the same class and under similar circumstances.” In addition, the physician owes a duty of fidelity to the patient that includes the duty to disclose the diagnosis of an incurable ailment. In this context, the court held that in order to prevail, a plaintiff must prove that a reasonably competent obstetrician would have correctly interpreted the ultrasound results and communicated the diagnosis to the patient. Viewing the allegations in the light most favorable to the plaintiff, the court held that the elements of duty and breach could feasibly be met by both plaintiffs. Both the misdiagnosis of the fetal medical condition and the failure to disclose medical information constitute breaches of a physician’s duty. Turning to the next element, consequent injury, a plaintiff must prove that the physician’s breach of duty proximately caused injury or death. In both cases the plaintiff argued that, but for the doctor’s negligence, the plaintiff would have been informed of the severity of the birth defects while abortion was a legal and medically sound option, and plaintiff would have ultimately chosen to terminate her pregnancy. The majority characterized the injury as the taking of an unwanted pregnancy to term, and held that the “loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, [is not] a cognizable legal injury.” The lack of a legally cognizable injury was also held to preclude, as a matter of law, a suit by the child for wrongful life.

Following the lead of the Supreme Court of North Carolina, the majority focused on the birth of the impaired child as the alleged injury, and rejected the notion that the birth of a child could constitute a legal injury under traditional tort law. To do so would lead to the “untraditional” conclusion ‘that the existence of a human life can constitute an injury cognizable at law.’

The court also found the boundaries of a wrongful birth tort to be disturbing, as courts would be forced to make arbitrary decisions regarding which

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109 Id. at 688.
110 Id. at 687.
111 Id. at 688.
112 Id.
113 Id.
114 Grubbs, 120 S.W.3d at 688.
115 Id.
116 Id.
117 Id.
118 Id. at 689.
119 Id. at 690.
120 See Azzolino v. Dingfelder, 337 S.E.2d 528, 532-34 (N.C. 1985) (holding that the injury alleged in all wrongful birth and wrongful life actions is the existence of a human life, and that such life, even severely impaired, cannot constitute a legal injury).
121 Grubbs, 120 S.W.3d at 688-89.
122 Id. at 689 (quoting Azzolino, 337 S.E.2d at 534).
undetected fetal traits should be actionable.\textsuperscript{123} This would require judicial determination of which characteristics make a person unfit or defective, and could quickly lead to suits by parents who were denied the opportunity to have an eugenic abortion.\textsuperscript{124} The court found that these questions counsel “great [judicial] restraint in recognizing such new and complex causes of action,”\textsuperscript{125} and make the legislature the most appropriate forum for their resolution.\textsuperscript{126}

Though recovery in tort was ruled out, the court held that a cause of action for breach of contract is not precluded.\textsuperscript{127} The fact that the misdiagnosed fetal condition was “incurable” does not relieve a doctor “of any proven contractual responsibility to report to patients the accurate results of diagnostic procedures.”\textsuperscript{128}

Justice Keller wrote separately to dissent.\textsuperscript{129} He began by acknowledging that a woman’s right to choose an abortion is a legal reality that, though still controversial and divisive, has been decided with finality by the nation’s high court.\textsuperscript{130} The fundamental issue is “whether . . . our common law should [recognize] a duty to exercise care in providing information that bears on that choice.”\textsuperscript{131}

In answering that question affirmatively, the dissent asserted that the right to choose an abortion “protects a distinctly personal interest,”\textsuperscript{132} that of self-determination.\textsuperscript{133} This interest in self-determination encompasses the personal decision whether to give birth to a child with birth defects, and gives rise to a doctor’s duty to disclose information “sufficient to enable [the patient] to make an informed and meaningful decision concerning whether or not to continue the pregnancy.”\textsuperscript{134} The essence of the injury is the “invasion of [the plaintiff’s] reproductive autonomy.”\textsuperscript{135} The compensable damages that result from this invasion include emotional distress caused by deprivation of the choice of whether to continue a troubled pregnancy and extraordinary medical expenses to care for the special needs of the child.\textsuperscript{136} Damages do not include compensation for the child’s deficiencies.\textsuperscript{137}

Justice Keller argued that once the injury is properly identified as an invasion of reproductive autonomy, the majority’s conclusion that there is no legally

\textsuperscript{123} Id. at 690.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 691.
\textsuperscript{126} Id. at 690.
\textsuperscript{127} Grubbs, 120 S.W.3d at 691.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 693.
\textsuperscript{130} Id.
\textsuperscript{131} Id. (quoting Smith v. Cote, 513 A.2d 341, 344 (N.H. 1986)).
\textsuperscript{132} Id. at 695 (quoting Canesi v. Wilson, 730 A.2d 805, 810 (N.J. 1999)).
\textsuperscript{133} Grubbs, 120 S.W.3d at 695.
\textsuperscript{134} Id. at 695-96 (quoting Canesi, 730 A.2d at 810-11).
\textsuperscript{135} Id. at 696.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
cognizable injury must fail. In addition, proper characterization of the injury avoids the majority’s confusion between the injury and the damages that provide compensation for the injury. The injury is deprivation of choice, and the damages include, among other things, extraordinary costs that result from “a physician’s violation of the patient’s right to make an informed procreative decision.”

Justice Keller noted that almost all jurisdictions that have heard wrongful birth actions have permitted the award of extraordinary expenses related to the child’s disability. Focusing on such expenses avoids the divisive philosophical debate over the value of an impaired life, and avoids an unjust result. Instead, Justice Keller argued that the majority’s decision, which allowed no damages in tort for wrongful birth, jeopardized the standard of professional conduct by denying, as a matter of law, that negligent doctors cause harm to their patients in the context of prenatal birth defect screening.

Though the dissent expressed profound disagreement with the majority’s analysis of wrongful birth, a unanimous court agreed that suit by the child for wrongful life cannot proceed because of a lack of injury. Following the Grubbs decision, it is clear that wrongful birth and wrongful life are not cognizable claims under Kentucky law.

IV. OTHER MEDICAL MALPRACTICE ISSUES

A. Juror Issues

1. Peremptory Challenges

In Sommerkamp v. Linton, the Supreme Court of Kentucky held that the presence or absence of cross-claims is not dispositive of whether co-defendants have antagonistic interests for the purpose of granting peremptory challenges.

Plaintiff sued two doctors for failure to diagnose and treat a soft tissue injury which resulted in the amputation of her right foot, left thumb and part of a finger. The co-defendants, a hand surgeon and a vascular surgeon, performed

138 Id.
139 Grubbs, 120 S.W.3d at 696.
140 Id. at 695.
141 Id. at 697.
142 Id. at 698.
143 Id. at 697.
144 Id. at 696.
145 Grubbs, 120 S.W.3d at 694.
146 Id.
147 114 S.W.3d 811 (Ky. 2003).
148 Id. at 816.
149 Id. at 814.
different procedures at various times. Plaintiff brought separate claims against each co-defendant, and each obtained separate counsel and filed separate answers. Neither defendant filed a cross-claim, and plaintiff filed an instruction for apportionment. The trial judge found that the interests of the co-defendants were antagonistic and awarded each four peremptory challenges, as prescribed by Kentucky Rule of Civil Procedure 47.03(1). At trial, the jury returned a verdict in favor of the defendants. The appeals court reversed, holding that the trial judge erred in granting defendants separate peremptory challenges. The appeals court found the lack of cross-claims dispositive in determining that the co-defendants did not have antagonistic interests.

The supreme court reversed, holding that the presence or absence of cross-claims is only a factor to be considered when determining whether co-defendants’ interests are antagonistic. The court identified a number of such factors:

1. Whether the coparties are charged with separate acts of negligence;
2. Whether they share a common theory of the case;
3. Whether they have filed cross claims;
4. Whether the defendants are represented by separate counsel;
5. Whether the alleged acts of negligence occurred at different times;
6. Whether the defendants have individual theories of defense; and
7. Whether fault will be subject to apportionment.

The court also noted that the adoption of comparative negligence and the law of apportionment have rendered cross-claims unnecessary because fault is automatically subject to apportionment by statute. Defense strategies involve

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150 Id.
151 Id.
152 Id. at 816.
153 Sommerkamp, 114 S.W.3d at 815.
154 Ky. R. Civ. P. 47.03(1). The rule states: “In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.” Id.
155 Sommerkamp, 114 S.W.3d at 814.
156 Id.
157 Id. at 816.
158 Id.
159 Id. at 815.
160 Id. at 817. See Ky. Rev. Stat. Ann. § 411.182 (Banks-Baldwin 2004) which states:

1. In all tort actions, including products liability actions, involving fault of more than one party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
denying all responsibility or shifting blame to the other defendant if necessary.\textsuperscript{161}

“[C]odefendants that are charged with separate acts of negligence [are deemed] to be antagonistic because [the statute] requires apportionment of the total liability.”\textsuperscript{162}

A similar result was obtained in \textit{Bowman ex rel. Bowman v. Perkins}.\textsuperscript{163}

Plaintiff brought a medical malpractice action against her physician, Dr. Perkins, and two other parties, Dr. Moses, and Dr. Moses’ medical clinic,\textsuperscript{164} alleging that Dr. Perkins negligently administered medication according to a policy or pattern of the clinic.\textsuperscript{165} No cross claims were filed.\textsuperscript{166} At trial, Dr. Perkins was allowed four peremptory challenges and Dr. Moses and his clinic were given four peremptory challenges collectively.\textsuperscript{167} Defendants prevailed by jury verdict.\textsuperscript{168} Plaintiff appealed arguing that the co-defendants’ interests were not antagonistic because no cross-claims were filed and each filed pretrial memorandums that defended the other.\textsuperscript{169} The verdict was affirmed on appeal.\textsuperscript{170}

The high court affirmed, holding that the presence or absence of cross-claims is only one factor to be considered, and that agreement between the parties on some points of proof does not preclude a finding that the parties’ interests are antagonistic.\textsuperscript{171}

\begin{itemize}
\item[(a)] The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
\item[(b)] The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
\item[(2)] In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
\item[(3)] The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
\item[(4)] A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons’ equitable share of the obligation, determined in accordance with the provisions of this section.
\end{itemize}

\textsuperscript{161} Sommerkamp, 114 S.W.3d at 816.
\textsuperscript{162} \textit{Id.} at 817 (emphasis added).
\textsuperscript{163} 135 S.W.3d 399, 401 (Ky. 2004).
\textsuperscript{164} \textit{Id.} at 400.
\textsuperscript{165} \textit{Id.} at 401.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.} at 400.
\textsuperscript{169} \textit{Bowman}, 135 S.W.3d at 401.
\textsuperscript{170} \textit{Id.} at 400.
\textsuperscript{171} \textit{Id.} at 401.
defendants were in conflict. The nature of plaintiff’s allegations required Dr. Moses to disclaim an agency relationship with Dr. Perkins, and show that Dr. Perkins made his medical decisions independently.

2. Juror Bias

The issue of juror bias was also raised in Bowman. Plaintiff argued that the trial court erred when two jurors were not dismissed for potential prejudice. The jurors, numbers 60 and 7, were current patients of Dr. Moses, however plaintiff was able to eliminate only one of the two on a peremptory challenge. In finding no error, the court of appeals relied on Altman v. Allen, which held that a former doctor-patient relationship does not, by itself, establish a presumption of bias. The supreme court reversed, holding that “a current and ongoing physician-patient relationship is such a close relationship where a trial court should presume the possibility of bias.” The court found such a relationship to be based on trust and confidence, particularly in rural areas served by few doctors.

B. Expert Witness Issues

1. Expert Witness Compensation

The Supreme Court of Kentucky addressed a single question in Tuttle v. Perry: to what extent is evidence of an expert’s compensation admissible. The plaintiff, the estate of Christopher Tuttle, brought suit against a doctor who failed to diagnose a thoracic aortic aneurism that ruptured days later taking Mr. Tuttle’s life. Defendant hired two expert witnesses who charged $5,000 and $2,000 per day to testify at trial, and several hundred dollars per hour to provide deposition testimony. The trial court excluded evidence of the experts’ compensation. Defendant prevailed by jury verdict, which was upheld on appeal.
The high court reversed, holding that the amount of money paid to an expert witness for his testimony, “great or small,” is always admissible on cross-examination. Such information allows a jury to determine the extent to which an expert’s testimony may be influenced by his compensation. Previously, Kentucky law discouraged admission of any evidence of an expert’s compensation, but permitted admission of such evidence at the discretion of the trial court. The court noted that in the thirty-eight years since this issue was squarely addressed by the high court, the role of expert testimony has become increasingly important. Expert testimony is used more frequently and its admissibility has been an important issue in front of the United States Supreme Court. In addition, experts are highly compensated, which has led to the public perception of bias in favor of their employer. The court expressly rejected any prerequisite to the admission of evidence of the amount of an expert’s compensation, and left to the trial court the discretion to limit cross-examination to avoid collateral matters and diversion of the jury.

2. Expert Witness Retention and Bias

Two issues involving expert witness testimony were raised by the plaintiffs on appeal to the high court in *Miller ex rel. Monticello Banking Company v. Marymount Medical Center*. The supreme court held: (1) that evidence that an expert was originally hired and compensated by the opposing party is relevant to the credibility of the expert’s testimony and (2) that evidence of a settlement is admissible to show bias of an expert witness. Rebecca Miller was brought to Marymount Medical Center to give birth. She delivered a healthy girl by caesarian section, but developed respiratory problems. After chest x-ray studies and blood gas readings, doctors treated Mrs. Miller for pneumonia by administering antibiotics and oxygen. In addition, she was given injections of Demerol for pain and stress. Ten minutes after one such injection, she was discovered in a state of comatose and

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187 *Tuttle*, 82 S.W.3d at 924.
188 *Id.*
189 *Id.*
190 *Id.* at 922-23 (citing *Current v. Columbia Gas of Ky.*, 383 S.W.2d 139, 144 (Ky. 1964)).
191 *Id.* at 923.
192 *Id.*
193 *Tuttle*, 82 S.W.3d at 923.
194 *Id.* at 924.
195 125 S.W.3d 274, 278 (Ky. 2004).
196 *Id.* at 282.
197 *Id.* at 281-82.
198 *Id.* at 276.
199 *Id.*
200 *Id.*
201 *Miller*, 125 S.W.3d at 276.
respiratory arrest. She was resuscitated five minutes later and was able to breathe on her own, but never regained consciousness.

Mrs. Miller brought suit against two doctors and the Marymount Medical Center alleging medical malpractice. Her husband Timothy and daughter Rachel Ann brought suit against the doctors for loss of consortium. Plaintiffs settled with the doctors, and the claims against Marymount went to trial. Plaintiffs’ two expert witnesses agreed that earlier treatment by intubation and 100% oxygen could have prevented the respiratory arrest. During depositions before settlement, plaintiffs’ experts did not criticize the treatment administered by the nurses, with the exception of the Demerol injection prior to respiratory arrest. Plaintiffs also retained a third expert, Dr. Robertson, who was identified as a trial witness, and provided a pre-trial deposition that was also not critical of the nursing care provided by the hospital. Plaintiffs decided not to call Dr. Robertson. However, Marymount read Dr. Robertson’s deposition into evidence at trial to show that the care provided by the nurses was not negligent. Marymount prevailed by jury verdict, and the plaintiffs raised a number of issues on appeal.

Plaintiffs argued that the trial court erred when it permitted Marymount to inform the jury that Dr. Robertson, whose pre-trial deposition Marymount read into evidence, was originally retained by plaintiffs. Applying Tuttle v. Perry, the court held that the fact that an expert was retained by a particular party and the amount of compensation paid are “highly relevant to the issue of the expert’s credibility,” even when the witness was retained by an opposing party. The court dismissed persuasive authority suggesting that such evidence is unduly prejudicial, noting that Marymount would have been permitted to cross examine Dr. Robertson about her retention arrangements had

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202 Id.
203 Id.
204 Id. at 277.
205 Id.
206 Id.
207 Miller, 125 S.W.3d at 277.
208 Id. at 279.
209 Id. at 284.
210 Id. at 282.
211 Id.
212 Id.
213 Miller, 125 S.W.3d at 277.
214 Id. at 278.
215 Id. at 282.
216 82 S.W.3d 920, 924 (2002) (holding that the amount of an expert’s compensation is always admissible).
217 Miller, 125 S.W.3d at 282.
218 Id.
the plaintiffs called her to testify.\textsuperscript{220} Furthermore, the court did not find that Marymount was bolstering Dr. Robertson’s testimony because it is routine practice to ask preliminary questions of a witness that relate to credibility or bias.\textsuperscript{221} Plaintiffs’ argument that such evidence will have a chilling effect on the retention of experts was dismissed because consultations are confidential under Kentucky law, while depositions of testifying witnesses are subject to discovery.\textsuperscript{222}

Plaintiffs also asserted that the trial court erred when it permitted evidence of the prior settlements to be admitted during cross-examination of plaintiffs’ experts.\textsuperscript{223} After settling with the doctors, plaintiffs’ experts changed their testimony to criticize the nurses for failing to order repeat blood gases.\textsuperscript{224} On cross-examination, both experts admitted to overlooking information in the medical records—mistakes they discovered after plaintiff settled with the doctors.\textsuperscript{225} Plaintiffs argued that any evidence of the fact or amount of a settlement with co-defendants is per se inadmissible.\textsuperscript{226} In rejecting plaintiffs’ assertion, the court emphasized that Kentucky Rule of Evidence 408\textsuperscript{227} expressly permits the admission of evidence of a settlement to prove bias or prejudice of a witness,\textsuperscript{228} and such testimony provides a motive for an expert’s change of

\textsuperscript{220} \textit{Miller}, 125 S.W.3d at 283.
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.} at 284. See \textit{KY. R. CIV. P. 26.02(4)(b)}. The rule states:

\begin{quote}
A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
\end{quote}

\textit{Id.} See also \textit{KY. R. CIV. P. 32.01} (prescribing use of depositions).
\textsuperscript{223} \textit{Id.} at 280.
\textsuperscript{224} \textit{Id.} at 279-80.
\textsuperscript{225} \textit{Id.} at 280.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{KY. R. EVID. 408}. The rule states:

\begin{quote}
Evidence of:
(1) Furnishing or offering or promising to furnish; or
(2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.
\end{quote}

\textit{Id.}
\textsuperscript{228} \textit{Miller}, 125 S.W.3d at 280-82.
The court further held that evidence of bias is always relevant and never “collateral[,] and may always be proved to enable the jury to estimate credibility.”

3. Certainty of Defense Expert’s Testimony

In *Sakler v. Anesthesiology Associates, P.S.C.*, the court of appeals was faced with the question of whether an expert testifying for the defense may couch his testimony in terms of possibilities rather than reasonable medical probabilities. Plaintiff Ruth Sakler underwent hip surgery under general anesthesia in conjunction with endotracheal intubation. After surgery, Mrs. Sakler suffered from vocal cord paralysis and difficulty swallowing, requiring a feeding tube and a tracheotomy to assist her breathing. Mrs. Sakler and her husband sued Anesthesia Associates, the anesthesiologist and the nurse anesthetist, alleging that the intubation was negligently performed. The jury returned a verdict for the defendants.

On appeal, the Saklers argued that defense expert testimony should not have been admitted because it was not based on reasonable medical probabilities. Instead, plaintiffs pointed to several statements of Dr. Jeffery Bumpous, an otolaryngologist, that suggested a number of alternative theories of causation to explain Mrs. Sakler’s post-operative condition. The Saklers asserted that all medical expert testimony must be based on reasonable medical probability.

The court held that a defendant’s medical expert may couch his testimony in terms of possibility to rebut a plaintiff’s expert, who must testify in terms of a reasonable medical probability. If the plaintiff has established a prima facie case, defendant must only rebut or discredit one element of plaintiff’s cause of action. Defendant need not prove an alternative theory of causation in order to prevail. Otherwise, the burden would shift to the defendant to exculpate himself by proving some distinct theory of causation, a far cry from merely casting doubt on plaintiff’s theory.

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229 Id. at 281.
230 Id.
231 Id. at 282 (quoting Parsley v. Commonwealth, 306 S.W.2d 284, 285 (Ky. 1957)).
233 Id. at 212.
234 Id. at 211.
235 Id. at 211-12.
236 Id. at 212.
237 Id.
238 *Sakler*, 50 S.W.3d at 212.
239 Id. at 212-13.
240 Id. at 212.
241 Id. at 213.
242 Id. at 214.
243 Id.
244 *Sakler*, 50 S.W.3d at 214.
4. Qualification to Testify as Expert

In *Thomas v. Greenview Hospital, Inc.*, the defendant, Greenview Hospital, argued that the admission of a nurse’s expert testimony was in error because her training and experience were insufficient to provide testimony about the proper treatment of a pressure ulcer. The nurse, Holly Strader, served as director of a home health services provider that served many elderly non-ambulatory clients, treated pressure ulcers in an emergency room, and was a supervisor at a small hospital. Greenview argued that she was not qualified to testify because “she was not certified in geriatrics or wound care, never taught geriatrics or nursing, and never worked in a nursing home.” The court rejected Greenview’s arguments because they were relevant to the credibility of the witness, not to her qualifications to testify. For admissibility, Kentucky law only requires that an expert have “adequate, rather than outstanding qualifications.” It is sufficient that the expert have “some knowledge of the area.” So long as this threshold requirement is met, the testimony is admissible. However, the expert’s level of education, training and experience may be considered by the jury when deciding the weight to give the testimony. The court held that the trial court did not abuse its discretion in finding that Ms. Strader had the minimal level of training and practical experience necessary to qualify as an expert witness.

C. Discovery, Evidentiary, and Damages Issues

1. Evidence of Routine Conduct; Absence of Pain and Suffering Damages; Collateral Source Doctrine

The court of appeals also heard several discovery, evidentiary, and damages issues in *Thomas v. Greenview Hospital, Inc.* The estate of Lena Rhodes brought an action for malpractice against Greenview Hospital for allegedly negligent treatment that Ms. Rhodes received prior to her death. Upon her admission to Greenview Hospital for dialysis, Ms. Rhodes was suffering from a number of serious medical problems, including end stage renal disease, diabetes,
and congestive heart failure. Subsequently, while attempting to get up from her chair, she fell and broke her hip. Due to the injury, she was confined to her bed, and her doctor ordered that she be turned every two hours or as needed. These orders were consistent with the hospital’s procedures. Ms. Rhodes’ condition worsened after she developed a pressure ulcer that did not respond to treatment and became severely infected. Ms. Rhodes died of chronic renal failure. The estate prevailed with a jury verdict of $62,000, which included medical expenses and punitive damages. Nothing was awarded for mental and physical pain and suffering. Both parties appealed raising multiple issues.

The court first addressed plaintiff’s argument that testimony about Greenview’s policy of frequently turning bedridden patients is prohibited “habit” evidence, offered to show that the hospital staff did in fact turn Ms. Rhodes at the prescribed intervals. Greenview argued that the evidence pertained to the hospital’s custom, not an individual’s habit, and that evidence of an organization’s custom is admissible in every other jurisdiction. A unanimous court held that Kentucky law precludes the admission of all evidence of habit and custom to prove conforming conduct, “an extreme minority position” that was affirmed by a plurality of the high court in Burchett v. Commonwealth. However, Greenview prevailed on this issue because the plaintiff opened the door to the evidence. Plaintiff questioned the nurses about the absence of records that Ms. Rhodes had been turned regularly. The nurses pointed out entries that indicated that the hospital’s safety rounds had been performed. On cross-examination by Greenview, the nurses described the hospital’s routine safety procedures for turning bedridden patients. The court held that Greenview’s cross-examination was proper because the hospital’s safety procedures became relevant to explain entries in the medical records offered by plaintiff.

257 Thomas, 127 S.W.3d at 666.
258 Id.
259 Id. at 667.
260 Id.
261 Id.
262 Id.
263 Thomas, 127 S.W.3d at 668.
264 Id.
265 Id. at 666.
266 Id. at 669.
267 Id.
268 Id. at 670.
269 Thomas, 127 S.W.3d at 670.
270 98 S.W.3d 492, 496-99 (Ky. 2003) (holding that habit evidence is never admissible because it leads to undue prejudice, confusion of the issues, and undue delay).
271 Thomas, 127 S.W.3d at 671.
Turning to the jury’s failure to award pain and suffering damages, plaintiff argued that it was entitled to a new trial because the absence of such damages rendered the verdict inadequate as a matter of law. Kentucky law does not require an award of damages for pain and suffering when medical expenses are awarded, instead, the jury verdict must be supported by the underlying evidence. Applying the clearly-erroneous standard, the court held that the jury verdict was supported by the conflicting evidence with respect to Ms. Rhodes’ perception of pain from the pressure ulcer. Contraindicating pain and suffering damages was evidence that her advanced diabetic state diminished her sensitivity to pain, that she declined pain medication for her hip injury, and that she repositioned herself in a manner that would aggravate pain caused by the pressure ulcer.

Greenview appealed the admission of evidence of medical expenses that it originally charged the plaintiff but later wrote off. Plaintiff argued that the collateral source rule prohibited exclusion of evidence relating to the full amount of medical expenses. Greenview argued that the collateral source rule did not apply to this evidence, because the charges were written off and not subject to indemnification or payment by third parties. The court agreed with Greenview that the collateral source doctrine did not apply to medical expenses that are written off, but held that the evidence was nevertheless admissible because it was relevant to plaintiff’s claim of pain and suffering. The amount of medical expenses originally charged was indicative of the level of treatment received by Ms. Rhodes, and thus was helpful to the jury when determining the extent of pain and suffering.

2. Work Product Doctrine; Pain and Suffering Damages; Relief from Final Judgment

The issues of work product privilege, pain and suffering damages, and relief from final judgment were raised in Alliant Hospitals, Inc. v. Benham. Zachary Benham was born with severe brain damage, which left him in a semi-conscious state. His parents sued the doctor and the hospital in which he was born alleging medical malpractice. Plaintiffs asserted two theories of recovery. First, plaintiffs alleged that the doctor misused a vacuum extractor device which caused cerebral bleeding. Second, plaintiffs alleged that Zachary

276 Id. at 672.
277 Thomas, 127 S.W.3d at 672. See also Miller v. Swift, 42 S.W.3d 599, 602 (Ky. 2001) (holding that a jury is not required to award damages for pain and suffering whenever it awards medical expenses).
278 Thomas, 127 S.W.3d at 672.
279 Id.
280 Id. at 674.
281 Id.
282 Id. at 675.
283 Id.
284 Thomas, 127 S.W.3d at 675.
was injured before labor, and that his attending nurses negligently failed to recognize the indications of his distress and take appropriate action. The doctor was exonerated, and plaintiffs received a final judgment of approximately $3 million from the hospital, including approximately $2 million for future medical expenses. After final judgment and before defendant’s post-trial motions were heard, Zachary passed away. The hospital appealed alleging three errors. First, a pre-litigation consultation letter written by plaintiffs’ counsel should have been admitted into evidence. Second, plaintiffs were not entitled to pain and suffering damages because the evidence was insufficient to prove that Zachary could perceive pain given the nature and severity of his injury. Finally, defendant argued that it was entitled to relief from a portion of the judgment because Zachary’s death obviated the need for future medical expenses.

The work product doctrine was held to apply to a pre-litigation consultation letter written by the plaintiffs’ attorney. The letter, written to a consultant, allegedly recited the opinion of plaintiffs’ expert about the cause of Zachary’s injury. Defense counsel, over plaintiffs’ objection, was permitted to depose the consultant regarding the letter, and used the letter to cross-examine the expert. When defendant moved to introduce the letter into evidence, the trial court sustained the plaintiffs’ objection, ruling that the document was privileged work product.

Defendant appealed and advanced several arguments why the privilege should not apply. Defendant argued that the work product doctrine should be “narrowly cabined” because it is contrary to the court’s truth finding function. The court acknowledged a trend toward disclosure of materials relied upon by testifying experts and the importance of facilitating cross-examination. The court refused, however, to make an exception, stressing that

291 Alliant, 105 S.W.3d at 475.
292 Id.
293 Id.
294 Id.
295 Id.
296 Id.
297 Id.
298 Id.
299 Id.
300 Id.
301 Id.
302 Id.
303 Alliant, 105 S.W.3d at 475.
304 Id.
305 Id.
the privilege is useful when applied to pre-litigation consultations because it “enable[s] and . . . encourage[s] plaintiff’s counsel to assess the client’s claim prior to filing suit.”

Defendant’s other arguments—that the same information was disclosed in other documents and that the plaintiff’s “permitted” use of the letter in deposition—were summarily rejected.

Next, the court turned to whether the plaintiffs could recover damages for pain and suffering when Zachary was born with severe brain injuries that left him impaired and only partly conscious. Defendant argued that the plaintiffs failed to prove that Zachary was capable of perceiving pain given his injuries, and that evidence of his injuries suggested that he could not. Following *Vitale v. Henchey*, the court held that a person in a partly conscious state may recover pain and suffering damages. The court found persuasive the fact that Zachary, though obviously impaired, was responsive to his surroundings, especially his occasional expression of displeasure with the inattention of his father. Overall, the evidence was sufficient to support the jury’s finding that Zachary was capable of feeling pain.

Finally, the court addressed defendant’s request for relief from the final judgment awarding approximately $2 million for future medical expenses that were rendered unnecessary because of Zachary’s subsequent death. Defendant argued that the judgment should not be treated as final because post-trial motions were still pending, and, alternatively, that relief from final judgment is permitted under Kentucky Rule of Civil Procedure 60.02, subsections (e) or (f), which permit relief when the judgment is no longer equitable or when there is an extraordinary reason justifying relief. The court held that the judgment was

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306 Id.
307 Id. at 476-77.
308 Id. at 477.
309 *Alliant*, 105 S.W.3d at 477.
310 24 S.W.3d 651, 659 (Ky. 2000) (holding that plaintiff’s claim for pain and suffering damages presented a jury question when plaintiff’s only signs of consciousness were movement of her extremities and flinching of her eyes in response to her name).
311 *Alliant*, 105 S.W.3d at 477.
312 Id.
313 Id.
314 Id. at 478.
315 Id. See KY. R. CIV. P. 60.02, stating:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) *newly discovered evidence* which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not
final upon entry by the clerk, and that the defendant was not entitled to relief from final judgment under the statute. The court recognized the conflict between finality of judgment and the court’s desire to base judgments on the truth. This conflict is addressed by the statute, which permits relief from final judgment only under limited circumstances. The court rejected defendant’s argument that either subsection (e) or (f) applied. Instead, the court held that only subsection (b), which permits relief “upon the ground of ‘newly discovered evidence,’” applied to the case at bar, and that newly discovered evidence includes “only evidence in existence before judgment.” Damage awards for future expenses are based on predictions or estimates, supported by expert testimony, with an expectation of finality on the part of both parties. The court refused to disturb the trial court’s conclusion that it had fulfilled its truth-finding function under the circumstances by carefully considering the question of future needs after becoming well informed of the facts.

D. Vicarious Liability

1. Statute of Limitations Does Not Bar Suit Against Principal

In Cohen v. Alliant Enterprises, Inc., the Supreme Court of Kentucky addressed the question of whether a hospital may be held vicariously liable for the negligent acts of its agent, a doctor, when the statute of limitations for bringing a negligence action against the doctor had expired. In answering that question affirmatively, the court held that “[i]t is the negligence of the servant that is imputed to the master, not the liability.” Plaintiff, Cohen, was treated at defendant’s medical center by Dr. Ewing for an injury to his foot.
examined a small puncture wound, found no foreign matter, and told Cohen to soak his foot and seek treatment in case of infection. Approximately seven months later, Cohen underwent surgery to remove a wooden splinter. Cohen filed suit naming the defendant medical center and a Dr. Thomas, who was not involved in Cohen’s treatment. By the time the mistake was discovered, the statute of limitations against Dr. Ewing had expired.

Defendant argued that it could not be held vicariously liable for Dr. Ewing’s negligence because suit against the doctor was barred by the statute of limitations. Defendant relied on certain language in *Copeland v. Humana of Kentucky, Inc.* suggesting that the master is not liable for acts of the servant so long as the servant is free from liability. The high court dismissed that statement as dicta relating to the wording of a settlement agreement. The supreme court held instead that *Copeland* stood for the proposition that settlement with the agent precludes recovery from the principal on the theory of vicarious liability. The court drew an analogy between the statute of limitations and the now-defunct doctrine of interspousal immunity. Formerly, Kentucky law did not permit an employer to benefit from interspousal immunity when an employee negligently injured his or her spouse while on the job. Likewise, the employer is not shielded from vicarious liability merely because the statute of limitations has run against the employee. The court also found no merit to defendant’s argument that plaintiff could not proceed against the principal alone after having dropped the agent from the suit.

Justice Johnstone dissented arguing that a viable cause of action for negligence against the agent must exist before the principal can be held vicariously liable, because the principal’s liability is secondary to or derivative of the agent’s liability. Justice Johnstone noted the absence of a single Kentucky case where a principal was held vicariously liable without a finding that the agent was liable as well.

2. Release of Agent Bars Suit Against Principal

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331 Id.
332 Id.
333 *Cohen*, 60 S.W.3d at 537.
334 Id. at 537-38.
335 Id. at 538.
337 *Cohen*, 60 S.W.3d at 538.
338 Id. at 538-39.
339 Id. at 538.
340 Id.
341 Id.
342 Id.
343 *Cohen*, 60 S.W.3d at 539.
344 Id. at 540.
345 Id.
In *Waddle v. Galen of Kentucky, Inc.*, Plaintiff, Gerold Waddle, was injured in a motorcycle accident and was treated by Dr. Brown at a hospital owned by Galen of Kentucky. Plaintiff alleged that Dr. Brown negligently delayed his surgery, causing complications. Plaintiff brought a medical malpractice action against Doctor Brown and Galen. Plaintiff’s claim did not allege any theory of liability against Galen other than vicarious liability under the theory of ostensible agency. Plaintiff voluntarily dismissed the action against Dr. Brown, apparently after receiving $9,900 from Dr. Brown’s insurance carrier as compensation for his costs. Plaintiff intended to proceed solely against Galen. However, the trial court dismissed the claim, holding that the voluntary dismissal of Dr. Brown released Galen of its liability as principal under the theory of ostensible agency.

The plaintiff appealed arguing that the voluntary dismissal was not a release, and, alternatively, that a release of the agent does not necessarily operate as a release of the principal. In rejecting these arguments, a unanimous court first held that the oral agreement to dismiss the claim against Dr. Brown in exchange for $9,900 was a release because it was a binding contract supported by valuable consideration. Next, the court relied on *Copeland v. Humana of Kentucky, Inc.* in holding that the release precluded plaintiff from recovering against Galen on the theory of vicarious liability. Since Galen’s liability as principal was derived solely from the alleged negligence of its agent, Dr. Brown, the release of Dr. Brown barred recovery from Galen on the theory of vicarious liability. The court found that plaintiff’s reliance on *Cohen v. Alliant Enterprises, Inc.* was misplaced. *Cohen* was distinguished because that case did not involve a settlement or other discharge of the doctor-agent’s negligence.

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347 Id. at 365.
348 Id. at 362.
349 Id.
350 Id.
351 Id. at 363.
352 *Waddle*, 131 S.W.3d at 363.
353 Id. at 363 n.7.
354 Id. at 363.
355 Id.
356 Id. at 363-64.
357 Id. at 365.
359 *Waddle*, 131 S.W.3d at 366.
360 Id.
361 Id.
362 Id. at 366-67.
E. Miscellaneous Issues

1. Revocation of Consent

In *Coulter v. Thomas*, the Kentucky high court announced a test to determine whether a patient has effectively revoked consent to a medical procedure while the procedure is in progress. Plaintiff Shirley Coulter complained of extreme pain when an automatic blood pressure cuff was placed on her arm during a surgical procedure. According to Ms. Coulter, she demanded that the cuff be removed. Dr. Thomas, on the other hand, testified that Ms. Coulter only complained of pain. Before the cuff was removed, it inflated at least one more time allegedly causing severe and permanent injury to her arm below the elbow. Plaintiff filed suit against her physician, Dr. Thomas, and the medical center alleging medical malpractice for failure to obtain informed consent to use the automatic blood pressure cuff, and for battery because the cuff remained operating after she revoked consent. The trial court refused to give a jury instruction on the battery claim, and the defendants prevailed by jury verdict. On appeal, plaintiff argued that she effectively revoked consent to use the cuff, therefore her battery claim should have been permitted.

The court held that two elements must be present in order for a patient to effectively revoke consent during a medical procedure. First, the patient must unequivocally act or speak “from a clear and rational mind . . . such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn.” Second, withdrawal of the treatment must not be “detrimental to the patient’s health or life from a medical viewpoint.” The court held that summary judgment was improper because a question of fact existed as to whether Ms. Coulter effectively revoked consent. Evidence was presented that supported both elements necessary to prove revocation, including Ms. Coulter’s testimony that she commanded the staff to “[t]ake it off,” and the fact that removal of the cuff caused no complications to

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363 33 S.W.3d 522 (Ky. 2000).
364 Id. at 524-25.
365 Id. at 523.
366 Id.
367 Id. at 524.
368 Id. at 523.
369 *Coulter*, 33 S.W.3d at 523.
370 Id.
371 Id.
372 Id. at 524.
373 *Id.* (quoting Mims v. Boland, 138 S.E.2d 902, 905 (Ga. Ct. App. 1964)).
374 *Id.* (quoting Mims, 138 S.E.2d at 905).
375 *Coulter*, 33 S.W.3d at 524.
376 *Id.*
Because plaintiff claimed that she revoked consent, the jury should have received an instruction for battery.378

2. Statute of Limitations: Time of Discovery

The high court in Wiseman v. Alliant Hospitals, Inc.379 held that mere suspicion that unexplainable chronic pain was caused by a defective medical procedure does not constitute discovery of the injury for the purpose of the statute of limitations.380 In 1989, Deborah Wiseman underwent a procedure to remove a portion of her cervix.381 After the procedure, she complained of pain around her tailbone.382 Ms. Wiseman was subsequently treated for a broken tailbone, but continued to experience undiagnosed pain in her lower back for a number of years.383 On January 16, 1996, she underwent surgery on a lesion that had developed on her buttocks.384 A piece of a uterine probe was discovered inside the wound, about three-quarters of an inch below the surface of the skin.385 Eleven months after discovery of the probe, Ms. Wiseman filed suit against Dr. Ulfe, her gynecologist.386 The trial court granted summary judgment in favor of the doctor, ruling that the cause of action had accrued on or before June 1994.387 On appeal, plaintiff argued that she had no way to know that the probe was left inside her body, that subsequent medical examinations failed to identify the origin of the pain, and that mere suspicion that the pain was caused by complications of surgery was itself insufficient to trigger the running of the statute of limitations.

In reversing the summary judgment, the court recognized that a cause of action accrues only when the plaintiff discovers the injury—the malpractice—and not merely the harmful condition.388 Though plaintiff suspected that complications from her operation caused the pain, the court held that the cause of action against Dr. Ulfe did not accrue until plaintiff discovered the cervical probe, at which time the “injury became objectively ascertainable” and plaintiff became aware “that she had a viable claim for medical malpractice.”389 Prior to discovery of the probe, plaintiff could only rely on the expertise and skill of her physicians.390

377 Id. at 524-25.
378 Id. at 525.
379 37 S.W.3d 709 (Ky. 2000).
380 Id. at 713.
381 Id. at 710.
382 Id. at 711.
383 Id.
384 Id.
385 Wiseman, 37 S.W.3d at 711.
386 Id.
387 Id.
388 Id. at 711-12.
389 Id. at 712.
390 Id. at 713.
391 Wiseman, 37 S.W.3d at 713.
3. Physician’s Liability Under the Kentucky Consumer Protection Act

In Simmons v. Stephenson, the court of appeals held that the Kentucky Consumer Protection Act does not apply to the misconduct of a physician in the performance of a medical procedure. The plaintiff, Robert Simmons, underwent eye surgery to correct a cataract. After surgery Simmons complained of pain and visual problems, and later discovered that a lens fragment remained in his eye, requiring corrective surgery. Simmons filed a pro se action against his physician, Dr. Stephenson, alleging violation of the Consumer Protection Act, which states, in part, that “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful.” More specifically, plaintiff alleged that Dr. Stephenson engaged in deceptive and misleading conduct when he failed to notify plaintiff of the lens fragment and the need for corrective treatment. Plaintiff’s complaint did not include any expert medical proof to establish negligence. Defendant was granted summary judgment.

The court held that the term “trade or commerce” in the statute does not include the performance of surgery. A physician’s conduct may constitute trade or commerce only if it is related to the entrepreneurial, commercial or business aspects of the medical practice. Because the allegations related solely to the surgery and medical treatment provided afterward, plaintiff did not state a claim under the Act. The court further held that the defendant was entitled to summary judgment on any negligence claim because the complaint omitted expert medical proof of any such negligence.

V. CONCLUSION

392 84 S.W.3d 926 (Ky. Ct. App. 2002).
393 Id. at 928.
394 Id. at 927.
395 Id.
396 Id.
398 Simmons, 84 S.W.3d at 927.
399 Id.
400 Id.
401 Id.
402 Id.
403 Id.
404 Id. at 928.
405 Simmons, 84 S.W.3d at 928.
406 Id.
In conclusion, two of the decisions covered in this survey illustrate the fortitude and independence of the Kentucky courts. First, the court of appeals affirmed that the Commonwealth is alone among the fifty states in prohibiting evidence of the custom of an organization to prove action in conformance therewith, “an extreme minority position.” In addition, Justice Wintersheimer’s 1983 declaration in dicta that Kentucky courts would not recognize a cause of action for wrongful birth or wrongful life was affirmed twenty years later, five to two, echoing the Justice’s declaration that the birth of a child cannot be considered an injury. Though the Supreme Court of Kentucky has shut the door on any possibility of recovery in tort for wrongful birth or wrongful life, it conspicuously left open the possibility of recovery in contract. Because the Kentucky legislature has not spoken on this issue, breach of contract actions for failure to properly diagnose and report an incurable fetal medical condition during prenatal screening procedures are still viable actions and will likely appear before Kentucky courts in the future.

407 Thomas, 127 S.W.3d at 670.
408 Grubs, 120 S.W.3d at 688-89.
409 Id. at 691.
BALANCING PRIVATE PROPERTY RIGHTS WITH “PUBLIC USE”: A SURVEY OF KENTUCKY COURTS’ INTERPRETATION OF THE POWER OF EMINENT DOMAIN

by Michael A. Ruh, Jr.* and Matthew T. Lockaby†

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      Bailey v. K.Y.B.C. Land Corporation
      Slack v. Burckley
      Hale v. Columbia Natural Resources, Inc.
   D. Inverse Condemnation
      Lawson v. Central Associated Engineers
   E. Rights of Redemption
      Coleman v. City of Pikeville

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The purpose of this survey is to provide a practitioner’s guide to recent court opinions interpreting and applying the Eminent Domain Act of Kentucky. This survey includes opinions from Kentucky state courts, the United States District Court for the Eastern District of Kentucky (applying Kentucky law), and the Sixth Circuit Court of Appeals (also applying Kentucky law). Section II summarizes relevant statutory sections of the Eminent Domain Act to provide a framework for the reader to understand the significance of these recent cases. Section III surveys more recent cases concerning the use of eminent domain in Kentucky and opinions interpreting the Eminent Domain Act. In some instances, the authors highlight older Kentucky cases and United States Supreme Court opinions to provide the practitioner with a historical context for such recent opinions.

Similar to the Fifth Amendment of the United States Constitution, Section 13 of the Kentucky Constitution pronounces that “nor shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.” The first three groups of case summaries in Section III are organized to follow the three critical sections of Section 13 of the Kentucky Constitution: aspects of a “taking;” interpretations of the “public use” requirement; and decisions regarding “just compensation.”
Enacted in 1976, the Eminent Domain Act of Kentucky (hereinafter “EDA” or “the Act”) sets forth the procedures by which a condemnor may exercise its power of eminent domain. The relevant sections setting forth the condemnation procedure are set forth below.

Section 416.550. Implicit in this section is that any condemnor, defined under section 415.540(2) as “any person, corporation or entity, including the Commonwealth of Kentucky, its agencies and departments, county, municipality and taxing district authorized and empowered by law to exercise the right of eminent domain,” who desires to condemn a tract of land must first in good faith negotiate with the property owner to “acquire the property right” prior to filing a condemnation proceeding. However, such preliminary negotiations need not occur in the event the property owner is unknown or cannot be located after a reasonable search.

Section 416.560. A department or agency of a local city, county, or municipal government can exercise its power of eminent domain only by requesting the local government to initiate proceedings on its behalf. The costs associated with the condemnation will be paid by the department or agency making the condemnation request. However, before a request is made to the local government to institute condemnation proceedings, the department or agency has the right to “enter upon any land . . . in order to make studies, surveys, tests . . . and appraisals[].” Any damages sustained as a result thereof will be assessed by the court and figured into the property owner’s just compensation.

Section 416.570. To begin the actual condemnation proceedings, the condemning authority must “file a verified petition in the circuit court of the county in which all or the greater portion of the property sought to be condemned is located.” The verified petition shall contain: (i) evidence that the petitioner is in fact entitled to condemn; (ii) a description of the property sought to be
condemned; and (iii) an application to have commissioners appointed by the court to determine the amount of just compensation.14

Section 416.580.15 Three commissioners will be appointed by the circuit court.16 The commissioners, owners of land in the county where the circuit court sits, calculate an award that “fairly represents the reduction in market value of the entire property.”17 The commissioners’ award is the difference between the fair market value of the property immediately before the taking and the fair market value of the property immediately after the taking.18

Section 416.590.19 After the condemning authority files its verified petition, the circuit court will notify the property owner of the proceedings and the amount of the award determined by the commissioners.20 In the event that the property owner desires to file an answer to the verified petition, the property owner has twenty days from date of service of the notice from the circuit court.21

Section 416.610.22 After the twenty-day answer period expires, the circuit court will assess the commissioners’ findings to ensure the findings comport with section 416.580.23 If the commissioners’ report does not so comport, the commissioners will be required to make any necessary corrections.24 If the property owner does not file an answer or exceptions to the condemning authority’s verified petition, the circuit court will enter an interlocutory judgment.25 The judgment permits the condemning authority to take possession of the property in accordance with its condemning purpose and remit to either the court or the condemnee the just compensation as awarded by the commissioners.26 However, if the property owner has filed an answer or exceptions to the condemning authority’s verified petition, a hearing will be conducted by the court to determine whether the condemnation is appropriate and enter an interlocutory judgment accordingly.27

14 Id. § 416.570(1)-(3).
15 Id. § 416.580.
16 Id. § 416.580(1).
17 Id.
18 KY. REV. STAT. ANN. § 416.580(1) (Banks-Baldwin 2004). See also id. § 416.660(1) (stating that just compensation is “the difference between the fair market value of the [property] . . . immediately before the taking and the fair market value of the [property] immediately after the taking”).
19 Id. § 416.590.
20 Id. § 416.590.
21 Id. See also id. § 416.600 (stating that an answer must be filed in response to a summons on or before twenty days after service).
22 Id. § 416.610.
23 Id. § 416.610(1).
24 KY. REV. STAT. ANN. § 416.610(1) (Banks-Baldwin 2004).
25 Id. § 416.610(2).
26 Id. § 416.610(2)(c).
27 Id. § 416.610(4). Should the court determine that the condemnation is inappropriate, all costs will be borne by the party that sought to condemn. Id. § 416.610(4)(c). However, “all costs” does
Section 416.620. Whether the circuit court finds that the condemnation is appropriate or inappropriate, both the property owner and the condemning party are permitted to file exceptions to the interlocutory judgment. Exceptions filed by either party must be filed within thirty days. Courts have strictly adhered to the thirty-day statute of limitations for filing exceptions. If no exceptions are filed within the thirty-day limitations period, the circuit court “shall enter such final judgment as may be appropriate.”

Section 416.670. The failure of the condemning authority to begin development within eight years after the condemnation triggers the condemnee’s right of redemption. Such a right entitles the condemnee to repurchase the unused or undeveloped portion of the condemned property for the same price the condemnor paid to condemn the property. The statute assigns an affirmative duty on the condemnor to notify the condemnee that the planned development has not been undertaken and that, as a result, the condemnee has the right to repurchase the undeveloped land.

III. CASE SUMMARIES

A. Aspects of a “Taking”

The Kentucky Supreme Court has defined a “taking” as “the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment.” However, a person does not have a due process right to an eminent domain proceeding unless that person has suffered deprivation to their right to property. As such, a “taking” has not occurred under the Fifth

not include an award of attorney’s fees. Commonwealth v. Knieriem, 707 S.W.2d 340, 341 (Ky. 1986).
28 KY. REV. STAT. ANN. § 416.620 (Banks-Baldwin 2004).
29 Id. § 416.620(1).
30 Id.
32 KY. REV. STAT. ANN. § 416.620(6) (Banks-Baldwin 2004).
33 Id. § 416.670.
34 Id. § 416.670(1) (emphasis added).
35 Id.
36 Id. § 416.670(2).
Amendment of the United States Constitution if the property owner is deprived of any right in the property “that [was] not part of the title to begin with.”

In Wessels Construction and Development Company v. Commonwealth of Kentucky, the plaintiff argued that the closure of a particular street amounted to a taking of his property without just compensation. The district court disagreed, stating that the only existing property right with respect to the closure of a “public way is that [the property owner must have] reasonable access to the public highway system.” Due to the fact that the plaintiff had another, albeit more circuitous, way of ingress and egress, the plaintiff did not have a protected property right taken from him. Accordingly, because no property right was lost, no taking had occurred.

Siding Sales, Inc. v. City of Bowling Green, 984 S.W.2d 490 (Ky. Ct. App. 1998). A fire entirely ruined the plaintiff’s property. The City delayed the plaintiff’s re-occupancy of the premises during the reconstruction period so that the county water district could complete a water line project, which would increase the water supply to the plaintiff’s property. As a result of the project, the plaintiff did not resume normal operation for approximately six months after the fire. The plaintiff brought suit against the City seeking lost profits for the unnecessary delay of its resumed operations. The circuit court granted summary judgment in favor of the City on all claims.

The court of appeals affirmed, upholding the circuit court’s finding that the City’s acts were a valid exercise of police power and that, accordingly, no taking had occurred. The court of appeals first noted that the “right to conduct a business is subordinate to the police power of the state reasonably exercised in the public interest.” The court determined that the county water district’s project to increase the water supply to the plaintiff was in the public’s interest and that the re-occupancy delay served a valid public purpose. More importantly, however, the court of appeals determined that the exercise of police power in the name of the public interest did not deprive the plaintiff of the economic use of its property to such an extent that it assumed a burden that

Rather, it extends various procedural safeguards to certain interests “that stem from an independent source such as state law.” Id. (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

41 Id. at 27.
42 Id.
43 Id. at 28.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id. at 494.
50 Siding Sales, Inc., 984 S.W.2d at 494.
51 Id. at 495.
should have been “borne by the public as a whole.”\textsuperscript{52} Indeed, the regulated use of the property pending the completion of the water line project did not unfairly single out the plaintiff.\textsuperscript{53} Finally, the court of appeals concluded that even had a taking actually occurred, the plaintiff still had no recourse for recovery because “lost profits are not a proper measure of damages in a ‘takings’ case.”\textsuperscript{54}

\textit{Bobbie Preece Facility v. Commonwealth of Kentucky}, 71 S.W.3d 99 (Ky. Ct. App. 2001). Ms. Preece, sole proprietor of the Bobbie Preece Facility, conducted “charitable gaming activities” such as bingo.\textsuperscript{55} Ms. Preece also owned a ten percent interest in Preece Wholesale, Inc., a distributor of gaming supplies and equipment.\textsuperscript{56} In 1994, the Charitable Gaming Act was enacted, which required Ms. Preece to be licensed in her gaming and distributing businesses.\textsuperscript{57} Ms. Preece applied for and was granted a license each year through 1999.\textsuperscript{58} In 1998, however, the Charitable Gaming Act was amended so that no person licensed as a charitable gaming facility could concurrently be licensed as a gaming supplies distributor.\textsuperscript{59} At the time for license renewal, Ms. Preece was informed that only one of her licenses would be eligible for renewal.\textsuperscript{60} Despite this notice, Ms. Preece still applied for renewal of both licenses; however, the Commonwealth only renewed her distributor license.\textsuperscript{61}

Ms. Preece brought suit, claiming that her property had been taken without just compensation.\textsuperscript{62} The circuit court determined that because the right to engage in charitable gaming is a statutory right, such a right can be heavily regulated by the legislature.\textsuperscript{63} As such, Ms. Preece’s right “is more akin to a

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 494.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. As amended, the Charitable Gaming Act provides in pertinent part:

No person who is licensed as a charitable organization, and no owner, officer, employee, or member of the immediate family of an owner, officer, or employee of a licensed charitable gaming facility shall be eligible for licensure as a distributor or manufacturer. No affiliate of an owner, officer, or employee, or member of the immediate family of an owner, officer, or employee of a licensed charitable gaming facility shall be licensed as a distributor or manufacturer.

\textit{KY. REV. STAT. ANN.} § 238.530(3) (Banks-Baldwin 2004).
\textsuperscript{61} Bobbie Preece Facility, 71 S.W.3d at 101.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 103.
\textsuperscript{64} Id. at 102.
privilege than to a property right.”64 Thus, because no property right existed, just compensation was not required.65

The court of appeals affirmed, noting that even though the concept of a “taking” has evolved to include not just the conventional affirmative act of physical appropriation, but also regulatory interference which denies the owner of all beneficial uses of one’s property, the Commonwealth’s denial of Ms. Preece’s charitable gaming license did not reach to such a level.66 Though Ms. Preece conceded that she had not been denied all beneficial uses of her property, she was clearly denied “the most profitable one.”67 The court of appeals rejected her argument, holding true to the general rule that lost profits are “not a proper element of compensation for land taking in condemnation proceedings.”68

Kipling v. City of White Plains, 80 S.W.3d 776 (Ky. Ct. App. 2001). The City initiated condemnation proceedings in order to construct a water and sewer line.69 The Kiplings objected, claiming that the condemnation was improper because their property had been declared an “agricultural district” pursuant to section 262.85070 of the Kentucky Revised Statutes.71 The Kiplings further argued that the circuit court should defer to the decision of the local soil and water conservation board, which concluded that although the utility easement was an obvious necessity, the water lines should not be placed on the plaintiffs’ property.72 The circuit court concluded that the intention of section 262.850 was not to preempt the law of eminent domain as set forth by the Eminent Domain Act of 1976.73 Accordingly, the condemnation process could proceed.74

64 Id.
65 Id.
66 Bobbie Preece Facility, 71 S.W.3d at 103. The court of appeals cited to Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992), which concluded that “[w]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking.” Id. (emphasis added).
67 Id. at 104.
68 Id.
69 Kipling v. City of White Plains, 80 S.W.3d 776, 777 (Ky. Ct. App. 2001). Due to past strip mining operations, a large number of homes lost water supply. Id. To rectify the situation, the city decided to extend its water lines to these homes. Id. However, in order to access the homes which needed the additional supply, an easement over the plaintiff’s property was necessary. Id. at 777-78.
70 Ky. Rev. Stat. Ann. § 262.850 (Banks-Baldwin 2004) (stating that it is the state’s policy to “conserve, protect and to encourage development and improvement of its agricultural lands for the production of food and other agricultural products”).
71 Kipling, 80 S.W.3d at 781.
72 Id. at 780. The board strictly interpreted section 262.850(2), which provides in pertinent part, “[i]t is the policy of the state to conserve, protect and to encourage development and improvement of its agricultural lands for the production of food and other agricultural products.” Ky. Rev. Stat. Ann. § 262.850(2) (Banks-Baldwin 2004).
73 Kipling, 80 S.W.3d at 781.
74 Id.
On appeal, the Kiplings again argued that, as an agricultural district, their property was immune to condemnation proceedings because the land, for all intents and purposes, had already been set aside for a public purpose. Therefore, the Kiplings argued, “land devoted to a public use may not be taken for another public use under the power of eminent domain.” The court of appeals disagreed, stating that section 262.850 in no way provided that land is reserved for a public purpose once it is approved as an agricultural district. Further, “the fact that the public receives some sort of benefit from a certain use of land does not mean that the land is being used for a public purpose.” The court of appeals also rejected the Kiplings’ argument that the circuit court was bound by the decision of the local soil and water conservation board, finding the board’s decision to be both non-adjudicatory and non-binding.

Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District, 72. S.W.3d 918 (Ky. 2002). Spanish Cove, a waste water treatment plant servicing a particular area of Jefferson County, brought an action claiming a taking without compensation under the Fifth Amendment of the United States Constitution and sections 13 and 242 of the Kentucky Constitution. In an expansion effort, the Metropolitan Sewer District (“MSD”) attempted to connect its pipe system with Spanish Cove’s pipe system, an act which, according to Spanish Cove, would “render [its] facility valueless.”

The circuit court dismissed the action, concluding that the claim was not yet ripe because at the time Spanish Cove filed its suit, nothing had been taken. The court of appeals affirmed, determining that there been no taking. The court of appeals determined “that the owner of [a water] treatment facility had bare legal title to the pipes” which service the facility’s customers. Because the actual customers maintained a free usage of the pipes, the actual servicing of the customers was only an expectancy interest—“not a protected property interest.” Therefore, Spanish Cove did not have recourse through which to request compensation because there was no taking of a protected property interest. The supreme court affirmed, also finding that an expectancy interest is

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75 Id. at 784.
76 Id.
77 Id.
78 Id.
79 Kipling, 80 S.W.3d at 785, 786.
80 Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metro. Sewer Dist., 72 S.W.3d 918, 919 (Ky. 2002).
81 Id.
82 Id. at 921.
83 Id. at 920.
84 Id. (citing Calvert Inv., Inc. v. Louisville-Jefferson County Metro. Sewer Dist., 847 F.2d 304, 308 (6th Cir. 1988)).
85 Id. (emphasis added).
86 Spanish Cove Sanitation, Inc., 72 S.W.3d at 920-21.
not synonymous with a protected property interest, again concluding that no taking had occurred.\footnote{Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002).}

Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002). Prater, the minister of a local church, brought suit against the City for alleged violations of the Fifth Amendment of the United States Constitution.\footnote{Id. at 421.} Prater argued that church property was taken without just compensation when the City developed a previously dedicated road that the church claimed to own.\footnote{Id. at 425.} The road separated two parcels of land, one of which was owned by the church.\footnote{Id. at 422-23.} The other parcel was subdivided for purposes of constructing a residential subdivision and the road was necessary as it provided the public’s only manner of ingress and egress.\footnote{Id. at 425.} Prater argued that the church came into ownership of the road when it acquired the other parcel of land.\footnote{Id. at 425.} And once the church acquired that property, the public’s need for the road dissipated.\footnote{Id. at 425.} As such, Prater argued that the interest held by the City concurrently terminated.\footnote{Id.}

The court of appeals affirmed the district court’s entry of summary judgment in favor of the City.\footnote{Id. at 422.} As a preliminary matter, the court concluded that the church’s dedication of the road did not continue to vest the church with title of the road in fee simple.\footnote{Id. at 425.} Rather, “a valid statutory dedication . . . generally ‘vests the fee in the dedicatee in trust for the public.’”\footnote{Id. (citing 23 AM. JUR. 2d, Dedication § 59 (1983)).} On this basis, because the road was free to any member of the public to use, the court ultimately concluded that the City developed the road for a public purpose, which “left the [plaintiff] without any viable claim that the City took the [church]’s property when it developed the dedicated roadway.”\footnote{Id. at 427.} The court held that the City properly obtained its property interest in the road and had never surrendered or abandoned this property interest.\footnote{Id. at 426.} Accordingly, since the church retained no property interest in the subject road the church could not establish a taking.\footnote{Prater, 289 F.3d at 426.}

B. The “Public Use” Requirement versus the “Public Purpose” Requirement

\footnote{Prater, 289 F.3d at 426. In making his argument, Prater relied on City of Louisville v. Louisville Scrap Material Co., 932 S.W.2d 352, 355 (Ky. 1996), which held that “if the condemning authority ceases to use the property for a public purpose, the real property at that time would revert to the owner in fee simple.” Id. at 422.}
1. **Historical Background: Federal and Kentucky Cases**

In 1798, Chief Justice of the United States Supreme Court Salmon P. Chase announced that “the general principles of law and reason forbid . . . a law that takes property from A and gives it to B.”\(^{101}\) One hundred years later the Supreme Court continued to restrict takings by private individuals, stating, “[t]he taking by a state of the private property of one person . . . without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.”\(^{102}\)

Despite these early decisions, the government’s power to exercise eminent domain became broader and more expansive in the mid-twentieth century.\(^{103}\) Such expansion permitted local legislative bodies to acquire “blighted” private property for purposes of urban renewal and development.\(^{104}\) Not surprisingly, the private property condemned would benefit private developers who planned to use the land in a manner more economically desirable to the community at large.\(^{105}\)

Consider *Berman v. Parker*,\(^{106}\) the landmark 1954 Supreme Court decision which permitted the exercise of eminent domain for purposes of economic redevelopment—even if that included the future resale of the land to a private developer.\(^{107}\) In *Berman*, the plaintiff-property owner challenged the constitutionality of the District of Columbia’s Redevelopment Act of 1945.\(^{108}\) Pursuant to the Act, private property in Congressionally-branded “blighted areas” was to be condemned to eliminate substandard housing.\(^{109}\)

In sustaining the Act in question, the unanimous Court stated that, in cases involving a state’s police power, “the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”\(^{110}\) Further, that

\(^{101}\) Calder v. Bull, 3 U.S. 386, 388 (1798).

\(^{102}\) Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896). *See also* Wilkinson v. Leland, 27 U.S. 627, 658 (1829) (stating that taking land from A and giving it to B without A’s consent has never been a constitutional exercise of legislative power).


\(^{104}\) Id. Moreover, the branding of private property as “blighted” was in many cases pure legislative fiat.

\(^{105}\) Id.


\(^{108}\) *Berman*, 348 U.S. at 28.

\(^{109}\) Id. at 29. While the Act did not define “blighted area,” the substandard housing located in the labeled “blighted areas” was determined to be “detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.” Id. at 31.

\(^{110}\) Id. at 32. It also is worth noting that the “power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.” Id.
eminent domain is involved was of no consequence, as “the role of the judiciary in determining whether that power is exercised for a public purpose is an extremely narrow one.”  

According to the Supreme Court’s decision in *Berman v. Parker*, individuals whose property becomes subject to an urban redevelopment plan may not be accorded their full “bundle of rights.”

Next, consider *Hawaii Housing Authority v. Midkiff*, a 1984 Supreme Court decision which permitted the state of Hawaii to exercise its power of eminent domain to break up concentrated private land ownership. The Hawaiian “legislature concluded that the concentrated land ownership was responsible for skewing the residential fee simple market [and] inflating land prices” on the islands. In order to correct these problems, the legislature decided to force landowners to sell portions of their estate to other private individuals who were already leasing tracts from the landowners. In an effort to lessen the tax liability, the legislature condemned the land (thereby making the land sale involuntary and lessening the tax burden on the capital gain), and sold the land to those lessees who applied to purchase the land.

The district court found that the end the legislature sought was within the state’s general police power and that the state-chosen means for achieving such ends were neither arbitrary nor capricious. The Court of Appeals for the Ninth Circuit reversed, concluding that the legislature’s plan was “a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B’s private use and benefit.” Holding true to *Berman v. Parker*, the Supreme Court reversed the Ninth Circuit, reiterating that judicial scrutiny of legislative action, when found to be rationally related to a public purpose, is quite narrow. According to the Supreme Court, the “public use requirement is . . . coterminous with the scope of a [state’s] police powers.”

In *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*, the Supreme Court expanded the government’s power to condemn. The Supreme Court broadened its previous interpretation of the “public use” provision, set forth in

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111 Id. (emphasis added).
114 Id. at 231-32.
115 Id. at 232.
116 Id. at 233.
117 Id.
118 Id. at 235.
119 Hawaii Housing Authority, 467 U.S. at 235.
120 Id. at 239, 241.
121 Id. at 240.
122 Berlinger, supra note 107, at 791.
the late eighteenth and nineteenth centuries, to include “public purpose” as may be characterized by local legislatures.\textsuperscript{123}

The Supreme Court of Kentucky, in contrast, has not adopted such an expansive interpretation of “public use” and has “consistently recognized the necessity of protecting the right of a citizen to be secure in his ownership of property.”\textsuperscript{124} In City of Owensboro \textit{v.} McCormick,\textsuperscript{125} the Kentucky Supreme Court held that the power of eminent domain is not permissible under Sections 13\textsuperscript{126} and 242\textsuperscript{127} of the Kentucky Constitution when the property being condemned will not be used for a public use.\textsuperscript{128}

In \textit{McCormick}, the legislature of the city of Owensboro enacted the Kentucky Local Industrial Development Authority Act\textsuperscript{129} to condemn private productive agricultural property in order to use the land for an industrial and commercial business park.\textsuperscript{130} Under various sections of the Act, the establishment of the industrial park was deemed a matter of “public necessity,” serving a greater “public purpose.”\textsuperscript{131}

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Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law.
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\textsuperscript{123} \textit{Id.} at 791-92. \textit{See also} Poletown Neighborhood Council \textit{v.} City of Detroit, 304 N.W.2d 455 (Mich. 1981). In \textit{Poletown}, the Michigan Supreme Court adopted the \textit{Berman} rationale when it “upheld an urban renewal plan that condemned 465 acres of homes, businesses, schools, churches, and a hospital, to allow General Motors to build an automobile assembly plant.” Alice M. Noble-Allgire, \textit{Property Scholars Take Up Eminent Domain}, 19 \textit{PROB. \& PROP.} 11, 11 (Mar./Apr. 2005).

\textsuperscript{124} City of Owensboro \textit{v.} McCormick, 581 S.W.2d 3, 5 (Ky. 1979).

\textsuperscript{125} \textit{Id.} at 3.

\textsuperscript{126} Section 13 of the Kentucky Constitution provides, “nor shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.” KY. CONST. § 13.

\textsuperscript{127} Section 242 of the Kentucky Constitution provides:

\textsuperscript{128} Owensboro, 581 S.W.3d at 7 (stating that the same view of the public use requirement had been approved and adopted by earlier courts, including \textit{Sturgill \textit{v.} Commonwealth}, 384 S.W.2d 89, 91 (Ky. 1964), \textit{Hudgens \textit{v.} Register}, 285 S.W.2d 504, 506 (Ky. 1955), and \textit{Robinson \textit{v.} Swope}, 75 Ky. 21, 25 (Ky. 1876)). \textit{Id.} at 6.

\textsuperscript{129} KY. REV. STAT. ANN. §§154.50-301, 154.50-320, 154.50-326, 154.50-333 (Banks-Baldwin 2004).

\textsuperscript{130} Owensboro, 581 S.W.3d at 5-6.

\textsuperscript{131} \textit{Id.} at 4-5.
The trial court determined that “public purpose” as used in Section 171 of the Kentucky Constitution was synonymous to “public use” as used in Sections 13 and 242. Thus, like the United States Supreme Court’s more expansive view, the trial court concluded, “private property can be condemned for any purpose for which public funds might be expended.” The Kentucky Court of Appeals reversed and the Kentucky Supreme Court affirmed the court of appeals. The Kentucky Supreme Court could not find a single Kentucky case which supported the city’s argument that either a “public benefit” or a “public purpose” was sufficient to exercise the power of eminent domain. The court resolutely stated:

Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections whether they be cast in the fundamental fairness component of due process or in the prohibition against the exercise of arbitrary power.

The court went on to state that should “public use” be expansively interpreted to include a “public purpose” or “public benefit,” there would be no restrictions on the government’s ability to take private property.

Contrary to the United States Supreme Court’s expansive reading of the Public Use Clause, the Kentucky Supreme Court has followed the traditional interpretation set forth by the early courts in *Vanhorne’s Lessee v. Dorrance* and *Calder v. Bull*. Moreover, as the recent Kentucky cases set forth in this

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132 Section 171 of the Kentucky Constitution provides, in part:

The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

*KY. CONST.* § 171.

133 *Owensboro*, 581 S.W.3d at 7.

134 *Id.*

135 *Id.*

136 *Id.* at 5.

137 *Id.* at 5-6.

138 *Id.* at 6.

139 28 F. Cas. 1012 (1795).

140 3 U.S. 386 (1798). However, the Kentucky Supreme Court has conceded that the elimination of blight through urban renewal and redevelopment according to a proper plan does in fact constitute a “public use.” *Miller v. City of Louisville*, 321 S.W.2d 237, 240-41 (Ky. 1959).
survey will demonstrate, Kentucky has continued to adhere to the public usepublic purpose dichotomy set forth in City of Owensboro v. McCormick.

As early as 1907, the Kentucky Supreme Court declared:

> If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.  

Eighty-five years later, the Kentucky Supreme Court gave further effect to Chesapeake Stone Company v. Moreland, concluding that “Kentucky law does not permit the taking of private property for the purpose of transfer to another private enterprise.”

2. Recent Kentucky Opinions

Dannheiser v. City of Henderson, 4 S.W.3d 542 (Ky. 1999). Dannheiser, a developer who planned to sell lots in his new industrial park, brought suit against the City, who had also developed an industrial area in an effort to promote local economic development. Dannheiser planned to sell his lots for $15,000 per acre, the estimated fair market value, while the defendant sold its lots for $1,500, the exact cost per acre of the City’s initial purchase, but well below fair market

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141 Chesapeake Stone Co. v. Moreland, 104 S.W. 762, 765 (Ky. 1907).
142 Prestonia Area Neighborhood Ass’n v. Abramson, 797 S.W.2d 708, 711 (Ky. 1990). See also Prater v. City of Burnside, 289 F.3d 417, 426 (citing this as the current rule in Kentucky). Prudence again warrants a reference to the Michigan Supreme Court. This reference, however, is to County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), where the Michigan Supreme Court not only overruled its earlier decision in Poletown, but also adopted a more restrictive view of a government’s power to condemn private property. Hathcock, 684 N.W.2d at 785. The Michigan Supreme Court found that Poletown’s reliance on “a generalized economic benefit” could not justify the condemnation of 1300 acres of private property solely for transfer to another private entity to construct a business park. Id. Should the rather illusory requirement of “a generalized economic benefit” exclusively govern exercise of the eminent domain power, that rationale would validate nearly every attempted use of the power of eminent domain. Id. at 785-86. Accordingly, the Michigan Supreme Court checked the legislative power of eminent domain and now more closely follows the approach adopted by the Kentucky courts.
143 Dannheiser v. City of Henderson, 4 S.W.3d 542, 543-46 (Ky. 1999).
value. Dannheiser sought declaratory and injunctive relief for violations of Sections 3 and 179 of the Kentucky Constitution, arguing that the City violated such sections when it sold municipal property to private enterprises.

The circuit court entered summary judgment in favor of the City, determining that (i) the benefits which inured to the private industrial companies who purchased the City’s lots were “granted for a valid public purpose” and (ii) the development, marketing, and sale of the City’s lots did not violate Section 179 because the City’s “actions were taken for a valid public purpose.” On appeal, the court of appeals affirmed.

The supreme court “recognized that economic development is a valid public purpose.” Further, “the promotion of economic welfare, relief of unemployment and stimulation of industry” will be considered so long as those public purposes bear a reasonable relationship to the public interest. Moreover, when economic development falls within this broad definition, the courts will not interfere with the legislature’s public purpose determination. The court concluded that the City’s economic development plan bore a

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144 Id. at 543-44.
145 Section 3 of the Kentucky Constitution provides:

All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

KY. CONST. § 3.

146 Section 179 of the Kentucky Constitution provides:

The General Assembly shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads, or gravel roads: Provided, If any municipal corporation shall offer to the Commonwealth any property or money for locating or building a Capitol, and the Commonwealth accepts such offer, the corporation may comply with the offer.

KY. CONST. § 179.

147 Dannheiser, 4 S.W.3d at 544.
148 Id.
149 Id.
150 Id. at 546.
151 Id. at 545.
152 Id. at 546, 547. It must be noted here that while this proposition seemingly mirrors the pronouncement in Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984), that “the ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers[,]” there was no taking or condemnation proceeding in the instant case as there was in Hawaii Housing Authority. Id. at 543-44.
reasonable relationship to the public interest and served a valid public purpose.\textsuperscript{153} As such, the exercise of eminent domain power by the City did not violate the Kentucky Constitution.\textsuperscript{154}

\textit{Henn v. City of Highland Heights}, 69 F.Sup. 2d 908 (E.D. Ky. 1999), vacated by 2001 U.S. App. LEXIS 2490, No. 99-6346 (February 8, 2001). Clifford Henn and other property owners whose property either abutted or was located within the City’s proposed redevelopment area, brought suit claiming that there was no rational basis for the City’s designation of their property as “blighted.”\textsuperscript{155} Accordingly, the plaintiffs alleged that the City’s condemnation of the properties in question was improper.\textsuperscript{156}

Section 99.330\textsuperscript{157} of the Kentucky Revised Statutes pertains to urban renewal and community development and permits the creation of redevelopment districts for purposes of eliminating slums and blighted areas.\textsuperscript{158} The statute permits public money to be spent in an effort to obtain these areas and prepare them for redevelopment.\textsuperscript{159} The City’s comprehensive redevelopment plan for the area in question included such attractions as a hotel and conference center and office and retail space.\textsuperscript{160}

On cross-motions for summary judgment, the district court, in construing Kentucky state law, entered judgment in favor of Henn and the other property owners declaring that the redevelopment area designation was arbitrary, capricious, and void.\textsuperscript{161} The court conceded that the statutory scheme for urban renewal and redevelopment was constitutional as it was a legitimate exercise of the state’s police power.\textsuperscript{162} However, by statute, the City was not authorized to take private property from Henn and other property owners and sell it to another person because the City’s findings that the area in question was “blighted” were not supported by substantial evidence.\textsuperscript{163} The court determined that the area represented a “normal real estate market of moderately priced housing” and that

\textsuperscript{153} Dannheiser, 4 S.W.3d at 547.
\textsuperscript{154} Id. at 549.
\textsuperscript{156} Id.
\textsuperscript{157} KY. REV. STAT. ANN. § 99.330 (Banks-Baldwin 2004) (declaring that it was “the policy of this Commonwealth to . . . promote the health, safety, and welfare of the people . . . and particularly of the communities in which slum areas and blighted areas exist by the elimination of slum conditions and conditions of blight”).
\textsuperscript{158} Henn, 69 F. Supp. 2d at 910. See also KY. REV. STAT. ANN. § 99.330(2)(a) (Banks-Baldwin 2004).
\textsuperscript{159} Henn, 69 F. Supp. 2d at 910. See also KY. REV. STAT. ANN. § 99.330(2)(b) (Banks-Baldwin 2004) (declaring that the elimination of slum and blighted conditions for redevelopment constitutes a public use and public purpose).
\textsuperscript{160} Henn, 69 F. Supp. 2d at 910.
\textsuperscript{161} Id. at 911.
\textsuperscript{162} Id. at 913 (citing Miller v. City of Louisville, 321 S.W.2d 237, 240 (Ky. Ct. App. 1959)).
\textsuperscript{163} Id. at 914.
no evidence of blight existed whatsoever in the proposed redevelopment area.\textsuperscript{164}

In its decision, the court cited to the core historical Kentucky cases, \textit{City of Owensboro v. McCormick} and \textit{Chesapeake Stone Co. v. Moreland}, holding that private property cannot be taken for the purpose of transfer to another private enterprise.\textsuperscript{165}

On appeal, the Sixth Circuit vacated the district court’s decision on the sole basis that the district court had not fully explained its jurisdiction over the plaintiffs’ § 1983 claim.\textsuperscript{166} The court of appeals required more than a conclusory statement that the plaintiffs’ claim was sufficiently substantial.\textsuperscript{167}

\textit{God’s Center Foundation, Inc. v. Lexington-Fayette Urban County Government}, 125 S.W.3d 295 (Ky. Ct. App. 2002). The Lexington Fayette Urban County Government (“LFUCG”) filed a petition to condemn the Lyric Theatre, a historically and culturally significant landmark in the African-American community of Lexington.\textsuperscript{168} LFUCG claimed that the condemnation was a necessary part of the agreed cultural project between the LFUCG and the Commonwealth of Kentucky.\textsuperscript{169} The plan included restoration of the Lyric Theatre for its use as a cultural center.\textsuperscript{170} God’s Center objected, arguing that the taking pursuant to the Eminent Domain Act was neither necessary nor a public need.\textsuperscript{171} The circuit court entered judgment in favor of the LFUCG, granting its petition to acquire the Lyric Theatre by eminent domain.\textsuperscript{172}

The court of appeals affirmed, concluding that the taking was necessary for a valid public purpose as it was supported by evidence and applicable law.\textsuperscript{173} What constituted a “necessity” according to the court was “a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owners

\begin{enumerate}
\item Id.
\item Id. at 913. \textit{See also} \textit{City of Owensboro v. McCormick}, 581 S.W.2d 3, 5 (Ky. 1979) (holding that, with the exception of redevelopment for purposes of slum elimination, the taking of private property that will not be developed for public use is impermissible); \textit{Chesapeake Stone Co. v. Moreland}, 104 S.W. 762, 766 (Ky. 1907) (holding that the taking of private property is prohibited unless the taking serves to perform a public service).
\item Henn v. City of Highland Heights, No. 99-3536, 2001 U.S. App. LEXIS 2490, at *6-7 (6th Cir. Feb. 8, 2001). The district court’s jurisdiction over the plaintiff’s § 1983 claim gave it supplemental jurisdiction over the plaintiff’s state law claims. \textit{Id.} at *7-8.
\item Id. at *8.
\item God’s Ctr. Found., Inc. v. Lexington-Fayette Urban County Gov’t, 125 S.W.3d 295, 297 (Ky. Ct. App. 2002).
\item \textit{Id.} at 298. Opened in 1948, the Lyric Theatre was the primary entertainment venue for major black artists during the period of segregation. \textit{Id.} at 297. Although business declined and the theatre itself fell into disrepair, it stood as a symbol of pride to the African-American community. \textit{Id.} At the time the LFUCG filed its condemnation petition, the current owner had not reopened the facility to the public. \textit{Id.}
\item \textit{Id.} at 297.
\item \textit{Id.} at 298.
\item \textit{Id.} at 299.
\item \textit{Id.} at 303.
\end{enumerate}
consistent with such benefit."\textsuperscript{174} Clearly," the court determined, "the LFUCG’s represented purpose for the condemnation in order to preserve the Lyric Theatre structure and to utilize it for African-American cultural projects is a valid ‘public use’ that would benefit both the public at large and the African-American community in particular."\textsuperscript{175}

In sum, the Kentucky Supreme Court decision in \textit{City of Owensboro v. McCormick} and its specific holding in \textit{Chesapeake Stone Co. v. Moreland}, that private property cannot be taken for the purpose of transfer to another private enterprise, remains the law in the Commonwealth of Kentucky.\textsuperscript{176} However, recent cases indicate a trend in the Kentucky courts to give more deference to legislative purposes behind local economic development plans. Accordingly, the courts may base their decisions on compliance with the development plans as they relate to the legislative purposes. Such a trend would therefore close the theoretical dichotomy between the exercise of eminent domain for the “public use” versus a “public purpose,” a dichotomy which presently exists between Kentucky and federal case law.

C. \textit{Just Compensation}

“Just compensation . . . is that amount of money necessary to put a landowner in as good a pecuniary position, but no better, as he would have been in if his property had not been taken.”\textsuperscript{177} Just compensation is measured by what is considered to be the best use of the property in question, or, more succinctly, "that use which would bring [the owner] the highest price."\textsuperscript{178} Unless evidence proves contrary, the best use is the purpose for which the property is utilized at the time of condemnation.\textsuperscript{179} The measure of just compensation is determined by the difference between the fair market value of the property immediately before and after the taking.\textsuperscript{180}

The condemnee, however, is not the only party to which the notion of “just compensation” applies.\textsuperscript{181} Under the statute, the condemnor may also benefit from this measure of remuneration.\textsuperscript{182} Not only is the condemnee statutorily

\textsuperscript{174} God’s Center Found., Inc., 125 S.W.3d at 303 (citing Davidson v. Commonwealth, 61 S.W.2d 34, 36 (Ky. 1933)).
\textsuperscript{175} Id. at 301.
\textsuperscript{176} Henn v. Highland Heights, 69 F. Supp. 2d 908, 913 (E.D. Ky. 1999).
\textsuperscript{177} United States v. L.E. Cooke Co., 991 F.2d 336, 341 (6th Cir. 1993).
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Elizabethtown & Paducah R.R. Co. v. Helm’s Heirs, 71 Ky. 681, 684-85 (Ky. 1871). \textit{See also} KY. REV. STAT. ANN. § 416.580(1) (Banks-Baldwin 2004) (stating that just compensation is “the difference between the market value of the entire property immediately before the taking and the market value of the remainder of the property immediately after the taking thereof”).
\textsuperscript{181} Hamilton v. Commonwealth Transp. Cabinet Dep’t of Highways, 799 S.W.2d 39, 40 (Ky. 1990).
\textsuperscript{182} Id.
entitled to just compensation, the difference in fair market value of his property before and after the taking,\(^{183}\) but also the condemnor shall not be required to pay more for the property as just compensation than the value of the property actually taken.\(^{184}\) Finally, the court-appointed commissioners make the initial appraisal of what will constitute just compensation to the property owner in each case, but the final valuation may be determined by the jury upon the demand of the property owner.\(^{185}\)

*Commonwealth v. R.J. Corman Railroad Company*, 116 S.W.3d 488 (Ky. 2003). The Department of Highways (“Department”) initiated condemnation proceedings in connection with its project to widen and relocate U.S. Highway 68 and Kentucky Highway 80 in Logan County.\(^{186}\) The Department sought to condemn six grade level crossing easements over the defendant’s railroad lines.\(^{187}\) The commissioners calculated an award of $85,000 for the taking and an additional $9,000 for the fair rental value of various construction easements.\(^{188}\) The circuit court ignored these figures and granted the Department’s motion for summary judgment, finding that R.J. Corman Railroad Company (“the Railroad”) had not suffered any compensable loss as a result of the railroad track crossings.\(^{189}\) The court of appeals reversed and remanded the matter back to the circuit court.\(^{190}\)

After granting discretionary review, the supreme court reversed the court of appeals and affirmed the circuit court’s entry of summary judgment.\(^{191}\) The supreme court acknowledged that the measure of just compensation when a taking occurs “is the difference between the fair market value of the property immediately before [and after] the taking.”\(^{192}\) However, the supreme court also recognized limits to the type of information that may be included in assessing the fair market value, as some information is either irrelevant or non-compensable, and thus, shall be excluded from the valuation process.\(^{193}\)

The Railroad’s expert’s calculation included two such irrelevant and non-compensable measures: “1) the anticipated expenses for maintenance and operation of each crossing; and 2) the estimated litigation . . . [expenses] for accidents predicted to occur . . . over the next twenty years.”\(^{194}\) The supreme court rejected both of these factors as irrelevant and non-compensable.\(^{195}\)


\(^{184}\) *Hamilton*, 799 S.W.2d at 40.

\(^{185}\) Id. at 41.


\(^{187}\) Id.

\(^{188}\) Id.

\(^{189}\) Id.

\(^{190}\) Id. at 498.

\(^{191}\) R.J. Corman R.R. Co., 116 S.W.3d. at 491.

\(^{192}\) Id. at 492.

\(^{193}\) Id.

\(^{194}\) Id.

\(^{195}\) Id.
supreme court relied on *Louisville & Nash Railroad Company*, concluding that “estimated liability costs [are] . . . too remote and speculative in nature.” As such, they are irrelevant to the valuation process. In addition, “railroad companies cannot recover damages arising from the cost or expense of doing or maintaining those things that the state may compel them to do.” In such a mandate is the implicit distinction between a taking for public use and a state’s exercise of police power. The latter does not constitute a taking without due process or without payment of just compensation. As such, Kentucky courts have consistently denied all railroads compensation for the costs of maintaining and operating crossings pursuant to the State’s police power objectives.

In addition to rejecting various measures included in the Railroad’s expert’s fair market value calculation, the supreme court also rejected the method utilized by the Railroad’s expert to determine the fair market valuation. The Railroad’s expert first calculated the damages amount for each crossing, then subtracted that amount from the “before” figure to arrive at the “after” figure, “a practice commonly known as ‘price-tagging.’” The Railroad argued that its expert used the capitalization of net income approach, one of three generally acceptable methods of computing fair market value, and as such is insulated from an allegation of price-tagging. Essentially, the Railroad asserted that only two numbers are important to determine the fair market value: a “before” figure and an “after” figure, and the courts should not inquire as to the relevancy of the figures. The supreme court disagreed, determining that the Railroad’s expert did not “distinguish between the income [produced by] the property and [the] income [produced by] the business conducted upon the property.” The implication is that the Railroad’s expert may have included lost profits in his valuation. Lost profits, like liability expenses, are too speculative in nature and are thus non-compensable for valuation purposes.

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198 Id.
199 Id. at 492 (citing *Louisville & Nash R.R. Co.*, 114 S.W. at 749).
200 Id. at 494.
201 *R.J. Corman R.R. Co.*, 116 S.W.3d at 493.
202 Id.
203 Id. at 495.
204 Id.
205 Id. at 496.
207 Id.
208 The other two accepted methods of calculating the fair market value of property are the “sales comparison approach” and the “cost approach.” *Id.*
209 Id.
210 The Kentucky Supreme Court in *Commonwealth Dep’t of Highways v. Mann*, 387 S.W.2d 848, 850 (Ky. 1965), set forth the disfavored price-tagging formula: the subtraction of an “after” value, computed from various itemized damage factors, from the “before” figure.
211 *R.J. Corman R.R. Co.*, 116 S.W.3d at 496.
212 Id.
213 Id.
Big Rivers Electrical Corporation v. Barnes, 147 S.W.3d 753 (Ky. Ct. App. 2004). Big Rivers Electrical Corporation (“Big Rivers”) filed a condemnation proceeding, seeking to condemn an easement one hundred-feet wide, and extending over 3,200 feet across the Barnes’ farm in order to construct three electrical towers. After the towers were constructed, a survey revealed that not only had a fourth tower been built on the Barnes’ property, but also that guy wires were erected beyond the bounds of the granted easement. The court granted Big Rivers leave to amend its condemnation petition and the subsequent amended interlocutory judgment was duly entered. The Barneses, however, filed exceptions to the amended interlocutory judgment, seeking trespass damages from the time the fourth tower was constructed until the time the amended interlocutory judgment was entered. The jury awarded the Barneses $67,000 as just compensation for taking of the amended easement.

Big Rivers appealed, and argued that the Barnes’ expert improperly figured the market value of the property because he considered the value of the minerals on the Barnes’ property. In arriving at a figure of $67,000, the expert used the “income approach” to determine the fair market value of the property. The expert “determined the highest and best use of the [Barnes’] property was as a medium to long term coal reserve.” According to the expert, this highest and best use would have yielded a value of $742,000 before the taking and $675,000 after the taking, with the difference being $67,000. In contrast, Big Rivers’ expert testified that the highest and best use of the property was as a farm.

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211 Id.
212 Id. at 755-56.
213 Id.
214 Id.
215 Id. at 757. Essentially, Big Rivers argued that the Barnes’ expert had price-tagged the value of the property. Id. at 756. See Commonwealth v. Davis, 400 S.W.2d 515, 516 (Ky. 1966) (disapproving a property value calculation after first finding the worth of the coal on the property). Here, however, the court of appeals acknowledged that when the property does in fact contain “minerals, the quality and quantity of the minerals may be properly considered as affecting the market value of the land but they cannot be valued separately.” Big Rivers Elec. Corp., 147 S.W.3d at 756 (citing Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309, 311 (Ky. 1963)) (emphasis added).
216 Id. at 758.
217 Id. Pritchett did not use the sales comparison approach because other properties, although perhaps similarly situated as a farm of roughly equal value per acre, may not have had coal reserves. Id. Likewise, Pritchett did not use the cost approach because the property was not being used as a coal mine. Id.
218 Id. The “highest and best use” of a particular property is not necessarily the use to which the property was put at the time of the taking. Id. at 757. Provided that there is a reasonable “expectation” and a “probability” that the property will be put to a more profitable use in the “near future,” such use will be considered the highest and best use. Id.
219 Id. at 759.
220 Id.
expert calculated a “before” figure of $225,000 and an “after” figure of $218,500, for a difference of $6,500.\textsuperscript{221}

The court of appeals determined that the jury verdict was not excessive because “‘the highest and best use’ was as a coal reserve that could be economically mined in the near future.”\textsuperscript{222} Furthermore, substantial probative evidence supported the jury finding.\textsuperscript{223} Accordingly, the court of appeals rejected Big Rivers’ argument, but remanded the jury’s award of $67,000 as just compensation for the taking on other grounds.\textsuperscript{224}

\textit{Commonwealth v. Cooksey}, 948 S.W.2d 122 (Ky. Ct. App. 1997). The Commonwealth filed a petition to condemn a portion of the Cooksey’s property for the alteration of U.S. Highway 60.\textsuperscript{225} Thereafter, the Cookseys filed an answer and counterclaimed for damages for bad faith negotiations and punitive damages.\textsuperscript{226} The circuit court entered an interlocutory judgment authorizing the Commonwealth to condemn.\textsuperscript{227} The interlocutory judgment also “continued the cause for the filing of exceptions (K.R.S. 416.610(3))\textsuperscript{228} for the amount of compensation for the taking, \textit{and} for the amount of damages for bad faith, if such is shown in a bifurcated trial.”\textsuperscript{229}

The court of appeals noted that the Eminent Domain Act had no provisions which allowed a jury to consider or valuate damages for bad faith or fraud.\textsuperscript{230} Such damages would come only before the judge who would then decide if such bad faith or fraud affected the condemnor’s right to take.\textsuperscript{231} If the fraud or bad faith did affect the condemnor’s right to take, the court may find that the condemnor is not authorized to take the property sought to be condemned—but may not allow a jury to valuate damages for bad faith or fraud.\textsuperscript{232} As such, the court of appeals vacated and remanded the matter back to the circuit court.\textsuperscript{233}

\textit{Bailey v. K.Y.B.C. Land Corporation}, 39 S.W.3d 29 (Ky. Ct. App. 2001). Bailey, the owner of the surface estate, brought suit against K.Y.B.C., the owner of the mineral estate, for his share of the proceeds from the condemnation of the mineral estate.\textsuperscript{234} The Department of Highways brought separate condemnation

\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Big Rivers Elec. Corp.}, 147 S.W.3d at 760 (emphasis added).
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 760-61.
\textsuperscript{225} \textit{Commonwealth v. Cooksey}, 948 S.W.2d 122, 122 (Ky. Ct. App. 1997).
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Ky. Rev. Stat. Ann.} § 316.610(3) (Banks-Baldwin 2004). This section provides, “Any exception from such interlocutory judgment by either party or both parties shall be confined solely to exceptions to the amount of compensation awarded by the commissioners.” \textit{Id.}
\textsuperscript{229} \textit{Cooksey}, 948 S.W.2d at 122 (emphasis added).
\textsuperscript{230} \textit{Id.} at 123.
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
actions against both Bailey and K.Y.B.C. \(^{235}\) In the action concerning the mineral estate, an amount of $215,000 was agreed upon between the Department and K.Y.B.C. \(^{236}\) Immediately after the settlement, K.Y.B.C. claimed that it was entitled to the entirety of the proceeds. \(^{237}\) Bailey claimed that “he had a compensable interest” as the surface estate owner through his “right to take coal for household use.” \(^{238}\) The circuit court concluded that Bailey’s right to remove coal for his own use was not a compensable interest. \(^{239}\)

On appeal, Bailey argued that the “deed reserved to . . . [him] ‘the right to mine coal . . . for . . . household use.’” \(^{240}\) K.Y.B.C. argued that the surface estate owner’s reservation amounted to no more than an authorization to gather coal for his own use and that compensation was appropriate “only in the condemnation action involving the surface estate.” \(^{241}\) On this issue of first impression, the court of appeals agreed with K.Y.B.C.’s argument and affirmed the circuit court’s decision. \(^{242}\) The court of appeals concluded that Bailey’s right to gather and use coal for his own purposes was subject to K.Y.B.C.’s right to mine all the coal on the property. \(^{243}\) Therefore, if there was any value in the reservation of rights to the surface estate owner, such value would be determined in an action against Bailey. \(^{244}\)

*Slack v. Burckley, No. 2002-CA-002031-MR, 2004 WL 102805 (Ky. Ct. App. 2004).* Members of the Slack family acquired Henderson Farm in 1970. \(^{245}\) The subject property included Henderson Lane, a road which led to the residence. \(^{246}\) In 1977, adjacent tracts of land of Henderson Farm were purchased by other individuals, each of whom used Henderson Lane as a mode of ingress and egress. \(^{247}\) Burckley, one such adjacent property owner, sought to subdivide his land and sell each parcel. \(^{248}\) The subdivision plan was approved and Henderson Lane was used by the construction companies and the adjoining landowners. \(^{249}\) The U.S. Postal Service also utilized Henderson Lane in order to deliver mail. \(^{250}\) In addition to these uses of Henderson Lane, the county fiscal
court in 1984 established Henderson Lane as part of the county road system, spending over $2,000 in repairs and resurfacing.  

In arguing that Henderson Lane was private and could not be dedicated to public use without just compensation, the Slacks contended that the county neither strictly followed the statutory requirements for a proper dedication nor was Henderson Lane properly established as part of the county road system.  

Burckley argued that Henderson Lane was properly dedicated by estoppel. The court of appeals affirmed the circuit court’s decision, determining that Henderson Lane was properly dedicated to public use through estoppel. As such, no compensation was due to the plaintiff, because when a road is dedicated to public use, rather than condemned for public use, just compensation is not owed to the owner of the road. 

_Hale v. Columbia Natural Resources_, No. 2002-CA-00168-MR, 2003 WL 1240600, (Ky. Ct. App. 2003). Hale brought suit attempting to recover damages due to the defendant’s failure to increase the value of her property. While the defendant was replacing existing natural gas pipelines on her property, Hale asked the defendant if the pipelines could be installed “closer to a creek” and “not in the middle of the bottomland.” Citing concerns such as creek-bed erosion, the defendant denied Hale’s request. 

When the defendant completed the installation of the pipelines, it repaired any and all damage to Hale’s property and, according to Hale, the land was in the same condition after the installation as it was prior to the installation. Hale’s only complaint was that had the pipeline been placed in the location she desired, her property would have been worth more because it “would have enabled her to construct buildings on [the] bottomland.” Hale argued that the defendant “was obligated to ‘cooperate’ with her by moving the pipeline closer to the creek at [the defendant’s] expense for the sole purpose of potentially increasing the value of her property.” 

The circuit court entered summary judgment in favor of the defendant and dismissed Hale’s complaint with prejudice. The court of appeals affirmed, abruptly stating that such an argument “is both counterintuitive and contrary to

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251 Slack, 2004 WL 102805, at *1.
252 Id. at *2.
253 Id. at *1. Dedication by estoppel is a common law dedication in which “[l]ong-continued use by the public will constitute an implied acceptance of the dedication.” Id. at *2.
254 Id. at *2.
255 Id.
257 Id. at *1.
258 Id.
259 Id.
260 Id. at *2.
261 Id.
262 Hale, 2003 WL 1240600, at *2.
existing law." \textsuperscript{263} Section 416.660 of the Eminent Domain Act provides that just compensation to condemnees is the difference between the fair market value of the tract of land condemned immediately before and the fair market value of the tract of land condemned immediately after the taking. \textsuperscript{264} Quite simply, the loss of a potential increase in value of property would not establish any “difference” in the plaintiff’s property value immediately before and after the alleged taking. \textsuperscript{265} As such, Hale was not awarded any compensation. \textsuperscript{266}

In sum, these recent cases demonstrate both the categories of damages that Kentucky courts will include in the determination of “just compensation” and the relevant factors the court utilizes to make such calculation.

D. Inverse Condemnation

Where a condemning authority has taken private property without first instituting condemnation proceedings, a reverse, or inverse, condemnation has taken place. \textsuperscript{267} In such a case, the property owner can initiate a suit to recover the fair market value of the property which has been taken by the condemning authority. \textsuperscript{268} The same rules governing a properly executed condemnation apply to an inverse condemnation. \textsuperscript{269} Thus, the procedure follows as if the condemning authority had initiated condemnation proceedings prior to its extrajudicial taking. \textsuperscript{270} The circuit court will appoint three commissioners to appraise the fair market value of the property before and after the taking and the appropriate due process rights will be accorded to the condemnee. \textsuperscript{271} Interestingly, the condemnee in an inverse condemnation action will not be awarded any trespass damages—not even nominal damages—as compensation for the pre-authorized taking (assuming, of course, that the condemnation proceeding is adjudged in the

\begin{itemize}
\item \textsuperscript{263} \textit{Id.} at *4.
\item \textsuperscript{264} \textit{KY. REV. STAT. ANN.} § 416.660 (Banks-Baldwin 2004).
\item \textsuperscript{265} Hale, 2003 WL 1240600, at *4.
\item \textsuperscript{266} \textit{Id.} at *5.
\item \textsuperscript{267} Commonwealth Natural Res. and Envtl. Prot. Cabinet v. Stearns Coal & Lumber Co., 678 S.W.2d 378, 381 (Ky. 1984). It must be noted here, at the outset, that under Kentucky law, even before bringing a claim for inverse condemnation, “there must be an unauthorized taking,” Holloway Const. Co. v. Smith, 683 S.W.2d 248, 249 (Ky. 1984) (emphasis added).
\item \textsuperscript{268} Stearns, 678 S.W.2d at 381. At least from a theoretical standpoint, the property owner is entitled to bring an action for just compensation, notwithstanding the “bundle of rights” argument, because “when the acts of the state constitute a taking of property, the law [implies] an agreement to pay for it.” Jones v. Commonwealth, 875 S.W.2d 892, 893 (Ky. Ct. App. 1993) (citing Curlin v. Ashby, 264 S.W.2d 671, 672 (Ky. 1954)).
\item \textsuperscript{270} \textit{Id.}
\item \textsuperscript{271} \textit{KY. REV. STAT. ANN.} § 416.580(1) (Banks-Baldwin 2004).
\end{itemize}
condemning authority’s favor).\textsuperscript{272} In other words, the payment of just compensation from the condemning authority is the property owner’s “exclusive remedy.”\textsuperscript{273}

\textit{Lawson v. Central Associated Engineers}, No. 2001-CA-001789-MR, 2003 WL 1860266 (Ky. Ct. App. 2003). After finding that underground telephone cable had been installed on their property, the Lawsons brought suit against the telephone company, Duo County Telephone Cooperative Corporation (“Duo County”), seeking damages for illegal trespass.\textsuperscript{274} Duo County filed a counterclaim, seeking to condemn under the Eminent Domain Act the strip of land taken to install the underground cable.\textsuperscript{275}

The court-appointed commissioners concluded that the difference in the fair market value of the property before and after the taking was $700, and that the fair rental value of the easement was $500.\textsuperscript{276} The circuit court entered an interlocutory judgment granting Duo County the easement upon payment of $700 to the Lawsons.\textsuperscript{277} Subsequently, the Lawsons and Duo County settled their claims and the circuit court granted defendant’s motion for summary judgment.\textsuperscript{278} The Lawsons appealed the circuit court’s entry of summary judgment in favor of the defendant, arguing that the defendant was liable for its trespass.\textsuperscript{279}

Duo County and its agents prematurely took the Lawton’s property before a condemnation was approved by the circuit court.\textsuperscript{280} The court of appeals noted that “where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy of the landowners is . . . the [same] measure of damages . . . as in condemnation cases.”\textsuperscript{281} As such, the only remedy available to the Lawsons was the just compensation due to them for the taking.\textsuperscript{282} Accordingly, the Lawsons were not afforded any additional damages for trespass from the defendant.\textsuperscript{283}


\textsuperscript{273} \textit{Lawson}, 2003 WL 1860266, at *3.

\textsuperscript{274} \textit{Id. at} *1.

\textsuperscript{275} \textit{Id.}

\textsuperscript{276} \textit{Id.}

\textsuperscript{277} \textit{Id.}

\textsuperscript{278} \textit{Id.}

\textsuperscript{279} \textit{Lawson}, 2003 WL 1860266, at *2.

\textsuperscript{280} \textit{Id. at} *3.

\textsuperscript{281} \textit{Id.} citing \textit{Witbeck v. Big Rivers Rural Elec. Coop. Corp.}, 412 S.W.2d 265, 269 (Ky. 1967), \textit{overruled on other grounds by Commonwealth v. Stephens Estate}, 502 S.W.2d 71 (Ky. 1973)). \textit{See also} \textit{KY. CONST.} § 242 (“Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them.”).

\textsuperscript{282} \textit{Lawson}, 2003 WL 1860266, at *4.

\textsuperscript{283} \textit{Id.}
E. Rights of Redemption

The condemnee’s right of redemption, codified under section 416.670 of the Eminent Domain Act, gives the condemnee the right to repurchase all or portions of the condemned property which were not used or developed for that purpose for which it was condemned.284 The condemnee’s right of redemption is strictly a statutory right.285 The Kentucky Supreme Court was first confronted with an interpretation of this statute in Miles v. Dawson.286 In Miles, the plaintiff brought suit to recover an unused five acres of a fifteen-acre tract of land condemned for a highway redevelopment project.287 The court held that the “condemnee ha[d] a statutory right of redemption . . . [as to the portion of the] property condemned but not developed for the purpose for which it was condemned.288

In so holding, the court made an important technical distinction between the statute’s text as written and the text as it should be construed.289 Section 416.670(1) provides: “[d]evelopment shall be started on any property which has been acquired through condemnation within a period of eight (8) years.”290 The State argued that the word “any” was synonymous with “all” and referred to the tract of condemned property in its entirety.291 Thus, under the State’s argument, if the condemning authority began any development on any portion of a tract of condemned land, no matter how large the condemned tract nor how small the area of development, redemption rights would be a nullity.292 The court of appeals agreed with the State, concluding that to hold otherwise would place an intolerable burden on the State.293 However, the supreme court did not interpret the statute so broadly.294 The supreme court instead interpreted the statute to mean that the condemnee has the right to repurchase any portion of the property not so developed for its originally condemned purpose.295

Coleman v. City of Pikeville, 994 S.W.2d 524 (Ky. Ct. App. 1999). In 1984, the preceding owner of the subject property sold a portion of the property to the Pikeville Urban Renewal and Community Development Agency

284 Ky. Rev. Stat. Ann. § 416.670(1) (Banks-Baldwin 2004) (“The failure of the condemnor to so begin development shall entitle the current landowner to repurchase the property at the price the condemnor paid to the landowner for the property.”).
285 Miles v. Dawson, 830 S.W.2d 368, 369 (Ky. 1991).
286 Id. at 369.
287 Id. at 368-69.
288 Id. at 371.
289 Id. at 369-70.
291 Miles, 830 S.W.2d at 369.
292 Id. at 369-70.
293 Id.
294 Id.
295 Id. at 370-71 (emphasis added).
After the purchase was complete, PURCDA placed sixty-six thousand cubic yards of fill dirt on the property, over which was constructed water lines and a road. In 1990, however, the City dissolved PURCDA and took title to all property owned by PURCDA. In 1992, Coleman, the successor-in-interest to the preceding owner of the property, notified the City of her interest in repurchasing the unused property. The City refused to sell to Coleman and, instead, planned “to sell the property at a public auction.”

Coleman brought suit seeking to repurchase the property that was purchased from the preceding owner of the subject property pursuant to the condemnee’s right of redemption under the Eminent Domain Act. The circuit court entered judgment in favor of the City, finding that the statutory redemption right ends when development begins on a property. Further, and perhaps more dispositive, Coleman was not entitled to repurchase the property because the property had not been taken through condemnation. Because the preceding owner and the City had reached an agreement for the purchase and sale of the property, section 416.670 of the Eminent Domain Act was not applicable.

On appeal, Coleman argued that the dumping of fill material did not amount to development, that PURCDA’s abandonment of the development scheme implicated her right to repurchase, and that the relevant statute applied when the land was taken under the threat of condemnation. The court of appeals rejected each of Coleman’s arguments and affirmed each of the circuit court’s findings. First, as to the fill material, the court of appeals agreed with the circuit court’s finding that the dumping of fill material amounted to the beginning of development. The court of appeals also found that PURCDA’s dissolution was wholly irrelevant to Coleman’s statutory redemption right, stating that the requirement was that the development must simply commence within eight years. Finally, the court of appeals determined that the redemption right granted by the Eminent Domain Act “clearly applies only to

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296 Coleman v. City of Pikeville, 994 S.W.2d 524, 525 (Ky. Ct. App. 1999). It is important to note that the letter sent from PURCDA to the preceding owner of the subject property, Ms. Goff, also contained the conditional threat that should Ms. Goff not agree to sell, PURCDA would condemn her property through proper eminent domain proceedings. Id. at 524-25.
297 Id. at 525.
298 Id.
299 Id.
300 Id.
301 Id.
302 Id. at 526.
303 Id. at 526.
304 Id.
305 Id.
306 Id.
307 Id.
308 Coleman, 994 S.W.2d at 526.
property ‘acquired through condemnation.’

In so ruling, the court explicitly rejected the view held by other states where “a purchase made under the threat of condemnation is the same as a judicial condemnation.”

_Yahnig v. City of Somerset_, 129 S.W.3d 846 (Ky. Ct. App. 2003). In 1992, the City, on behalf of the local Airport Board, condemned Yahnig’s sixty-six acre farm to assist the local airport’s expansion project. After the condemnation was complete, the Airport Board spent nearly $20,000 to clear trees, fencing and buildings from the property so that the land could properly be leased for farming while construction was in preparation.

In 2001, Yahnig brought an action to repurchase his property, arguing that development had not begun on his property within eight years. Yahnig “contended that the Airport authority’s actions in removing a fence [and some buildings and] trees . . . [did] not amount to the beginning stages of development,” but were part of an ancillary effort to prepare the land for farming, “which was not the purpose of its condemnation.” The circuit court entered summary judgment in favor of the City, concluding that the requisite development had begun by way of the clearing of the fence and various buildings and trees.

The court of appeals affirmed, finding that under the Airport Board’s master plan for expansion preliminary steps were required to be taken prior to beginning actual construction of the airport expansion. Such preliminary steps included the removal of various buildings, sheds and trees and various fence rows around the property. As such, these actions constituted the development required under the Eminent Domain Act.

_Kelly v. Thompson_, 983 S.W.2d 457 (Ky. 1998). The Kentucky Transportation Cabinet condemned nearly five acres of land from the Thompsons in 1978 in order to construct and maintain U.S. Highway 119. The Thompsons attempted in 1988 to repurchase the undeveloped portion of the condemned land for the original pro-rata price. The State declined, asking for the current appraisal value, which was over $80,000 more. When the Thompsons refused to pay the State’s asking price, the State subsequently sold

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309 Id.
310 Id. (quoting Fuddy Duddy’s v. State Dep’t of Transp., 950 P.2d 773, 775 (Nev. 1997)).
312 Id. at 847-48.
313 Id. at 848.
314 Id.
315 Id.
316 Id. at 849.
317 Yahnig, 129 S.W.3d at 849.
318 Id.
319 Kelly v. Thompson, 983 S.W.2d 457, 457 (Ky. 1998).
320 Id. at 457-58.
321 Id. at 458.
the acreage to a private development company. The Thompsons brought suit to enforce their redemption right under the Eminent Domain Act.

The circuit court did not apply the redemption statute to the Thompson’s pre-1980 condemnation. The court of appeals reversed, holding that the legislature’s intent in enacting the condemnee’s statutory right of redemption was for it to apply to all property then held by the State. Further, even though the statute was not to be retroactively applied, the statute did confer a right upon condemnees which they did not have prior to 1980. The Kentucky Supreme Court affirmed, stating that the statute applied to condemnations that occurred both before and after 1980. “It is the failure of the condemning authority,” the supreme court noted, “to begin development within eight years, and not the condemnation, which entitles the current owner the opportunity to repurchase such surplus property.” The supreme court remanded to the circuit court for further proceedings so that the Thompsons could exercise their statutory right to repurchase.


Martin v. Commonwealth: The State condemned the Martins’ property in 1978 and compensated the Martins in the amount of $102,500. After the supreme court rendered its decision in Kelly v. Thompson in 1998, the Martins filed suit to repurchase the unused portion of the condemned property. The circuit court, however, granted summary judgment in favor of the State, determining that the five-year statute of limitations found in section 413.120(2) of the Kentucky Revised Statutes applied to the Martins’ claim—not the fifteen-year statute of limitations found in K.R.S. § 413.010.
Kelly v. Thompson: On remand from the supreme court, the State again argued that the statute of limitations to enforce a condemnee’s redemption right was five years, as governed by K.R.S. § 413.120(2). The State argued that the Thompsons’ claim was time-barred because in 1988 the State had offered the Thompsons the unused condemned property for repurchase, but the Thompsons did not bring suit to enforce their redemption right until after 1993. The Thompsons countered by arguing that the fifteen-year statute of limitations under K.R.S. § 413.010 applied and, alternatively, because the State failed to provide proper “notice of the statutory right,” any statute of limitations was effectively tolled. The circuit court did not rule on what statute of limitations was applicable because it held that the State did not give proper notice to the Thompsons of their “right to repurchase at the price paid by the [State].” As such, summary judgment was granted in the Thompsons’ favor and the State was directed to offer the Thompsons the unused portion of condemned land at the price originally paid by the State.

The court of appeals addressed two issues: first, whether a condemnee’s statutory right of redemption was governed by a five-year or fifteen-year statute of limitations and second, regardless of what statute of limitations applied, when that statute of limitations began to run. As to the first issue, the court of appeals held that the five-year statute of limitations under K.R.S. § 413.120(2) applied because a condemnee’s right of redemption is a statutorily granted right. In contrast, the fifteen-year statute of limitations under K.R.S. § 413.010 generally applied to adverse possession, which was a common law doctrine.

As to the second issue, the court of appeals stated that “a cause of action accrues when a party has the right and capacity to sue.” A condemnee acquires such a right and capacity only “upon the condemnor’s failure to begin development [on the condemned property or a portion thereof] within eight years.” However, notwithstanding the requisite eight years, the statute of fixed by the statute creating the liability, shall be commenced within five (5) years after the cause of action accrued.”

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335 Martin, 2001 Ky. App. LEXIS 1245, at *12. Section 413.010 provides that “an action for the recovery of real property may be brought only within fifteen (15) years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims.” KY. REV. STAT. ANN. § 413.010 (Banks-Baldwin 2004).
337 Id.
338 Id.
339 Id. at *11.
340 Id.
341 Id. at *13, *15.
343 Id. at *14.
344 Id. at *15.
345 Id.
limitations was tolled until the condemnee knew or had reason to know of his right.\footnote{Id. at *16.} In condemnation proceedings, the condemnor has a duty to provide notice to the condemnee of his right to repurchase, which, by statute, must be at the same price the condemnor originally paid for the property.\footnote{Id. at *17.} Only at the time such notice is provided will the five-year statute of limitations begin to run.\footnote{Martin, 2001 Ky. App. LEXIS 1245, at *17.} The court of appeals affirmed the circuit court in the matter of \textit{Kelly v. Thompson} and reversed and remanded the matter of \textit{Martin v. Commonwealth}, finding that the circuit court improperly determined the Martin’s claim to be time-barred.\footnote{Id. at *20-21. The court of appeals’ ruling on both cases was affirmed in \textit{Vandertoll v. Commonwealth}, 110 S.W.3d 789, 793 (Ky. 2003).}

\textit{Vandertoll v. Commonwealth}, 110 S.W.3d 789 (Ky. 2003). This case also involved a consolidated appeal.\footnote{Vandertoll, 110 S.W.3d at 792. The Kentucky Supreme Court affirmed the court of appeals’ decision as to \textit{Commonwealth v. Thompson} and \textit{Martin v. Commonwealth}, primarily adopting the circuit court and court of appeals’ reasoning where applicable. \textit{Id.} at 793. As such, only the \textit{Vandertoll v. Commonwealth} decision is discussed despite the consolidation.} Here, the Supreme Court ruled on \textit{Vandertoll v. Commonwealth} as well as the appeal from the court of appeals’ ruling on \textit{Martin v. Commonwealth} and \textit{Kelly v. Thompson}.\footnote{Id. at 792-93.}

In 1967, the State condemned twenty-six acres of the Vandertolls’ property in order to construct and maintain Interstate 64.\footnote{Id. at 793.} The State thereafter declared a twelve-acre portion of the property to be surplus and the parties attempted to negotiate a repurchase and sale agreement.\footnote{Id.} Unable to come to an agreement, the Vandertolls brought suit in 1995 seeking to repurchase the surplus property.\footnote{Id.} Ruling after the supreme court handed down its original \textit{Kelly v. Thompson} decision, the circuit court determined that the Vandertolls’ claim was time-barred “because the ‘triggering event’ for [the statute] was the expiration of the eight years in which the [State] ha[d] to develop the condemned property, and in order for the statute to not have retroactive application, the triggering event must have occurred after [the statute was enacted] in 1980.”\footnote{Vandertoll, 110 S.W.3d at 793.} Because the eight years expired in 1975, the Vandertolls could only be protected by the statute if it were applied retroactively, which was not permitted by either legislative intent or the \textit{Kelly v. Thompson} decision.\footnote{Id.} The court of appeals affirmed.\footnote{Id.} The supreme court also affirmed, holding that “to allow landowners whose rights to repurchase their condemned property were triggered before the statutory
amendment of [K.R.S. §] 416.670 in 1980 (by the expiration of eight years without development), would be to allow retroactive application of that statute in violation of [K.R.S. §] 446.080(3). As such, the Vandertolls did not have a cause of action under the statutory right of redemption.

F. Good Faith Offer to Purchase

In general, the Kentucky Constitution and supporting case law all unequivocally require any condemning authority to act in good faith while exercising its power of eminent domain. Accordingly, prior to initiating condemnation proceedings, the condemning authority must make a good faith offer to purchase the property from the owner for a “just compensation” amount. In some instances, the Kentucky courts have so strictly construed the condemning authority’s requirement to make a good faith offer prior to filing condemnation proceedings that, when there is no such effort, the action may be dismissed. Notwithstanding this requirement, the condemning authority is not required to “haggle” with the property owner.

Vincent v. City of Powderly, No. 2002-CA-01315, 2003 WL 22025850 (Ky. Ct. App. 2003). To assist its sewer system expansion project, the city distributed letters to landowners requesting easements for the construction. While many of the landowners provided the city with an easement, the Vincents did not reach such an agreement. Because the deadline was near to receive the federal grant through which the project was funded, the city initiated condemnation proceedings against the Vincents and other landowners who had not settled with the city for its requested easement. The court-appointed commissioners, without an appraisal or a survey, found twice that property would not suffer a loss in market value as a result of the city’s project.

358 Id. at 794. Section 446.080(3) of the Kentucky Revised Statutes provides that “[n]o statute shall be construed to be retroactive, unless expressly so declared.” KY. REV. STAT. ANN. § 446.080(3) (Banks-Baldwin 2004).
359 Vandertoll, 110 S.W.3d at 794.
360 City of Bowling Green v. Cooksey, 858 S.W.2d 190, 192 (Ky. Ct. App. 1992) (interpreting KY. REV. STAT. ANN. § 416.550 (Banks-Baldwin 2004)).
361 Coke v. Commonwealth, 502 S.W.2d 57, 59 (Ky. 1973). See also Usher and Gardner, Inc. v. Mayfield Indep. Bd. of Educ., 461 S.W.2d 560, 562-63 (Ky. 1970) (determining that condemnor must make reasonable efforts to contract to purchase prior to initiating condemnation proceedings).
362 McGee v. City of Williamsburg, 308 S.W.2d 795, 798 (Ky. 1958) (citing Howard Realty Co. v. Paducah & Illinois R.R. Co., 206 S.W. 774 (Ky. 1918)).
363 Coke, 502 S.W.2d at 59.
365 Id.
366 Id. The breakdown in negotiations, according to the court, occurred when the Vincents turned down the city’s offer, which was calculated according to an appraisal of similar property, and made no counteroffer. Id. at *2.
367 Id.
The circuit court entered an interlocutory judgment permitting the condemnation and the court of appeals affirmed. The court concluded that while “a condemnor . . . is required to negotiate in good faith with a condemnee in an effort to reach a private agreement regarding purchase of the . . . property[,]” a survey or appraisal is not required to meet this condition. In response to the Vincents’ argument that the city’s “take-it-or-leave-it” offer amounted to a failure to negotiate in good faith, the court reiterated the established principal that the condemning party is “not required to haggle” with the condemnee in order to satisfy the good-faith offer requirement.

_**Louisville and Jefferson County Metropolitan Sewer District v. Becker,** No. 2001-CA-001457, 2003 WL 1253699 (Ky. Ct. App. 2003)._ After experiencing severe storm water drainage problems, the Beckers contacted the Sewer District to find a remedy. The Sewer District determined that because storm water drainage improvements would require extensive construction, the concurrent construction of a sewer system would be beneficial. The Sewer District held a public meeting regarding the potential construction of the sewer system. When put to a vote, exactly one-half of the voters favored the construction and the other one-half of the voters opposed it. However, an additional forty-four affected property owners did not vote. Despite the Sewer District’s standard protocol requiring a clear fifty-one percent majority vote in favor of a proposed project in order to go forward, the Sewer District testified that the residents did in fact vote affirmatively for the project.

The Sewer District determined that it would be most efficient to complete the project by connecting the new sewer line to a private sewer line which traversed the property of Golden Foods, a local business, then connecting to the Sewer District’s existing system. However, in order to do so, the Sewer District needed to acquire the private line owned by Golden Foods. Negotiations between the Sewer District and Golden Foods twice broke down before the Sewer District withdrew all previous offers and sent its “last and final good faith offer” to Golden Foods. This offer was later amended to correct a
typographical error, but Golden Foods again rejected.\textsuperscript{380} Thereafter, condemnation proceedings were filed by the Sewer District.\textsuperscript{381}

The circuit court entered judgment in favor of Golden Foods, dismissing the Sewer District’s petition.\textsuperscript{382} The court of appeals affirmed, finding that the final “take-it-or-leave-it” offer was suspect because of the inadequate amount offered.\textsuperscript{383} The court also found that while the Sewer District had offered to acquire Golden Food’s private sewer line and construct another sewer line exclusively for Golden Foods, the Sewer District’s real intention was to have all customers—both residential and commercial—share the “exclusive” sewer line.\textsuperscript{384} Accordingly, the court determined that the Sewer District did not act reasonably, fairly and in good faith in its negotiations with Golden Foods.\textsuperscript{385} Although the court did not address the issues regarding the Sewer District’s failure to follow its own protocol, the court did outwardly admonish the actions taken by the Sewer District, as part of its ultimate conclusion that the Sewer District “failed to engage in the proper course of negotiations that would necessarily serve as the required predicate for condemnation proceedings.”\textsuperscript{386} As such, the condemnation was “both inappropriate and unacceptable.”\textsuperscript{387}

Kentucky courts have interpreted K.R.S. § 416.550\textsuperscript{388} to impose a duty on the condemning authority to make a good faith offer to purchase price with the owner, but the courts qualify such requirement.\textsuperscript{389} At the very least, the condemning authority must make an offer to purchase the property of the owner.\textsuperscript{390} However, the courts appear willing to review the reasonableness and

\begin{quote}
Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670. It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.
\end{quote}

\textsuperscript{380} Id.
\textsuperscript{381} Id.
\textsuperscript{382} Id.
\textsuperscript{383} Becker, 2003 WL 1253699, at *4.
\textsuperscript{384} Id.
\textsuperscript{385} Id.
\textsuperscript{386} Id. at *5.
\textsuperscript{387} Id.
\textsuperscript{388} KY. REV. STAT. ANN. § 416.550 (Banks-Baldwin 2004) provides:

\begin{quote}
Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670. It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.
\end{quote}

\textsuperscript{390} See Cooksey, 858 S.W.2d at 192; Coke, 502 S.W.2d at 59; Usher, 461 S.W.2d at 562-63.
the sufficiency of this offer to purchase the property in light of the circumstances.\textsuperscript{391}

G. The Filing of Exceptions

The fundamental purpose of the statute of limitations for filing exceptions to the circuit court’s interlocutory judgment “[i]s to compel each party to speak up within 30 days or forever hold his peace.”\textsuperscript{392} K.R.S. § 416.620 speaks directly to the filing of exceptions, providing in pertinent part, “[w]ithin thirty (30) days from the date of entry of an interlocutory judgment authorizing the petitioner to take possession of the property, exceptions may be filed with either party or both parties.”\textsuperscript{393}

In \textit{Kentucky Utilities Company v. Brashear}, the defendant argued on appeal that Kentucky Utilities failed to properly notify him regarding the interlocutory judgment and therefore, he was permitted to file exceptions beyond the 30-day limit.\textsuperscript{394} The court of appeals disagreed, stating that the judgment was entered on the same day of the hearing from which the judgment resulted.\textsuperscript{395} However, there is room to reason that had the defendant not received notice of the interlocutory judgment, a trial court would not be considered to have abused its discretion to extend the 30-day period (or, more simply, to toll the start of the limitations period until the party did receive notice).\textsuperscript{396}

\textit{Commonwealth v. McDonald}, No. 2002-CA-001194-MR, 2003 WL 22025512 (Ky. Ct. App. 2003). The State condemned a portion of McDonald’s land in order to construct a new road.\textsuperscript{397} The commissioners’ report was entered with the court and, after negotiating certain terms regarding the placement of a noise reduction wall fronting McDonald’s property, the two parties entered into an agreed interlocutory judgment.\textsuperscript{398} Thirty-seven (37) days later, however, the State filed an exception to the commissioners’ award, arguing that the agreed terms pertaining to the placement of the noise reduction wall would affect the just compensation owed to McDonald.\textsuperscript{399} However, the circuit court applied the holding in \textit{Kentucky Utilities v. Brashear}, and refused to permit the exceptions and a final judgment was entered.\textsuperscript{400} The State argued on appeal that the thirty-
day period during which exceptions can be filed did not begin until the State remitted the amount awarded by the commissioner. The court of appeals disagreed, concluding that pursuant to K.R.S. § 416.620(6), exceptions must be filed within thirty days of the interlocutory judgment.

IV. CONCLUSION

The Fifth Amendment to the United States Constitution, in seeking to balance individual property rights with the authority of the government to achieve, inter alia, valid social goals, commanded “nor shall private property be taken for public use, without just compensation.” In the Fifth Amendment, the Framers designed two limitations to the government’s authority to take private property. First, private property can only be taken for a “public use.” And second, such a qualified taking requires “just compensation.” The Kentucky Constitution provides similar requirements for the government to exercise its power of eminent domain.

One commentator argues that if private property ownership was subject to unfettered legislative discretion, then such ownership would “in effect [be] held at the sufferance of lawmakers.” However, an equal incongruity would result if legitimate social goals of the state were subject to the power of private owners. Thus, the coexisting yet incongruent rights of private individuals are ostensibly balanced by the “just compensation” and “public use” requirements, regardless of how counterintuitive or, at the very least, how inconsistent, the government’s power to condemn and the property owner’s proverbial bundle of rights are with each other.

401 Id.
402 KY. REV. STAT. ANN. § 416.620(6) (Banks-Baldwin 2004). This section provides:

(6) Upon the final determination of exceptions, or upon expiration of thirty (30) days from entry of the interlocutory judgment if no exceptions are filed, the Circuit Court shall make such orders as may be proper for the conveyance of the title to the extent condemned, to the property, and shall enter such final judgment as may be appropriate.

403 Id.
404 McDonald, 2003 WL 22025512, at *2.
405 U.S. CONST. amend. V.
406 Berlinger, supra note 107, at 791.
407 Id.
408 Id.
409 KY. CONST. § 13.
Indeed, eminent domain “is one of the most intrusive powers of government, [potentially] requir[ing] owners [to] relinquish their property without their consent.”[^411] As such, eminent domain has historically been referred to as the “despotic” power.[^412] Despite its controversy throughout American jurisprudence, the power of eminent domain has survived nevertheless, as “the existence of such power is necessary; government could not subsist without it[].”[^413] Indeed, without this power, nearly all public works projects, such as the building of roads, public utilities, bridges, and parks, would be subject to either the benevolence of private land owners or the persuasive power of local government. What consequently arises is the inevitable “tension between the right of individuals to enjoy private property and the right of the community to achieve legitimate social goals.”[^414] Professor Ely poses the issue which lies at the root of the private-public debate: to what extent should the perceived needs of the public trump the rights of individual owners?[^415] Even more controversial, and perhaps the source of more litigation, is to what extent the perceived needs of other individuals or private organizations trump the rights of individual owners. This private right versus public benefit debate shall continue to evolve in this country because the right to own private property is the cornerstone of our society. Accordingly, courts and legislatures must anticipate the growing struggle between such competing interests in property law and carefully interpret or enact laws that preserve this delicate balance.[^416]

[^411]: Ely, supra note 103, at 31.
[^412]: Id. at 32.
[^414]: Ely, supra note 103, at 31.
[^415]: Id.
[^416]: The United States Supreme Court has an opportunity to continue to preserve this balance, or even tip the balance in favor of either the private owner or the government when it rules on Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), cert. granted 125 S. Ct. 27 (2004). In Kelo, the Connecticut Supreme Court upheld an economic development plan that will condemn ninety acres of residentially- and commercially-owned land and will make that land available to private developers. The plaintiff’s certiorari petition to the Supreme Court asked the court to determine whether the “public use” clause permits condemnations “not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy[,]” Kelo v. City of New London, petition for cert. filed, 2004 WL 1659558 (U.S. July 19, 2004) (No. 04-108). The Supreme Court’s determination on this issue will undoubtedly affect how courts around the country, including Kentucky, treat the state’s power of eminent domain.