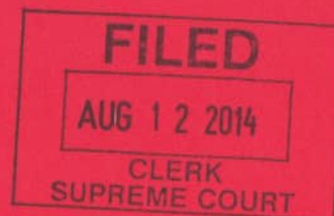

SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-538-DG

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2010-CA-1063-MR

RON CADLE, Individually and as the Administrator for the Estate of Jane Cadle, and SARAH CADLE — APPELLANTS

v.

BRIEF FOR APPELLANTS

WILMA CORNETT and ALLSTATE INSURANCE — APPELLEES

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this brief was served via registered mail upon the Clerk of the Supreme Court, 700 Capitol Avenue, Frankfort, KY 40601 and via first-class mail, postage prepaid, this the 11 day of August, 2014, upon Hon. James B. Dilbeck, 1100 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, Hon. William Clifton Travis, Travis & Herbert, PLLC, Jefferson Marders Building,11507 Main Street, Louisville, KY 40243, Hon. Samuel Givens, Kentucky Court of Appeals, 700 Democrat Drive, Frankfort, KY 40601 and Hon. James M. Shake, Jefferson Circuit Judge, 700 West Jefferson Street, Louisville, KY 40202. It is further certified that the record on appeal was not withdrawn.

INTRODUCTION

This is a wrongful death and personal injury case involving a catastrophic, fatal traffic collision on Interstate 64 in Shelby County. The Jefferson Circuit Court granted appellees' motions for summary judgment. The trial court concluded, as a matter of law, that the admitted negligence of appellee Cornett was not a substantial factor in causing a subsequent collision that killed Jane Cadle and seriously injured Ron and Sarah Cadle. A divided Court of Appeals panel affirmed. This appeal follows.

STATEMENT CONCERNING ORAL ARGUMENT

The Cadles welcome oral argument.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

STATEMENT OF POINTS AND AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 4

I. The Court of Appeals erroneously held that the superseding cause doctrine applies 4

Pathways, Inc. v. Hammons, 113 S.W.3d 85 (Ky. 2003) 4

Gerebenics v. Galliard, 338 S.W.2d 216 (Ky. 1960) 4

Estate of Wheeler v. Veal Realtors & Auctioneers, Inc., 997 S.W.2d 497 (Ky. App. 1999) 4

Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980) 5

Donegan v. Denney, 457 S.W.2d 953, 958 (Ky. 1970) 5

NKC Hospitals v. Anthony, 849 S.W.2d 564 (Ky. Ct. App. 1993) 5

James v. Meow Media, Inc., 90 F.Supp.2d 798, 809-9 (W.D. Ky. 2000) 5, 10

Com. Transportation Cabinet v. Babbitt, 172 S.W.3d 786, 793 (Ky. 2005) 6

Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006) 9

Montgomery Elevator Co. v. McCullough, 676 S.W.2d, 76, 780 (Ky. 1984) 10

II. The superseding cause doctrine has limited applicability in modern Kentucky tort laws 12

Dick's Sporting Goods, Inc. v. Webb, 413 S.W.3d 891 (Ky. 2013) 12

Shelton v. Ky. Easter Seals Soc'y, Inc., 413 S.W.3d 901 (Ky. 2013) 12

Kentucky River Med. Ctr. V. McIntosh, 319 S.W.3d 385 (Ky. 2010) 12-13

III. The Court of Appeals erroneously affirmed the trial court's grant of summary judgment 14

Steelvest, Inc. v. Scansteel Svc. Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) 14

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1986) 14

CONCLUSION 15

STATEMENT OF THE CASE

Ronald, Jane and Sarah Cadle were traveling eastbound on Interstate 64 in Shelby County (between Exits 32 and 35, the "Shelbyville exits") on May 8, 2005, which was Mothers' Day. The Cadles were returning to their home in Lexington from Jane Cadle's parents' home in Orleans, Indiana.

Wilma Cornett and her husband, James, were traveling westbound on Interstate 64 on their way home to Louisville. The parties do not dispute that Wilma Cornett fell asleep and negligently lost control of her vehicle. The Cornett vehicle left the traffic lanes of the highway, entered the median and rapidly approached eastbound traffic.

Traffic in the eastbound lanes naturally stopped in response to Ms. Cornett's loss of control and the approaching, oncoming vehicle in the then-grassy median. The Cornett vehicle came to rest on an embankment, near an overpass for a creek. The Cornetts were injured, and various law enforcement and emergency medical agencies were notified to respond to the scene.[1]

The Cadles' Toyota Highlander was in the pack of vehicles which braked in response to the Cornett vehicle's cross-over into the median of the highway. These vehicles came to a stop on eastbound Interstate 64 as a result of Wilma Cornett's negligence. Tragically, the Cadles' vehicle was rear ended by a tractor trailer traveling approximately 60 miles per hour.

Jane Cadle was killed. Sarah Cadle and Ron Cadle were severely injured; both spent an extended period of time in the hospital and in rehabilitation following the accident.

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[1] The Shelbyville Police Department, the Shelby County Sheriff's Office and the Shelby County Emergency Medical Service were involved in the rescue and investigation efforts.

The Shelby County Emergency Medical Service (EMS) run reports for the Cornett collision and the Cadle collision indicate that the incidents occurred within two minutes of each other. Shelby County dispatch received the call for the Cornett collision at 4:22 p.m. Dispatch received the call regarding the Cadle collision at 4:24 p.m. Emergency personnel were on the scene at 4:32 p.m. for the Cornett collision and were on the scene at 4:34 p.m. for the Cadle collision. These reports were before both courts below.

Further, to the extent that there was confusion regarding the timing of the notifications, Steve Wortham, the Chief of Operations for the Shelby County EMS, executed an affidavit which sets forth that the Shelby County EMS was notified and responded to the two collisions as stated in the EMS run reports. Mr. Wortham's sworn testimony is uncontroverted, and must be accepted as true given then procedural posture of this litigation.[2] Thus, it is undisputed that the Shelby County EMS was notified about the Cadle collision approximately two minutes after it was notified about the Cornett collision.

Jane Cadle's estate and Ron and Sarah Cadle, individually, brought suit against Cornett and Allstate, their underinsured motorist carrier, in Jefferson Circuit Court, alleging that Cornett's negligence was a substantial factor in the Cadle collision. Minimal discovery took place before appellees filed motions for summary judgment which mirrored each other. Appellees[3] argued that the times in the EMS reports were simply "wrong" and that it was impossible for the accidents to have occurred within two minutes of each other and that Cornett's negligence had "spent itself" by the time the Cadle collision occurred.

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[2] The Affidavit of Steve Wortham and the EMS run reports from the Cadle collision and the Cornett collision are collectively attached Exhibit 5 and incorporated herein by reference. These documents were considered substantively by the circuit court in its resolution of the issues presented in appellees' motions for summary judgment.

[3] Allstate, the Cadles' underinsured motorist carrier, adopted Cornett's arguments at the Court of Appeals and the circuit court.

The circuit court considered appellees' position, entertained oral argument and entered an order at first *overruling* appellees' motions for summary judgment on December 21, 2009.[4]

Unsatisfied, the appellees sought reconsideration of the circuit court's opinion and order. Oral arguments were again conducted. No discovery was taken in the interim. The circuit court, however, held that its understanding of the facts had been "clarified" by the renewed motions for summary judgment, holding that the negligence of the truck driver superseded the negligence of Cornett. It subsequently granted the renewed motions in its opinion and order entered March 23, 2010.[5]

The Cadles filed a timely motion to alter, amend or vacate the reconsidered opinion of the circuit court. Oral arguments were again held. No discovery was taken in the interim. Nonetheless, the circuit court again held that Cornett's negligence was superseded, as a matter of law, by the actions of the truck driver. The court thus overruled the motion to alter, amend or vacate on May 14, 2010.[6]

The Court of Appeals panel (Judges Acree and Moore in the majority and Judge Nickell in dissent) affirmed the trial court, but a philosophical split in the panel as to the viability of the superseding cause doctrine in the age of comparative fault was apparent. Judge Nickell's dissent (and Judge Acree's concurrence) encouraged this Court to "avail itself of this opportunity to clarify its position regarding the validity of the superseding cause doctrine in light of our adoption of pure comparative fault." Opinion of Court of Appeals at 27 (Nickell, J., dissenting).

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[4] Attached as Exhibit 4.
[5] Attached as Exhibit 3.
[6] Attached as Exhibit 2.

ARGUMENT

I. The Court of Appeals erroneously held that the superseding cause doctrine applies based upon the uncontradicted timeline of events

A parsimonious approach to this case does not necessarily entail the gutting of the superseding cause doctrine feared within Chief Judge Acree's concurring opinion. Appellees argued, and the Court of Appeals agreed, that the negligence of the truck driver excused Cornett's negligence as a matter of law. Cornett admittedly fell asleep at the wheel on an interstate highway.[7] Thus, the sole question before this Court is whether a jury *could possibly* conclude that Cornett's deviation from the applicable standard of care was a substantial factor in, or a proximate cause of, Ron and Sarah Cadle's injuries and Jane Cadle's death.

Proximate cause is a mixed question of law and fact in Kentucky. Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003). It consists of two separate, but not mutually exclusive, legal concepts: cause and effect and legal cause. Id.

To satisfy the cause and effect requirement, an act must induce an accident which otherwise would have not occurred. Gerebenics v. Galliard, 338 S.W.2d 216, 219 (Ky. 1960). Put another way, the injury alleged would not have occurred "but for" the conduct of the defendant. Id.

To satisfy the legal cause, or proximate cause, requirement, a tortfeasor's conduct must be a "substantial factor" in bringing about the plaintiff's injury. Estate of Wheeler v. Veal Realtors & Auctioneers, Inc., 997 S.W.2d 497, 499 (Ky. App. 1999). Inherent in the concept of legal cause are the familiar concepts of "foreseeability" and "intervening" and

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[7] This Court should disregard appellees' anticipated argument that the claims against the tractor trailer driver have been resolved. That fact, for reasons of comparative fault and apportionment, is irrelevant to whether Wilma Cornett could be *partially liable* for the Cadles' collision. Third party theories are available to argue the negligence of the tractor trailer driver.

"superseding" causes. Deutsch v. Shein, 597 S.W. 2d 141, 144 (Ky. 1980). The circuit court misapplied these concepts to the very limited factual record in this case.

"A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which is antecedent negligence and a substantial factor in bringing it about." Donegan v. Denney, 457 S.W.2d 953, 958 (Ky. 1970). Appellees cited and the courts below relied upon Donegan for the proposition that the negligence of Cornett had "spent itself" by the time the Cadle collision occurred. The courts below erred in relying so heavily on Donegan and in arriving at their respective conclusions for several reasons.

The Court of Appeals, in NKC Hospitals v. Anthony, 849 S.W.2d 564 (Ky. Ct. App. 1993) provided the following guideposts to follow in determining whether, as a matter of law, the superseding cause doctrine applies. Id. Superseding causes possess the following attributes.

1. An act or event that intervenes between the original act and the injury;
2. The intervening act must be of independent origin, unassociated with the original act;
3. The intervening act must itself be incapable of bringing about the injury;
4. The intervening act or event must not have been reasonably foreseeable to the original actor;
5. The intervening act involves unforeseen negligence of a third party or an Act of God or natural force; and
6. The original act must itself be a substantial factor in causing the injury, not a remote cause.

Id. as paraphrased by James v. Meow Media, Inc., 90 F.Supp.2d 798, 809-9 (W.D. Ky. 2000). The case *sub judice* fails to comport with this guidance on a number of fronts.

First, as noted above, there is no proof which contradicts the affidavit of Steve Wortham and the EMS run reports which indicate that emergency personnel were notified about the Cadle collision within two minutes of the Cornett collision. There can be no

questions surrounding the accuracy of Mr. Wortham's affidavit or the accuracy of the EMS run reports because there was no evidence to the contrary before the circuit court or the Court of Appeals. Second, the adoption of and strict adherence to the doctrine of pure comparative fault has substantially diminished the rationale for the doctrine of superseding cause since Donegan and other similar cases were decided. Com. Transportation Cabinet v. Babbitt, 172 S.W. 3d 786, 793 (Ky. 2005).

> The advent of more refined tools for apportionment of liability - comparative responsibility, comparative contribution and substantial modification or joint several liability - also has undermined one important rationale for these rules: *the use of scope of liability to prevent a modestly negligent tortfeasor from being held liable for the entirety of another's harm when the tortious acts of another, more culpable person, were also the cause of the harm.*

Babbitt, 172 S.W.3d at 793 (internal citations omitted) (emphasis added).

Further, Donegan is distinguishable on its facts. That case involved the negligent loading of glass bottles onto the back of a Pepsi truck. The nature and character of the negligence alleged was discrete from the facts of this case: loading and unloading bottles of cola there, falling asleep at the wheel here.

In Donegan, traffic slowed when the bottles spilled onto the highway because they were negligently loaded onto the truck. The negligence in Donegan was thus far more attenuated to the harm caused than the negligence alleged in this case. A jury could conclude that the negligence of Cornett united with the negligence of others within two minutes to produce a horrific result: a fatal interstate collision.

Here, Ms. Cornett negligently lost control of her vehicle at a high rate of speed and traversed into a grassy median on an interstate highway. But for her negligence in falling asleep at the wheel, the Cadles' collision would not have happened. Her negligence set in

force a rapid course of events which would not have occurred, save her failure to exercise reasonable care. The courts below also disregarded that the collisions at issue occurred on an interstate highway, on a stretch of that highway between this state's two largest cities, on Mothers' Day, and where the speed limit was 65 miles per hour. Moreover, vehicles are larger, faster and more prevalent than at the time Donegan was decided.

The EMS run reports (Exhibit 5) indicate that units did not arrive on the Cornett scene until *4:28 p.m.*, yet EMS was notified about the Cadle collision at *4:24 p.m.* The run reports and the affidavit of Steve Wortham demonstrate the following:

Cornett -1622 Collision at mile marker 33

INCIDENT DATA

LICENSE # 1118 INCIDENT # St. ALS

DATE 05/08/05 RUN # 05-2204

ORIGIN I 64 E 33mm LOCATION CODE 005

ZIP CODE 40065

DESTINATION Start Cart LOCATION CODE

ZIP CODE

TIMES (MILITARY)			MILEAGE	
CALL RECEIVED	16	22		
DISPATCH/NOTIFIED	16	22	START	35449
ENROUTE	16	23		
AT SCENE	16	28	SCENE	35452
DEPART SCENE				
ARRIVE DESTINATION			DEST.	
RETURN TO SERVICE			BASE	

PATIENT DEMOGRAPHIC DATA

PATIENT NAME (LAST, FIRST, MI) Cornet, Wilma

ADDRESS

ADDRESS

CITY STATE ZIP

PHONE SEX M (F) D.O.B. 76

VEHICLE ID 27 ALS EQUIPPED 1-YES 2-NO 1

CREW I.D.			CERTIFICATION #
1	CRW.	E. Bland	4061
2	1st ATT.	K Ishikawa	1509P
3	2nd ATT. PARAMEDIC INTERCEPT	Gr. FD	

Cadle – 1624 Collision at mile marker 32

INCIDENT DATA

LICENSE # 1118 INCIDENT # St. ALS

DATE 05/08/05 RUN # 05-2201

ORIGIN E64 - 32 mm LOCATION CODE 00095

ZIP CODE

DESTINATION Life Flight Helicopter DNT LOCATION CODE

ZIP CODE

TIMES (MILITARY)			MILEAGE	
CALL RECEIVED	16	24		
DISPATCH/NOTIFIED	[illegible]	26	START	
ENROUTE	[illegible]	[illegible]		
AT SCENE	[illegible]	32	SCENE	
DEPART SCENE	[illegible]			
ARRIVE DESTINATION			DEST.	
RETURN TO SERVICE	18	17	BASE	

PATIENT NAME (LAST, FIRST, MI) Cadle, Sarah

ADDRESS

ADDRESS

CITY STATE ZIP

PHONE SEX M (F) D.O.B.

VEHICLE ID 25 ALS EQUIPPED 1-YES 2-NO 1

CREW I.D.			CERTIFICATION #
1	DRVR.	C. Simpson	2627J
2	1st ATT.	D. Bain	1044
3	2nd ATT. PARAMEDIC INTERCEPT	E. Whitworth	1795

Wortham Affidavit

<u>**AFFIDAVIT OF STEVE WORTHAM**</u>

The Affiant, after being duly sworn, does hereby state as follows:

1. My name is Steve Wortham. I am over the age of eighteen (18) years old and am competent to testify to the matters herein.

2. I am the Chief of Operations for Shelby County EMS, located in Shelby County, Kentucky.

3. Shelby County EMS responded to the scene of an accident occurring on or about May 8, 2005, at approximately mile marker 32 on I-64 East.

4. The run report from the ambulance that was dispatched was turned in to me by the EMTs with a post-it note stating that the times they recorded were incorrect.

5. I telephoned central dispatch to obtain the correct times of when the call was received, the ambulance was dispatched and enroute, and when the ambulance arrived at the scene. The times were then changed on the run sheet accordingly, with the updated times written over the incorrect times.

6. To the best of my knowledge, the run sheet currently reflects the correct times. The call was received at 16:24. The ambulance was dispatched at 16:24. They were enroute at 16:24. The ambulance arrived on the scene at 16:32.

Further Affiant saith naught.

Steve Wortham

Accordingly, the evidence before the courts below was that the Cadle collision happened four minutes before the responders arrived at the Cornett site. Based upon these uncontroverted facts, a jury could conclude that the public safety personnel response to the scene had nothing to do with the Cadle collision. The courts below seemingly ignored the

possibility (all that is required under Steelvest) that a jury could conclude otherwise and erred in doing so.

The cases relied upon by appellees in the courts below were pre-comparative fault cases that should have limited if no applicability in the pure comparative fault era. The Babbitt court also recognized that previous superseding cause cases involving automobiles were decided at a time when "contributory negligence was a complete bar to recovery, that they were decided in an era when vehicles were slower, traffic volume was lighter, and highways were not designed with interstate travel in mind." Babbitt, 172 S.W.3d at 793.

These principles are directly applicable to this case. The Court of Appeals failed to take these tenets into account and relied solely on Donegan, holding that the "factual similarities between this case and [Donegan] cannot be ignored." However, the Court of Appeals largely ignored the important principles in Babbitt which caution strongly against judicial, rather than jury, resolution of proximate cause questions like those presented by the facts of this case.

Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006) is also instructive on the diminished importance of the superseding cause doctrine after the adoption of pure comparative fault. In Pile, a police officer arrested an individual for driving under the influence following a traffic accident caused by the intoxicated individual. Id. at 39-40. The police officer handcuffed the individual, placed him in a three-point restraint in the back seat of a cruiser in which a Plexiglas divider separated the front and back seats. Id. The officer stopped to assist with traffic flow, but left the keys in the ignition. The individual arrested managed to work his way into the driver's seat and caused a fatal

collision involving an individual who was not involved in the first collision caused by the arrested individual. Id.

This Court cited Babbitt, and held that the actions of the arrested criminal defendant did not supersede the alleged negligence of the police officer, *as a matter of law*, in leaving the keys in the vehicle. Id. at 42.

Here, again, the negligence is far less attenuated. In this case, two traffic collisions occurred within two minutes of each other. In Pile, an intoxicated criminal defendant with a blood alcohol content of .278, in handcuffs and a three-point restraint, behind Plexiglas, commandeered an official police vehicle, drove away from the scene and caused a fatal collision. This Court held that the arrestee's *intentional act* did not excuse the negligence of the police officer. In this case, neither should any alleged negligence of the truck driver excuse, as a matter of law, Cornett's admitted negligence.

Compare the case before this Court to James v. Meow Media, 90 F.Supp.2d 798 (W.D. Ky. 2000). There, the court considered whether the superseding cause doctrine applied where a school shooter stated that video games and violent movies caused him to commit mass murder. In deciding that the criminal acts of the shooter superseded any negligence on the part of the producers of the video games and movies. The court held that the criminal acts of the shooter were "highly extraordinary in nature," "unforeseeable in character," and that his actions "operated to relieve [the media producers] of liability." Id. at 808. Further, the response of the shooter to the media materials was not a "normal response" to viewing the materials. Id. quoting Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 780 (Ky. 1984).

Here, on the record before the Court of Appeals, a fatal automobile collision occurred within two minutes of the incident precipitated by Mrs. Cornett's falling asleep at the wheel. The possibility that a second auto collision could occur in rapid succession to another auto collision is hardly "highly extraordinary in nature" or "unforeseeable in character." The possibility is rather quite ordinary and exceedingly foreseeable. A parade of hypotheticals can also be used to demonstrate the intrinsic messiness associated with judicial, rather than jury, resolution of these questions. How far back does a chain reaction accident have to go in order to absolve the original tortfeasor? What if the accidents happen five seconds apart? Ten seconds apart? Fifteen seconds apart? Thirty seconds apart? 120 seconds apart? Line drawing is useful in the law, but only when it makes sense. Here, it does not. The Court of Appeals left it to the court to draw the line. These questions are best answered by a jury. This Court noted as much in its recent decisions in Dick's Sporting Goods v. Webb and Shelton v. Ky. Easter Seals Soc'y, Inc. discussed in more detail infra. The jurisprudential purpose for comparative fault is two-fold: a modestly negligent tortfeasor does not escape liability as they might have under the common law, and more culpable tortfeasors avoid the harsh result possible under a joint and several liability scheme. There is no downside to applying these principles in the case before the court.

"A jury, acting in its role as fact-finder, could reasonably conclude under the facts...that Cornett's negligence, combined with the negligence of others, caused the Cadles' wreck and resulting death and injuries..." Opinion of Court of Appeals at 27 (Nickell, J., dissenting). A jury should be permitted to apply its understanding of modern realities and to make a factual determination regarding whether Ms. Cornett has any

liability for Jane Cadle's death and the injuries sustained by Ron and Sarah Cadle. Summary judgment was thus inappropriate and the Court of Appeals should be reversed under the principles set forth in NKC Hospitals, Babbitt and Pile.

II. The superseding cause doctrine has limited applicability in modern Kentucky tort law

In relying on Donegan so heavily, appellees and the courts below set aside the sea change in Kentucky law which comparative fault brought about. Before the adoption of comparative fault in Hilen v. Hays and KRS 411.182, tortfeasors were joint and severally liable for the total amount of damage done to plaintiffs. Conversely, plaintiffs had to deal with the harsh result of contributory negligence. These common law doctrines led to unjust results; however, here, comparative fault would allow the jury to weigh Ms. Cornett's negligence against the negligence of others. The law holds her liable only for that percentage of the total harm for which the jury concludes she is responsible.

Common law tort doctrines like the superseding cause doctrine have limited applicability in modern Kentucky substantive tort jurisprudence. Less than one year ago, in Dick's Sporting Goods, Inc. v. Webb, 413 S.W.3d 891 (Ky. 2013) and its companion case Shelton v. Ky. Easter Seals Soc'y, Inc., 413 S.W.3d 901 (Ky. 2013), this Court held that summary judgment should only be used to terminate negligence-based litigation as an "extraordinary remedy." Dick's, 413 S.W.3d at 894.

This Court further held in Shelton that the "court must decide if the injury which the plaintiff received, and the personal interest of the plaintiff invaded, is worthy of protection against the alleged conduct of the defendant." Shelton, 413 S.W.3d at 908 n.23 (internal citation omitted). "The incompatibility between the open and notorious doctrine as an absolute, automatic bar to recovery and comparative fault is great." Kentucky River

Med. Ctr. v. McIntosh, 319 S.W.3d 385 (Ky. 2010). So too is the superseding cause doctrine incompatible with modern principles of comparative fault, at least in this case, which a jury could possibly conclude was an expected, foreseeable result of falling asleep at the wheel. Perhaps the superseding cause doctrine has a place in modern Kentucky law, but it is better applied in cases like James supra, rather than in cases where two auto collisions occur minutes apart on a congested interstate highway on a holiday weekend. James is the jurisprudential tonic to the concerns levied in Chief Judge Acree's concurring opinion in the Court of Appeals—the superseding cause doctrine does not necessarily die with this case or others like it; it rather is reserved for use in cases where the independent act of negligence truly is dissociated from the cause in fact. That is simply not the case here.

The superseding cause doctrine, like the "open and obvious" doctrine addressed in Shelton and Dick's, is as the Court suggested in Babbitt of less import in the age of pure comparative fault. Put another way, the question is one of breach and apportionment of fault rather than one of duty and rigid common law expressions of what, exactly, is "proximate cause." Pure comparative fault provides a way to answer intrinsically difficult questions without resort to vague and amorphous doctrines like the "open and obvious" doctrine in the slip and fall cases and the superseding/intervening cause equation in this case. Modern comparative fault is algebra; the common law doctrine endorsed by the Court of Appeals is calculus. The equation is easier to solve using the formula used by both the bench and bar in the 30 years since Hilen v. Hays was decided: pure comparative fault in negligence cases.

III. The Court of Appeals erroneously affirmed the trial court's grant of summary judgment

The standard for summary judgment is a familiar one: Disputed facts must be viewed in the light most favorable to the party opposing summary judgment, here the Cadles. Steelvest, Inc. v. Scansteel Svc. Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

The circuit court granted appellees' respective motions for summary judgment, concluding that, as a matter of law, that the negligence of the truck driver vitiated any negligence on the part of Wilma Cornett. The Court of Appeals erred by concluding that summary judgment was appropriate in this case where no depositions were taken, no substantive discovery undertaken and by failing to assume the facts in the light most favorable to the non-moving party.

The proper function of summary judgment is to terminate litigation only when it appears that the party opposing the motion cannot produce evidence at trial that would lead to a verdict in its favor. Id. There must be no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1986).

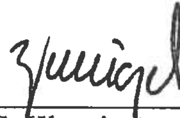
As demonstrated herein, genuine issues of fact remain. Resolution of those facts in the Cadles' favor could lead to a verdict in their favor. Summary judgment was inappropriate in this case and the Court of Appeals should be reversed. Decisions of this Court subsequent to the trial court's consideration of the matter urge even more caution in considering motions for summary judgment premised on common law tort doctrines which predate the adoption of pure comparative fault in Kentucky.

CONCLUSION

The "extreme remedy" of summary judgment in a negligence case was inappropriate on the limited factual record before the courts below. "Genuine issues of material fact" remain with respect as to whether Wilma Cornett is liable to the Estate of Jane Cadle and to Ron and Sarah Cadle for their horrific injuries. A jury could conclude that Wilma Cornett's negligence was a substantial factor in causing the injuries alleged. While her negligence may be mitigated by the negligence of others, this determination of comparative fault is suited for a jury. The Court of Appeals erred by holding otherwise.

The opinion of the Court of Appeals should be reversed, and this case necessarily should be remanded to the Jefferson Circuit Court for disposition by a jury.

Respectfully submitted,



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APPENDIX

Tab 1: Opinion of Court of Appeals

Tab 2: Memorandum Opinion and Order Overruling Motion to Alter, Amend or Vacate

Tab 3: Memorandum Opinion and Order Granting Motion for Summary Judgment

Tab 4: Opinion and Order Overruling Motion for Summary Judgment

Tab 5: EMS Run Reports and Affidavit of Steve Wortham