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THOU SHALT NOT LIE: ENFORCEMENT OF NON-RELIANCE
CLAUSES UNDER KENTUCKY LAW

W. Ashley Hess * and Alexander L. Ewing **

I. INTRODUCTION

The scene is all too familiar. During the sale of a business, the seller and buyer exchange business information and discuss the possible deal for weeks, sometimes months, before the attorneys are engaged. Once involved, the attorneys finish negotiating the terms, draft the transaction documents and close the deal. The attorney representing the seller wants to ensure that the buyer does not have the ability to bring claims against the seller following the closing based on statements made outside the written contract. The seller does not desire, and probably does not expect, to be liable for any extra-contractual representations. In order to guard against such claims, the seller’s attorney includes a traditional “integration” or “merger” clause and, in addition, inserts a “non-reliance” clause in the transaction documents. One may ask, “what has the seller’s attorney’s hard fought negotiation to include the non-reliance clause really accomplished?”

A non-reliance clause is a contractual term by which a party represents that it is relying only on the representations and warranties made within the written contract and that the party specifically is not relying on oral statements or representations that are not set forth in the written contract. In business transactions, a party may use a non-reliance clause to protect itself against claims of fraud based on extra-contractual representations. Typically, when a business deal goes awry and the buyer sues the seller, the buyer makes one or more of the following claims: (i) breach of seller’s representations and warranties in the agreement, (ii) violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 thereunder (in cases involving the sale of stock), (iii) violations of state securities fraud statutes (in cases involving the sale of stock), (iv) common law fraud, (v) negligent misrepresentation, and (vi) breach of

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The purpose of the non-reliance clause is to establish what representations have been given and to eliminate the “reasonableness” component of the reasonable reliance element of a fraud claim based upon representations that are not included in the written contract. If the buyer has agreed that he or she has not relied on any representations outside of the written contract, then reliance on such extra-contractual representations should be unreasonable.

So, the answer is clear: by successfully negotiating the inclusion of the non-reliance clause in the agreement, the seller should win on summary judgment motion if the buyer brings a fraud claim based on extra-contractual representations. The seller’s attorney has saved valuable time and money for his client. Unfortunately for transactional attorneys, it is not that easy. Enforcement of non-reliance clauses is not consistent among the jurisdictions. Certain jurisdictions strictly enforce non-reliance clauses and dismiss claims based on extra-contractual representations, while other jurisdictions do not find that reliance upon such extra-contractual representations is per se unreasonable when the contract contains a non-reliance clause. In those jurisdictions, where courts do not strictly enforce the non-reliance clause, the non-reliance clause is only one element to consider when determining whether the buyer’s reliance on the allegedly fraudulent, non-contractual representation is reasonable. Thus, a seller in those jurisdictions will not win at the summary judgment stage, but can use the existence of the non-reliance clause as evidence of why the buyer’s reliance on the extra-contractual representation was unreasonable.

Section II of this Article briefly discusses the difference between a “non-reliance” clause and a typical “integration” or “merger” clause. Section III of this Article discusses various court interpretations of Kentucky case law that have analyzed the effect of non-reliance provisions on the ability of parties to bring claims based on fraud. Section IV of this Article briefly summarizes several cases involving the enforcement of non-reliance clauses in jurisdictions other than Kentucky. Section V discusses issues to consider when drafting a non-reliance clause and offers a sample provision.

5. See Rivermont, 113 S.W.3d at 636-43; See also Quaintance, supra note 5.
6. Id.
7. Id.
9. Id.
II. LIMITING THE AGREEMENT TO THE TERMS OF THE CONTRACT

It is important to distinguish an “integration” or “merger” clause from a “non-reliance” clause. An integration or merger clause is a provision reciting that the writing contains the entire agreement and serves as evidence of the parties’ intent that the agreement be completely integrated in the writing. Therefore, a court will generally consider only the language within the writing when interpreting a contract containing an integration or merger clause. Though a non-reliance clause is similar to an integration or merger clause in that both clauses are meant to clarify the exact terms of the agreement between the parties, a non-reliance clause goes one step further than the integration or merger clause and provides that the party is making an express representation that he or she is not relying on any representations other than those made within the contract. Depending on the specificity of the language used in the clauses, an integration or merger clause and a non-reliance clause can be very similar, and both may be used as a defense by the accused party against any claim for which reasonable reliance on an extra-contractual statement is an element.

III. CONTRACTING AGAINST RELIANCE ON EXTRA-CONTRACTUAL REPRESENTATIONS: A SURVEY OF KENTUCKY LAW

A. Decisions From Kentucky Courts.

1. Radioshack Corp. v. Comsmart, Inc.

The dispute in Radioshack Corp. v. Comsmart, Inc. arose from the purchase by Comsmart, Inc. (“Comsmart”) of a franchise from Radioshack Corporation (“Radioshack Corp.”). Radioshack Corp. entered into a franchise agreement allowing Comsmart to open a Radioshack store in Irvine, Kentucky. As part of the transaction, Comsmart entered into an installment promissory note to borrow money from Radioshack Corp. Dean, the president of Comsmart, personally guaranteed the promissory note. Comsmart defaulted on its payment of the promissory note, and Radioshack Corp. sued for breach of contract.

11. Id.
15. Id.
16. Id.
17. Id.
18. Id.
In their defense, Comsmart and Dean argued that Radioshack Corp. made material misrepresentations about the profitability of the franchise. First, Dean claimed that representatives of Radioshack Corp. said Comsmart could expect a 40% profit margin during the first year, and that the most they could lose during the first year was $125,000. Second, Dean claimed that the representatives of Radioshack Corp. indicated that Radioshack Corp. would provide Comsmart’s store with a certain inventory of top selling Radioshack items. Third, Dean claimed that the Radioshack representatives made statements to him regarding the performance of the Irvine Radioshack store under the prior owner. Dean asserted that the Radioshack Corp. representatives told Dean that the store had “done great” and made annual purchases from Radioshack Corp. of $175,000.

Relying on the merger and integration clauses contained in the contracts, Radioshack Corp. argued that Comsmart was precluded from bringing evidence of representations outside the written contract. During the negotiations, Comsmart and Dean received an initial offering circular that disclaimed any representations regarding the potential earning capacity of the business. Comsmart and Dean also signed the franchise agreement and promissory note which contained the merger and integration clauses.

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19. Id.
20. Radioshack, 222 S.W.3d at 262.
21. Id.
22. Id.
23. Id.
24. Id. at 260.
25. Id.
26. Radioshack, 222 S.W.3d at 260. The clause in the franchise agreement provided as follows:

Integration. All prior negotiations and agreements between the parties with respect to the subject matter of this Agreement are merged in this Agreement, in the other agreements signed in conjunction with this Agreement, and in the Store Reference Guide. No prior statement, agreement or understanding, oral or written, not contained in the final agreements will be recognized or enforced. Except for changes to the Store Reference Guide and other rules or regulations promulgated as provided in this Agreement, no change or amendment to the Agreement shall be effective unless in writing and signed by you and a corporate officer of Tandy Corporation or the Vice President-Radioshack Franchise/Dealer Division. Id.

Similarly, the promissory note contained the following language:

NO COURSE OF DEALING BETWEEN BORROWER AND PAYEE, NO COURSE OF PERFORMANCE, NO TRADE PRACTICES, AND NO EXTRINSIC EVIDENCE OF ANY NATURE MAY BE USED TO CONTRADICT OR MODIFY ANY TERM OF THIS NOTE.

THIS NOTE AND THE OTHER WRITTEN LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES. Id.
Because Dean and Comsmart claimed that the contract was procured by fraud, the court allowed the parties to admit parol evidence to prove that specific claim.\textsuperscript{27} Dean and Comsmart based their fraud claim on the three representations summarized above.\textsuperscript{28} Relying largely on \textit{Bryant v. Troutman}\textsuperscript{29}, the court found that because fraudulent representations are not merged into the contract, parol evidence is admissible to show that the making of a contract was procured by fraud.\textsuperscript{30} So long as there is an allegation of fraud in the inducement to a written agreement, the parol evidence rule does not apply.\textsuperscript{31} Thus, the court held that the parol evidence was admissible to establish that the contract was procured by fraudulent misrepresentations.\textsuperscript{32}

Next, the court turned to the task of determining whether Dean and Comsmart could establish a claim of fraud by clear and convincing evidence.\textsuperscript{33} In order to establish a claim of fraud, Dean and Comsmart had to prove six elements: (i) that the declarant made a material misrepresentation to the plaintiff, (ii) that this misrepresentation was false, (iii) that the declarant knew it was false or made it recklessly, (iv) that the declarant induced the plaintiff to act upon the misrepresentation, (v) that the plaintiff relied upon the misrepresentation, and (vi) that the misrepresentation caused injury to the plaintiff.\textsuperscript{34}

The court held that neither the first nor the second claim of Dean and Comsmart was actionable as fraud because Comsmart and Dean could not prove that they reasonably relied on those representations.\textsuperscript{35} The court noted that these two representations dealt with an opinion as to future events, not past facts.\textsuperscript{36} The Court held that “while the written disclaimers do not preclude a tort action for misrepresentation, such disclaimers are relevant to determine whether a person reasonably relied on the representations.”\textsuperscript{37} The court stated that “the franchise agreement specifically disclaimed any oral understandings or agreements which were not set out in the written contract.”\textsuperscript{38} Therefore, the court held that “any promises or understandings concerning the type of inventory Radioshack would send to Comsmart and Dean were specifically disclaimed by the franchise agreement and are therefore not actionable.”\textsuperscript{39}

\begin{thebibliography}{9}
\bibitem{27} Id. at 260-61.
\bibitem{28} Id. at 262.
\bibitem{29} 287 S.W.2d 918 (Ky. 1956).
\bibitem{30} \textit{Radioshack}, 222 S.W.3d at 260.
\bibitem{31} Id. at 261.
\bibitem{32} Id.
\bibitem{33} Id. at 261-62.
\bibitem{34} Id. at 262 (citing United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999)).
\bibitem{35} Id.
\bibitem{36} \textit{Radioshack}, 222 S.W.3d at 262.
\bibitem{37} Id. (citing \textit{Rivermont}, 113 S.W.3d at 640-41).
\bibitem{38} Id.
\bibitem{39} Id.
\end{thebibliography}
The court, however, did find that Dean and Comsmart presented sufficient evidence to create a jury issue regarding their third claim of fraud.40 Dean claimed that the Radioshack Corp. representatives made statements to him regarding the performance of the Irvine Radioshack store under the prior owner.41 Allegedly, the Radioshack Corp. representatives told Dean that the store had “done great” and made annual purchases from Radioshack of $175,000.42 In fact, the store lost more than $30,000 in its first year of operation, it failed to pay Radioshack Corp. for much of the inventory it purchased and, when it closed, it owed Radioshack Corp. more than $40,000.43 “These representations clearly related to past events.”44 The court found that a “jury could reasonably find that these misrepresentations were intentional or reckless, that Comsmart and Dean reasonably relied on the statements . . . ”45 For these reasons, the court affirmed the judgment of the trial court.46


In Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., the Kentucky Court of Appeals analyzed the effect of a “non-reliance” clause on the ability of the plaintiff to bring a cause of action for fraud.47 In Rivermont, MD Investments (“MD”) owned and operated a Holiday Inn hotel in Louisville, Kentucky.48 Rivermont Inn, Inc. (“Rivermont, Inc.”) wanted to buy the hotel from MD and continue operating the hotel as a Holiday Inn.49 Because the franchise license for the Holiday Inn was not transferable, Rivermont, Inc. needed to obtain a new franchise license from Holiday Hospitality Franchising, Inc., the franchisor (the “Franchisor”), in order to operate the hotel as a Holiday Inn.50 Rivermont, Inc. applied for a franchise license from the Franchisor prior to closing of the transaction with MD, but the Franchisor did not grant the franchise license to Rivermont, Inc. before the closing.51

During the application process, Rivermont, Inc. acknowledged in writing several times that the Franchisor made no oral agreements with respect to the granting of licenses.52 Those documents further provided that the Franchisor

40. Id.
41. Id. at 262-63.
42. Radioshack, 222 S.W.3d at 262.
43. Id. at 263.
44. Id.
45. Id.
46. Id.
47. Rivermont, 113 S.W.3d at 639-40.
48. Id. at 639.
49. Id.
50. Id.
51. Id.
52. Id. (emphasis added).
Three days prior to the closing, Rivermont, Inc. allegedly contacted a representative of the Franchisor to determine whether Rivermont, Inc. should close the transaction. According to Rivermont, Inc., the Franchisor’s representative told the representative of Rivermont, Inc., “that licensing would be forthcoming and to close on the property.” Rivermont, Inc. claimed that, based on these representations, it closed on the purchase of the property. After the closing, the Franchisor informed Rivermont, Inc. that the franchise license would be issued subject to a condition that Rivermont, Inc. must complete certain improvements to the property. Rivermont, Inc. sued the Franchisor alleging fraudulent misrepresentation.

The Franchisor argued that there was no written agreement regarding the granting of the franchise license that supported Rivermont Inc.’s claim. Further, the Franchisor argued that Rivermont Inc. could not have reasonably relied upon the alleged oral statements regarding the granting of the franchise license because Rivermont, Inc. agreed in writing that it was not relying upon any oral agreements or promises. Rivermont, Inc. argued that under Kentucky law, “non-reliance” clauses are never enforceable (relying on the holding in Bryant v. Troutman discussed below) and that its written acknowledgments that it was not relying on any oral agreements not set forth in the written contracts between Rivermont Inc. and the Franchisor did not preclude its fraud claim. The circuit court held for the Franchisor, and Rivermont Inc. appealed the decision.

The Kentucky Court of Appeals rejected Rivermont, Inc.’s argument that non-reliance clauses are never enforceable in Kentucky. The court found that Bryant dealt with the introduction of parol evidence to establish a claim of fraud in a case involving the sale of real estate, not with the ability to absolve a seller from any claim of fraud through the use of a non-reliance clause. It is interesting to note that the court in Rivermont interprets Bryant as a decision relating to non-reliance clauses, as opposed to solely merger and integration clauses, as suggested by the Bryant decision itself and the court in Radioshack. See Bryant, 287 S.W.2d at 920; Radioshack, 222 S.W.3d at 261.
facts of Rivermont.65 The Rivermont court noted that Rivermont, Inc. acknowledged in writing that the Franchisor did not make any oral agreements or promises with respect to the franchises or licenses.66 The appeals court agreed with the circuit court that the statement attributed to the Franchisor’s representative was a “prediction, and not a statement of present or past material fact.”67 Based on these facts, the appeals court held that the circuit court correctly determined that there was not enough evidence to support a claim of fraudulent misrepresentation because of the facts known to Rivermont, Inc., and Rivermont Inc.’s written agreement that the Franchisor did not make any oral agreements or promises concerning the granting of the franchise license.68 After rejecting Rivermont Inc.’s arguments and interpreting Bryant broadly, the Kentucky Court of Appeals held that “as a matter of law, a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing . . .”69

3. Bryant v. Troutman

As discussed above, the plaintiff in Rivermont based its argument that non-reliance clauses are not enforceable under Kentucky law on the Kentucky Supreme Court’s holding in Bryant v. Troutman.70 In Bryant, the Kentucky Supreme Court (formerly the Kentucky Court of Appeals) examined whether a seller could protect itself from claims of fraud brought by a buyer in a real estate transaction.71 The contract in Bryant expressly provided that the parties “[were] not relying on verbal statements not contained [in the contract].”72 The court noted that though such a clause serves to merge the entire transaction into the contract as written, fraudulent representations are not merged into the contract, and therefore parol evidence is still admissible to show that the contract was procured by fraudulent representations.73 The court would not allow the seller to commit fraud by concealing defects with this property and shield himself from liability by including the clause disclaiming liability for oral statements.74 In dictum, the court noted that “[o]ne cannot contract against his fraud.”75

65. Id.
66. Id. (emphasis added).
67. Rivermont, 113 S.W.3d at 640 (emphasis added).
68. Id.
69. Id. The court cites no Kentucky authority for this proposition of law, but cites to Trifiro v. New York Life Ins. Co., 845 F.2d 30 (1st Cir. 1988) as an example.
70. Id.
71. Bryant v. Troutman, 287 S.W.2d 918, 919-20 (Ky. 1956).
72. Id. at 920.
73. Id.
74. Id.
75. Id. at 921 (citing 6 CORBIN ON CONTRACTS, § 1516, p. 983).
B. Federal Application of Kentucky Law

1. Papa John’s Intern., Inc. v. Dynamic Pizza, Inc.

In *Papa John’s Intern., Inc. v. Dynamic Pizza, Inc.*76, Papa John’s and Dynamic Pizza entered into a series of franchise agreements.77 When disputes arose over several issues, Papa John’s filed suit against Dynamic Pizza.78 Dynamic Pizza counterclaimed that Papa John’s made fraudulent representations regarding sales volume, site selection, marketing, and Papa John’s continued support.79 Papa John’s moved for summary judgment arguing that the merger and integration clauses in the agreement and certain specific statements in acknowledgements signed by Dynamic Pizza prevented Dynamic Pizza from relying on any oral representations about sales volume, revenues, or profits.80 Thus, Papa John’s claimed that Dynamic Pizza was precluded from making any claims of fraudulent inducement.81

Applying Kentucky law, the court held that because the written contracts contained merger and integration clauses, Dynamic Pizza’s claim of fraud must fail.82 First, the court recognized that a merger and integration clause is sufficient basis to consider the agreement a complete and accurate integration of the contract.83 Therefore, the court held that no evidence can be introduced to contradict the writing.84 The court reasoned that “if any misrepresentations fraudulently induced [Dynamic Pizza] into entering the [agreement], i.e., misrepresentations made prior to the signing of the agreement, the merger and integration clause prevents this action from being brought.”85

Further, the Papa John’s court noted that “all of the statements made by Papa John’s concerned future events,” were statements that were merely predictive, and were statements which Defendants could not reasonably relied upon.86 Kentucky courts have specifically held that it is unreasonable to rely on projections of future profits or future sales in a fraud case.”87 Further, the court went on to state that “Papa John’s correctly states that under Kentucky law, actionable misrepresentations must relate to a past or present material fact which is likely to effect the conduct of a reasonable man and be an inducement of the contract. Mere statements of opinion or prediction, such as future profits or how

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77. Id. at 741.
78. Id.
79. Id. at 744.
80. Id. at 744-45.
81. Id.
83. Id. (citing KFC Corp. v. Darsam Corp., 543 F. Supp. 222 (W.D. Ky. 1982) (interpreting Kentucky law)).
84. Id.
85. Id.
86. Id. at 749 (emphasis added).
87. Id. (citing Rivermont, 113 S.W.3d at 640).
well a business will do in a particular market, may not be a basis for a fraud or misrepresentation action because predictions are not past or present material facts.”

Thus, the court held that, “[a] party cannot rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing.”

Essentially, the court ruled that a merger and integration clause prevents claims of fraud where those claims are based on alleged oral statements regarding future actions to be taken by the parties, or events which may occur in the future. In its decision, the court in Papa John’s stressed that the parties involved were sophisticated parties. The Papa John’s court indicated that between sophisticated parties, a court must apply contractual agreements as written.

C. Analysis of the Enforcement of Non-Reliance Clauses Under Kentucky Law.

Although the courts in Rivermont and Radioshack reached different conclusions, the holdings and application of the law are consistent. The plaintiff’s claims in Rivermont were based on oral statements regarding future events. Those claims were properly dismissed. In Radioshack, two of the three statements upon which the plaintiff’s claims were based were oral statements regarding future events. The Court of Appeals of Kentucky determined that the promises regarding future actions to be taken with respect to the Radioshack store were specifically disclaimed by the language of the contract. In both cases, Rivermont and Radioshack, the claims based on the oral statements about future events were not actionable. The claim that survived in Radioshack was the oral statement regarding a past factual matter: the performance of the Radioshack store in Irvine, Kentucky under the prior owner. Although reconciling these decisions may be difficult upon a first reading, these decisions are consistent considering the nature of the specific representations upon which the fraud claims were based in each of the cases.

While the Bryant case was discussed in both Rivermont and Radioshack, the Bryant case is distinguishable from both cases. Most notably, the dispute in Bryant arose from the sale of residential real estate, in which the seller did not
disclose certain defects about the house. In contrast, Rivermont and Radioshack both involved transactions involving the purchase of a business. For this reason, the analysis in Bryant is not relevant to a non-reliance clause in a contract between parties buying or selling a business. Clearly, Rivermont and Radioshack provide more relevant analyses for determining the effect of contractual language intended to limit the ability of the parties to rely on extra-contractual representations in a business transaction.

The holding of the federal court in the Papa John’s case is consistent with the decisions in Rivermont and Radioshack. Specifically, Papa John’s, Rivermont, and Radioshack are in agreement concerning extra-contractual representations about future events. The Papa John’s decision is in accord with the Kentucky courts’ decisions in finding that a party cannot rely on extra-contractual representations that conflict with contrary written disclaimers which that party earlier specifically acknowledged in writing.

Based on the analyses and holdings in these cases, the rule that has developed under Kentucky law is as follows: (i) disclaiming statements in a contract are effective to preclude a party from successfully bringing a claim for fraud where the claim is based on extra-contractual predictions of future events or actions; (ii) where the basis of the fraud claim is a statement regarding a past factual issue, the disclaiming statements are evidence as to whether the claiming party reasonably relied on the representations, but such disclaiming statements do not establish per se that the claiming party did not reasonably rely on such representations. Thus, where the fraud claim is based on a statement regarding a past factual issue, the issue is for a jury to decide whether a party reasonably relied on the extra-contractual statement even though there was language in the contract specifically disclaiming such reliance. Within this framework, a well-crafted non-reliance clause in a contract is very valuable for a party selling a business.

IV. ENFORCEMENT OF NON-RELIANCE CLAUSES IN OTHER JURISDICTIONS

As mentioned above, much of the analysis concerning non-reliance clauses has emerged from cases analyzing claims based on Rule 10b-5 under the Securities and Exchange Act of 1934. Rule 10b-5 under the Securities and Exchange Act of 1934 states, in part, that it is unlawful in connection with the

100. Bryant, 287 S.W.2d at 920.
101. Rivermont, 113 S.W.3d at 639; Radioshack, 222 S.W.3d at 259-260.
102. Papa John’s, 317 F. Supp. 2d at 749; Rivermont, 113 S.W.3d at 640; Radioshack, 222 S.W.3d at 262.
103. Papa John’s, 317 F. Supp. 2d at 750 (citing Rivermont, 113 S.W.3d at 640-641).
104. See Radioshack, 222 S.W.3d at 262; Rivermont, 113 S.W.3d at 640; see also Church v. Eastham, 331 S.W.2d 718, 719 (Ky.1960); McHargue v. Fayette Coal & Feed Co., 283 S.W.2d 170, 172 (Ky.1955).
105. See Rivermont, 113 S.W.3d at 640; see also Radioshack, 222 S.W.3d at 261-63.
106. Radioshack, 222 S.W.3d at 263.
purchase or sale of any security for a person to make or omit a statement of material fact necessary to make the statements made from being misleading.\textsuperscript{107} Reasonable reliance by the plaintiff is an element of a claim based on Rule 10(b)-5 just as reasonable reliance is an element in proving common law fraud under Kentucky law.\textsuperscript{108} Thus, the analyses utilized by courts addressing the enforcement of a non-reliance clause in such cases are instructive.

1. Non-Reliance Clause Precludes Fraud Claims

   a. Second Circuit Approach

   In \textit{Harsco Corp. v. Segui}\textsuperscript{109}, the buyer, Harsco Corporation (“Harsco”), a manufacturer and marketer of industrial goods and services sought to purchase a company in the steel industry.\textsuperscript{110} After entering into the agreement to purchase the stock of the seller, Harsco sued, alleging that the seller’s representations contained material misrepresentations and omissions.\textsuperscript{111} The stock sale agreement contained a provision that specifically disclaimed representations not in the agreement.\textsuperscript{112} Additionally, the agreement included a merger clause.\textsuperscript{113} Furthermore, the agreement contained a provision enabling Harsco to terminate the deal if it discovered that any of the seller’s representations were untrue during the fourteen days of confirmatory due diligence.\textsuperscript{114} Nevertheless, Harsco did not terminate the agreement.\textsuperscript{115}

   In its analysis of the question whether the disclaimer language and the merger clause precluded Harsco from successfully pursuing its fraud claim, the court focused on the fact that the agreement at issue was between two

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{107} 17 C.F.R. § 240.10b-5(b) (2006).
\item \textsuperscript{108} See \textit{Harralson v. Monger}, 206 S.W.3d 336, 341 (Ky. 2006) (citing \textit{Bassett v. National Collegiate Athletic Ass'n}, 428 F.Supp.2d 675, 682 (E.D.Ky. 2006)).
\item \textsuperscript{109} \textit{Harsco Corp. v. Segui}, 91 F.3d 337 (2d Cir. 1996).
\item \textsuperscript{110} \textit{Id.} at 340.
\item \textsuperscript{111} \textit{Id.} at 340-41.
\item \textsuperscript{112} \textit{Id.} at 342. According to the court, the agreement provided that the sellers: “shall not be deemed to have made to Purchaser any representation or warranty other than as expressly made by [the sellers] in Sections 2.01 through 2.04 hereof . . . . Without limiting the generality of the foregoing, and notwithstanding any otherwise express representations and warranties made by the [sellers] in Sections 2.01 through 2.04 hereof . . . , the [sellers] make no representation or warranty to Purchaser with respect to: (a) any projections, estimates or budgets heretofore delivered to or made available to Purchaser of future revenues, expenses or expenditures, future results of operations, [etc.]; or (b) any other information or documents made available to Purchaser or its counsel, accountants, or advisors with respect to [MultiServ], except as expressly covered by a representation and warranty contained in Sections 2.01 through 2.04 hereof.” \textit{Id.} at 342-43.
\item \textsuperscript{113} \textit{Id} at 343. The merger clauses provided that the Agreement “contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Agreement and supersedes all prior arrangements or understandings with respect thereto.” \textit{Id.}
\item \textsuperscript{114} \textit{Harsco}, 91 F.3d at 341.
\item \textsuperscript{115} \textit{Id.}
\end{itemize}
\end{footnotesize}
sophisticated parties negotiating at arm’s length. Considering the relative parity of the parties, the court was willing to defer to the terms of the agreement. According to the terms of the agreement, Harsco was apparently satisfied that there were no representations other than those set forth in the agreement, and, furthermore, Harsco chose to close the transaction after the two-week window of confirmatory due diligence. The Second Circuit Court of Appeals found that, in the presence of a non-reliance clause, reliance on representations outside the agreement is unreasonable, and therefore a fraud claim cannot survive based on such representations. Thus, the Second Circuit Court of Appeals found that the district court properly dismissed Harsco’s fraud claims.

b. Seventh Circuit Approach

In Rissman v. Rissman, the Seventh Circuit Court of Appeals found that a non-reliance clause precluded a seller’s claim of fraud. In Rissman, two brothers were the only stockholders in an electronics corporation. After a falling out, one brother sold all of his shares in the company, roughly one-third of the outstanding stock, to the other stockholder for $17 million. Thirteen months after the sale, the company sold its assets to a large toy maker for $335 million. The seller sued, claiming that the buyer deceived him into selling his shares by stating that he would never sell the company or take it public.

Although the seller asked for a representation that the buyer would not sell the company, the buyer refused to include such a representation in the contract. The buyer, however, did offer a representation that he was unaware of any third-party offers to buy the company. Moreover, the parties agreed that if the company were sold before the seller received all installments of the purchase price, he would receive accelerated payment of the principal and interest. In addition to these terms, the agreement included a non-reliance clause.

116. Id. at 344.
117. Id.
118. Id.
119. Id. at 345.
120. 213 F.3d 381 (7th Cir. 2000).
121. Id. at 385, 387.
122. Id. at 387.
123. Id. at 382.
124. Id.
125. Id.
126. Rissman, 213 F.3d at 383.
127. Id.
128. Id.
129. Id. at 383. The Agreement contained a representation given by the Seller that provided: “(a) no promise or inducement for this Agreement has been made to him except as set forth herein; (b) this Agreement is executed by [Arnold] freely and voluntarily, and without reliance upon any
Under these facts, the court found that any reliance by the seller on the buyer’s oral representation would be unreasonable. The court noted that to permit a party to rely on a representation outside of the contract when the seller included a representation to the contrary in the written agreement would permit that party to lie. In the court’s opinion, the non-reliance clause ensures that the transaction and any subsequent litigation will proceed on the basis of the parties’ writings. The seller in this transaction could have protected himself with more thorough negotiations, but failed to do so. Furthermore, the court rejected the argument that the non-reliance clause should be rejected as “boilerplate.” The court noted that contractual language only serves its functions if enforced consistently, and the designation of language as boilerplate should not influence the application of the parties’ agreement. In sum, the non-reliance clause prevented the seller from bringing a claim based upon reliance on representations outside the contract.

   a. First Circuit Approach

In Rogen v. Ilikon Corp., a fired executive of a company sold his shares back to the company. Shortly after the sale, the company landed a major licensing agreement for its rights to aluminum can technology, which increased the value of its stock. The seller sued for fraud, stating that the company represented to him that it would not pursue negotiations for licensing its product and that the aluminum can technology had not reached the stage needed for use in the market. In the stock sale agreement, the seller acknowledged that he did not rely on any representations outside the contract.

statement or representation by Purchaser, the Company, any of the Affiliates or O.R. Rissman or any of their attorneys or agents except as set forth herein; (c) he has read and fully understands this Agreement and the meaning of its provisions; (d) he is legally competent to enter into this Agreement and to accept full responsibility therefor; and (e) he has been advised to consult with counsel before entering into this Agreement and has had the opportunity to do so.” Id.

130. Id.
131. Rissman, 213 F.3d at 383.
132. Id. at 384.
133. Id.
134. Id. at 385.
135. Id.
136. Id.
137. 361 F.2d 260 (1st Cir. 1966).
138. Id. at 262.
139. Id. at 263.
140. Id.
141. Id. at 265. The contract contained this provision: “that [the plaintiff and his father] are fully familiar with the business and prospects of the corporation, are not relying on any representations or obligations to make full disclosure will respect thereto, and have made such investigation thereof as they deem necessary.” Id.
In *Rogen*, the court rejected the argument that the non-reliance clause eliminated any reasonable reliance on representations outside the contract.\(^\text{142}\) In making its decision, the court noted that to say non-reliance is established as a matter of law ignores the possibility that a judge or jury could find that the reliance was reasonable because the plaintiff was not an experienced business person, or other factual circumstances that would justify reliance.\(^\text{143}\) Even though these factors may be outweighed by the non-reliance clause itself, a plaintiff is not precluded from showing reasonable reliance.\(^\text{144}\)

b. Third Circuit Approach

In *AES Corp. v. Dow Chemical Co.*,\(^\text{145}\) the buyer agreed to purchase a power company from the seller.\(^\text{146}\) The agreement contained clauses in which the buyer stated that it would not rely on any representations outside of the definitive agreement.\(^\text{147}\) During negotiations, the seller provided information to potential buyers, including a computer model to value its assets.\(^\text{148}\) However, these valuations included assumptions about the expenses and revenues of a particular

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\(^{142}\) *Rogen*, 361 F.2d at 267-68.

\(^{143}\) *Id.*

\(^{144}\) *Id.* at 268.

\(^{145}\) 325 F.3d 174 (3d Cir. 2003).

\(^{146}\) *Id.* at 176.

\(^{147}\) *Id.* at 176-77. Specifically, the clauses were:

“We [AES] acknowledge that neither you [Destec], nor Morgan Stanley [Destec's Investment Banker] or its affiliates, nor your other Representatives, nor any of your or their respective officers, directors, employees, agents or controlling persons within the meaning of section 20 of the Securities Exchange Act of 1934, as amended, make any express or implied representation or warranty as to the accuracy or completeness of the Information, and we agree that no such person will have any liability relating to the Information or for any errors therein or omissions therefrom. We further agree that we are not entitled to rely on the accuracy or completeness of the Information and that we will be entitled to rely solely on any representations and warranties as may be made to us in any definitive agreement with respect to the Transaction, subject to such limitations and restrictions as may be contained therein.” *Id.* at 176.

“[o]nly those particular representations and warranties which may be made to a purchaser in a definitive agreement, when, as, and if executed, and subject to such limitations and restrictions as may be specified in such definitive agreement, shall have any legal effect.” *Id.*

“Except for the representations and warranties contained in this Article IV, neither Dow nor any other person makes any other express or implied representation or warranty on behalf of Dow.” *Id.* at 177.

“[t]his Agreement and the Confidentiality Agreement, and certain other agreements executed by the parties hereto as of the date of this Agreement, constitute the entire agreement, and supersedes (sic) all prior agreements and understandings (written and oral), among the parties with respect to the subject matter hereof.” *Id.*

\(^{148}\) *AES Corp.*, 325 F.3d at 177.
plant still in construction. The buyer sued, alleging fraud.

The court noted that for the fraud claim to succeed, the buyer would have to prove that it reasonably relied on the representations. Though the non-reliance clause is evidence against reasonable reliance, the court held that the existence of a non-reliance clause is not conclusive. Non-reliance clauses are only among the circumstances considered in determining the reasonableness of reliance, and will not provide immunity against fraud claims. However, the court noted that while a non-reliance clause is not dispositive, a plaintiff may face an “uphill battle” in proving its case and summary judgment may be appropriate at some point. Nevertheless, in the case at bar, there was sufficient evidence to overcome summary judgment on the issue of reasonable reliance.

c. Sixth Circuit Approach

In Brown v. Earthboard Sports USA, Inc., a wealthy investor purchased several thousand shares of stock from a skateboard company. Before making this purchase, the investor’s financial advisor told the investor that a large footwear company was about to acquire the skateboard company, after which the footwear company would swap its shares for shares of the skateboard company one-for-one. Considering that the footwear company’s stock price was twice the price of the skateboard company’s stock, the investor stood to double his money. Furthermore, the third-party broker led the investor to believe that the acquisition was imminent, and therefore the investor would have to act fast.

After the purchase, the acquisition by the large footwear company never came to fruition. It was later revealed that the entire scheme was fraudulent. The investor sued the financial advisor and his employer alleging, among other things, securities fraud. In his defense, the financial advisor claimed that

149. Id.
150. Id.
151. Id. at 178.
152. Id.
153. Id. at 180.
154. AES Corp., 325 F.3d at 181.
155. Id. at 182.
156. Id. at 184.
157. 481 F.3d 901 (6th Cir. 2007).
158. Id. at 907.
159. Id.
160. Id.
161. Id.
162. Id. at 908.
163. Earthboard Sports, 481 F.3d at 908.
164. Id. at 905.
investor’s claims based on securities fraud should be dismissed because the subscription agreement signed by the investor contained a clause pursuant to which the investor acknowledged that he was not relying on any third-party advice in making his decision to purchase the stock. In light of this provision, the sellers claimed that the buyer reasonably could not have relied on representations outside of the contract. The court, however, rejected this argument.

The court stated that it considers several factors when determining reasonable reliance in a non-insider context, including (1) the sophistication of the plaintiff; (2) the existence of long-standing business or personal relationships; (3) access to relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite it; and (8) the generality or specificity of the misrepresentations. To dismiss claims of fraud per se as lacking reasonable reliance due to a non-reliance clause would defeat the purpose of the contextual analysis. Instead of adopting a per se rule, the court ruled that the non-reliance clause is only one factor considered in the contextual analysis and can serve as evidence against reasonable reliance. Under this rule, the court found that there was enough evidence of reasonable reliance for the buyer’s claim of securities fraud to survive summary judgment.

d. Non-Reliance Clauses under Delaware Law: Lessons From the ABRY Case

In addition to the circuit court cases discussed in this Article, the Delaware Court of Chancery in ABRY Partners V, L.P. v. F&W Acquisition LLC recently discussed the effect of a non-reliance clause on the claims of one of the parties to that litigation and the specificity required in order to have an effective non-reliance clause. ABRY involved two sophisticated private equity firms that entered into a Stock Purchase Agreement for one party to purchase a portfolio company of the other party. ABRY Partners, L.P. and its affiliates (“ABRY Buyer”) purchased from Providence Equity Partners, Inc, and its affiliates (“Providence”) the stock of F&W Publications, Inc., a company engaged in the business of selling magazines and publishing books (“F&W”). Following the

165. Id. at 921.
166. Id.
167. Id.
168. Id.
169. Earthboard Sports, 481 F.3d at 921.
170. Id.
171. Id.
172. 891 A.2d 1032 (Del. Ch. 2006).
173. Id. at 1034.
174. Id.
closing of the transaction, ABRY Buyer alleged that the financial statements of F&W contained material misrepresentations and were possibly manipulated by Providence to boost the purchase price. The Stock Purchase Agreement contained a clause whereby ABRY Buyer promised that it was not relying on representations and warranties outside the four-corners of the Stock Purchase Agreement and “that no such extra-contractual representations had been made.” Additionally, the terms of the Stock Purchase Agreement limited Providence’s liability for any misrepresentation of fact within the Stock Purchase Agreement to an amount not exceeding a contractually-established indemnity fund. The Stock Purchase Agreement also provided that the indemnity claim was the sole remedy of ABRY Buyer and barred a rescission claim.

In the decision, the Delaware Chancery Court noted that non-reliance clauses in agreements between sophisticated parties preclude any reliance on extra-contractual representations. The court stated that “[t]o fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing . . . to enable it to prove

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175. Id. at 1038.
176. Id. at 1034-35. Specifically, the agreement contained the following provisions:

   “Acquiror acknowledges and agrees that neither the Company nor the Selling Stockholder has made any representation or warranty, expressed or implied, as to the Company or any Company Subsidiary or as to the accuracy or completeness of any information regarding the Company or any Company Subsidiary furnished or made available to Acquiror and its representatives, except as expressly set forth in this Agreement . . . and neither the Company nor the Selling Stockholder shall have or be subject to any liability to Acquiror or any other Person resulting from the distribution to Acquiror, or Acquiror’s use of or reliance on, any such information or any information, documents or material made available to Acquiror in any ‘data rooms,’ ‘virtual data rooms,’ management presentations or in any other form in expectation of, or in connection with, the transactions contemplated hereby.” Id. at 1041.

   EXCEPT AS EXPRESSLY SET FORTH IN THIS ARTICLE III, THE COMPANY MAKES NO REPRESENTATION OR WARRANTY, EXPRESSED OR IMPLIED, AT LAW OR IN EQUITY IN RESPECT OF THE COMPANY OR THE COMPANY SUBSIDIARIES, OR ANY OF THEIR RESPECTIVE ASSETS, LIABILITIES OR OPERATIONS, INCLUDING WITH RESPECT TO MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, AND ANY SUCH OTHER REPRESENTATIONS OR WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED. ACQUIROR HEREBY ACKNOWLEDGES AND AGREES THAT, EXCEPT TO THE EXTENT SPECIFICALLY SET FORTH IN THIS ARTICLE III, THE ACQUIROR IS ACQUIRING THE COMPANY ON AN “AS IS, WHERE IS” BASIS. THE DISCLOSURE OF ANY MATTER OR ITEM IN ANY SCHEDULE HERETO SHALL NOT BE DEEMED TO CONSTITUTE AN ACKNOWLEDGEMENT THAT ANY SUCH MATTER IS REQUIRED TO BE DISCLOSED. Id. at 1042-43.

177. ABRY 891 A.2d at 1035.
178. Id.
179. Id.
that another party lied orally or in a writing outside the contract’s four corners.\textsuperscript{180} The court noted, however, that “murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations.”\textsuperscript{181} In order to limit reliance to those specific representations set forth in the four corners of the document, the contract must contain a clause that includes a clear anti-reliance provision by which a party has promised that it did not rely on statements not set forth in the written contract.\textsuperscript{182}

Ultimately, ABRY Buyer did not assert claims based on extra-contractual representations. Hence, the court’s decision addressed the issue whether ABRY Buyer’s remedies were limited to those specified in the contract if ABRY Buyer could establish that Providence fraudulently made the representations in the contract\textsuperscript{183} The court held that public policy necessitated an exception to the general rule in Delaware that courts will respect the terms of the written contract entered into by sophisticated parties.\textsuperscript{184} The court would not limit Providence’s exposure if ABRY Buyer could show that Providence made false contractual representations to ABRY Buyer.\textsuperscript{185}

V. DRAFTING A NON-RELIANCE CLAUSE

A. Factors to Consider When Drafting a Non-Reliance Clause.

The cases discussed in this Article provide insight regarding the factors courts in Kentucky and other jurisdictions weigh when determining whether and how to enforce non-reliance clauses and thus provide guidance for the attorney drafting a non-reliance clause in transaction documents.\textsuperscript{186} As the cases demonstrate, courts are forced to strike a balance between (i) the parties’ ability to contract freely, and (ii) the public policy against insulating parties from fraud.\textsuperscript{187} Below is a brief discussion of certain factors courts consider when analyzing the effect of a non-reliance clause on the ability of the parties to bring fraud claims based on extra-contractual representations.

1. Relative Sophistication of the Parties

In the Kentucky cases discussed in this Article, the courts did not focus on the relative sophistication of the parties as a reason to not dismiss the claims based on extra-contractual representations. Only the federal court in \textit{Papa
John’s raised the element of sophistication as a factor considered in its decision to enforce the non-reliance clause by stating that it would enforce contractual agreements between sophisticated parties. Because the Sixth Circuit Court of Appeals and other circuit courts have emphasized the sophistication of the parties as a factor in the consideration whether to enforce a non-reliance clause, attorneys drafting non-reliance clauses should seek to establish the sophistication of the contracting parties or to establish that both parties to the transaction are represented by experienced counsel.

The Delaware Chancery Court in ABRY emphasized the relative sophistication of the parties. The Delaware Chancery Court held that, between two sophisticated parties, the parties to a contract may assign risk of factual errors to one another. Generally, contracts between sophisticated parties with equal bargaining strength should be honored. Similarly, the court in Harsco enforced the non-reliance clause in part because both parties “were sophisticated business entities negotiating at arms length.” The Harsco court distinguished its case from the holding in Rogen on this point.

The court in Rogen refused to hold that the non-reliance clause precluded any claim of fraud because of the possible disparity in bargaining power between the two parties. Furthermore, the court stated that it was possible that the plaintiff should not be prevented from alleging fraud because he “was not an experienced businessman” and may have been “exceedingly gullible” and “overtrusting.” Similarly, even though the court in Earthboard Sports found that a non-reliance clause is one factor to consider when determining whether a party’s reliance on extra-contractual representations was reasonable, it noted that the sophistication of the plaintiff is also a factor to be considered when determining the reasonableness of a party’s reliance. Finally, the court in AES Corp. noted that a non-reliance clause in an agreement between sophisticated parties may be best suited for strict enforcement. In fact, the court noted that though a non-reliance clause will not always provide immunity from claims of fraud made by a sophisticated party, “cases involving a non-reliance clause in a negotiated contract between sophisticated parties will often be appropriate candidates for resolution [of fraud claims] at the summary judgment stage.”

188. Papa John’s, 317 F. Supp. 2d at 745.
189. ABRY, 891 A.2d at 1035, 1057, 1061, 1063-64.
190. Id. at 1035.
191. Id. at 1060.
192. Harsco, 91 F.3d at 344.
193. Id.
194. Rogen, 361 F.2d at 267-68.
195. Id. at 267.
196. Earthboard Sports, 481 F.3d at 916.
197. AES Corp., 325 F.3d at 181.
198. Id.
2. Public Policy Against Fraud

Public policy against preventing fraud is a second factor courts consider when determining whether and how to enforce a non-reliance clause. The public policy concerns, however, must be balanced with the right of sophisticated parties to negotiate deal terms and enter into binding contracts. As discussed above, courts in some jurisdictions have held that reliance on extra-contractual representations is per se unreasonable when a party has agreed specifically that it is not relying on any extra-contractual representations. Courts in other jurisdictions consider the existence of a non-reliance clause as one factor in the determination of whether a party could have reasonably relied on a fraudulent, extra-contractual representation.

In Kentucky, the public policy against fraud is strong. The Kentucky Supreme court has stated that “one cannot contract against his own fraud.” Kentucky courts and a Federal District Court interpreting Kentucky law have addressed the specific issue whether a party may bring a fraud claim based on extra-contractual representations when that party has specifically agreed in a signed, written contract that the terms of the transaction are limited to the written contract and that it is not relying on any extra-contractual representations. Under Kentucky law, the balance between respecting the right of parties to contract freely and supporting the strong public policy against fraud, is reached by refusing to dismiss claims of fraud based on extra-contractual statements at the summary judgment stage and allowing those claims to be decided by a judge or jury when those claims are based on statements regarding past factual issues.

B. A Sample Non-Reliance Clause.

When drafting a non-reliance clause, consider a clause that addresses each of the elements considered in the cases discussed in this Article. Below is a sample clause.

Each of the Parties is sophisticated and was advised by experienced counsel and, to the extent it deemed necessary, other advisors in connection with this Agreement. Buyer acknowledges that it has performed a comprehensive due diligence investigation of the business and operations of the Company and that Buyer and Seller have included

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199. See ABRY, 891 A.2d at 1035; See also Earthboard Sports, 481 F.3d at 921.
200. See id.
201. See Bryant, 287 S.W.2d at 921.
202. Id. (citing 6 CORBIN ON CONTRACTS, § 1516, p. 983).
204. See Rivermont, 113 S.W.3d at 261.
in this Agreement all representations and warranties between the Parties. Each of the Parties acknowledges that (i) there are no representations or warranties by or on behalf of any Party hereto or any of its respective Affiliates or representatives other than those expressly set forth in this Agreement; (ii) no Party has relied or will rely in respect of this Agreement or the transactions contemplated hereby upon any document or written or oral information previously furnished to or discovered by it or its representatives, other than this Agreement (including the Disclosure Schedule hereto); and (iii) the Parties’ respective rights and obligations with respect to this Agreement and the events giving rise thereto will be solely as set forth in this Agreement. The Company and its Affiliates, agents, officers, directors and shareholders will not have or be subject to any liability to Buyer or any other person resulting from the distribution to Buyer, or Buyer’s use of, any information not contained in this Agreement.\(^{205}\)

VI. CONCLUSION

For mergers and acquisitions attorneys in Kentucky, a non-reliance clause is an important tool that can protect a contracting party against claims of fraud based on extra-contractual representations. Based on the cases discussed in this Article, the rule under Kentucky law is as follows: (i) disclaiming statements in a contract are effective to preclude a party from successfully bringing a claim for fraud where the claim is based on predictions of future events or actions; (ii) where the basis of the fraud claim is an extra-contractual representation regarding a past factual issue, the disclaiming statements do not establish per se that the claiming party did not rely on such statements or that such reliance was unreasonable, but the disclaiming statement is evidence as to whether the claiming party reasonably relied on the extra-contractual representations.\(^{206}\) Thus, where the fraud claim is based on a statement regarding a past factual issue, the issue is for a jury to decide whether a party reasonably relied on the extra-contractual representation even though there was language in the contract specifically disclaiming such reliance.\(^{207}\) Within this framework, a well-crafted non-reliance clause in a contract could be very valuable for a party selling a business or engaged in another business transaction.

\(^{205}\) This sample clause is based on the sample clause provided in the Dechert article. I changed it slightly. See Dechert LLP July 9, 2003 Special Alert. Mergers & Acquisitions. Rule 10b-5 claims in Stock Deals: How Much Can You Rely on Your “Non-Reliance” Clause? Also available at http://www.dechert.com/library/MA_7-03_SA.PDF.

\(^{206}\) See Rivermont, 113 S.W.3d at 640; See also Radioshack, 222 S.W.3d at 261-63.

\(^{207}\) Radioshack, 222 S.W.3d at 263.
SURVEY: HOW KENTUCKY COURTS HAVE APPLIED THE 
PROTECTIVE SWEEP DOCTRINE

Lisa Hubbard* and Angela M. Goad **

I. INTRODUCTION

Overall, this article is intended to survey Kentucky court opinions wherein “protective sweeps” are discussed. In Kentucky, it is permissible under the Fourth Amendment to perform a warrantless sweep of a house when making an arrest.1 Kentucky law requires that there be a “serious and demonstrable potentiality for danger” in order for the “protective sweep” exception to apply.2

Section II (A) will briefly discuss the purpose of the Fourth Amendment, as well as introduce the concept of the protective sweep. Section II (B) will examine the development of the protective sweep doctrine by discussing Supreme Court of the United States decisions, which effectively laid the foundation. Subsection B will conclude by tracing the protective sweep’s initial recognition to the Supreme Court of the United States’ decision, Maryland v. Buie.3 Furthermore, in Section II (C) the article will examine Kentucky cases and Kentucky courts’ interpretations of protective sweeps. Finally, in Section II (D) the survey will further analyze Kentucky case law by looking at the various factual distinctions of each case, and how the court relied upon them in forming its conclusion.

II. DISCUSSION

A. The Evolution of Fourth Amendment Law which led to the Protective Sweep Doctrine

The Fourth Amendment originated because the Framers of the Bill of Rights wanted to secure to the American people protections from unreasonable searches and seizures.4 The text of the Fourth Amendment is as follows:

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2. Id. (citing United States v. Morgan, 743 F.2d 1158, 1163 (6th Cir. 1984)).
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^5\)

Even though the Supreme Court of the United States has held that “it is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable,”\(^6\) it has specified certain exceptions where the warrantless search and seizure may be allowed.\(^7\) Over time, the evolution of the various exceptions to Fourth Amendment law led to the implementation of the protective sweep doctrine in Maryland v. Buie.\(^8\) The next section of the article will discuss the Supreme Court of the United States cases which laid the foundation for the protective sweep, as well as the case that initially recognized the protective sweep doctrine.

\textbf{B. Supreme Court of the United States Cases}

In Terry v. Ohio, the Supreme Court of the United States faced the question of whether a warrantless search of an individual violated Fourth Amendment rights if it was conducted by the officer to protect himself or others in the area.\(^9\) In Terry, the Court had to specifically decide whether police, for their own protection, had the right to pat down the outer clothing of an individual, if there was reasonable cause to believe the individual was armed, and whether the weapons seized were allowed to be admitted into evidence.\(^10\)

In Terry, the trial court held that “purely for his own protection . . . the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed.”\(^11\) The trial court further stated that the “‘frisk’ of the outer clothing for weapons” was “essential to the proper performance of the officer’s investigatory duties, for without it ‘the answer to the police officer may be a bullet . . . .’”\(^12\)

Although the Supreme Court stated that it was not retracting from its previous holdings that whenever possible police must obtain judicial approval prior to searches and seizure through the warrant process,\(^13\) and that in most cases non-compliance with warrant requirements will only be

\begin{itemize}
  \item \(^{5}\) U.S. CONST. amend. IV.
  \item \(^{8}\) Jamie Ruf, Note, Expanding Protective Sweeps Within the Home, 43 AM. CRIM. L. REV. 143 (2006).
  \item \(^{9}\) 392 U.S. 1, 30 (1968).
  \item \(^{10}\) \textit{Id.} at 8.
  \item \(^{11}\) \textit{Id.}
  \item \(^{12}\) \textit{Id.}
  \item \(^{13}\) \textit{Id.} at 20. See Katz v. United States, 389 U.S. 347, 357 (1967).
\end{itemize}
justified by the existence of exigent circumstances, it concluded the following:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

The Court concluded that a protective search for weapons is “a brief, though far from inconsiderable, intrusion upon the sanctity of the person.”

Following the Terry decision, the Supreme Court analyzed how far the “search incident to arrest” principle should appropriately be extended. In Chimel v. California, the Court stated that in Terry v. Ohio, the “stop and frisk” was upheld because it was merely a protective search for weapons. Relying upon this analysis, the Court determined that it is reasonable for the arresting officer to search the person being arrested for the purpose of confiscating weapons that the arrestee could later use to successfully resist arrest or escape. The Court stated that if the search for weapons was not conducted, the officer’s safety could be jeopardized, or the arrest could be hindered. Additionally, the Court held that there is sufficient justification to search the area within the arrestee’s immediate control, which the Court defined as an area that the arrestee may “gain possession of a weapon or destructible evidence.”

After applying the Fourth Amendment principles in Chimel, the Court found that there was no justification for the search to go beyond the room in which the arrest occurred, because it was out of the arrestee’s area of immediate control.

16. Id. at 26.
18. Id. (citing Terry, 392 U.S. at 29).
19. Id. at 763.
20. Id.
21. Id.
22. Id.
Thus, the Court concluded that absent a search warrant, the scope of the search was unreasonable, and hence violated the Fourth Amendment.23

In *Michigan v. Long*, the Court addressed the question that had previously been left unanswered: whether the protective search for weapons extended beyond the person when there was no probable cause to arrest.24 In *Long*, the Court held that “the protective search of the passenger compartment was reasonable under the principles articulated in *Terry* and other decisions of this Court.”25

The Court stated that the past cases specify that protection of police as well as other people can validate protective searches.26 The Court discussed that in *Terry*, the validity of a protective search hinged upon whether or not the officer truly had an “articulable suspicion that an individual is armed and dangerous.”27 The Court further stated the following:

> These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.28

The Court concluded that once an officer discovers contraband, other than weapons, inside of a vehicle when performing a *Terry* search, the officer does not have to ignore the contraband, and the evidence does not have to be suppressed.29

Building upon the cases of *Terry* and *Long*, the Court held in *Maryland v. Buie* that “[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”30 The Court said that this was the proper balance since it complied with the previous cases such as *Terry* and *Long*.31

The Court stated that “‘a protective sweep’ is a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others.”32 The Court further noted that a protective sweep should be

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25. *Id.* at 1035.
26. *Id.* at 1049.
27. *Id.* at 1034 (citing *Terry*, 392 U.S. at 24).
28. *Id.* at 1049 (quoting *Terry*, 392 U.S. at 21).
31. *Id.* at 334.
32. *Id.* at 327.
restricted to only visual inspections of areas where a person could be hiding.\textsuperscript{33} The Court accentuated that a protective sweep should never be a full search of the premises.\textsuperscript{34} Furthermore, the Court announced that the sweep should last “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”\textsuperscript{35}

The Court stated that “[i]n Terry and Long we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them.”\textsuperscript{36} The Court then rationalized that in \textit{Buie}:

\begin{quote}
[T]here is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A Terry or Long frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s “turf.”\textsuperscript{37}
\end{quote}

Moreover, the Court distinguished \textit{Chimel}, on the basis that it was a complete search of the entire house, whereas the protective sweep is merely a limited intrusion of the home.\textsuperscript{38}

Thus, once the protective sweep doctrine was established, it was then left up to the state courts to interpret it. The following subsection will examine how Kentucky courts have integrated the protective sweep into state law, as well as how they have interpreted it by discussing various cases which deal with this issue.

\section*{C. Kentucky Case Summaries}

\subsection*{1. Commonwealth v. Elliott\textsuperscript{39}}

In \textit{Elliott}, the Kentucky Court of Appeals concluded that if the safety check or protective sweep exception were to be adopted then there must be a “serious

\begin{footnotesize}
\begin{itemize}
\item[33.] \textit{Id.}
\item[34.] \textit{Id.} at 335.
\item[35.] \textit{Id.} at 335-36.
\item[36.] \textit{Buie}, 494 U.S. at 333.
\item[37.] \textit{Id.}
\item[38.] \textit{Id.} at 336.
\item[39.] 714 S.W.2d 494 (Ky. Ct. App. 1986).
\end{itemize}
\end{footnotesize}
and demonstrable potentiality for danger.” 40 In this case, a probation officer, as well as two police officers, went to Elliott’s sister’s home, where he was living. 41 Although the officers did not have an arrest warrant, “a parole officer is authorized by statute to make an arrest upon a reasonable belief that the parolee has violated the terms of his release.” 42 The parole officer had received information from an informant that Elliott had repeatedly gone out of state with the intention to obtain drugs to sell. 43 The officers were allowed to enter Elliott’s sister’s home after they knocked on the door, whereby they immediately arrested Elliott. 44

After Elliott was in custody, the officers, acting on information that there was a potential accomplice, looked throughout the house. 45 During this check, the parole officer saw a set of scales, a packet of white powder, a razor blade, and plastic bottles containing white powder. 46 Subsequently, Elliott’s sister gave permission to search her premises, in which the officers found more drugs. 47

Elliott was charged with trafficking in a controlled substance; nonetheless, the indictment was dismissed due to the trial court’s suppression of the evidence. 48 On appeal, the Commonwealth argued that the court should consider the search of the home a “protective sweep” or “safety check” of the premises. 49 The Commonwealth advocated for the Kentucky Court of Appeals to follow the Sixth Circuit Court of Appeals and acknowledge the “protective sweep” exception to the warrant requirement. 50 The court discussed the application of the protective search by other courts:

This type of search has been upheld in several courts in circumstances in which the police officers have reasonable grounds to believe that they may be in danger from areas not in the immediate vicinity of a defendant. The Supreme Court, in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), specifically recognized the officers’ right to conduct a warrantless search of the physical area within the defendant’s immediate control. Many state courts and lower federal courts have interpreted *Chimel* in a fairly loose manner, upholding searches outside of the defendant’s “reach” area, in the interest of safety of the police officers. However, to date, the Supreme

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40. *Id.* at 496 (citing United States v. Morgan, 743 F.2d 1158, 1163 (6th Cir. 1984)).
41. *Id.* at 495.
42. *Id.* See KY. REV. STAT. ANN. § 439.430 (LexisNexis 2007).
43. *Id.*
44. *Id.*
45. *Elliott*, 714 S.W.2d at 495.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 496.
The Kentucky Court of Appeals determined that if the “safety check” exception is adopted, there must be a “serious and demonstrable potentiality for danger.”52 Hence, the Commonwealth carries the burden of proving that officers had probable cause for their belief that a serious threat of danger existed.53

The Kentucky Court of Appeals affirmed the trial court’s decision to suppress the evidence, reasoning that there were no immediate threats or security risks to the officers in this case.54 Furthermore, the parole officer admittedly stated that he never had information that Elliott’s alleged “accomplice” was in the residence, that Elliott had any weapons on his person or in the house, or that controlled substances were present in the house.55 In addition, the officers had numerous days to obtain a search warrant preceding Elliott’s arrest.56 Thus, the Kentucky Court of Appeals concluded that when considering the totality of the circumstances, the warrantless intrusion of the home did not fall under the protective sweep exception.57

2. Lyvers v. Commonwealth58

In Lyvers, the Kentucky Supreme Court held that the admission of seized evidence during the protective sweep conducted in that case was harmless error due to the fact that the evidence was “not critical to the Commonwealth’s case.”59 In this case, Rico Lyvers was convicted of two counts of first-degree robbery and for being a persistent felony offender in the first degree, for which he was sentenced to forty years in prison.60 Lyvers appealed to the Kentucky Supreme Court as a matter of right, alleging that the trial court had erroneously admitted evidence that was the result of an unconstitutional arrest.61

In this case, Lyvers was found guilty of robbing Deanna Bradley, who is a detective, and Kimberly Cole.62 Lyvers advanced toward the women in the parking lot of their apartment and demanded money while incessantly threatening them.63 Lyvers ran to a waiting car to escape after stealing the

51. Elliott, 714 S.W.2d at 495-96.
52. Id. at 496 (citing United States v. Morgan, 743 F.2d 1158, 1163 (6th Cir. 1984)).
53. Id. (citing United States v. Kolodziej, 706 F.2d 590, 597 (5th Cir. 1983)).
54. Id.
55. Id.
56. Id.
59. Id. at *3.
60. Id. at *1.
61. Id.
62. Id.
63. Id.
women’s wallets, and Bradley followed Lyvers while Cole called 911. \textsuperscript{64} When the car Lyvers was in came to a sudden stop, he jumped out and fled. \textsuperscript{65} The driver of the car spoke with Bradley and then entered an apartment close by. \textsuperscript{66} Bradley waited for additional police officers to arrive at the location before pursuing further action. \textsuperscript{67} The police discovered that the driver of the vehicle was Rodriguez Lyvers, and that the robber was his brother Rico. \textsuperscript{68} Rico Lyvers eventually opened the rear window of his apartment after Rodriguez repeatedly knocked on the door and window. \textsuperscript{69} Thereafter, the police officers arrested Rico Lyvers and gained entry into his apartment through the open window and conducted a protective sweep. \textsuperscript{70} During the protective sweep, the police seized a shirt that was similar to that of the perpetrator. \textsuperscript{71}

Lyvers argued that since he was illegally arrested the protective sweep was unlawful, and moved to suppress the evidence. \textsuperscript{72} The trial court denied the motion and concluded that the police had probable cause to make the warrantless felony arrest, and allowed the evidence to be admitted. \textsuperscript{73}

On appeal, the Kentucky Supreme Court affirmed the trial court’s decision. \textsuperscript{74} The court stated that it did not need to consider whether or not the arrest was legal to conclude that reversible error had not occurred. \textsuperscript{75} The court further stated that “[e]ven if the shirt was obtained during a search incident to an unlawful arrest, its admission was nonetheless harmless.” \textsuperscript{76} The court reasoned that the evidence seized was “not critical to the Commonwealth’s case.” \textsuperscript{77} Therefore, the court concluded that the admission of the evidence seized during a protective sweep of Lyver’s apartment was harmless error. \textsuperscript{78}

3. Taylor v Commonwealth \textsuperscript{79}

In Taylor, the Kentucky Court of Appeals held that since there was no evidence seized as a result of the officers’ initial warrantless search of the house,
the defendants could not raise a Fourth Amendment challenge. In this case, the defendants, Taylor and Cato, were arrested after officers executed a traffic stop. The officers stated that they had observed the defendants engaging in an illegal drug transaction, and then followed behind them until they abruptly pulled into a residential driveway. At this point, the officers moved toward the car and observed a marijuana “blunt” in the vehicle. Additionally, quantities of crack cocaine were seized from the vehicle. Afterward, the officers performed a protective sweep of the inside of the residence, but did not seize any evidence. After a search warrant for the residence was issued, officers discovered drug paraphernalia, crack cocaine, and $430 in cash.

At a pretrial suppression hearing, the defendants contested the police conduct. Specifically, they challenged the legitimacy of the protective sweep of the residence performed by the officers. After the trial court denied the suppression motion, the defendants entered conditional guilty pleas to the charged offenses of trafficking in cocaine, possession of marijuana, and possession of drug paraphernalia. The trial court did not address the potential constitutional issues because it found that “[n]o evidence was seized in connection with the officers’ [protective] sweep of the residence; and no information from that sweep was used in obtaining the warrant.” Thus, the Kentucky Court of Appeals affirmed the trial court’s ruling on this issue.

4. Lindeman v. Commonwealth

In Lindeman, the Kentucky Court of Appeals determined that an officer’s “mere apprehension for personal safety” is not sufficient to fall under the protective sweep exception to the warrant requirement. In this case, two deputies placed Lindeman (a juvenile) into custody because he seemed to be under the influence and possessed marijuana. The officers then took the juvenile to his residence, which was only one-fourth of a mile away. Once the officers and the juvenile arrived at the residence, the officers detected a strong

80. Id. at *3.
81. Id. at *1.
82. Id.
83. Id.
84. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
93. Id. at *4.
94. Id. at * 1.
95. Id.
smell of marijuana. For this reason, one of the deputies took the juvenile to the front porch, while the other deputy walked to the backyard of the trailer. Once in the backyard, the deputy observed several buckets containing marijuana plants. The juvenile’s mother, Lindeman, and her boyfriend, Machniak, were immediately arrested and placed in the police vehicle. From the front porch, the deputies could see marijuana and a scale sitting on the coffee table.

While the deputies waited for a drug enforcement agent to arrive, Lindeman asked the police to allow her son to re-enter the residence to obtain her medication. Hence, once Lindeman consented, a deputy entered into the residence with the juvenile. Once inside, the deputy saw a marijuana plant in the kitchen, and then after walking roughly fifty feet down the hallway observed many more marijuana plants. The deputy then peered into a bedroom and saw more plants under growing lights placed on shelves. As one deputy was inside of the residence, the other deputy peaked into an outbuilding window which was within five feet of the trailer. The deputy entered the partially locked building and discovered additional marijuana plants. Both Lindeman and Machniak entered guilty pleas and appealed the circuit court’s denial of their motion to suppress the evidence obtained as a result of what they argued was a warrantless search.

The court discussed the justifications for a protective sweep as follows:

A protective sweep can justify a warrantless intrusion into a residence only when the police have articulable facts which, taken together, with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. A mere apprehension for personal safety is insufficient to create an exception to the warrant requirement.

The court determined that, when applying the standard for a protective sweep, there was no justification for the deputy’s exploration of the trailer. The court reasoned that the two adult suspects were in the police car, and there

96. *Id.*
97. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at *4* (citing United States v. Colbert, 76 F.3d 773, 776 (6th Cir. 1996)).
109. *Id.* (citing Commonwealth v. Johnson, Ky., 777 S.W.2d 876, 880 (Ky.1989)).
was no information that anyone posing danger was still inside.\textsuperscript{111} Furthermore, neither adult suspect had threatened the officers or possessed any weapons.\textsuperscript{112} The court stated that “[i]f there were an actual fear of danger, it would have been reasonable for the officer to remain with the juvenile at the front of the trailer and after retrieving the medication, to exit the residence.”\textsuperscript{113} But, instead the deputy walked through the residence and found the illegal drugs.\textsuperscript{114} Thus, the court concluded that “the warrantless intrusion into areas of the residence other than in the immediate vicinity of the juvenile was illegal and the evidence seized should have been suppressed.”\textsuperscript{115}

The court further found that there was no exception to the warrant requirement for the deputy to enter the building outside of the residence.\textsuperscript{116} The deputy’s explanation was that he believed that a dangerous person was inside of the building.\textsuperscript{117} The court reasoned that there was no evidence that anyone on the property was dangerous.\textsuperscript{118} Consequently, the officer did not have an articulable fear for his safety or that the marijuana plants would be destroyed.\textsuperscript{119} Thus, the court held that any evidence seized in the hallway and bedroom of the residence, as well as the outbuilding, must be suppressed.\textsuperscript{120}

5. Delong v. Commonwealth\textsuperscript{121}

In Delong, the Kentucky Court of Appeals concluded that the initial protective sweep conducted by the police of a motel room constituted a safety search and was thus constitutional.\textsuperscript{122} However, the court determined that the extensive search of the motel room and the vehicle was unconstitutional and could not be justified by either exigent circumstances or because the police discovered that Delong was on probation after he had been arrested.\textsuperscript{123}

In this case, a detective investigated a report at the Four Seasons Inn that stated strong chemical smells were being emitted from the third floor.\textsuperscript{124} The detective knocked on Delong’s motel door, identified himself as a law enforcement officer, and told him to open the door.\textsuperscript{125} Defendant Delong continuously stalled by creating numerous excuses, and refused to open the

\begin{itemize}
  \item 111. Id.
  \item 112. Id.
  \item 113. Id.
  \item 114. Id.
  \item 115. Id.
  \item 117. Id.
  \item 118. Id.
  \item 119. Id.
  \item 120. Id.
  \item 122. Id. at *1.
  \item 123. Id. at *1, 4.
  \item 124. Id. at *1.
  \item 125. Id.
\end{itemize}
motel room door. The detective heard Delong hurriedly moving around inside of the motel room and then heard a toilet flush approximately five times. The detective informed Delong that if he did not immediately open the door then he would be arrested for disorderly conduct and resisting arrest. When other officers arrived at the motel, Delong opened the door and was placed under arrest. After Delong’s arrest, the detective conducted a protective sweep of the room to make sure a dangerous person was not hiding in the room and to ensure the officers’ safety.

After being arrested, Delong told the officers that he was on probation. Since the defendant was on probation, the officers called a probation officer to the scene. Shortly after the probation officer arrived, an extensive search was implemented of Delong’s motel room as well as his automobile. The search revealed drug paraphernalia and an array of items commonly used to manufacture methamphetamine. Delong appealed his conviction following his conditional guilty plea to possession of drug paraphernalia, first offense.

The Kentucky Court of Appeals discussed the exigent circumstance exception to the warrant requirement:

A well-established exception to the search warrant requirement authorizes a police officer without a warrant to enter a residence in order to address an exigent circumstance, such as the threat of imminent injury or the imminent destruction of evidence. However, when exigent circumstances provide sufficient grounds for a limited warrantless safety search, that safety search must be limited only to the intervention that is reasonably necessary to address the exigency. Thus, “a warrantless search must be ‘strictly circumscribed by the exigencies which justify its initiation[,]’ and exigent circumstances do not allow an officer to disregard the warrant requirement.

The Kentucky Court of Appeals concluded that there was sufficient evidence to support the police officers’ entry into the defendant’s motel room as well as the protective sweep which secured the location and prevented the destruction of evidence. Nonetheless, the court found that once the defendant was taken out

126. Id.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id. at *2.
134. Id.
135. Id. at *1.
136. Id. at *3 (citing Commonwealth v. McManus, 107 S.W.3d 175, 177 (Ky. 2003)).
137. Id. (citing Mincey v. Arizona, 437 U.S. 385, 393 (1978)).
138. Id. (citing Mincey, 437 U.S. at 393).
of the motel room and the premises was secured, any further search conducted without a search warrant was unconstitutional.\textsuperscript{140} The court stated that “[t]he officers’ safety search of Delong’s motel room should have been limited only to removing people from the area, to observing items in plain view, and to securing any item in plain view that constituted a present danger.”\textsuperscript{141}

6. Hamilton v. Commonwealth\textsuperscript{142}

In \textit{Hamilton}, the Kentucky Court of Appeals found that “[t]he protective sweep concept has been acknowledged in several Kentucky and Sixth Circuit cases.”\textsuperscript{143} In this case, Officer Justice conducted a traffic stop on Sloan, who seemed anxious.\textsuperscript{144} The officer inquired about a bulge of money in Sloan’s pocket.\textsuperscript{145} Sloan stated that he was going to use the $2,000 in cash to purchase a car.\textsuperscript{146} He then told the officer that he was going to defendant Hamilton’s residence.\textsuperscript{147} Approximately thirty-six minutes after the initial traffic stop, the officer stopped Sloan again and found that his cash was gone.\textsuperscript{148} When the officer pressured Sloan, he revealed that he had paid defendant Hamilton for a car, but could not give any specifications as to the type of car.\textsuperscript{149} Officer Justice became suspicious because of Sloan’s responses in conjunction with the knowledge that Hamilton was possibly a drug dealer.\textsuperscript{150} Subsequently, Hamilton was called and he denied any knowledge of a car deal with Sloan.\textsuperscript{151}

Officer Justice, as well as several other officers decided to go to Hamilton’s residence for a “knock and talk.”\textsuperscript{152} When James Hamilton answered the door, Officer Justice witnessed a female dart through the house.\textsuperscript{153} James Hamilton stated that the female possibly had an outstanding arrest warrant, and that she could possibly escape out the back door.\textsuperscript{154} Officer Justice testified that out of concern for safety, and because he did not know whether the female had a warrant for her arrest, or whether there were any other individuals in the house,

\begin{footnotesize}
\begin{enumerate}
\item 140. \textit{Id.}
\item 141. \textit{Id.} (citing Kleinholz \textit{v. United States}, 339 F.3d 674 (8th Cir. 2003)).
\item 144. \textit{Id.} at *1.
\item 145. \textit{Id.}
\item 146. \textit{Id.}
\item 147. \textit{Id.}
\item 149. \textit{Id.}
\item 150. \textit{Id.}
\item 151. \textit{Id.}
\item 152. \textit{Id.}
\item 153. \textit{Id.}
\end{enumerate}
\end{footnotesize}
he entered the house and went into the direction he had previously seen the female run. Officer Justice heard noises coming from the closet, and when he opened the door, he found Beverly Hamilton, James Hamilton’s live-in girlfriend. At this point, Justice began to recite Beverly her Miranda rights and she told him that she would cooperate by showing them where the drugs and money were. During the search the officers found oxycontin, xanax, cocaine, roughly $12,000 in cash, and a gun in the living room hidden in the couch. James and Beverly Hamilton were both arrested and charges were filed.

At the suppression hearing, James Hamilton argued that no probable cause existed for the police to enter his residence, or to perform a search without a warrant. The trial court acknowledged that case law has allowed for exceptions to warrantless searches, as well as the concept of third-party consent. After the trial court denied the suppression motion, Hamilton entered a conditional guilty plea in which he received a ten-year sentence. Hamilton argued on appeal that the trial court should have granted his motion to suppress.

The Kentucky Court of Appeals stated that “[t]he protective sweep concept has been acknowledged in several Kentucky and Sixth Circuit cases.” The court determined that the police officer “had general as well as specific information that brought him to Hamilton’s particular residence.” Furthermore, the court stated that Beverly’s erratic behavior coupled with Hamilton’s comments supplied additional exigent circumstances. In addition, it was reasonable for Justice to believe that the third party, Beverly, had the capacity to consent to the search of the home. Thus, the court did not find clear error and affirmed the trial courts findings.

D. Analysis of Kentucky Case Law

As previously stated in the article, the Supreme Court of the United States held that a protective sweep can occur when an “officer possesses a reasonable

155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
161. Id.
162. Id.
163. Id.
164. Id. at *2. (citing United States v. Colbert, 76 F.3d 773 (6th Cir. 1996); United States v. Johnson, 9 F.3d 506, 510 (6th Cir. 1993); United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991); Davis v. Commonwealth, 120 S.W.3d 185 (Ky. Ct. App. 2003)).
165. Id. at *3.
167. Id. at *2.
168. Id. at *3.
belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Kentucky law requires a “serious and demonstrable potentiality for danger” in order for the protective sweep exception to apply. Furthermore, in Kentucky, the government has the burden to establish that the police officers had probable cause to believe that a serious threat of danger existed. The following section will scrutinize the facts of each case that the Kentucky courts relied upon in the determination of whether or not a search was a constitutional protective sweep.

In Elliott, the court found that the warrantless intrusion could not be justified by the protective sweep exception. In this case, the court based its decision on the totality of the circumstances. The court focused on the following facts when making its decision: the parole officer had no evidence an accomplice was in the house, nor that the defendant was armed with a weapon, or had any weapons or controlled substances in the house. Moreover, the court concluded its analysis by reasoning that the police had several days prior to the arrest to secure a search warrant, as well as the defendant did not resist arrest. Since there was no imminent threat, immediate threat or security risk to the police officers in this case, the protective sweep exception did not apply. Hence, in Elliott, the government failed to meet its necessary burden of proof because it did not show that the officers had probable cause to believe a serious threat of danger existed.

In Lyvers, the court determined that reversible error did not occur as to the admittance of evidence seized during the protective sweep, because the admission was harmless. Specifically the court honed in on the fact that although the purpose of presenting the shirt was to identify the defendant as the robber, it was not crucial to the Commonwealth’s case. The court stated that the shirt was “merely cumulative of more persuasive evidence.” The court reasoned that the defendant was identified by his victims, and the defendant confessed to the police that he had robbed the women. The court concluded that “[i]n light of the volume of evidence indicating Appellant’s guilt, we cannot

169. Buie, 494 U.S. at 337.
170. Elliot, 714 S.W.2d at 496 (citing Morgan, 743 F.2d at 1163).
171. Id. (citing Kolodziej, 706 F.2d at 597).
172. Id.
173. Id.
174. Id.
175. Id.
176. Elliott, 714 S.W.2d at 496.
177. Id.
178. 2006 WL 2452557, at *3.
179. Id.
180. Id.
181. Id.
find any substantial possibility that the result would have been any different
absent admission of the shirt.\footnote{182}

In \textit{Taylor}, the court’s analysis of the protective sweep was quite simple
because the officers did not seize any evidence as a result of the police officers’
protective sweep.\footnote{183} Therefore, the court concluded that the defendants could
not argue that their Fourth Amendment rights were violated since no evidence
was obtained from the protective sweeps.\footnote{184}

In \textit{Lindeman}, the court held that the police officers’ search of the residence
cannot accurately be upheld as a protective sweep.\footnote{185} The court noted that the
two adult suspects were outside of the residence in a police car, and neither had
weapons or threatened the officers, as well as the police officers had no
information that a dangerous person was inside.\footnote{186} Thus, since there was no
actual fear of danger, the illegal evidence obtained from the warrantless intrusion
into residence, other than evidence found in the locality of the juvenile, should
be suppressed.\footnote{187} Furthermore, the court found that the entry of the outbuilding
was illegal due to the fact that the police officers explanation - that he believed
the building was occupied by a dangerous person - seemed to be nothing more
than a pretext to conduct a search without a warrant.\footnote{188}

In \textit{Delong}, the court determined that the police officers’ initial entry into the
motel room and the performance of a protective sweep to secure the premises
and to prevent the destruction of evidence was constitutional; but the evidence
did not support any further warrantless search of the motel room after Delong
was taken away and the premises secured.\footnote{189} In its analysis, the court focused on
the fact that it is generally known that chemicals used to manufacture
methamphetamines are hazardous to a person’s health and safety.\footnote{190} The court
found that there was substantial evidence of the potential risks, and they were
serious enough to validate the immediate actions of the police.\footnote{191} Thus, the court
held that the Commonwealth’s evidence proved the warrantless search, or
protective sweep, was proper.\footnote{192}

The most recent Kentucky case regarding the issue of protective sweeps is
\textit{Hamilton v. Commonwealth}.\footnote{193} The court stated that it was obvious that the
police officer had information that Hamilton was potentially a drug dealer.\footnote{194}

\begin{footnotes}
\footnotetext{182}{\textit{Id.}}\footnotetext{183}{2003 WL 1407622, at *3.} \footnotetext{184}{\textit{Id.}}\footnotetext{185}{2004 WL 758287, at *4.} \footnotetext{186}{\textit{Id.}}\footnotetext{187}{\textit{Id.}}\footnotetext{188}{\textit{Id.}}\footnotetext{189}{2005 WL 2573401, at *4.} \footnotetext{190}{\textit{Id.} at *3.} \footnotetext{191}{\textit{Id.}}\footnotetext{192}{\textit{Id.}}\footnotetext{193}{2007 WL 2811836, at *1.} \footnotetext{194}{\textit{Id.} at *2.}
\end{footnotes}
The court further stated that it was reasonable for the officers to think that a drug transaction had just occurred, due to the suspicious information that Sloan had given them.\textsuperscript{195} Additionally the court stated, “Beverly’s erratic behavior in conjunction with the voluntary statements made by Hamilton regarding a potential outstanding warrant gave reason to the police to suspect she could be concealing or destroying evidence or worse taking actions that could bring the officers’ safety into question.”\textsuperscript{196} Thus, the court found that sufficient exigent circumstances had been proven and affirmed the lower court’s decision.\textsuperscript{197}

III. CONCLUSION

This survey assessed how the evolution of Fourth Amendment law led to the implementation of the protective sweep. Additionally, the article reviewed the origin of the protective sweep and the standard that must be met in order for the exception to apply. Furthermore, this article surveyed the Kentucky cases which dealt with the issue of protective sweeps. Finally, the survey closely analyzed the facts of each Kentucky case which the court considered pertinent in formulating its decision. As the survey indicated, a court’s determination as to whether or not a search is considered a constitutional protective sweep largely depends upon the specific facts surrounding the warrantless search.

\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id. at *3.
RECOVERY OF NONPECUNIARY DAMAGES IN MASS TORT ACTIONS IN KENTUCKY: A DEFENSE PERSPECTIVE

James A. Comodeca* and Amanda N. McFarland**

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**I. INTRODUCTION**

This survey provides Kentucky practitioners with an overview of the nonpecuniary damages available to plaintiffs in mass tort claims, including those

1. Also referred to as “irreparable damages,” nonpecuniary damages are difficult or impossible to measure in monetary terms. BLACK’S LAW DICTIONARY 417-18 (8th ed. 2004). They include damages for “companionship, society, love, advice, and guidance;” “anguish or emotional harm;” and punitive damages. DAN B. DOBBS, THE LAW OF TORTS 812 (2000).
for negligence and strict products liability. While mass tort actions traditionally have not been as prevalent in Kentucky as cases involving a single plaintiff or a single injury, these cases nevertheless illustrate the types of damages available to plaintiffs in Kentucky, and secondarily, the types of plaintiffs who may recover those damages. And, while a discussion of damages presumes that the plaintiff has asserted - and proven liability under - a veritable cause of action, such a discussion not only involves consideration of the type of injury the plaintiff has suffered, but also implicitly entertains the question whether the plaintiff has suffered injury or loss at all, and thus, whether liability should even be imposed.

Section II of this Survey provides a legal framework for the types of non-pecuniary damages available in Kentucky. Reviewing courts principally analyze jury verdicts in two main ways: first, a court may determine whether the award is “contrary to the law,” or second, a court may determine whether the jury verdict is inadequate or excessive. Section II enumerates the standard of review for each element of damages and focuses on the questions of law that a consideration of damages evokes.

Section II is divided into three subsections. Subsection A discusses damage awards for pain and suffering, including two variations of mental distress, general pain and suffering damage requirements, and the standard of review. Subsection B discusses parental and spousal loss of consortium. Finally, Subsection C addresses the guidelines that the Supreme Court of the United States and Kentucky courts have set forth for assessing the availability of punitive damages, as well as guidelines for evaluating the appropriateness of a punitive damages award. Section III provides practice pointers which aid the practitioner in developing an effective defense strategy for minimizing the amount of damages before and during trial.

II. DISCUSSION OF NONPECUNIARY DAMAGES

A. Pain and Suffering

Pain and suffering damages compensate the plaintiff for “physical discom-fort or emotional distress.” First, this section discusses the recoverability of speculative mental distress damages in Kentucky, including “pre-impact fear” and mental distress damages associated with the increased risk of future harm. Second, this section discusses other general requirements and limitations the law places on pain and suffering damages. Finally, the section addresses the amount of proof required to establish damages and the standard of review that a

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5. BLACK’S LAW DICTIONARY 1141 (8th ed. 2004).
reviewing court employs to determine whether the damages are inadequate or excessive.

1. Case Summaries and Overview

In Kentucky, pain and suffering damages are recoverable when the plaintiff has suffered injury or harm, and was conscious, partly conscious, or had intervals of consciousness for the period during which he seeks to recover damages. The plaintiff can often recover mental distress damages even when he has been minimally contacted or injured by the plaintiff, but some level of contact must have occurred in order to prove that a cause of action exists.

If the plaintiff died as a result of the tortfeasor’s conduct, the decedent’s estate or family members can recover for their losses under Kentucky’s wrongful death statute. Kentucky’s survival statute preserves the decedent’s cause of action and allows his representatives to recover for losses suffered by the decedent, but only if the decedent lived for a period of time between his injury and death.

a. Speculative Mental Distress Damages

A decedent cannot recover pain and suffering damages if he dies immediately upon impact. Some plaintiffs have unsuccessfully attempted to bypass this requirement by seeking pain and suffering damages for the instant before the decedent was killed, but suffered from mental distress or anguish of the imminent accident. A plaintiff must also prove a present physical injury to recover. Plaintiffs have also unsuccessfully attempted to bypass this requirement by claiming that they have been exposed to a toxic substance which has

6. Capital Holding Corp., 873 S.W.2d at 195.
9. KY. REV. STAT. ANN. § 411.130(1) (LexisNexis 2007) provides:
   Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.
10. KY. REV. STAT. ANN. § 411.133 (LexisNexis 2007) provides:
    It shall be lawful for the personal representative of a decedent who was injured by reason of the tortious acts of another, and later dies from such injuries, to recover in the same action for both the wrongful death of the decedent and for the personal injuries from which the decedent suffered prior to death, including a recovery for all elements of damages in both a wrongful death action and a personal injury action.

See also Ronald W. Eades, Kentucky Law of Damages § 37:12 (2007).
11. Id.
12. See, e.g., Steel Tech., Inc. v. Congleton, 234 S.W.3d 920, 928 (Ky. 2007).
increased their risk of developing a disease, and deserve compensation for the emotional distress and fear of developing the disease. Therefore, recovery of pain and suffering damages in Kentucky largely centers on the existence of a physical injury, and an impact which caused the injury.

i. The Impact Rule and “Pre-Impact Fear”

Kentucky’s “impact rule” holds that plaintiffs who seek to recover mental distress damages must demonstrate that their mental distress was accompanied by either physical contact or injury. Further, the mental distress must be related to, and a result of, the injury. This rule precludes recovery for any mental distress experienced prior to impact or injury. This section will first analyze Kentucky decisions addressing the impact rule and pre-impact fear, then compare those decisions with cases from other jurisdictions.

1. Kentucky Decisions

_Deutsch v. Shein_, 597 S.W.2d 141 (Ky. 1980).

In _Deutsch_, the defendant doctor was negligent in failing to test the plaintiff for pregnancy before exposing her to harmful radiation, which was extremely dangerous to her unborn fetus. Thereafter, the plaintiff underwent a therapeutic abortion because she learned that radiation exposure resulted in a high probability that her fetus would be injured or damaged. Applying the “impact rule,” the court held that minimal injury or contact, including contact that is “slight, trifling, or trivial, will support a cause of action.” When seeking recovery for mental distress, however, the plaintiff must demonstrate that the mental distress damages are “related to, and the direct and natural result of, the physical contact or injury sustained.”

In this case, the defendant’s act of administering x-rays to the plaintiff was a sufficient physical contact to support the plaintiff’s cause of action and mental suffering claim. Although there was no proof that the x-rays actually harmed the fetus, it was reasonable, the court held, for the plaintiff to seek advice from other doctors and elect to abort the fetus when faced with potentially extreme

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14. _See, e.g., id._
15. _Deutsch v. Shein_, 597 S.W.2d 141, 145-46 (Ky. 1980) (quoting Morgan v. Hightower’s Adm’t, 163 S.W.2d 21, 22 (Ky. 1942)).
16. _Id._ at 146.
17. _Congleton_, 234 S.W.3d at 929.
18. _Deutsch_, 597 S.W.2d at 142-43.
19. _Id._ at 143.
20. _Id._ at 146. (citing Ky. Traction and Terminal Co. v. Robman’s Guardian, 23 S.W.2d 272 (1929)).
21. _Id._ (citing Hetrick v. Willis, 439 S.W.2d 942, 943 (Ky. 1969)).
22. _Id._ at 145-46.
The abortion itself was the harm that resulted from plaintiff’s negligence. The defendant was liable for this harm and the plaintiff’s mental distress because his negligent act was a substantial factor in causing the plaintiff to abort her fetus.

Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920 (Ky. 2007).

In Congleton, the Kentucky Supreme Court did not allow the decedent to recover for mental distress experienced immediately prior to the impact caused by the defendant’s negligence. The decedent died at the scene of a car accident in which a 37,000 pound steel coil came loose from the defendant’s truck and crushed the decedent’s side of the vehicle. The plaintiff’s counsel presented evidence of skid marks and witness testimony that the decedent’s “face was fixed in the expression of a scream,” implying that the decedent slammed on her brakes and saw the steel coil prior to impact. However, the inconclusive nature of the evidence presented confirmed the notion that many claims for “pre-impact fear” are too speculative.

The court reversed the lower court’s $100,000 damages award for “pre-impact fear.” It upheld the traditional “impact rule,” which states that “damages for mental distress sought to be recovered [must] be related to, and the direct and natural result of, the physical contact or injury sustained.” Contrary to the Restatement view, damages for mental distress caused by fear of the impact, but not the impact itself, are not recoverable in Kentucky, at least without more demonstrable proof. The court did not rule out the potential recovery for “pre-impact fear” in cases where the plaintiff provides more concrete evidence such as a first-hand account, reliable eyewitness testimony, or medical testimony demonstrating “mental distress manifesting in medical injury.” The court declined to alter the impact rule in this case because there

23. Id. at 145.
24. Deutsch, 597 S.W.2d at 145.
25. Id.
26. Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 929 (Ky. 2007).
27. Id. at 923.
28. Id. at 928.
29. Id. at 929.
30. Id. at 930.
32. See RESTATEMENT (SECOND) OF TORTS § 456(a) (1965) (allowing recovery for mental distress that results from the conduct which caused bodily harm).
33. Congleton, 234 S.W.3d at 929-930.
34. Id. But see Benyon v. Montgomery Cablevision Ltd. P’ship, 718 A.2d 1161, 1185 (Md. 1998) (holding that only “evidence from which a reasonable inference could be drawn that the
was no scientific or medical proof of mental injury, and the victim was unable to testify about her “pre-impact fear” because she died immediately after the impact.\footnote{Congleton, 234 S.W.3d at 930.}

2. Other Jurisdictions


In other jurisdictions, courts have also refused to allow recovery for “pre-impact fear.”\footnote{See, e.g., In re Aircrash Disaster Near Roselawn, Ind. on October 31, 1994, 926 F.Supp. 736, 742 (N.D. Ill. 1996); Fogarty v. Campbell 66 Express, Inc., 640 F.Supp. 953, 963 (D. Kan. 1986); Gilbaugh v. Valzer, No. 99-1576-AS, 2001 U.S. Dist. LEXIS 9864, at *15 (D. Ore. June 7, 2001); Stecyk v. Bell Helicopter Textron, Inc., 53 F.Supp. 2d 794, 798 (E.D. Pa. 1999); Chicago, R.I. & P.RY. Co. v. Caple, 179 S.W.2d 151, 154 (Ark. 1944); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 446 (Wis. 1994).} In \textit{Fogarty}, a case with facts similar to those of \textit{Congleton}, the decedent died in a car accident caused by the defendant’s negligence.\footnote{Fogarty, 640 F.Supp. at 955.} Despite evidence of skid marks measuring fifty-six feet long, the court refused to allow recovery for mental distress experienced prior to injury.\footnote{Id. at 958.} The court emphasized the subjective nature of such testimony and difficulty in proving the emotional distress.\footnote{Id. at 963.} It further criticized “pre-impact fear” damages for their temporary and “harmless” nature and the unfairness of holding a merely negligent defendant liable for transitory emotional distress.\footnote{Id.}


plaintiff presented testimony from the decedent’s son, who witnessed his mother’s fear upon seeing defendant’s oncoming vehicle.44

This is perhaps the kind of evidence which may have persuaded the Congleton court to award damages for pre-impact fear because decedent’s son was a first-hand witness to the decedent’s terror. Because the impact occurred only seconds later, the court held that the trial court abused its discretion in awarding $15,000 for “pre-impact fear.”45 The court amended the judgment and reduced the “pre-impact fear” award to $7,500, which reflected the maximum amount previously awarded in a similar case.46 Although available in other jurisdictions, “pre-impact fear” damages are not available in Kentucky.47 The “impact rule” requires that the plaintiff’s mental distress be a result of some physical contact or injury, thus precluding “pre-impact fear” damages.48

ii. Increased Risk of Future Harm

Courts also examine the requirement of present physical injury or harm when evaluating a plaintiff’s claim for “increased risk of future disease or injury.”49 These claims typically arise after the plaintiff has been exposed to a substance which increases his risk of developing a disease.50 Plaintiffs with such claims normally seek damages for medical monitoring and other future medical expenses,51 future impairment, and future pain and suffering, or more specifically, the mental distress caused by fear of developing the disease.52 Discussion of the cause of action for increased risk of future harm is relevant because it affects the recoverability of nonpecuniary mental distress damages associated with the risk.

Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994).

Bailey determined the standard for recovery of increased risk of future harm in Kentucky.53 The Kentucky Supreme Court synthesized its holdings in Deutsch and Davis v. Graviss, another case dealing with the type of injury or

44. Id. at 567. The evidence demonstrated that when the son saw defendant’s oncoming vehicle and slammed on the brakes, decedent “looked up and saw the car coming, and she reached over and grabbed my arm, and she gasped, which is a frequent thing that she did when she was frightened.” Id.
45. Id.
46. Id.
47. See Steel Tech., Inc. v. Congleton, 234 S.W.3d 920, 929 (Ky. 2007).
48. Id.
49. See, e.g., Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 195 (Ky. 1994); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 851-52 (Ky. 2002).
50. See, e.g., Bailey, 873 S.W.2d at 189; Wood, 82 S.W.3d at 851-52.
51. See, e.g., Wood, 82 S.W.3d at 851.
52. See, e.g., Bailey, 873 S.W.2d at 190.
53. Id. at 195.
contact needed to establish a cause of action and damages.  

Davis held that the “increased likelihood of future complications” is compensable when the plaintiff suffered a “realized injury other than a mere contact.” Deutsch, however, held that a cause of action accrues when some physical contact or injury occurs that is indirectly related to, but a substantial factor in, causing the resulting harm. In reconciling the cases, the Bailey court held that, in order to recover for increased risk of future harm and the mental distress which accompanies this risk, some physical injury or a “demonstrable harmful result” must have occurred. This injury or harm triggers the cause of action.

Thus, whether one seeks to recover for present mental distress caused by present harm, or the mental distress associated with increased risk of future harm, the touchstone is that some tangible harm, loss, or damage has already occurred. As long as the harm or injury has occurred, it is irrelevant whether the defendant directly or indirectly caused the harm; what is important is that the defendant’s negligent act was a substantial factor in bringing about the harm.

In Bailey, the court precluded negligence recovery because the plaintiff had not suffered any physical injury or harm. Rather, the plaintiff was exposed to asbestos and, as a result, incurred an increased risk for developing asbestosis and mesothelioma. The ingestion of the toxic substance, and the increased risk for developing a disease itself, did not constitute a “harmful result” or injury, therefore, the plaintiff’s cause of action had not yet accrued.

Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849 (Ky. 2002).

The court precluded recovery for the plaintiff’s increased risk of developing diseases such as valvular heart disease and hypertension as a result of exposure to fenfleuramine (Fen-Phen), a drug manufactured by the defendant. In this case, the plaintiff brought negligence and strict liability claims. She also claimed damages for the future medical expenses she would incur in order to monitor the side effects of the drug, and reimbursement for the costs expended to

54. Id. (citing Davis v. Graviss, 672 S.W.2d 928, 932 (Ky. 1984)).
55. Id. (citing Davis, 672 S.W.2d at 932).
56. Id. (citing Deutsch v. Shein, 597 S.W.2d 141, 145-46 (Ky. 1980)).
57. Id.
58. Bailey, 873 S.W.2d at 194.
59. See id. at 195.
60. See id.
61. Id.
62. Id. at 189.
63. Id. at 195. See also McGinnis v. Theuer, No. 2006-CA-000105, 2007 WL 1192084, at *1 (Ky. Ct. App. Mar. 30, 2007) (holding that because the defendant was not liable for negligence, failure to instruct the jury regarding the plaintiff’s damages for increased risk of future harm was not improper because plaintiff did not “suffer a present injury caused by defendant’s negligence”).
64. Wood, 82 S.W.3d at 851-52.
65. Id. at 851.
purchase the drug. The plaintiff, however, had not yet undergone testing or incurred any expenses, and further, demonstrated no injury or harm. Both negligence and strict liability claims require a present physical injury “that produces loss or damage.”

The court compared the plaintiff’s exposure to Fen-Phen and increased risk of developing heart disease to the plaintiff’s exposure to asbestos and increased risk of developing asbestosis in Bailey, and found the two situations indistinguishable. As it was in Bailey, so it was here: because the plaintiff’s claims to future injury or prospective medical expenses were speculative, and the plaintiff could not prove a present injury or harm, her cause of action had not accrued.

An alteration to the physical injury requirement would have major implications in many areas of Kentucky law. The court referred to the potential of discarding the present physical injury requirement as a “sweeping change,” and asserted that “[i]n the name of sound policy, we decline to depart from well-settled principles of tort law.” Not only did the Supreme Court of the United States refuse to endorse recovery for prospective medical monitoring damages, but practical considerations also support this decision.

For instance, the administrative concerns involved in determining the amount of damages to award, and concerns regarding whether the plaintiff will actually utilize the award for medical monitoring when his insurance also covers the costs, are great. Allowing medical monitoring damages and damages for increased risk of future harm would cause a flood of litigation based on speculative claims. The legislature is better suited to gather relevant information and make an informed determination on this issue, especially with regard to collateral claims, which would in effect provide notice to potential tortfeasors. Finally, the rule actually protects victims in the long run, by preserving their claims until the injury or harm has actually manifested and damage awards may be higher, thus preventing claim preclusion under the

66. Id. Note that, although plaintiff did not seek relief for apprehension of future disease, this case presents the scenario in which plaintiffs normally seek such damages.
67. Id. at 854-55.
68. Id. at 853 (quoting Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973)).
69. Id. at 854-55.
70. Wood, 82 S.W.3d at 854-55.
71. Id. at 855-56.
72. Id.
74. Wood, 82 S.W.3d at 857.
75. Id.
76. Id. at 858.
77. Further complications arise when the plaintiff’s medical monitoring expenses are covered by his health care insurer or employer, and the court must determine whether the collateral source rule precludes the plaintiff from recovering damages from the defendant. Victor E. Schwartz et al., Medical Monitoring—Should Tort Law Say Yes? 34 WAKE FOREST L. REV. 1057, 1078-79 (1999).
78. Wood, 82 S.W.3d at 858.
doctrine of res judicata.79 As a result, no damages associated with increased risk of future harm are recoverable in Kentucky, including those for the mental distress associated with such a risk.80

b. Other General Pain and Suffering Requirements and Limitations

Other than the requirement of present physical injury and the limitations imposed by the “impact rule,” Kentucky law imposes other limitations upon the recovery of pain and suffering damages. The plaintiff must have experienced some level of consciousness for the time during which he is seeking damages.81 Additionally, a compensatory damages award for medical expenses need not be automatically accompanied by an award for pain and suffering.82 Finally, the jury must be properly instructed regarding compensation for “loss of enjoyment of life,” as it is part of pain and suffering damages, and not a separate element of damages.83


In order to recover damages for pain and suffering, the plaintiff must have been conscious, or partially conscious, even in intervals, during the time which he experienced mental or physical suffering.84 In Benham, the infant plaintiff was born with brain damage as a result of the defendant hospital’s negligence.85 The doctor incorrectly used a vacuum extractor while delivering the child, which resulted in cerebral bleeding, and the nurses neglected to respond to signs that the fetus was “dangerously distressed.”86 The plaintiff suffered from seizures and had to undergo “uncomfortable” treatments.87

The jury witnessed the awake and somewhat responsive child at trial.88 Therefore, the court ruled that pain and suffering damages were appropriate because he was conscious.89 The court noted that pain and suffering damages may also be appropriate where “the injured person was ‘partly conscious,’ had intervals of consciousness, or was conscious for a short time before death.”90 Thus, the court affirmed the trial court’s $3,000,000 damages award, including $2,000,000 for future medical expenses.91

79. Id.
81. Benham, 105 S.W.3d at 477.
84. Benham, 105 S.W.3d at 477 (citing Vitale v. Henchey, 24 S.W.3d 651, 659 (Ky. 2000)).
85. Id. at 475.
86. Id.
87. Id. at 477.
88. Id.
89. Id.
90. Benham, 105 S.W.3d at 477 (citing Vitale, 24 S.W.3d at 659).
91. Id.
Miller v. Swift, 42 S.W.3d 599 (Ky. 2001).

Overruling former precedent, the Kentucky Supreme Court held that a damages award for medical expenses need not be accompanied by an award for pain and suffering. In Miller, the plaintiff was injured in a motor vehicle accident caused by the defendant’s negligence. The plaintiff claimed that the injuries she suffered in the accident exacerbated her previous medical conditions, which included: “rheumatoid arthritis, carpal tunnel syndrome, gastritis and problems with her knee and shoulder.” Although the plaintiff’s doctor testified that she developed several conditions after the accident, and the jury awarded $3,570.57 for medical expenses and $1,698.82 for lost wages, the plaintiff received no compensation for pain and suffering.

The reviewing court deferred to the jury’s factual determination that the plaintiff did not suffer additional pain and suffering caused by the accident. The court held that a zero damages award for pain and suffering, when accompanied by an award for medical expenses, was not inadequate as a matter of law. As a factual matter, the jury can adequately determine whether injury caused by the tortfeasor’s misconduct actually aggravated the plaintiff’s previous injuries, and need not automatically award pain and suffering damages when it has awarded damages for medical expenses.


Based on the Miller decision, the Kentucky Court of Appeals affirmed the trial court’s zero damages award for pain and suffering in a case where the plaintiff received $17,727.65 for medical expenses, and $13,903.12 for lost wages. The plaintiff was injured in a car accident, for which both the defendant and the plaintiff were equally liable. The plaintiff went to the hospital immediately following the accident, but doctors released her without work restrictions and she worked a twelve-hour nursing shift that night. She took medication for two days, but did not visit her doctor until she was involved

92. "Miller, 42 S.W.3d at 602.
93. Id. at 600.
94. Id.
95. Id. at 603 (Graves, J., dissenting) (noting that the plaintiff’s doctor testified that the accident caused the following injuries: trauma from the seatbelt, causing discoloration to the chest and shoulder; a bruised acromioclavicular joint; pain, swelling, and a sprained knee).
96. Id. at 600 (majority opinion).
97. Id.
98. Miller, 42 S.W.3d at 602.
99. Id.
101. Id. at *5.
102. Id. at *8.
in another car accident more than one month later, from which she recovered easily and promptly.\textsuperscript{103} Subsequently, the plaintiff was in a third car accident, and as a result, underwent surgery for a herniated disc.\textsuperscript{104} Her doctor reported a “good result” after surgery, and she returned to work shortly thereafter.\textsuperscript{105}

Based on this evidence, the jury determined that the plaintiff had a high pain threshold, and the injuries caused by the defendant’s negligence did not warrant a pain and suffering award.\textsuperscript{106} Although the court criticized \textit{Miller} for its potential to “unjustly punish dedicated workers with high pain tolerance, like [the plaintiff], or inordinately enrich malingerers and less able workers with low pain tolerance,”\textsuperscript{107} it deferred to the jury’s determination that the evidence supported the damages award, and noted that the jury is “not bound to believe a plaintiff or her doctors.”\textsuperscript{108}

\textit{Adams v. Miller}, 908 S.W.2d 112 (Ky. 1995).

Damages for loss of enjoyment of life, also known as hedonic damages, compensate the plaintiff for “the pleasure, the satisfaction, or the ‘utility’ that human beings derive from life,”\textsuperscript{109} as opposed to pain and suffering damages, which compensate the plaintiff for his “physical discomfort or emotional distress.”\textsuperscript{110} \textit{Adams} held that loss of enjoyment of life is only recoverable as a part of pain and suffering damages, and courts may not provide separate jury instructions for loss of enjoyment of life.\textsuperscript{111}

c. Proof of Damages and Standard of Review

Kentucky courts do not require a high quantum of proof to demonstrate pain and suffering in personal injury cases. Because “[n]o measuring cup has been devised by man or the courts to measure accurately pain and suffering,” the courts are hesitant to usurp the role of the jury in finding or measuring such damages.\textsuperscript{112} Accordingly, “it is the rule that where a substantial personal injury is sustained, suffering is presumed and need not be proven.”\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} Id. at *8-9.
  \item \textsuperscript{105} Id. at *9.
  \item \textsuperscript{106} \textit{McCulloch}, 2007 Ky. App. LEXIS 283, at *6.
  \item \textsuperscript{107} Id. at *12.
  \item \textsuperscript{108} Id. at *9 (citing Spalding v. Shinkle, 774 S.W.2d 465, 467 (Ky. Ct. App. 1989)).
  \item \textsuperscript{110} Black’s Law Dictionary 1141 (8th ed. 2004).
  \item \textsuperscript{111} Adams, 908 S.W.2d at 116.
  \item \textsuperscript{112} Yankey v. McHatton, 444 S.W.2d 745, 747 (Ky. 1969).
  \item \textsuperscript{113} Schriewer v. Schworer, 178 S.W.2d 598, 599 (Ky. 1944).
\end{itemize}
Conversely, a jury is also free to not award pain and suffering damages, even where medical damages are awarded. This holds true for future medical expense and pain and suffering awards as well. While the facts of a particular case may suggest a logical inconsistency where a jury awards medical expense damages but no pain and suffering damages, “[t]here must be evidence to support either award.”

The jury must determine the amount of damages that will reasonably compensate the plaintiff for all mental and physical suffering caused by the defendant’s misconduct. The plaintiff is not entitled to separate jury instructions for mental and physical suffering; however, he is entitled to separate instructions for past and future suffering. When considering whether a damage award is excessive, a reviewing court must give considerable deference to the jury’s determination of damages. It may utilize the “first blush” test, which asks whether the damage award is “so great as to strike the mind at first blush as being the result of passion and prejudice.” A second standard states that the reviewing court must defer to the trial court’s determination as long as the “verdict bears any reasonable relationship to the evidence of loss suffered.”

Kentucky law is unclear as to whether the amount of damages awarded in previous similar cases should be considered as evidence when determining the excessiveness of an award. Because the law is unsettled in this area, parties

116. Id. at 467 (Ky. Ct. App. 1989) (citing and distinguishing American States Ins. Co. v. Audubon Country Club, 650 S.W.2d 252, 254 (Ky. 1983) (finding reversible error in award of medical expenses without pain and suffering, but stating “[t]here can be no blanket rule. . . .”)).
117. Prichard v. Collins, 15 S.W.2d 497, 499 (Ky. 1929).
119. Id. at 450 (citing Fowler v. Carrollton Pub. Library, 799 F.2d 976 (5th Cir. 1986)).
120. Id. (citing Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974)).
121. Yankel, 444 S.W.2d at 747.
122. Id. Cf. Commercial Carriers, Inc. v. Matraca, 311 S.W.2d 565, 567 (Ky. 1958) (citing Spot Cash Tobacco Co. v. Pike, 264 S.W.2d 67, 68 (Ky. 1954)) (holding that jury verdicts are excessive if “disproportionate to the injuries suffered[”]). See also Eades, supra note 4 (noting that the “first blush” standard and the “disproportionate” standard “seek the same result;” however, it would be useful to use them both).
123. Humana of Ky., Inc., v. McKee, 834 S.W.2d 711, 725 (Ky. 1992). See also Eades, supra note 4 (concluding that the Humana standard is consistent with the “first blush test,” and must be used only when the court first determines that the award is excessive “at first blush”).
124. Compare Louisville Taxicab and Transfer Co. v. Langley, 265 S.W.2d 931, 932 (Ky. Ct. App. 1954) (holding that previous adjudications should not be considered because it is too difficult to articulate a general rule; thus, damages must be determined based on the facts of individual cases) with Townsend v. Stamper, 398 S.W.2d 45, 49-50 (Ky. Ct. App. 1966) (recognizing that previous jury verdicts are one factor to be considered when evaluating the excessiveness of an award, along with the facts of the case and changed economic conditions).
may convincingly argue either to exclude or include such evidence. Further, courts should recognize factors such as the changing value of money, the relatively small number of cases which are actually reported, and the disparity of circumstances that arise, which make it difficult to accurately compare the value of an injury.


The court applied the “first blush” test in _Gersh_. The plaintiff was severely injured in a motor vehicle accident. The jury awarded the plaintiff, a passenger in the vehicle driven by the defendant, $2,000,000 for pain and suffering. The defendant appealed the damages award, alleging that it was excessive and a result of the jury’s passion and prejudice. The Kentucky Court of Appeals utilized the “first blush” test to determine whether the verdict was the result of passion or prejudice. The court stated that this standard requires deferral to the jury’s findings, unless clearly erroneous or upon a determination that the trial judge committed an error of law.

The jury’s verdict was not clearly erroneous or the result of passion or prejudice, because evidence of the plaintiff’s pain and suffering supported the award. Evidence supporting the award included fractures to plaintiff’s nose, cheekbone, eye socket, and back; seven surgeries; at least two surgeries expected in the future; two months of taking pain medication and antibiotics; two months of missing school; therapy for depression and stress; continuing back pain; and double vision. Although a high quantum of evidence is not always necessary to establish damages, it is more likely that the court will defer to a jury’s findings under the “first blush” standard when there is a large amount of evidence supporting the plaintiff’s injuries.

2. Analysis of Pain and Suffering Damages

The plaintiff must provide evidence of a present physical injury or harm to recover for pain and suffering damages. The plaintiff may also recover for his mental distress if he can prove that it is accompanied by, and the direct result of,
physical contact or injury. These rules of law, in conjunction with the requirement that the plaintiff be conscious in order to recover for pain and suffering, prevent plaintiffs who are killed upon impact from recovering any pain and suffering damages. Some plaintiffs have attempted to bypass this requirement by unsuccessfully claiming mental distress damages for the fear or anguish that the deceased experienced immediately prior to the impact which caused his death, also termed “pre-impact fear.”

Thus far, the Kentucky Supreme Court has refused to award “pre-impact fear” damages. However, in Congleton, the court seemed to leave open the possibility of allowing plaintiffs to recover for pre-impact mental distress damages in wrongful death cases in the future. When the appropriate case presents itself, the court may join other jurisdictions in providing recovery for “pre-impact fear.” The “appropriate” case is one in which the plaintiff presents more demonstrable evidence, such as testifying on his own behalf regarding the “pre-impact fear” (although unavailable in wrongful death cases), presenting reliable eyewitness testimony, or presenting medical or scientific evidence demonstrating the “pre-impact fear.” The court clearly refused to award “pre-impact fear” damages when there is evidence such as skid marks in the road, demonstrating that the plaintiff slammed on her brakes before the accident, or testimony that the plaintiff’s face was fixed in the expression of a scream.

When considering damages for the mental distress associated with increased risk of future harm, the same general rule applies: the plaintiff must have already suffered some tangible harm, loss, or damage. The requirement of present physical injury, examined in Congleton and Bailey, is well-established in Kentucky and it is unlikely that the court will deviate from this standard. The plaintiff in Wood did not claim future mental distress damages; however, the case is a paradigm example of a situation in which the plaintiff usually seeks damages for mental distress associated with increased risk of future harm. Although the court focused on the policy rationale underpinning its refusal to award medical monitoring damages, the rationale for precluding medical

139. See, e.g., Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 928 (Ky. 2007).
140. Id. at 930.
141. Id.
142. Id.
143. Id.
144. Id. at 928.
146. Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 856 (Ky. 2002) (noting that “[i]n the sound name of policy, we decline to depart from well-settled principles of tort law”).
147. Id. at 851.
148. See id.
monitoring damages is parallel to the rationale for precluding mental distress damages.

Critics note several reasons why the fear associated with increased risk of harm should not be recoverable.149 First, the grounds for recovery for traditional emotional distress without proof of injury involves a “serious and clearly identifiable immediate emotional response that radically altered the emotional well-being of the plaintiff.”150 However, in asbestos cases, as with other types of increased risk of injury or disease cases, the likelihood of developing the disease is very remote.151 Where the actual risk of developing the disease is unknown or very low, the mental distress simply cannot reach the high standard to which it has traditionally been held in emotional distress cases.152 Therefore, mental distress without proof of injury should not be recoverable.153

Allowing claims for mental distress associated with the fear of future disease would also open the floodgates for potential litigants.154 Once the masses of plaintiffs with, albeit, speculative claims, recover for mental distress without proof of present physical injury, the defendant company will be left without any resources to compensate future plaintiffs.155 Thus, future plaintiffs who have claims that are actually substantiated by physical injury or harm will be virtually unable to recover due to a depletion of resources.156

The speculative nature of the claims raises another concern: how does one separate meritorious from non-meritorious claims?157 With no actual evidence at hand, other than statistics indicating that the plaintiff’s exposure to a product may have caused increased risk of developing a disease, there is no way to prove that the plaintiff is suffering emotional distress.158 However, critics fail to recognize that, in this instance, plaintiffs may present evidence of some physical manifestation of mental distress, or doctor’s testimony or diagnosis, in order to prove that they have suffered mental distress.

Courts must consider the numerous practical problems that arise when awarding damages for mental distress associated with increased risk of future injury or disease. These limitations, considered in conjunction with the policy and precedent that favors upholding the present physical injury requirement,

150. *Id.* at 833.
151. *Id.* at 831-32.
152. *Id.* at 832-33.
153. *Id.* at 833.
154. *Id.* at 834-35.
156. *Id.* at 833-34.
157. *Id.*
158. *Id.* at 834.
provides sound basis for continuing to preclude recovery of pain and suffering damages or medical monitoring damages for increased risk of future harm.

Besides the requirement of present physical injury, courts impose further limitations upon pain and suffering damages. In order to recover, the plaintiff must have been conscious for the time during which he seeks pain and suffering damages. Additionally, plaintiffs do not automatically receive pain and suffering damages when they suffer minor injuries and incur medical expenses. A prudent practitioner may investigate the plaintiff’s activities prior and subsequent to the accident in order to prove that, although he incurred medical expenses, the plaintiff had a high tolerance for pain. While, on one hand, the McCulloch court simultaneously affirmed Miller, yet criticized the conclusion that those with a higher pain tolerance may be “unjustly punish[ed],” useful is the maxim from McCulloch: that a jury is “not bound to believe a plaintiff or her doctors.”

A reviewing court may utilize three potential standards in determining the reasonableness of a jury verdict. First, it may consider whether, at “first blush,” the award seems to be the result of passion or prejudice. Second, it may determine whether the verdict is “disproportionate to the injuries suffered.” Lastly, the reviewing court may ascertain whether the jury’s pain and suffering award bore a “reasonable relationship to the evidence of loss suffered.”

If contesting an excessive verdict, the practitioner may first attempt to convince the court that the “first blush” standard is appropriate because it involves less inquiry to the nature and extent of the injuries. It simply asks whether the jury might have been influenced by passion or prejudice, and, “at first blush,” or before a thorough consideration of the case, it is more likely that a court will answer in the affirmative.

However, it is suggested that a combination of the standards should be used, so that the inquiry becomes two-fold: first, because both standards “seek the same result,” the court should analyze whether the verdict is excessive at first blush or is disproportionate to the injury. If it answers in the affirmative, the court should proceed to determine whether there is a reasonable relationship

159. Benham, 105 S.W.3d at 477.
162. Id. at *9 (citing Spalding v. Shinkle, 774 S.W.2d 465, 467 (Ky. Ct. App. 1989)).
164. Commercial Carriers, Inc. v. Matracia, 311 S.W.2d 565, 567 (Ky. 1958) (citing Spot Cash Tobacco v. Pike, 254 S.W.2d 67, 68 (Ky. 1954)).
166. EADES, supra note 4.
between the damages award and the evidence of injury or loss. While placing a higher burden on the defendant, this conglomeration encompasses the variety of ways in which a verdict may be reviewed.

Next, because the law is not well-settled in this area, the practitioner may either argue that the court should or should not allow evidence of prior similar verdicts in order to determine whether an award is adequate or excessive. Depending on the type of injury, the practitioner may use this ambiguity in the law to his advantage in various regards. However, critics caution the use of prior verdicts in this manner due to the constantly changing value of money, the relatively small number of cases which are actually reported due to settlements, and the system of publishing opinions, and the disparity of circumstances that arise. It is important to remember that each situation and each injury varies somewhat from one case to the next, and comparing the value of an injury is difficult.

B. Loss of Consortium

This section will discuss the availability of three kinds of loss of consortium damages: first, loss of spousal consortium; second, loss of a child’s consortium; and third, loss of parental consortium.

1. Case Summaries and Overview

Under the Kentucky Revised Statutes, loss of spousal consortium is the loss of “services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband.” This also encompasses loss of “domestic tranquility, attention, and performance of household duties.” Loss of parental consortium under the Kentucky Revised Statutes compensates for “loss of affection and companionship.”

While Kentucky has recognized spousal loss of consortium claims for many years, and a parent’s claim for loss of a child’s consortium for even longer, it did not begin to recognize child’s loss of parental consortium until 1997, when the Kentucky Supreme Court developed a common law parental loss of

167. Id.
168. Id.
169. Id.
170. Id.
171. KY. REV. STAT. ANN. § 411.145 (LexisNexis 2007).
173. KY. REV. STAT. ANN. § 411.135 (LexisNexis 2007).
174. Deitzman v. Mullin, 5 S.W. 247, 248 (Ky. 1900) (recognizing a husband’s cause of action for loss of his wife’s spousal consortium); Kotsiris v. Ling, 451 S.W.2d 411, 412 (Ky. 1970) (recognizing a wife’s cause of action for loss of her husband’s spousal consortium).
175. KY. REV. STAT. ANN. § 411.135 (LexisNexis 2007).
consortium cause of action.\textsuperscript{176} The law is inconsistent in this area in at least one regard: in order to avoid double recovery, the statutory cause of action for loss of spousal consortium, and the courts’ interpretation of it, precludes recovery for spousal loss of consortium extending beyond the decedent’s death in wrongful death cases.\textsuperscript{177} Damages for loss of parental consortium or loss of a child’s consortium, however, are only recoverable in wrongful death cases, thus precluding recovery when the aggrieved party has only been injured.\textsuperscript{178}

A cause of action for loss of parental consortium is considered “separate and independent” from a wrongful death cause of action, which compensates for the loss of the decedent’s earning power.\textsuperscript{179} However, limitations on both spousal and parental loss of consortium claims do exist where an insurance policy places limits upon the amount of recovery,\textsuperscript{180} and in lawsuits against the Commonwealth, in which the Board of Claims Act\textsuperscript{181} precludes parties from recovering for spousal or parental consortium.\textsuperscript{182}

a. Loss of Spousal Consortium

In order to recover for spousal consortium, spouses must be married at the time that the injury giving rise to the cause of action occurred.\textsuperscript{183} Recovery for loss of “household services” initially developed as a husband’s remedy for loss of a legal right to his wife’s household duties.\textsuperscript{184} While this seems antiquated

\begin{itemize}
\item \textsuperscript{176} Giuliani v. Guiler, 951 S.W.2d 318, 322 (Ky. 1997) (recognizing a minor child’s claim for loss of parental consortium as recoverable and separate from wrongful death claims).
\item \textsuperscript{177} Clark v. Hauck Mfg. Co., 910 S.W.2d 247, 252 (Ky. 1995);
\item \textsuperscript{179} Department of Educ. v. Blevins, 707 S.W.2d 782-84 (Ky. 1986). See also Giuliani, 951 S.W.2d at 322 (recognizing a minor child’s claim for loss of parental consortium as recoverable and separate from wrongful death claims).
\item \textsuperscript{180} Moore v. State Farm Mut. Ins. Co., 710 S.W.2d 225, 226 (Ky. 1986) (precluding recovery for loss of spousal consortium because the injured party had recovered the maximum amount available “per person” for bodily injury under the insurance policy); Daley v. Reed, 87 S.W.3d 247, 250 (Ky. 2002) (holding that loss of parental consortium claims derive from wrongful death claims, and are not recoverable after deceased party’s estate has recovered the maximum amount available “per person” under the insurance policy).
\item \textsuperscript{181} KY. REV. STAT. ANN. § 44.070(1) (LexisNexis 2007) (providing recovery to parties who suffer injury as a “proximate result of negligence on the part of the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies”).
\item \textsuperscript{182} City of Danville v. Goode, 122 S.W.3d 591-93 (Ky. Ct. App. 2003) (precluding recovery for spousal consortium in a Board of Claims suit because KRS § 44.070(1) “precludes liability for collateral or dependent claims which are dependent on loss to another and not the claimant.”); Williams v. Kentucky Dep’t of Educ., 113 S.W.3d 145, 156 (Ky. 2003) (precluding recovery for parental consortium in Board of Claims suit).
\item \textsuperscript{183} Angelet v. Shivar, 602 S.W.2d 185, 185 (Ky. Ct. App. 1980) (precluding husband’s recovery for loss of spousal consortium due to wife’s emotional and physical distress, inflicted upon her by her father before she became married).
\item \textsuperscript{184} Schulz v. Chadwell, 558 S.W.2d 183, 188 (Ky. Ct. App. 1977).  
\end{itemize}
due to the expanding roles of women in the workplace and men in the household, it has been interpreted in modern times as “mutual contributions that are normally expected in the maintenance of a household,” without regard to either spouse’s legal right to such services.185


According to Lane, the purpose of awarding damages for spousal loss of consortium is to “compensate for that period of time while the injured spouse was still alive but incapable of fully participating with the other spouse in conjugal relations attendant to the marital status.”186 In Lane, the decedent was killed in a bulldozer accident and his estate brought a strict products liability and negligence claim against the bulldozer manufacturer.187 Although the facts did not state whether or how long the decedent survived until a passerby found him and called for medical assistance, the medical personnel confirmed that decedent died in the accident.188

In determining whether a decedent’s death should be considered “instantaneous” for purposes of awarding spousal consortium damages, the court compared Lane with Brooks v. Burkeen, a similar case.189 In Brooks, the decedent died “instantaneously” as result of asphyxiation while cleaning out a furnace at work.190 The court found the nature of the deaths in Brooks and Lane were similar because both decedents died while at work, and their spouses “lost no services, society, fellowship, or affectionate relations prior to death,” presumably because they were not with the decedent immediately prior to death.191 Additionally, because the decedent was not alive and injured for any “appreciable length of time following the accident,” the decedent’s wife could not recover loss of consortium damages for a period during which he was alive.192

185. Id. (noting that had husband paid for household help while wife was injured and filed a loss of consortium claim, he would have been entitled to recovery for such expenses) (citing Restatement (Second) of Torts § 693, cmt. f).
187. Id. at *1.
188. Id.
189. Id. at *18 (citing Brooks v. Burkeen, 549 S.W. 2d 91 (Ky. 1977), overruled on other grounds by Giuliani v. Guiler, 951 S.W.2d 318 (Ky. 1997)).
190. Id. (citing Brooks, 549 S.W.2d at 92).
191. Id. (citing Brooks, 549 S.W. 2d at 92).
192. Lane, 2003 WL 1923518, at *18.
b. Loss of a Child’s Consortium

Kentucky recognizes a cause of action for a surviving parent’s loss of a child’s consortium.\textsuperscript{193} Unlike spousal consortium, recovery is limited to wrongful death suits.\textsuperscript{194}

Recovery is also limited to cases in which parents experienced loss of companionship and affection while the child was a minor.\textsuperscript{195}


A parent’s right to recovery for loss of love and affection of his child is restricted to wrongful death suits, thereby excluding consortium claims in suits involving mere injury.\textsuperscript{196} This rule precluded plaintiff’s parents’ recovery for loss of their son’s consortium while he suffered from a wrist injury caused by the defendant’s negligence.\textsuperscript{197}

c. Loss of Parental Consortium

Loss of parental consortium is a recent judicially created remedy which was not recognized until 1997.\textsuperscript{198} Since then, courts have interpreted the statute in ways that are consistent with KRS § 411.135,\textsuperscript{199} the analogous loss of a child’s consortium statute.\textsuperscript{200} Courts have found that loss of parental consortium and loss of a child’s consortium are essentially indistinguishable, therefore, they have attempted to maintain consistency between both kinds of loss of consortium.\textsuperscript{201}

\begin{footnotesize}
\begin{itemize}
\item[193.] KY. REV. STAT. ANN. § 411.135 (LexisNexis 2007).
\item[194.] Bayless v. Boyer, 180 S.W.3d 439, 449 (Ky. 2005).
\item[195.] \textit{Id.}
\item[197.] Bayless, 180 S.W.3d at 442, 449.
\item[198.] Giuliani v. Guiler, 951 S.W.2d 318, 323 (Ky. 1997).
\item[200.] KY. REV. STAT. ANN. § 411.135 (LexisNexis 2007) provides:
\begin{quote}
In a wrongful death action in which the decedent was a minor child, the surviving parent, or parents, may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.
\end{quote}
\item[201.] Lambert, 37 S.W.3d at 780.
\end{itemize}
\end{footnotesize}
Giuliani v. Guiler, 951 S.W.2d 318 (Ky. 1997).

In Giuliani, Kentucky first recognized a child’s loss of parental consortium claim. In Giuliani, a wrongful death suit brought by the surviving child seeking damages for the loss of love and affection of his mother, who died during childbirth as a result of the defendant doctor’s negligence. The court noted that the purpose of a loss of consortium claim is not only to provide monetary damages, but to hold negligent defendants accountable for their misconduct. Additionally, a child’s claim for loss of parental consortium should be recoverable because it is legally indistinguishable from parental loss of a child’s consortium, which is provided for by Kentucky statutes.


In interpreting Giuliani, courts have held that only minor children, and not those who have reached the age of majority, can recover for loss of parental consortium. In Clements, the plaintiffs argued that, while Giuliani provided recovery for a minor child’s loss of parental consortium, the court did not expressly preclude recovery for loss of parental consortium of a child who had attained majority. The court recognized the plaintiff’s contention that adult children deserve redress for loss of consortium just as much as their minor siblings. However, the analogous statute for loss of a child’s consortium only allows the parent to recover if his child was a minor. The Clements court refused to allow major children to recover for loss of parental consortium because expanding the major child’s ability to recover, while statutes restrict the parent’s ability to recover for loss of a major child’s consortium, is inconsistent and exceeds judicial authority.


Courts have also interpreted Giuliani as limiting the scope of a child’s recovery for parental consortium to cases involving claims for wrongful death,
thereby excluding claims for mere injury.\textsuperscript{211} The Giuliani court reasoned that the statute providing parents with a claim for loss of a child’s consortium is legally indistinguishable from a child’s claim for loss of his or her parent’s consortium.\textsuperscript{212} Based on this rationale, Lambert held that because the statutory loss of a child’s consortium only provides relief in a wrongful death claim, the analogous common law loss of a parent’s consortium must operate in the same manner.\textsuperscript{213}

\textit{Daley v. Reed, 87 S.W.3d 247 (Ky. 2002).}

Additional complications arise when parties seek loss of consortium damages in claims against their insurance company. Giuliani and Blevins held that a survivor’s loss of consortium damages were a separate cause of action from a wrongful death claim; however, those cases involved common law rights of action.\textsuperscript{214} In contrast, insurance policies may still limit recovery when a “per person” clause restricts the maximum coverage that an injured party may receive under the policy.\textsuperscript{215}

In Daley, the insurance policy enumerated the maximum amount the policy would pay “per person” “for damages arising out of bodily injury to one person in any one motor vehicle accident, including damages sustained by anyone else as a result of that bodily injury.”\textsuperscript{216} The decedent’s children argued that their loss of consortium claims should fall under the subsequent “per accident” clause of the policy, which allowed an additional sum when two or more people were injured in an accident.\textsuperscript{217} However, only one person, the children’s mother, was injured in the accident.\textsuperscript{218} The court found that the children’s loss of consortium claims were “derivative of” the decedent’s wrongful death claim and fell within the “per person” limitation of the insurance policy.\textsuperscript{219} Therefore, the children’s consortium claims were not considered a separate recoverable injury.\textsuperscript{220} Because the insurance company had paid the maximum amount recoverable to the decedent’s estate in the wrongful death action under the “per person” limitation, the court precluded recovery for the loss of consortium claims.\textsuperscript{221}

\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} (citing Giuliani v. Guiler, 951 S.W.2d 318, 323 (Ky. 1997)).
\textsuperscript{214} Daley v. Reed, 87 S.W.3d 247, 249 (Ky. 2002).
\textsuperscript{215} \textit{Id.} at 249-50.
\textsuperscript{216} \textit{Id.} at 248.
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.} at 249-50.
\textsuperscript{220} Daley, 87 S.W.3d at 249-50.
\textsuperscript{221} \textit{Id.} at 248-50.
2. Loss of Consortium Analysis

While the law regarding recovery of spousal consortium damages has been well-settled for many years, the relatively new common law cause of action for loss of parental consortium has spurred many recent developments in the law surrounding consortium damages. The inherent inconsistency of awarding spousal consortium damages only for the time during which the plaintiff was alive, but injured, and awarding damages for parental or child’s consortium only when the child or parent has died, is troubling.

While Kentucky statutes limit a parent’s loss of a child’s consortium damages to wrongful death suits, the legislature has not similarly limited spousal damages. Although the law has been well-settled for many years, Kentucky courts may, as they did in Giuliani, expand the common law cause of action for spousal consortium to wrongful death suits. However, courts are likely to be more hesitant in similarly expanding the recovery of damages for child’s consortium to suits involving injury. This is because loss of a child’s consortium is analogous to the statutory loss of parental consortium, and, as courts have recognized, should operate in the same manner.

Kentucky statutes also only allow recovery of damages for loss of a child’s consortium for the time during which the child was a minor. Courts have similarly limited analogous damages for loss of parental consortium because the claims are similar. Therefore, the expanding recovery to major children for loss of parental consortium is likely a task that will be left to the legislature.

Further, recovery for loss of consortium is limited by, and ultimately often precluded by, automobile insurance policies which cap the amount of recovery “per person,” and include loss of consortium damages within that element of damages. While the practitioner should be aware of this limitation, which often automatically precludes consortium damages, the same implications are not always true of mass torts situations, in which liability and damages are not

222. See Giuliani, 951 S.W.2d at 323.
224. See, e.g., Lambert, 37 S.W.3d at 780; Bayless v. Boyer, 180 S.W.3d 439, 449 (Ky. 2005).
227. See Giuliani, 951 S.W.2d at 323.
229. Daley v. Reed, 87 S.W.3d 247, 249 (Ky. 2002).
230. See Susanne Cetrulo, A Practitioner’s Analysis of the Loss of Parental Consortium in Kentucky, 26 N. Ky. L. Rev. 1, 15 (1999) (noting that, prior to Daley, the court’s eventual determination of how to interpret automobile insurance policies would have a substantial effect on parental consortium claims, and may render the “discussion of this new claim . . . rather meaningless to the practitioner”).
always determined by the terms of an insurance policy because the plaintiff is generally not insured for the injuries which occur in mass torts suits.

C. Punitive Damages

Kentucky statutes define punitive damages as “damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.”233 Section a) explains the Supreme Court of the United States’ guidelines for awarding punitive damages, which are utilized by Kentucky courts.234 Section b) explains the way in which Kentucky courts have interpreted such guidelines, as well as the additional standards Kentucky courts employ to analyze punitive damages.235

1. Case Summaries and Overview

Punitive damages are recoverable when the plaintiff proves by clear and convincing evidence that “the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.”236 The “oppression, fraud, or malice” standard has been held unconstitutional and altered by the courts,237 but aids the court in determining whether punitive damages should be awarded at all.

When evaluating the reasonableness of a punitive damages verdict, courts must conduct a *de novo* review.238 Kentucky courts, both at the trial and appellate level, utilize three guideposts enumerated by the Supreme Court of the United States to determine the appropriate amount of punitive damages.239 In addition to these guideposts, the Kentucky Revised Statutes list several factors

234. *Id.*
235. *Id.*
   (a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.
   (b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.
   (c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.
237. Williams v. Wilson, 972 S.W.2d 260, 268-69 (Ky. 1998).
which courts must consider when evaluating the reprehensibility of the defendant’s misconduct.  

a. Supreme Court of the United States Guidelines  


In Gore, the plaintiff sued a vehicle manufacturer for fraud in suppressing the fact that it had repainted a vehicle before selling it as a “new” vehicle to the plaintiff. Accord- ing to the defendant’s policy, when the cost of minor repairs to a new vehicle was less than three percent of the retail price of the vehicle, the company would not disclose the repairs to the purchaser. Here, the cost of repainting the plaintiff’s vehicle was only one and a half percent of the total retail price. The plaintiff sought and was awarded $4,000 in compensatory damages and $4,000,000 in punitive damages, calculated based on similar acts of fraud which defendant committed in other jurisdictions.

The Alabama Supreme Court reduced the punitive damages award to $2,000,000 and “disclaimed any reliance on ‘acts that occurred in other jurisdictions.’” The amount was five hundred times the amount of compensatory damages. The Supreme Court of the United States held that the award was unconstitutionally excessive, and articulated three guideposts which courts must use when evaluating the reasonableness of a punitive damages award. The guideposts are: (i) the degree of reprehensibility of the defendant’s conduct; (ii) the ratio between the amount of punitive damages and the actual or potential harm suffered by the plaintiff; and (iii) the ratio between punitive damages and the civil penalties imposed for comparable misconduct.

In evaluating the defendant’s reprehensibility, the Supreme Court of the United States noted that the plaintiff only suffered economic loss, as opposed to physical injury or damage, and the defendant did not act with “reckless disregard for the health and safety of others.” Although the Court declined to make a categorical determination of the reasonableness of punitive damages awards, it

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240. KY. REV. STAT. ANN. § 411.186(2) (LexisNexis 2007).
242. Id. at 563-64.
243. Id.
244. Id. at 564-65.
245. Id. at 567.
246. Id. at 582.
248. This guidepost includes consideration of the following factors: whether “the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” Id. at 575.
249. See Gore, 517 U.S. 559.
250. Id. at 576.
noted that the 500:1 ratio of punitive damages to compensatory damages certainly “raise[s] a suspicious judicial eyebrow.”251 Finally, the Court compared the punitive damages award with the comparable civil penalty in Alabama ($2,000), and found that the punitive damages award was “substantially greater” than the civil penalty.252 All of these factors contributed to the Court’s decision to remand the case because the punitive damages award was unconstitutional.253

b. Kentucky Guidelines

As discussed in section i), in order to recover punitive damages in Kentucky, plaintiffs must meet a threshold requirement of proving that the defendant was grossly negligent.254 Section ii) explains that, when evaluating the appropriate amount of punitive damages, juries and reviewing courts must analyze the award using the Gore guideposts and factors listed in the Kentucky Revised Statutes.

i. Standard for Awarding Punitive Damages

The statutory definition of malice, found in KRS § 411.184(1), states that the defendant must have either acted intentionally, or “with a flagrant indifference to the rights of the plaintiff and a subjective awareness that such conduct will result in human death or bodily harm.”255 The Kentucky Supreme Court found the statutory definition of “malice” unconstitutional because it imposed a new subjective standard in place of the traditional common law gross negligence standard, and thus, violated the jural rights doctrine.256 In order to recover punitive damages, therefore, the plaintiff must prove that the defendant was grossly negligent, or exhibited “wanton or reckless indifference to the rights of others.”257 Additionally,

251. Id. at 583.
252. Id. at 584.
253. Id. at 586. See also State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) [hereinafter Campbell]. Where the defendant insurer was found liable for bad faith and fraud, the Supreme Court of the United States applied the Gore guideposts and struck down a punitive damages award of $145,000,000. Id. The trial court awarded only $1,000,000 in compensatory damages. Id. at 426. The Court found a presumption against a 145:1 ratio of punitive to compensatory damages, held that the reprehensibility of the defendant’s misconduct did not warrant such a large punitive damages award, and considered that the comparable civil sanction was only a $10,000 fine. Id.
254. See Williams v. Wilson, 972 S.W.2d 260, 268-69 (Ky. 1998).
255. KY. REV. STAT. ANN § 411.184(1) (LexisNexis 2007).
256. Williams, 972 S.W.2d at 268-69.
257. Id. at 262. See also Phelps, 103 S.W.3d at 52 (citing Fowler v. Mantooth, 683 S.W.2d 250, 252 (Ky. 1984)) (holding that the gross negligence standard herein described is interchangeable with the implied malice standard, under which the defendant exhibits outrageous conduct that is “sufficient to evidence conscious wrongdoing”).
based on the plain language of the statute, the plaintiff cannot recover punitive damages from a deceased defendant’s estate.


The gross negligence and implied malice standards were not satisfied when the defendant, while driving ten miles per hour over the speed limit, passed the plaintiff in a no-passing zone and caused a collision between plaintiff and defendant’s vehicles. The defendant conceded liability, and the court affirmed the trial court’s determination that, while negligent, the defendant’s acts did not rise to the level of gross negligence because they did not exhibit a “wanton or reckless disregard for the safety or others.” The court noted that punitive damage awards are appropriate in gross negligence cases, such as those in which the defendant drives while intoxicated or exhibits eighteen instances of “conscious disregard for public safety.”

**ii. Standard for Evaluating the Appropriate Amount of Punitive Damages**

When assessing the appropriate amount of punitive damages, juries and reviewing courts consider the *Gore* guideposts and the following five factors, which evaluate the reprehensibility of the defendant’s misconduct:

(a) The likelihood at the relevant time that serious harm would arise from the defendant’s misconduct;
(b) The degree of the defendant’s awareness of that likelihood;
(c) The profitability of the misconduct to the defendant;

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258. KY. REV. STAT. ANN. § 411.184(2) (LexisNexis 2007) (stating that a plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice”)(emphasis added).
259. Stewart v. Estate of Cooper, 102 S.W.3d 913, 914 (Ky. 2003) (holding that plaintiffs cannot recover from a deceased defendant’s estate because the estate itself did not act toward the plaintiff with the requisite oppression, fraud, or malice).
260. Kinney v. Butcher, 131 S.W.3d 357, 359 (Ky. Ct. App. 2004). Although this piece of evidence was contested, the court assumed “for the purposes of this argument” that it was accurate. *Id.*
261. *Id.* at 358-59. *Cf.* Gersh v. Bowman, 329 S.W.3d 567, 572 (Ky. Ct. App. 2007) (holding that defendant met grossly negligent standard when, with two passengers in the car, he drove at least thirty-four miles per hour over the speed limit on a sharp curve, while it was dark, and one of the passengers had previously warned defendant that they were approaching the curve).
262. *Id.* at 359 (citing Shortridge v. Rice, 929 S.W.2d 194, 197-198 (Ky. 1996) (holding that any evidence of punitive damages requires a jury instruction regarding such damages; the court remanded the case to the trial court because it neglected to include a punitive damages jury instruction when the defendant drove while intoxicated); *Stewart*, 102 S.W.3d at 916 (Ky. 2003) (holding the plaintiff could not recover punitive damages against the tortfeasor’s estate; in this case, the tortfeasor was an intoxicated driver).
264. *Id.* (citing Phelps v. Louisville Water Co., 103 S.W.3d 46, 53-54 (Ky. 2003)).
(d) The duration of the misconduct and any concealment of it by the
defendant; and
(e) Any actions by the defendant to remedy the misconduct once it
became known to the defendant.265

The jury may not consider the financial situation of either party when
determining punitive damages.266 In accordance with KRS 411.186(2)(c),
however, evidence of the defendant’s financial situation is relevant when
demonstrating the extent to which the defendant profited from the wrongful
act.267 Note that a reviewing court must review the trial court’s punitive
damages award de novo.268

*1 (Ky. Aug. 24, 2006).

When evaluating the reasonableness of punitive damages awards, Kentucky
courts apply the Gore guideposts.269 In a property dispute over access to a public
road, the Kentucky Supreme Court in Roberie upheld $5,000 in punitive
damages, awarded to the plaintiffs as a result of the defendants’ “intimidating,
abusive behavior and for blocking access to the road.”270 The defendants’
conduct satisfied the first guidepost and was sufficiently reprehensible because
evidence supported the jury’s determination that the defendants acted with
malice or oppression, which is comparable to the “intentional malice, trickery, or
deceit” standard enumerated in Campbell.271

Although no compensatory or nominal damages were awarded, compensa-
tory damages are not a prerequisite for punitive damages, as long as the plaintiff
suffered an injury for which compensatory damages, in any amount, may be
awarded.272 Reasonableness is the touchstone of a punitive damages award
analysis, which is not merely a mathematical formula,273 and potential damages
or harm may also be considered in determining the constitutionality of the
award.274 Because the jury verdict could have supported a nominal damages

265. KY. REV. STAT. ANN. § 411.186(2) (LexisNexis 2007).
266. Hardaway Mgmt. Co. v. Southerland, 977 S.W.2d 910, 916 (Ky. 1998).
267. Id. (citing KY. REV. STAT. ANN. § 411.186(2)(c) (LexisNexis 2007)).
268. Phelps, 103 S.W.3d at 53 (citing Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532
U.S. 424 (2001)).
Aug. 24, 2006). See also Steel Tech., Inc. v. Congleton, 234 S.W.3d 920, 931 (Ky. 2007).
271. Id. at *25.
272. Id. at *19-20.
273. Id. at *21 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).
274. Id. at *23 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993));
Gore, 517 U.S. at 583).
award, and it was difficult to calculate the value of the non-economic harm, the punitive damages award satisfied the second guidepost.275

No comparable civil penalty existed for blocking a public road, and although a criminal statute outlawed this behavior, the court did not defer to the unlawful nature of the act because punitive damages should not be used in place of criminal penalties.276 Had the punitive damages award been more than $5,000, the court likely would have found it unreasonable because there was no comparable civil penalty.277


The facts of _Sand Hill Energy_ are explained in the first opinion regarding this matter issued by Kentucky Supreme Court.278 The decedent’s estate brought a products liability action against the automobile manufacturer after the vehicle’s transmission shifted from park to reverse, causing the vehicle to move and crush the decedent, who was standing behind it.279 The trial court originally awarded the decedent’s estate $20,000,000 in punitive damages and $3,000,000 in compensatory damages,280 including $2,000,000 for loss of decedent’s earning capacity and $1,000,000 for pain and suffering.281

On appeal, the Kentucky Supreme Court affirmed the compensatory damages award and reduced the punitive damages award to $15,000,000.282 The court reviewed the trial court’s determination of punitive damages _de novo_ and according to the _Gore_ factors.283 The court noted the defendant’s reprehensibility in continuing to install the faulty transmission into its vehicles while aware of its “dangerous propensities,”284 the relatively small ratio of punitive damages to compensatory damages (7:1) compared with that of recent Supreme Court of the United States opinions,285 and comparable punitive damage verdicts in similar litigation throughout the nation.286

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275. _Id._ at *26.
276. _Roberie_, 2006 Ky. LEXIS 186, at *27.
277. _Id._ at *27.
278. _Sand Hill Energy, Inc. v. Ford Motor Co._, 83 S.W.3d 483 (Ky. 2002) [hereinafter _Sand Hill I_].
279. _Id._ at 485-86.
280. _Id._ at 485.
281. _Id._ at 495.
282. _Id._ at 496.
283. _Id._ at 494.
284. _Sand Hill I_, 83 S.W.3d at 494.
285. _Id._ at 494-95. In _Gore_, the punitive damages award ($4,000,000) was one thousand times the amount of compensatory damages ($4,000). BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 564-65 (1996). In _Leatherman_, the punitive damages award ($4,500,000) was ninety times the amount of compensatory damages ($50,000). _Cooper Indus._, Inc. v. _Leatherman Tool Group_, Inc., 532 U.S. 424, 426 (2001).
286. _Id._ at 495-96.
Sand Hill II, the second opinion issued by the Kentucky Supreme Court in this matter, was decided after the Supreme Court of the United States issued the Campbell opinion.287 Campbell enumerated the standards a court must employ when determining whether out-of-state conduct is relevant in the punitive damages award.288 Sand Hill II vacated the punitive damages award and remanded the case back to the trial court because the trial court issued incorrect jury instructions.289

The trial court incorrectly allowed the jury to consider the defendant’s out-of-state conduct in assessing punitive damages, and punish the defendant for both its in-state and out-of-state conduct.290 When there is a sufficient nexus between the defendant’s out-of-state conduct and the conduct which caused the plaintiff’s harm, however, the jury may consider the out-of-state conduct in determining the defendant’s culpability with regard to the plaintiff.291 However, the court must instruct the jury that the punitive damages award cannot be used as a means to punish out of state behavior.292

Phelps v. Louisville Water Co., 103 S.W.3d 46 (Ky. 2003).

The court affirmed a $2,000,000 punitive damages award assessed against the defendant whose negligence while performing work on a public street caused a fatal car accident.293 The defendant exhibited reprehensible behavior in its failure to obtain a permit in order to perform work on the street; failure to follow local regulations regarding warning signs, barricades, and placement of trailers; and failure to implement a traffic control plan.294 Although the trial court’s punitive damages award resulted in a 11:1 ratio of punitive to compensatory damages,295 it was reasonable because the amount awarded for each plaintiff’s loss of income ($150,000) was relatively low; therefore, the punitive damages

287. Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153, 155 (Ky. 2004) [hereinafter Sand Hill II]. After the Kentucky Supreme Court reduced the punitive damages award to $15,000,000, the defendant petitioned for a writ of certiorari to the Supreme Court of the United States. Id. While defendant’s petition was pending, the Supreme Court of the United States issued the Campbell opinion, which changed the way in which the Kentucky Supreme Court should have analyzed Sand Hill I. Id. Subsequently, the Supreme Court of the United States vacated Sand Hill I and remanded the case to the Kentucky Supreme Court to review in light of Campbell. Id.


289. Id. at 167-68.

290. Id. at 157. The trial court considered evidence such as the amount of defective vehicles the defendant sold nationwide and the amount of similar incidents nationwide which were caused by the defective transmission in defendant’s vehicles. Id.

291. Id.

292. Id.

293. Phelps, 103 S.W.3d at 49.

294. Id. at 53-54.

295. Id. at 54.
award served to sufficiently punish the defendant and deter future misconduct.\textsuperscript{296} Finally, although the comparable civil penalty for “improperly setting up traffic control” was only $100, the defendant was on notice that its grossly negligent acts might cause traffic accidents and, thus, result in large damage awards in wrongful death civil actions.\textsuperscript{297}

\textit{Steel Technologies, Inc. v. Congleton}, 234 S.W.3d 920 (Ky. 2007).

In \textit{Congleton}, the Kentucky Supreme Court upheld a $1,000,000 punitive damages award, while the compensatory damages award was $667,267.\textsuperscript{298} The decedent was killed in a car accident in which a steel coil came loose from a tractor-trailer driven by the defendant’s employee, and struck the decedent’s vehicle.\textsuperscript{299} The defendant driver had secured the steel coils with only three chains, while aware that federal regulations required the use of at least five chains.\textsuperscript{300}

The court reviewed the punitive damages award \textit{de novo} and analyzed the defendant’s misconduct according to the \textit{Gore} factors.\textsuperscript{301} It held that the punitive damages award was constitutional.\textsuperscript{302} Although the degree of reprehensibility did not reach the highest level because the conduct was not intentional, the defendant did exhibit a “reckless disregard for the lives or safety of others.”\textsuperscript{303} The harm was not merely economic, as it was in \textit{Gore}, but involved the loss of a life, which weighs more than mere economic harm.\textsuperscript{304} Under the second guidepost, the 1.5:1 ratio between the punitive damages award and the compensatory damages award was significantly lower than the 145:1 ratio found inappropriate by the Supreme Court in \textit{Campbell} and the 500:1 ratio found inappropriate in \textit{Gore}.\textsuperscript{305} Finally, the comparable civil penalty was $10,000.\textsuperscript{306} The court noted that the fine was “significantly less” than the punitive damages award, but the disparity of the civil penalty imposed in comparison with the punitive damages award was significantly less than those in \textit{Gore} and \textit{Campbell}.\textsuperscript{307}

\textsuperscript{296} Id. at 54-55.
\textsuperscript{297} Id. at 55.
\textsuperscript{298} Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 931-32 (Ky. 2007).
\textsuperscript{299} Id. at 923.
\textsuperscript{300} Id.
\textsuperscript{301} Id. at 931-32.
\textsuperscript{302} Id. at 932.
\textsuperscript{303} Id. at 931.
\textsuperscript{304} Congleton, 234 S.W.3d at 931.
\textsuperscript{305} Id. at 931-32.
\textsuperscript{306} Id. at 932.
\textsuperscript{307} Id.
2. Punitive Damages Analysis

Recent Kentucky reviewing courts have been willing to affirm larger punitive damages awards. While meeting the gross negligence or implied malice standards alone is often difficult, practitioners may attempt to argue that the damages should be awarded according to the standard enumerated in KRS § 411.184 (c), which defines “malice.” The statute imposes a subjective standard in addition to the malice requirement, effectively making it more difficult to impose punitive damages because the plaintiff must prove that the defendant was actually aware that his conduct would cause injury or death. Stated differently, the subjective standard imposes an actual intent or knowledge requirement. The Kentucky Supreme Court, however, explicitly held that the additional subjective requirement was unconstitutional. It is unlikely that the court will reverse this decision, given the long-standing prevalence of the common law “gross negligence” requirement for punitive damages.

For those attempting to persuade the court to reduce punitive damages awards, the requirement that the reviewing court conduct a de novo review is beneficial. The reviewing court must consider the facts anew, without deferring to the trial court, to determine whether the award was excessive. This provides the practitioner with an additional opportunity to present the Gore factors and explain why, based on the evidence, the award is excessive and the case should be remanded.

Practitioners must also be careful that the jury is correctly instructed regarding the tortfeasor’s out-of-state conduct. While evidence of similar out-of-state misconduct is admissible to the jury, there are restrictions. The jury should only consider this evidence when there is a sufficient nexus between the extraterritorial conduct and the in-state conduct which caused the plaintiff’s injury. Further, the jury must understand that the punitive damages award should not be used as a tool to punish the defendant for its out-of-state conduct. The evidence is only used as a factor the jury may consider when evaluating the defendant’s culpability.

308. Id. at 931-32; See also Phelps v. Louisville Water Co., 103 S.W.3d 49 (Ky. 2003).
309. KY. REV. STAT. ANN. § 411.184(c) (LexisNexis 2007).
310. Id.
311. Williams v. Wilson, 972 S.W.2d 260, 262 (Ky. 1998).
312. Id. at 268-69.
313. Id. at 264-65. The court noted that, according to the jural rights doctrine, “recovery of punitive damages for grossly negligent conduct was a recognized common law right which predated the 1891 Constitution.” Id.
315. See, e.g., id.
317. Id.
318. Id.
319. Id.
III. PRACTICE POINTERS

Instead of focusing solely on issues of liability, an effective defense strategy will include consideration of damages issues and the potential for minimizing damages at all stages of the lawsuit. Besides utilizing the determinations of law regarding damages discussed above, a practitioner may minimize damages by employing practical skills both before and during trial, which are discussed in the following sections.

A. Minimizing Damages Pre-Suit

In order to minimize damages and establish credibility with all parties involved, the practitioner should demonstrate that he cares about the injured plaintiff and his corresponding emotions. The practitioner should recognize all facts, good and bad, and pay attention to the plaintiff’s injuries. The defendant may also provide compensation, treatment, or assistance with plaintiff’s injuries prior to the lawsuit, understanding that he will receive credit in the future and during trial for money expended. This can ensure that the plaintiff’s medical needs are met, which facilitates maximum recovery and plaintiff’s return to “normal life.”

B. Minimizing Damages Pre-Trial

There are several steps defense counsel should take early in the litigation process to reduce the potential for a finding of liability, but also to reduce the potential scope of non-economic damages in an injury case. Such opportunities include filing motions to dismiss claims that fail to adequately allege damages or that seek to recover for injuries arising from previously litigated events, exposing the unreliability of plaintiff’s medical experts under Daubert, filing motions in limine to exclude prejudicial evidence, and using discovery to lock the plaintiff in to a defined set of damages before trial.

1. Motions to Dismiss

Upon receipt of a complaint, defense counsel can immediately begin the process of minimizing the potential scope of damages. Particularly, defense counsel should identify pleading deficiencies for damages that require heightened specificity in the complaint. While Kentucky requires “notice pleading,” a permissive approach to the pleading of pain and suffering damages that presumes such damages will flow from serious injuries, other non-

320. See Gaines v. Murphy, 239 S.W.2d 453, 456 (Ky. 1951); McCracken & McCall, Inc. v. Bolton, 200 S.W.2d 923, 923-24 (Ky. 1947).

economic damages require additional support in the complaint.\textsuperscript{322} In Kentucky, special damages must be specifically alleged to support recovery.\textsuperscript{323} Accordingly, where a plaintiff has failed to allege such damages in the complaint but later expands the scope of claimed damages, defense counsel should be vigilant to recognize the change and contest the expansion of damages.

When dealing with punitive damages claims, defense counsel should insure that the allegations in the complaint satisfy the gross negligence requirement and move to dismiss any punitive claims that do not allege more than ordinary negligence.\textsuperscript{324} This may be especially effective where the plaintiff has included a claim for punitive damages more as an afterthought than a well-supported part of the complaint. The argument should be renewed in a summary judgment motion where the evidence does not support the plaintiff’s allegations supporting a punitive damages claim.\textsuperscript{325}

Additionally, in the event that the tortfeasor has died, defense counsel should note that punitive damages claims should be dismissed against the tortfeasor’s estate, as Kentucky’s punitive damages statute does not confer liability on anyone but “the defendant from whom such damages are sought . . .”.\textsuperscript{326}

Defense counsel may also pursue dismissal of injury claims when the plaintiff brings a claim for injuries developing outside the relevant statute of limitations. If an initial injury is insufficient to warrant a lawsuit, but a later more serious injury or disease from the same cause develops, a plaintiff may not be barred from bringing his claim despite the early notice of the initial injury.\textsuperscript{327}

\textsuperscript{322} See Gaines, 239 S.W.2d at 456 (Ky. 1951); Bolton, 200 S.W.2d at 923-24 (Ky. 1947) (holding that “special damages cannot be recovered unless specially pleaded. Special damages are such as are not to be implied or presumed as a necessary result of the commission of a wrong, or such as can be deemed to have been within the contemplation of the parties”); Galliaer v. So. Harlan Coal Co., 57 S.W.2d 645, 647 (Ky. 1932).

\textsuperscript{323} See id.

\textsuperscript{324} See Williams v. Wilson, 972 S.W.2d 260, 264 (Ky. 1998).


\textsuperscript{326} Stewart v. Estate of Cooper, 102 S.W.3d 913, 914 (Ky. 2003) (holding that plaintiffs cannot recover from a deceased defendant’s estate because the estate itself did not act toward the plaintiff with the requisite oppression, fraud, or malice) (emphasis in original).

\textsuperscript{327} Carroll v. Owens-Corning Fiberglas Corp., 37 S.W.3d 699, 702-3 (Ky. 2000) (holding that some plaintiffs in toxic substance cases, such as those involving asbestos litigation, are not restricted by the traditional “discovery rule” because toxic substance cases involve an “extended latency period” between exposure to the substance and diagnosis of the disease. Thus, when the plaintiff cannot reasonably predict whether the initial minor illness will result in a more severe disease, the statute of limitations does not begin running on a later disease until diagnosis of the later disease, which is “separate and distinct” from the earlier illness). Cf. Combs v. Albert Kahn & Assoc., Inc., 183 S.W.3d 190, 198 (Ky. Ct. App. 2006) (distinguishing Carroll and holding that the one-year statute of limitations precluded plaintiff’s suit because he had reason to believe he was at risk of developing a serious disease at the time of his first illness. Thus, in asbestos cases a plaintiff may either:

\begin{itemize}
  \item follow the Capital Holding Corp. path: filing suit within one year of diagnosis of his first asbestos-related disease or injury.
  \item Alternatively, if his first asbestos-related injury is non-disabling and he has no reason to believe
If, however, the plaintiff elects to bring a claim on an initial injury, he must do so with regard to any future injuries as well. If the plaintiff attempts to later bring additional claims from a subsequent disease arising from the same cause, the statute of limitations may bar his suit if his original illness was disabling and he had reason to believe it would develop into a more serious disease. In this case, defense counsel should move to dismiss plaintiff’s claims.

2. Expert Evidence Under Daubert

Although Kentucky courts do not always require a high degree of proof for non-economic damages, there must still be evidence to support them. While the defense will naturally seek to defeat plaintiff’s claims on the basis of liability, defense counsel should also seek to eliminate unreliable expert evidence so as to weaken plaintiff’s support for excessive non-economic damages. Because Kentucky has adopted the rule of Daubert, defense counsel may seek to exclude expert evidence for the usual reliability deficiencies. For example, where a plaintiff sought to recover for both short and long term effects of mold exposure in his home, a Kentucky court permitted the evidence regarding short term exposure effects but held that the expert evidence regarding long-term exposure was too speculative to go to a jury. Thus, even if defense counsel cannot exclude an expert’s testimony in its entirety, by attacking the speculative portions of the proposed evidence, the defense can eliminate evidence that might otherwise support significant additional damages.

3. Motions In Limine

In personal injury cases, the defense can substantially limit damages by excluding evidence that prejudices the jury to make emotional rather than rational assessments of appropriate awards. Because Kentucky juries have

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328. See Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 195 (Ky. 1994); Combs, 183 S.W.3d at 198.
329. Combs, 183 S.W.3d at 198.
332. See Toyota Motor Corp. v. Gregory, 136 S.W.3d 35, 39 (Ky. 2004) (interpreting Kentucky Rule of Evidence 702, under which “the trial court’s task is to determine whether the expert is proposing to testify to scientific, technical or other specialized knowledge that will assist the trier of fact to understand or determine a fact in issue. This calls upon the trial court to assess whether the proffered testimony is both relevant and reliable”).
334. Id.
335. See Ky. R. Evid. 403 (LexisNexis 2006) (stating that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice,
significant latitude to make determinations about non-economic damages, excluding prejudicial evidence can be crucial to controlling the risk of outsized awards. Defense counsel can most effectively minimize the risk of high damage awards by challenging prejudicial evidence with a motion in limine under Kentucky Rule of Evidence 103(d) before the jury is exposed to the evidence. By arguing against the evidence before trial, defense counsel can avoid settling for a likely ineffective limiting instruction where the jury has already heard prejudicial information about a plaintiff’s injuries or personal situation. Finally, by objecting to the evidence by written motion, defense counsel can carefully structure and present the argument, rather than rely on a quick oral objection at trial. Because prejudicial evidence is likely to involve unpleasant details about an injured plaintiff or the unhappy consequences of the injury on the plaintiff’s family, a dispassionate focus on the law in a written brief is, at times, a better means to exclude such evidence.

If the defense motion is overruled, the defense may choose to bring out the damaging evidence on its own to blunt its impact without surrendering the right to appeal the ruling. In many states, a preferred approach for minimizing the fact-finders’ exposure to prejudicial information at trial is to seek bifurcation of the liability and punitive damages stages of the trial. In Kentucky, however, such bifurcation is not permitted, making the effective use of motions in limine all the more important.

4. Discovery

An especially important technique for minimizing damages in Kentucky is the effective use of interrogatories to firmly establish the damages sought by the plaintiff. By rule in Kentucky, the plaintiff may not state the specific amount of unliquidated damages sought in the pleadings. To permit the defendant to

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337. Ky. R. Evid. 103(d) (LexisNexis2006) (stating that “[a] party may move the court for a ruling in advance of trial on the admission or exclusion of evidence”).
338. O’Bryan v. Hedgespeth, 892 S.W.2d 571, 574-575 (Ky. 1995) (noting that “[t]he evidence [of collateral source payments] as presented through the plaintiffs’ case obviously prejudiced the jury’s award. Left for the defendant to present after the plaintiffs had apparently concealed it, such evidence would have been even more devastating, adding insult to injury”).
339. Id.
341. See KY. REV. STAT. ANN. § 411.186(1) (LexisNexis 2007) (providing “[i]n any civil action where claims for punitive damages are included, the jury or judge if jury trial has been waived, shall determine concurrently with all other issues presented, whether punitive damages may be assessed”).
342. Ky. R. Civ. P. § 8.01(2) (LexisNexis 2007) (providing that “the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court”).

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prepare, however, the same rule provides that the plaintiff must respond to the defendant’s interrogatories requesting the amount of damages claimed.\textsuperscript{343} Furthermore, the amount stated by the plaintiff in response to the interrogatories will serve as a cap on the damages the plaintiff may obtain at trial.\textsuperscript{344}

Because this procedure permits the defendant to draft the interrogatories, defense counsel has considerable control over the specificity with which the plaintiff must respond. A thorough and creative use of interrogatories to identify the damages sought may later provide a means of preventing the plaintiff from expanding into even more remote types of damages as the case progresses. While the Kentucky Supreme Court recognizes that “the result . . . may seem harsh” it is nonetheless required by the “plain language” of the rule.\textsuperscript{345}

C. Minimizing Damages at Trial

There are several avenues defense counsel may take in order to minimize damages during different stages of trial. These include selecting defense-friendly jurors, presenting the injury to the jury early in the trial, emphasizing the plaintiff’s exaggeration of the injury or failure to mitigate damages, emphasizing the law surrounding damages, and obtaining concessions from an adverse witness.

1. Voir Dire

When selecting jurors, the practitioner should use effective questioning to eliminate jurors who may favor higher damage awards. For example, simple questions such as “Do you think that civil damage awards today are: too high, about right, or too low?” or “Is it more important to compensate an injured party than to determine who is at fault?” can quickly indicate whether the juror favors high or low damage awards. At trial, it is wise to first present the injury to the jury. This prevents the jury from guessing as to the impact of injury, allows the jury to grow comfortable with the extent of the injury, and blunts the visual impact of limited or token appearances of a severely injured plaintiff.

2. Opening Statements

In some instances, the plaintiff’s counsel may exaggerate injuries during the opening statement. During the closing argument, the practitioner should remind the jury of any exaggeration, inaccuracy, or failure to produce the convincing evidence promised in the opening statement regarding the plaintiff’s damages.

\textsuperscript{343} Id. (providing “[w]hen a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories”).\textsuperscript{344} Id. (providing that “the amount claimed shall not exceed the last amount stated in answer to interrogatories”); Fratzke v. Murphy, 12 S.W.3d 269, 271 (Ky. 1999); LaFleur v. Shoney’s, Inc., 83 S.W.3d 474, 477 (Ky. 2002). \textsuperscript{345} See Ky. R. Civ. P. § 8.01(2); Fratzke, 12 S.W.3d at 273.
Plaintiff counsel’s failure to substantiate the plaintiff’s claims with facts and evidence can damage the credibility or reliability of the evidence. Additionally, to avoid high damage awards, defense counsel should emphasize the law surrounding damages and make this a significant aspect of the case, reminding the jurors of their obligation to decide the case accordingly to the law and not sympathy.

3. Exclusions and Objections

Defense counsel should reassert objections to those inflammatory matters with limited probative value, such as crying relatives and gory photographs, that were not excluded prior to trial. The progression of the trial and the presence of jurors may give the judge pause to reconsider arguments for exclusion.

4. Cross-Examination

Often, concessions from adverse witnesses are more valuable than a statement from a pro-defense witness. Through effective cross-examination, defense counsel can demonstrate that although the plaintiff is injured, he has suffered less harm than suggested by the plaintiff and his attorney, thereby demonstrating to the jury that the effect of the plaintiff’s injuries could possibly be reduced or reversed and, therefore, that the damages award should be lower.

Cross-examination can also establish that plaintiff failed to mitigate his or her damages. If the jury believes that this plaintiff has unreasonably failed to pursue available treatment modalities to alleviate his or her injury, the jury’s natural sympathy may be dissipated.

5. Closing Statements

The content of defense counsel’s closing argument will be highly dependent on the nature of the case. If liability is clear, and high damages are at issue, counsel may emphasize that although a plaintiff may be entitled to reimbursement, that does not mean that a windfall profit is proper. Where it appears that the plaintiff is significantly overreaching in terms of his or her injury claims, defense counsel can emphasize the “responsibility to mitigate” as a theme to minimize damages, for example, where the plaintiff has missed doctor’s appointments, failed to engage in therapy, or failed to be retrained. If liability is at issue, defense counsel should heavily emphasize the law.

346. See Ky. R. Evid. 403 (LexisNexis 2006).
347. See, e.g., Blair v. Eblen, 461 S.W.2d 370, 372 (Ky. 1970) (holding that in a medical malpractice case, the defendant was not liable for damages which result from plaintiff’s negligence which aggravated or increased his injuries).
6. Jury Instructions

It is imperative that defense counsel remind the jury that their decision must not be influenced by sympathy, prejudice, or passion. Jury instructions are also a good time to re-emphasize and re-enforce to the jury that the case must be decided pursuant to the applicable law. The better the jury understands the law, the better chance the jury can decide the case pursuant to the same rather than through sympathy. In order to prevent high damage awards, defense counsel should emphasize the determinations of law in conjunction with the defense strategies explained herein.

IV. CONCLUSION

Most notable of the recent developments in Kentucky law of damages is the Kentucky Supreme Court’s opinion in Congleton. While emphasizing the long-standing history and validity of the “impact rule,” the court also left open the possibility of allowing recovery for “pre-impact fear” if the appropriate case presents itself to the court. There are further limitations on mental distress damages. Plaintiffs who have not yet experienced any physical injury or harm may not claim damages based on the mental distress associated with increased risk of future harm.

Courts place further limitations on pain and suffering damages. They are only recoverable if the plaintiff attained some level of consciousness during the time which he experienced pain and suffering. Additionally, plaintiffs should not expect that the court will automatically award pain and suffering damages when they also been awarded compensatory damages for medical expenses. Although this rule has been criticized by at least one court, it was upheld and is the law today.

Loss of consortium damages have been a topic for review since the Giuliani court developed the first cause of action for loss of parental consortium. Since then, courts have limited loss of parental consortium in the same way the Kentucky Revised Statutes limit loss of a child’s consortium: these claims are only valid in wrongful death suits, and can either be brought only by minor children, or recovered by parents of minor children. Loss of spousal

348. Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 929-30 (Ky. 2007).
353. See Giuliani v. Guiler, 951 S.W.2d 318, 323 (Ky. 1997).
consortium, however, is not limited to wrongful death suits. Instead, loss of spousal consortium is only recoverable for the time during which the spouse was injured, but alive.

Finally, negligent defendants and those liable for strict liability have recently been subject to large punitive damages awards. While the Kentucky Revised Statutes impose a subjective standard for punitive damages awards, that standard was held unconstitutional, and instead the courts imposed a traditional “gross negligence” standard. The limitations on punitive damages awards, however, remain useful. The jury may not consider the defendant’s financial condition unless it is considering the extent to which the defendant profited from the wrongful act. Further, the punitive damages award may not be used as a tool to punish the defendant for its out-of-state conduct.

A prudent practitioner, aware of the limitations on damages, may successfully preclude the court from awarding damages at trial. Defense counsel can also minimize damages pre-trial by filing motions to dismiss complaints which do not specifically allege special damages, attacking speculative expert evidence under Daubert, filing motions in limine to preclude prejudicial evidence, and carefully constructing interrogatories during the discovery period. During trial, defense counsel can minimize damages by utilizing effective cross-examination techniques, selecting jurors who do not favor high awards, emphasizing the law of damages during the case, and drafting jury instructions which emphasize the importance of determining damages based on the law, and not one’s emotions. By utilizing these strategies, or successfully convincing a reviewing court to reduce the amount of damages based on the principles of law, the practitioner may effectively minimize the amount of damages.

358. Id.
359. See, e.g., Steel Techs., Inc. v. Congleton, 234 S.W.3d 920, 932 (Ky. 2007); Phelps v. Louisville Water Co., 103 S.W.3d 46, 49 (Ky. 2003).
360. Williams v. Wilson, 972 S.W.2d 260, 264 (Ky. 1998).
I. INTRODUCTION

Our society is graying. People are living longer than they ever expected. Although this is reason to rejoice, many times, people either physically outlive their mental capacity or their financial capacity, or both. When these events occur, painfully though necessarily, these individuals are sent to live in long-term care facilities.

The long-term care facilities provide a necessary service to society. They provide health care and a social atmosphere for their residents. They also provide skills and services that family members cannot provide alone. However, family members forced to send their loved ones to long-term care facilities often do so because it is the last resort. They look to the long-term care facilities as almost a necessary evil: they wish they were not needed but acknowledge that they are indispensable.

The services are not provided for free, however. Either the families or the government must bear the cost. With the increase of life expectancy, it seems likely that more and more long-term care facility services will be needed. As demand goes up, costs follow. There quickly becomes a conflict between those who provide limited resources and those who just want their family members to be taken care of in the best manner possible.
This article takes a brief look at what happens when the interests between the parties collide. A recent case from the Kentucky Court of Appeals held that a patient’s estate was not bound by an alternative dispute resolution (“ADR”) agreement mandatory for admission to a nursing home facility when the patient’s daughter signed the ADR agreement on her mother’s behalf. The court found that the daughter could not be deemed an agent for her mother when she signed the admission agreement on her behalf.

The implication, though perhaps subtle, is that alternative dispute resolution is an admitted way to keep costs down. Kindred seems to imply that a long-term care facility cannot always rely on a daughter as the agent for her mother. We explore the case and its reasoning below for indications of the possible implications on the delivery of long-term care. The article begins with a discussion of the problems that arose out of the facts in Kindred and then turns to the case law that the Kindred court relied on in determining how to resolve issues of alternative dispute resolution and agency. We then return to the Kindred case and see how the court uses Kentucky precedent to determine the issues before it.

II. KINDRED ISSUES

A. Kindred Facts

In Kindred, Altha Duncan (hereinafter “Duncan”), the deceased, moved in next door to her daughter Susan Luttrell (hereinafter “Luttrell”). Luttrell testified that she owned the house in which Duncan was living, and that while Duncan did not pay rent, she did pay the utility bills. However, because Duncan did not have a checking account, in order to pay the bills, she had to endorse the checks and give them to Luttrell who would then cash them and purchase money orders. Additionally, Duncan required Luttrell’s assistance in setting up medical appointments as well as picking up prescription medications. Eventually, Duncan’s failing health problems forced her to move into Liberty Care Center, a long-term nursing home facility owned by Kindred Hospitals (collectively referred to as “Kindred”) on April 16, 2004. At the time of her admission, Duncan was having problems hearing and seeing and this, coupled with Duncan’s worsening eyesight, made Luttrell believe that Duncan

7. Id. at *20.
8. See id. at *5, 12.
9. See id. at *20.
10. Id. at *2.
11. Id.
13. Id.
14. Id.
would not be able to understand or sign the necessary documentation.\textsuperscript{15} Upon arrival to Kindred, Luttrell testified that she signed the admission forms under the impression that they were merely formalities necessary to admit Duncan into Kindred.\textsuperscript{16} Luttrell admitted that she should have read the forms closer, and further testified that, even though she was not able to understand the documents herself, she never asked anyone to read them to her.\textsuperscript{17} Luttrell’s testimony, however, is in stark contrast with the admissions personnel who testified that she read the entire ADR agreement to Luttrell at the time of admittance.\textsuperscript{18} Further, it is important to note that the admissions personnel was aware that Luttrell did not have power of attorney when she signed on behalf of her mother.\textsuperscript{19}

On February 16, 2005, Luttrell brought an action on behalf of her mother’s estate alleging violations of her mother’s rights as a long term care resident and wrongful death as a result of Kindred’s negligence.\textsuperscript{20} Kindred then filed a motion to stay the court action pending the ADR proceedings that were agreed to in the admission forms.\textsuperscript{21} Luttrell responded by arguing that the ADR agreement was not valid because it was not executed by a person with authorization to bind Duncan.\textsuperscript{22} The circuit court denied Kindred’s motion to stay the circuit court action, stating that Luttrell was not authorized to waive a Duncan’s right to a trial by jury.\textsuperscript{23} Thus, the effects of ADR agreements and the agency authority on healthcare in Kentucky finally amalgamated in July of 2007 when the Kentucky Court of Appeals was asked to determine what effect a daughter’s signature would have on an admissions form when that signature was made on behalf of her elderly mother.\textsuperscript{24} With these issues in mind, the court turned to Kentucky precedent on the issues of agency and ADR.\textsuperscript{25}

\section*{B. Kentucky’s Approach to ADR}

The Kentucky Court of Appeals began its analysis by reviewing Kentucky’s attitude towards alternative dispute resolution agreements.\textsuperscript{26} The court recognized that “Kentucky law generally favors the enforcement of arbitration agreements.”\textsuperscript{27}

\begin{itemize}
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id. at *3-4.
  \item \textsuperscript{17} Id. at *4.
  \item \textsuperscript{18} Kindred, 2007 Ky. App. LEXIS 236, at *4.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. at *6.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. at *7.
  \item \textsuperscript{23} Id. at *8-9.
  \item \textsuperscript{24} Kindred, 2007 Ky. App. LEXIS 236, at *12.
  \item \textsuperscript{25} Id. at *13
  \item \textsuperscript{26} Id. at *11-12.
  \item \textsuperscript{27} Id. at *11 (citing Kodak Mining Co. v. Carrs Fork Corp., 669 S.W.2d 917, 919 (Ky. 1984)).
\end{itemize}
In *Kodak Mining Co. v. Carrs Fork Corp.*, the Supreme Court of Kentucky was faced with the issue as to whether Kentucky public policy would prevent the enforcement of a private arbitration agreement if such an agreement fell outside the provisions of the Federal Arbitration Act. The parties involved had entered into two coal mining leases, both of which contained an arbitration clause. Subsequently, the lessor, Carrs Fork, initiated an action against Kodak in Knott Circuit Court, alleging that Kodak failed to fulfill its obligations under the leases. In response, Kodak raised as its defense Carrs Fork’s failure to submit to arbitration and requested a special hearing to resolve the matter. The trial court overruled Kodak’s arbitration defense, at which time Kodak moved for interlocutory relief from the Kentucky Court of Appeals, and then again from Kentucky’s Supreme Court.

The Kentucky Supreme Court determined that the case did fall within the Federal Arbitration Act, and that the arbitration clauses would be upheld. Although it was not necessary to address the question as to whether an arbitration clause would be enforceable when it arose outside of the provisions of the Federal Arbitration Act, the court took the time to clarify its earlier holding in *Fite & Warmath Construction Co. v. MYS Corp.*, and stated that the common law rule against arbitration in Kentucky is no longer applicable in future contract disputes. Further, the court noted that Kentucky case law “favor[s] the settlement of disputes by means of arbitration.” The attitude towards arbitration agreements adopted by Kentucky’s Supreme Court in *Kodak* is in line with the Supreme Court of the United State’s opinion in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, which holds that arbitration is generally to be favored.

Subsequently, the Kentucky Court of Appeals visited the issue of who determines whether the parties to a suit agreed to a valid and binding arbitration agreement in *General Steel Corp. v. Collins*. Plaintiff, Steve Collins (hereinafter “Collins”), agreed to purchase from General Steel Corporation (hereinafter “General Steel”), a specifically engineered building for his restaurant business. Above the signature line, the contract made reference to a

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28. 669 S.W.2d 917 (Ky. 1984).
29. *Id.* at 921.
30. *Id.* at 918.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Kodak*, 669 S.W.2d at 921.
35. 559 S.W.2d 729, 734-35 (Ky. 1977).
36. *Kodak*, 669 S.W.2d at 921.
37. *Id.* (quoting *Fite & Warmath Constr.*, 559 S.W.2d at 735).
39. *Id.* at 24-25.
41. *Id.* at 19.
separate conditions page, which contained a dispute resolution clause, requiring arbitration of claims relating to the contract.\textsuperscript{42} Before signing the contract, Collins obliterated the dispute resolution clause by marking it out in its entirety.\textsuperscript{43} Subsequently, Collins filed a complaint against General Steel seeking to recover a $24,000 deposit.\textsuperscript{44} General Steel responded by denying that Collins was entitled to a refund, and further, argued that the matter must be referred to arbitration in accordance with the terms of the agreement.\textsuperscript{45} The trial court denied the motion, and General Steel appealed alleging, among other things, that the trial court lacked the jurisdiction to decide the issue.\textsuperscript{46}

The Kentucky Court of Appeals held that the trial court did not exceed its jurisdiction by refusing to order arbitration in this matter.\textsuperscript{47} In support of its holding, the Kentucky Court of Appeals cited to both K.R.S. 417.050\textsuperscript{48} and 417.060,\textsuperscript{49} noting that where a determination of a binding arbitration clause is at issue, the court shall proceed to summarily determine the issue.\textsuperscript{50} It further went on to hold that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”\textsuperscript{51}

\section*{C. Kentucky’s View on Agency Authority}

Next, the court in \textit{Kindred} turned to case law establishing Kentucky’s view on agency agreements.\textsuperscript{52} The court found that in defining the agency relationship, the Kentucky Supreme Court has stated that “agency is the fiduciary relation which results from the manifestation of consent by one person

\begin{itemize}
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. at 20.
\item \textsuperscript{46} \textit{General Steel,} 196 S.W.3d at 20.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} KY. REV. STAT. ANN. § 417.050 (LexisNexis 2005 & Supp. 2007). The relevant part of this section provides:
\begin{quote}
A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.
\end{quote}
\item \textsuperscript{49} KY. REV. STAT. ANN. § 417.060 (LexisNexis 2005 & Supp. 2007). The relevant part of this section provides:
\begin{quote}
On application of a party showing an agreement described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.
\end{quote}
\item \textsuperscript{50} \textit{General Steel,} 196 S.W.3d at 20.
\item \textsuperscript{51} Id. (quoting \textit{Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.}, 460 U.S. 1, 24-25 (1983)).
\end{itemize}
to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."53 In Phelps, two men were killed when their car crashed into a flatbed trailer parked at a Louisville Water Company (hereinafter “LWC”) worksite.54 The estates of both decedents sued LWC and won both compensatory and punitive damages.55 LWC appealed, whereupon the Kentucky Court of Appeals determined that LWC was an agency of the City of Louisville, and fell within the definition of “local government” as defined by K.R.S. 65.200(3).56 Under this classification, the Kentucky Court of Appeals determined that the jury was precluded from awarding punitive damages against any “local government” and reversed.57 The administrators of the decedents’ estates appealed.58

The Supreme Court of Kentucky held that LWC was not an agency of the City of Louisville because the entities lacked the requisite right to control found in agency relationships.59 The Court stated that the “legislature made clear that the LWC . . . was prohibited from contracting or acting on behalf of the City” and that “[s]uch is not characteristic of an agency relationship.”60 Further, it was noted that the city did not control LWC’s contractual endeavors, and that the right to control is the most critical element in determining the existence of an agency relationship.61 As such, there was no manifestation of consent by either party that LWC should be an agency for the City of Louisville.62

In Estell v. Barrickman, the Kentucky Court of Appeals outlined the difference between implied actual authority and apparent authority.63 The defendant, Robert Barrickman (hereinafter “Barrickman”), was the sole proprietor of a service station, and the employer of Davis Chipman (hereinafter “Chipman”).64 While on an authorized service run for Barrickman, Chipman decided to pick up the plaintiff, Kim Lee Estell (hereinafter “Estell”), and take her with him.65 During the authorized run, Chipman lost control of his vehicle and flipped over while towing a disabled car.66 Chipman was relatively uninjured, but Estell suffered severe injuries, and subsequently brought suit

53. Id. (quoting Phelps v. Louisville Water Co., 103 S.W.3d 46, 50 (Ky. 2003)).
54. Phelps, 103 S.W.3d at 49.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id. at 50.
60. Phelps, 103 S.W.3d at 50-51.
61. Id.
62. Id. at 51.
63. 571 S.W.2d 650, 651-52 (Ky. Ct. App. 1978).
64. Id. at 651.
65. Id.
66. Id.
against both Barrickman and Chipman. The trial court granted Barrickman’s motion for summary judgment and Estell appealed.

On appeal, Barrickman contended that his employee had no implied authority to permit a third person to ride in the truck, and as such, the employer should not be liable because the employee was acting outside the scope of his employment. The Kentucky Court of Appeals, though granting the argument that Chipman had no implied authority to invite Estell, held that Barrickman had clothed Chipman with apparent authority to invite third party passengers. There had been evidence that Barrickman was aware of other non-business third party passengers riding with Chipman in the past, and from this evidence, the court reasoned that a question of fact had been raised as to whether Barrickman had granted Chipman the apparent authority to offer these rides. The court then went on to clarify between implied and apparent authority, stating that implied authority is actual authority, which was delegated and intended by the parties. Apparent authority, on the other hand, is authority which appears to be delegated to the agent by the principal under such circumstances that people are deceived by, and rely on that appearance of authority. Using this distinction, it was held that, while Chipman may not have had implied authority, the evidence supported the contention that Barrickman may have given him the apparent authority to offer rides to passengers.

In Mill Street Church of Christ v. Hogan, the Kentucky Court of Appeals addressed the scope of authority that an agent acting with implied authority may have. The plaintiff, Mill Street Church of Christ (hereinafter “MS Church”), hired Bill Hogan to paint the interior of their church. MS Church was aware that the job would require the work of more than one person, and contemplated hiring an assistant for Bill Hogan. Instead, once Bill Hogan reached the baptistry portion of the church, he discussed the possibility of hiring a helper with an elder of the church. According to the testimony of both the elder and Bill Hogan, the assistant that the church had picked was difficult to find, and as such, Bill Hogan took it upon himself to find his own assistant. Subsequently, Bill Hogan approached his brother, Sam Hogan, about helping him complete the

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67. Id.
68. Id.
69. Estell, 571 S.W.2d at 652.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id. at 653.
75. 785 S.W.2d 263 (Ky. Ct. App. 1990).
76. Id. at 267.
77. Id. at 265.
78. Id.
79. Id.
80. Id.
job. Sam Hogan accepted the job, and a half hour after he began working, he fell off a ladder and broke his arm. Sam Hogan then filed a claim under the Workers’ Compensation Act, whereby it was eventually decided that he was in fact an employee of the church and as such, entitled to compensation. On appeal, the church urged that the Board erred in finding that Bill Hogan was endowed with the implied authority to hire his brother on the church’s behalf.

The court rejected the church’s argument, holding that when determining whether implied authority exists, the focus should be on whether the agent reasonably believed the principal wished for him to have certain authority. The reasonableness of the belief can be ascertained by looking at the past and present actions of the principal.

D. Where Kentucky Courts Turn When the Case Law is Silent

It is important to note that in the cases above, Kentucky courts were never asked to determine what impact a familial relationship will have on establishing an agency relationship. However, other jurisdictions have been called to answer such questions and thus the Kentucky Court of Appeals in Kindred turned to these cases for guidance.

In Pagarigan v. Libby Care Center, Inc., the California Court of Appeals addressed the issue of when a relative may act as an agent. The plaintiffs had placed their mother in defendant’s nursing home, where she remained for nearly a year. Upon the mother’s entrance into the home, the plaintiffs signed two arbitration agreements stating that any dispute arising between a resident and the facility would be resolved by submission to arbitration. Subsequently, the plaintiffs filed suit, alleging that their mother, while in the defendant’s care, suffered a severe lower back sore caused by the nursing home’s negligence. The home filed a petition to compel arbitration based on the agreements signed by the plaintiffs, and the trial court denied the petition.

On appeal, the nursing home contended that the plaintiffs were acting in their capacity as agents for their mother because: (1) they held themselves out as having such authority; and (2) because they are the next of kin to the resident.

81. Hogan, 785 S.W.2d at 265.
82. Id.
83. Id. at 266.
84. Id. at 267.
85. Id.
86. Id.
88. 120 Cal. Rptr. 2d 892, 894-95 (Cal. Ct. App. 2002).
89. Id. at 893.
90. Id. at 893-94.
91. Id. at 893.
92. Id. at 893-94.
93. Id. at 894-95.
The court rejected both contentions holding that the plaintiffs may not become agents merely by their own representations, but rather, the principal must cause the third party to believe that such authority has been given based on the appeared intent of the principal. Further, the court held that while next of kin may be allowed to make medical treatment decisions for a patient, that does not translate into authority to sign an arbitration agreement on the patient’s behalf.

A similar result was obtained in Blankfeld v. Richmond Health Care, Inc. The plaintiff, Melvin Blankfeld (hereinafter “Melvin”) acting as the personal representative of his mother’s estate, admitted his mother to the defendant nursing home and signed an arbitration agreement on her behalf for disputes arising between residents and the facility. Subsequently, his mother filed a negligence suit against the nursing home while she was still alive, and after her death Melvin carried on the suit in his mother’s name. The nursing home moved to compel arbitration based on the agreements that Melvin signed on his mother’s behalf, and the trial court granted the motion.

On appeal, the court reversed, holding that Melvin only had the authority of a health care proxy, and that such authority did not include the ability to sign an arbitration agreement on his mother’s behalf. The court acknowledged that a health care proxy may make decisions regarding medical treatment of the principal, but went on to note that a proxy is generally used when the principal lacks the mental capacity to make informed health care decisions. Thus, the proxy is limited to those decisions regarding healthcare services that the principal would likely choose if able to do so.

III. USING WHAT WE KNOW: THE KINDRED COURT’S ANALYSIS

A. Arbitration Agreements and the Necessary Authority

On appeal, the Kindred court began its analysis by noting Kentucky’s favorable attitude towards arbitration agreements as stated by the courts in Kodak, Mercury Construction Corp., and General Steel. The state buttressed its reasoning with reliance on K.R.S. 417.050 which states in relevant part that

94. Pagarigan, 120 Cal. Rptr. 2d at 894.
95. Id. at 895.
97. Id. at 297.
98. Id.
99. Id.
100. Id. at 300-01.
101. Id. at 300.
102. Blankfeld, 902 So. 2d at 300.
ADR agreements are “valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.”

It then went on to determine whether Luttrell had the authority, actual, implied or apparent, to sign an ADR agreement on behalf of Duncan. In support of its contentions, Kindred brought forth evidence that at around the time Duncan was admitted, Luttrell was a co-signor on Duncan’s savings account; Luttrell was cashing Duncan’s endorsed checks and paying the bills with that money; and finally, Duncan never objected to Luttrell doing these things on her behalf. Kindred argued that Duncan’s acquiescence granted Luttrell actual authority to bind Duncan to the ADR agreement. The court disagreed, holding that the evidence Kindred brought forth merely shows Luttrell’s authority to make certain financial decisions, and that such authority did not grant Luttrell the power to waive Duncan’s right to a jury trial.

For similar reasons, the court rejected Kindred’s argument that Luttrell possessed implied authority. The court defined implied authority as “actual authority circumstantially proven which the principal actually intended the agent to possess” and noted, again, that the circumstantial evidence indicated that Luttrell was only given authority over certain financial matters.

Finally, the court rejected the argument that Luttrell had any apparent authority to bind Duncan because apparent authority had to derive from a third party’s reliance on the principal’s actions. Here, Kindred was arguing that Luttrell held herself out as an agent, and therefore had apparent authority over Duncan’s legal affairs. However, the court noted that the agent alone cannot create apparent authority simply by holding herself out as having it.

B. Familial Status and Statutory Authority in Kentucky

Kindred put forth one final argument that Luttrell had the statutory authority to make health care decisions on behalf of Duncan and that she derived her authority from K.R.S. 311.631.

106. *Id.* at *13.
107. *Id.*
108. *Id.*
109. *Id.* at *14.
110. *Id.* at *14-15.
112. *Id.* at *15-16.
113. *Id.* at *15.
114. *Id.* at *16.
115. *Id.* See *KY. REV. STAT. ANN.* § 311.631 (LexisNexis 2007) The relevant part of this section provides:

(1) If an adult patient whose physician has determined that he or she does not have decisional capacity has not executed an advance directive, or to the extent the advance directive does not address a decision that must be made, any one
The statute gave any one of the enumerated parties the authority to make health care decisions on behalf of an individual who does not have the capacity to make such decisions on his or her own.116 In defining “health care decision,” the court turned to K.R.S. 311.621(8), which defines “health care decision” as “consenting to, or withdrawing consent for, any medical procedure, treatment, or intervention.”117 The court noted that the ADR agreement did not involve medical procedures, judgments or interventions, and therefore did not provide any authority for Luttrell to bind Duncan to the ADR agreement.118

C. Distinguishing Contrary Case Law

The Kindred court, in searching other jurisdictions for guidance, not surprisingly found case law contrary to Pagarigan and Blankfield.119 In Covenant Health Rehab of Picayune, L.P. v. Brown,120 the court held that an appropriate surrogate could bind a patient to an arbitration agreement when that agreement relates to healthcare.121 The plaintiffs, administrators of their mother’s estate, filed a suit against Picayune Convalescent Center (hereinafter “PCC”) alleging that the decedent had been grossly neglected while a resident.122 PCC filed a motion to compel arbitration based on provisions in the admissions agreement which was signed by one of the plaintiffs on the decedent’s behalf.123 The trial court ordered a continuance of the trial for resolution of the arbitration issue, whereupon it was held that the arbitration clause was unconscionable.124

(1) of the following responsible parties, in the following order of priority if no individual in a prior class is reasonably available, willing, and competent to act, shall be authorized to make health care decisions on behalf of the patient:

(a) The judicially-appointed guardian of the patient, if the guardian has been appointed and if medical decisions are within the scope of the guardianship;
(b) The attorney-in-fact named in a durable power of attorney, if the durable power of attorney specifically includes authority for health care decisions;
(c) The spouse of the patient;
(d) An adult child of the patient, or if the patient has more than one (1) child, the majority of the adult children who are reasonably available for consultation;
(e) The parents of the patient;
(f) The nearest living relative of the patient, or if more than one (1) relative of the same relation is reasonably available for consultation, a majority of the nearest living relatives.

116. Id.
118. Id.
119. Id. at *18-19.
120. 949 So. 2d 732 (Miss. 2007).
121. Id. at 737.
122. Id. at 735.
123. Id.
124. Id. at 736.
On appeal, the Supreme Court of Mississippi reversed the lower court’s findings that the arbitration agreement was unconscionable. The court held that there was evidence that the deceased did not have the mental capacity to handle her affairs, and as such, she was legally capable of having her decisions made by a surrogate. Further, her adult daughter was an appropriate candidate for a surrogate, and as such, could make health-care decisions on her behalf.

However, the court in Kindred distinguished this case by noting first, that the Mississippi Code defined “health care decision” to include the “[s]election and discharge of health-care providers and institutions” as well as “[a]pproval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate” and finally “[d]irections to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.” Additionally, the ADR agreement in Covenant was part of the admissions agreement and not a separate document and therefore the court’s holding could have gone to either 1) whether a person has authority to sign the agreement as part of selecting health care providers or 2) to signing an ADR agreement as a stand alone document.

A result similar to Covenant was obtained in Owens v. National Health Corp. Mary King (hereinafter “Mary”), signed a durable power of attorney, naming Gwen C. Daniel (hereinafter “Daniel”) as her attorney-in-fact for healthcare decisions. Mary was subsequently admitted to the defendant nursing home, National Health Corporation (hereinafter “NHC”). The plaintiff, acting as conservator for Mary, filed suit against NHC, alleging negligence in the care provided to Mary. NHC filed a motion to compel arbitration based on a dispute resolution provision in the admissions contract, which was signed on Mary’s behalf by Daniel, the attorney-in-fact for Mary. The circuit court denied NHC’s motion and NHC appealed.

On appeal, the Tennessee Court of Appeals found that the durable power of attorney signed by Mary gave Daniel the right to execute any waiver, release or document necessary to implement healthcare decisions. The court held that this right included the authority to admit Mary to a nursing home, and further,
that the arbitration provision within the admissions contract was also valid as a means of implementing healthcare decisions. The court noted that “when attempting to receive healthcare, an individual must arrange for what services he or she will receive . . .” and it is not uncommon to agree as to how disputes arising from those services will be resolved.

Again, the Kentucky Court of Appeals was able to distinguish this case from the facts of Kindred because the health care surrogate in Owens had a Power of Attorney that empowered her to “execute any waiver, release, or other document that would be necessary to implement health care decisions.” However, Luttrell did not have this authority.

D. Judgment

The Kindred court unanimously concluded that Luttrell did not have any authority, actual, implied, or apparent, to bind the deceased to the ADR agreement, despite Kentucky’s favorable attitude toward dispute resolution. Also, where Kentucky case law was silent as to the familial relations, the court held that the “jurisdictions that have found no statutory authority in their surrogate legislation to bind a person to an ADR agreement to be most persuasive” and therefore it chose to adopt that position.

IV. CONCLUSION

The Kindred application and supporting case law illustrate that although Kentucky courts may have a favorable attitude towards ADR agreements, those agreements will not be valid if they are not signed by someone with the proper authority. Further, statutory authority given to a surrogate on behalf of an incapacitated individual will not empower that surrogate with the power to bind the patient to an arbitration agreement. However, because Luttrell was not given Power of Attorney over the deceased, whether or not such power would have enhanced her statutory authority to allow her to bind her mother to an ADR agreement is still a viable issue left open after the Kindred decision.

137. Id. at *10-11.
138. Id. at *14.
140. Id.
141. Id.
142. Id.
143. Id. at *11-12.
144. Id. at *12.
146. Id. at *20.
147. See id.