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# The Advocate

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*The members of the Kentucky Justice Association work to ensure that any person who is injured by the misconduct and negligence of others can get justice in the courtroom, even when taking on the most powerful interests.*

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## Protect the Seventh Amendment:

*“In suits at common law, where the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”*

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By Paul Kelley, KJA President

## We Need Each Other

**O**n December 8th, I was honored to be sworn in as the President of the Kentucky Justice Association for 2023. The greater honor was spending time with other members of the Executive Committee and Board of Governors during our annual planning meeting. If you did not know, we gather every December to celebrate the past year's achievements and plan for the upcoming year. We address legislative activity, seminars, promoting and achieving diversity, member wellness and numerous other issues. For me, it has always been a time of rejuvenation and inspiration, reconnecting with talented friends and colleagues, as well as making friends with new members of the Board. I always come away with the indisputable conclusion that we all need each other. KJA brings us together in ways we never could if it did not exist.

When I joined the Executive Committee in 2018, I had only a cursory understanding of everything KJA did and how my clients and I benefited from the tireless efforts of those who served before me. Over the last four years, I've seen first-hand how past presidents have reacted to a pandemic, devastating natural disasters, which affected so many Kentucky residents and, of course, legislative actions. Every member should be proud of the accomplishments of our past presidents and the manner in which they led this organization with grace, compassion, decisiveness, and energy. Importantly, most of what has been achieved could not have occurred without help from the many members who stepped up and took action when we needed it the most.

Indeed, we have far greater impact as an organization than any of us could have individually. KJA gives all of us a combined voice that we would not have as individuals—2023 will be no different. We will face myriad issues—some we expect and some we do not. While the Executive Committee, the Board of Governors, and Chief Executive Officer, Maresa Fawns, will be on the front lines addressing whatever challenges we face, we need everyone's assistance to achieve our goals. There are many ways to get involved in KJA. We have numerous committees that always need fresh blood to

give new ideas about how we can do things better. You may have connections with key legislators that will help us discuss proposed legislation. Perhaps you have a knack for dissecting bills and can assist in writing a better version. Of course, there are times when we need financial contributions. There are many talented members of our organization who can help, and now is the time to answer the call. KJA needs you!

You need KJA, too. As I hope everyone knows, KJA works hard in Frankfort to protect the 7<sup>th</sup> Amendment and our clients' rights to recover for their injuries. During the legislative session, Maresa Fawns and Director of Public Affairs, Griffin Gillis, are in Frankfort every day, along with a member of the Executive Committee, tracking legislation, attending committee meetings, and meeting with legislators to address issues related to bills. Over the years, many of our members have testified before committees in opposition or support of a proposed bill. Without KJA's efforts, the way we all practice law in Kentucky would likely look a whole lot different.

**Y**ou can also rely on KJA and your fellow members for support. Fighting for people who have no voice is a hard job. It's mentally, physically, and emotionally exhausting. Sometimes you can feel like you're on an island by yourself dealing with things no one else is dealing with. However, in most instances, it is likely that other members have faced similar issues and will be happy to help. Because of KJA, we all have access to hundreds of other members willing to provide insight and guidance on any issue that could arise in your practice. Without KJA, it is difficult to imagine having access to such valuable resources—literally, anytime we need it. I encourage everyone to take advantage of these resources. Undoubtedly, someone will be able to provide the assistance you need.

KJA has a Wellness Committee, dedicated to improving our members mental health and identifying members in need. Unfortunately, we have suffered too many losses of our colleagues to mental health crises. Dealing with our

clients' problems frequently causes us to ignore our own problems until they seem unmanageable. Following a recent string of deaths, David Gray and several other KJA members decided we've lost too much already and we're not going to sit idly by and lose more of our colleagues. Thus, they created the Wellness Committee and have done great work since it began. Board Member, Tony Colyer, gave an impassioned speech at our retreat about the committee's mission, and the work they've already done. We want, not only our members, but all Kentucky lawyers to know you can ask for help. The sense of community in this organization is strong, and we all feel responsible for the well-being of each other. Let's help look out for one another and make sure we always take care of ourselves while also shouldering our clients' burdens.

**T**here are many other benefits of being a KJA member. The more active you are, the more you benefit—the more all of us benefit. I encourage everyone to attend our seminars, annual convention, and social events and join one or more of our many committees. You'll make lifelong friends with other members while also protecting the 7th Amendment and the rights of all our clients and every citizen of the Commonwealth of Kentucky.

When I agreed to serve on the Executive Committee several years ago, I was determined to be a part of the solution rather than complain about the problem. I hope every member chooses the same. As individuals we have little power, but as a group we are an indomitable force. Have a fantastic 2023!



## Board of Governors

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By Maresa Taylor Fawns, Chief Executive Officer

## Happy 31 Years — My How Things Have Changed!

In following a tradition Hans Poppe began on his birthday each year, I think I'll begin a new tradition of naming 31 historical facts about KJA on the anniversary of my employment.

1. KJA, as it is now known, was founded in 1954.
2. I began at KJA (at that time, KATA) on January 2, 1992. There was a board meeting that Saturday where I met legendary lawyers who would become my friends. Unlike my memory today, I learned all 40 plus names/faces by the end of the meeting.
3. I previously worked for the Attorney General in his office, as well as in two of his campaigns. In those campaigns, I knew a lot of the names of KJA board members because they were respected and sought-after political contributors and advisors.
4. In 1992, there were actually staff people who used an IBM Selectric typewriter and no computer. In fact, several years later, one employee was adamantly opposed to using a computer and went kicking and screaming into the digital age. She soon figured out the time saving benefits and abandoned her long-held belief.
5. Our office was in Middletown, and we rented 4,000 square feet of space before buying property in Jeffersonton where we were located until 2021.
6. We now have beautiful office space in Frankfort right next to the Capitol.
7. KJA has had several names over the years including the Kentucky Academy of Trial Attorneys.
8. KJA began as attorneys wanted to learn from one another, and they held monthly dinner meetings in Louisville where plaintiff lawyers gathered to network.
9. One of the first big legislative fights was in the 1970s where lawyers fought no-fault insurance.
10. Penny Gold was the Executive Director of KATA when I started. She was/is an engaging leader who had the biggest of ideas and brought them to fruition.
11. Penny took over for Sharon Helton, who died in 1989.
12. Penny left KATA in 2003 to become Executive Director of the Kentucky Society of CPAs.
13. I took over when Penny left, so I celebrate my 20<sup>th</sup> year as Executive Director/CEO.
14. KATA changed its name to KJA in 2006, because we wanted the name to reflect what we DO, not who we ARE.
15. *The Advocate*, KJA's magazine, celebrated its 50<sup>th</sup> birthday in 2022.
16. We didn't publish a hard copy *Advocate* in 2020 and 2021 due to the pandemic.
17. We had a very popular Spring Break CLE in Destin, Florida for many years where families forged strong bonds that remain today.
18. In 1985, Peter Perlman became president of the American Trial Lawyers Association.
19. Making us proud again in 2022, Tad Thomas became the second Kentucky president of now AAJ.
20. I was president of the National Association of Trial Lawyers Executives in 2011.
21. I was president of the Kentucky Society of Association Executives in 2001.
22. Our staff has been with you a long time with a combined 106 years of service. WOW!
23. Staff went from going to the office every day to working from home—a product of the pandemic.
24. We used to budget a lot of money for postage. Thanks to the digital age, that line item is reduced dramatically.
25. For many years, we held a mid-Winter Convention. What were we thinking doing that during legislative sessions?!?
26. We did Trial by Jury at the Kentucky State Fair for years and years. Fairgoers sat on the jury in each of the many trials we conducted.
27. We used to mail KATA Klips (ugggh—the alliteration)

*Continued on page 29*



**Members of the 2023 Kentucky Justice Association Board of Governors. For a complete list of Board members, see page 5.**



**Greg Bubalo and Ann Oldfather received The Finis Price Outstanding Board Member Award at the KJA Board of Governors Retreat. They were honored for answering the call to serve and support those in pursuit of protecting the 7th Amendment.**



**Paul Kelley, right, 2023 KJA President receives the gavel from outgoing President, Rob Mattingly.**



By Tad Thomas, President, American Association for Justice

## AAJ Update

With support, dedication, and *persistent engagement* from my fellow trial lawyers nationwide, many pro-civil justice candidates prevailed in the elections in Congress.

Trial lawyers really showed up to protect the vote. More than 1,000 AAJ members volunteered through our Voter Protection Action Committee (VPAC) to help people make voting plans, drive people to the polls, work phone hotlines or as poll monitors, answer questions virtually and in-person, help with day-of voter registrations, assist voters who had been mistakenly turned away, and more. Engagement matters. As trial lawyers, we don't know any other way.

The close election outcome means that AAJ's continued bipartisan outreach remains crucial. We know that bipartisan outreach works and has led to much success for our lawyers and their clients.

In the new Congress, AAJ will be there to educate lawmakers on issues that matter to you, such as preserving your state common law remedies; Medicare Secondary Payer; raising the federal trucking insurance minimum; and deducting your business expenses in the year they are incurred.

### Medicare & Medicaid

I would like to share some excellent news on the Medicare Secondary Payer front which affects all trial lawyers. AAJ learned on October 14 that the Centers for Medicare & Medicaid Services (CMS)—at the request of the Biden Administration—has officially withdrawn a rule that would have increased Medicare Secondary Payer (MSP) reimbursements. More specifically, CMS was proposing a rule that mandates how the Agency would collect reimbursement for medical care that comes after a settlement or judgment.

AAJ sprang into action when we first learned of the CMS proposal and worked with the Administration to explain why a proposal such as this would harm beneficiaries. We also collaborated with allies in the business/insurance

community who also agree that the proposal would make it substantially more difficult to settle claims with a Medicare component. AAJ will immediately pivot to actually fixing the MSP statute as well as fixing the bad *Gallardo* decision which impacts Medicaid reimbursements.

### House of Representatives Passes Bill to Shine Light on Sexual Assault and Harassment

I have more good news to report. The U.S. House of Representatives passed the SPEAK OUT Act (S. 4524), which limits the enforceability of certain non-disclosure and non-disparagement clauses against sexual assault and sexual harassment survivors.

AAJ worked hard on this issue and strongly supports this crucial legislation that restores the rights of survivors of sexual assault and sexual harassment not to be silenced. Having already passed the Senate, the bill now heads to President Biden's desk to be signed into law.

Earlier this year, President Biden enacted a law that restored the rights of sexual assault and sexual harassment survivors to seek justice in court instead of being forced into arbitration. As advocates for civil justice and accountability, we are proud to see these significant steps in the fight to hold abusers and their enablers responsible.

Though barriers still exist for those seeking justice for all types of discrimination or corporate misconduct, we celebrate today's vote as a significant step forward. We will continue to work with Congress to grant these protections to others who have been hurt through no fault of their own.

### Legal Affairs

AAJ continues to file amicus briefs jointly with state trial lawyer associations. AAJ amicus briefs are available at [www.justice.org/amicusbriefs](http://www.justice.org/amicusbriefs). For more information about AAJ's legal affairs program, email [legalaffairs@justice.org](mailto:legalaffairs@justice.org).

Some highlights of joint briefs filed since July 2022 include the following:

- on punitive damage awards in Pennsylvania and in Geor-



- gia in *Bert Co. v. Turk* (Pa.) (filed jointly with PAJ Aug. 15, 2022) and in *McKinny v. Gwinnet Operations* (Ga.) (filed jointly with GTLA Sept. 7, 2022) and *Taylor v. Devereaux Foundation Inc.* (Ga.) (filed jointly with GTLA Sept. 7, 2022);
- on the issue of whether New Hampshire recognizes the recovery of medical monitoring damages in toxic exposure case in *Hermens v. Textiles Coated Inc.* (N.H., filed jointly with NHAJ Sept. 23, 2022);
  - on whether in Pennsylvania, it was an “error of law” in a products liability case to prevent the jury from

considering the product’s compliance with pertinent industry and governmental safety standard in *Sullivan v. Werner Co.* (Pa., filed jointly with PAJ Sept. 19, 2022);

- on privately enforceable rights under 42 U.S.C. § 1983 and the impact on the Federal Nursing Home Amendments Act of 1987 in *Health & Hosp. Corp. v. Talevski* (U.S. 21-806 filed jointly with PAJ Sept. 19, 2022); and
- in a California case in which defendant Gilead Sciences, a pharmaceutical company, is trying to upend product liability law and evade accountability for injuries its

products caused in *Gilead Sciences, Inc. v. Superior Court* (Cal. 1st Dist. Ct. App. No. A165558 filed jointly with CAOC Oct. 3, 2022).

### Fighting for All of Us and Our Clients

Thank you for your continued support. AAJ remains committed to fighting for access to justice for our clients. I look forward to providing these updates about important developments and welcome your input. You can contact me at [tad.thomas@justice.org](mailto:tad.thomas@justice.org).



## Be Part of the 7th Amendment Team

Your contributions, when combined with others, allows your voice to be heard. Help KJA’s legislative efforts to keep the 7th Amendment safe and your clients’ access to the courts open by donating today.

*“I give to KJA’s political efforts because we have to show strength to protect the 7th Amendment. Our nonpartisan issue requires political participation on both sides of the aisle.”*

— Tyler Thompson



Isn’t it time to do your part?  
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to make your contribution**



By Gregory J. Bubalo

## The Modern Puzzle of Personal Jurisdiction: Does *International Shoe* Still Fit?

Real estate and *now* litigation is LOCATION, LOCATION, LOCATION. For plaintiffs, the first decisions have recently become the hardest; namely, deciding where plaintiffs would like to file versus who can be sued in the plaintiffs' choice of forum, despite personal jurisdiction (PJ). *Int'l Shoe Co. v. Washington*,<sup>1</sup> was likely read in law school by every lawyer alive today, setting out the parameters of due process fairness. For most of us, after reading it, we didn't think much about it. The law of due process and PJ was relatively benign, with courts providing a broad range of available jurisdictions as long as the defendant(s) had "minimum contacts" with the forum state.

But the principles of PJ have come under increasing pressure and scrutiny with the onset of historic changes in the 21st century. The post WWII concept of "minimum contacts" (primarily based on geography) has become unreliable in predicting when a CR 12.02(b) motion to dismiss may be granted. And such a dismissal can be hard to explain to a client, especially if the dismissal occurs without a "savings statute" to toll the statute of limitation.<sup>2</sup> For Kentucky trial lawyers, PJ presents a special challenge in the face of three relatively recent, and confusing, cases: 1. *Caesars Riverboat Casino, LLC v. Beach*,<sup>3</sup> (hereafter *Caesars*); 2. *Bristol-Myers Squibb Co. v. Superior Court*,<sup>4</sup> (hereafter *BMS*); and 3. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*,<sup>5</sup> (hereafter *Ford*). *Ford* was handed down as the most recent case in 2021, and although it was a "unanimous" decision, the two concurring opinions in *Ford* unveil—at best—a contentious consensus among the Justices of the Supreme Court of the United States (SCOTUS).

### General and Case Specific PJ Delineated

#### Definitions of PJ by SCOTUS & SCOKY

Justice Ginsberg in *Goodyear* delineated "General" and "Case Specific" PJ:

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affilia-

tions with the State are so "*continuous and systematic*" as to render them essentially at home in the forum State. See *International Shoe*, 326 U.S., at 317, 66 S. Ct. 154, 90 L. Ed. 95. Specific jurisdiction, on the other hand, depends on an "affiliatio[n] between the forum and the underlying controversy," principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction."<sup>6</sup>

Definitions of General PJ versus Case Specific PJ have centered around these so-called canonical<sup>7</sup> phrases, italicized in Justice Ginsberg's quote, above. The puzzle for Plaintiffs' counsel is around the historic definitions of these phrases in SCOTUS cases which for decades settled the boundaries of PJ based on due process in the 14th Amendment.<sup>8</sup>

Moreover, in 2011, the Supreme Court of Kentucky (SCOKY) added another piece to the puzzle, holding: "[c]laims based upon contacts, conduct, and activities which may not fairly be said to meet one of these [9] explicit categories [set out in the Ky. Long Arm Statute] must be held to be outside of the reach of the statute, regardless of whether federal due process might otherwise allow the assertion of *in personam* jurisdiction."<sup>9</sup> *Caesars* reversed decades of cases<sup>10</sup> in Kentucky holding that KRS §454.210 ("the Ky. Long Arm Statute") extends "to the outer reaches of [federal] due process... ." In *Caesars*, SCOKY held that the wording of the Ky. Long Arm Statute dictates that, to impose PJ, the "defendant's conduct... must fall within one of the nine enumerated provisions in [the Statute] ...."<sup>11</sup> In other words, SCOKY placed still additional *statutory* barriers for plaintiffs to seeking redress from out-of-state defendants, beyond the 'due process' obstacle course constructed by SCOTUS.

### General PJ is Defined “At Home”

Natural persons have easily identifiable “homes” for the purpose of citizenship in one of fifty states. However, for corporate or unincorporated<sup>12</sup> business entities, being “at home” is much harder to determine. Although a corporation has no family and the closest thing to a house it has is an office, courts have treated corporations as “legal persons” for PJ purposes, where being “at home” is essential. Most recently, the boundaries for General (or “All Purpose”) PJ applied to corporate or unincorporated businesses have settled on three very narrow categories: (a) the State of Incorporation, (b) the location of the “headquarters” of the business; and/or, (c) where the corporation and other business entities have such a wide-ranging and systematic presence in the forum state that it is “essentially at home.”<sup>13</sup> According to *Daimler AG v. Bauman*, “Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.”<sup>14</sup>

Before *Goodyear*, the distinction between General and Case Specific PJ was murky. The facts of *Goodyear*,<sup>15</sup> decided as recently as 2011, illustrate. Two 13-year-old boys of US parents died in France from a bus accident allegedly caused by a Goodyear tire—manufactured and distributed overseas by Goodyear USA’s foreign subsidiaries. Goodyear USA was at that time an Ohio company and the subsidiaries were organized and operating, respectively, in Luxembourg, Turkey, and France.<sup>16</sup> The plaintiffs/parents of the boys sued Goodyear USA and its three subsidiaries in the plaintiffs’ home state of North Carolina claiming jurisdiction on the basis that some of the subsidiaries’ tires were distributed in North Carolina through coordinated distributorship by Goodyear USA. Although

Goodyear USA conceded that North Carolina courts had jurisdiction over it, the North Carolina Court of Appeals found All Purpose PJ over Goodyear USA’s foreign subsidiaries, despite their objections. The subsidiaries appealed to SCOTUS on PJ grounds.

SCOTUS ruled that the North Carolina courts confused General with Case Specific PJ, reversing and holding that the subsidiaries were “in no sense *at home* in North Carolina.”<sup>17</sup> “Their attenuated connections to the State, fall far short of ‘the continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.”<sup>18</sup>

SCOTUS also rejected arguments that the plaintiff parents were in North Carolina, had lost their children, and

should be able to sue the subsidiaries (presumably owned and controlled by Goodyear USA) in North Carolina. The plaintiff parents emphasized that their loss was suffered in North Carolina, that Goodyear USA had consented to PJ there, and France (where the accident occurred) had a law that allowed similar suits for French nationals.<sup>19</sup>

SCOTUS rejected arguments that North Carolina had a “well-recognized interest in providing a forum in which its citizens are able to seek redress for injuries that they have sustained, and a greater burden would be imposed upon the plaintiffs in the event that they were required to litigate their claims in France compared to the burden that would be imposed upon Defendants... .”<sup>20</sup> Such an interest

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## Personal Jurisdiction

*Continued from previous page*

“may strengthen the case for the exercise of *specific jurisdiction*,”<sup>21</sup> but not General PJ where the defendant subsidiaries did not “design, manufacture, market and sell *their tires* in”<sup>22</sup> North Carolina. No Case Specific PJ would exist unless the suit, “*aris[es] out of or relate[s] to the defendant’s contacts* with the forum,”<sup>23</sup> and that, at least in a product liability case, “even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”<sup>24</sup> In sum, *Goodyear* clarified what it meant to be “at home” for corporations and other unincorporated business entities for General PJ and suggested some guidelines for the Case Specific PJ analysis.

*Goodyear*, however, left open the third category of General PJ, recognizing that a corporation could be “at home” when it has the “continuous and systematic general business contacts.” In addition, although identifying the “magic language” that the suit must be “related to” or “arise out of” the defendants’ contacts with the case in the forum, nowhere does SCOTUS in *Goodyear* explicitly require that there be a *causal connection* between the defendants’ contacts with the forum, and the suit or the injury suffered to invoke Case Specific PJ. The definitive answer to that question would have to wait a decade when, in 2021, *Ford* was decided.

### BMS Limits Case Specific PJ But Declines To Require “Causation”

*BMS* involved a consolidated mass action of 86 California residents and 592 non-residents from other states alleging a drug product liability case against BMS for injury due to its drug,

Plavix. Defendant BMS was headquartered in New York and incorporated in Delaware. fifty percent of its work force was employed in New York and New Jersey. It also carried on regular and continuous activities in California, with five research and laboratory facilities and around 160 employees located in that state, 250 sales representatives there and a lobbying office in Sacramento. Although Plavix was not manufactured, labeled, or packaged in California, and FDA and other regulatory compliances were not satisfied there, BMS sold 187 million Plavix pills a year in California making nearly a billion dollars in revenue a year from that drug alone.<sup>25</sup>

Although Defendant BMS did not challenge PJ for the 86 California residents making drug product liability claims, the defendant did challenge both General and Case Specific PJ of the 592 non-residents making nearly identical claims, because the non-residents:

- Were not prescribed Plavix in California.
- Did not ingest Plavix in California.
- Were not injured in California.
- Were not residents in California.
- BMS did not manufacture, label, package, or work on the regulatory approval of the drug in California.<sup>26</sup>

When *BMS* was presented to SCOTUS, the case was couched in the briefs by Defendant BMS as being an issue of causation, as follows:

Whether a plaintiff’s claims arise out of or relate to a defendant’s forum activities when there is no causal link between the defendant’s forum contacts and the plaintiff’s claims....<sup>27</sup>

Defendant BMS emphasized that since *International Shoe*, SCOTUS made clear “time and again that

‘specific or case-linked’ jurisdiction requires a causal connection between the defendant’s forum conduct and the litigation.”<sup>28</sup> Defendant BMS emphasized that Case Specific PJ over a defendant should be imposed only when there is shown to be a causal connection between the defendants’ contacts with the forum and the plaintiff’s injuries.<sup>29</sup>

*BMS* did not answer the causation question directly, however. Instead, SCOTUS emphasized that its past decision required that the case “arise from” or be “related to” the defendants’ contacts with the forum regarding the plaintiffs’ case. And the non-residents simply had no such contacts<sup>30</sup> because “related to” refers to the defendant’s conduct in the forum state and does not mean related to other California Plaintiffs who have brought similar claims.<sup>31</sup>

Justice Sotomayor was the only dissenting vote, and her dissent must be read to understand the impact *BMS* had on plaintiffs’ products liability and mass tort actions, as quoted below:

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*, 571 U. S. \_\_\_, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.<sup>32</sup>

Justice Sotomayor understood the practical side of the problem, stating: “I fear the consequences of the Court’s decision today will be substantial. The majority’s rule will make it difficult to

aggregate the claims of plaintiffs across the country whose claims may be worth little alone.”<sup>33</sup> She emphasized that the Court lost sight of the main issue; namely, fundamental fairness:

Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. First, the defendant must have “purposefully avail[ed] itself of the privilege of conducting activities within the forum State” or have purposefully directed its conduct into the forum State. Second, the plaintiff’s claim must “arise out of or relate to” the defendant’s forum conduct. Finally, the exercise of jurisdiction must be reasonable under the circumstances.<sup>34</sup>

Finally, she recognized that SCOTUS “precedents do not require this result, and common sense says that it cannot be correct.”<sup>35</sup>

**“Causation” is not Required in *Ford***

In contrast to *BMS*, *Ford* was a stark reversal of course involving two separate car wrecks (one in Minnesota and the other in Montana) asserting products liability claims for allegedly unreasonably defective cars. Residents of those states sustained the injuries. One case involved a Ford Explorer when a tread separated from the rear tire, causing the vehicle to spin out of control killing the driver, who owned the car. The other involved a passenger in a Crown Victoria. When the driver/owner rear ended a snowplow, the air bag failed to deploy in the Crown

Victoria and the passenger suffered serious brain injury. Neither car was purchased in the states in which the accidents occurred.

In another time or circumstance, perhaps Ford and its lawyer would have never thought of dismissing these claims on PJ grounds, based on products liability for serious injuries sustained in the states in which they were brought by citizens of those states. But in the aftermath of *BMS*, the next move seemed inevitable, described by Justice Kagan, writing the Opinion, as follows:

According to Ford, the state court (whether in Montana or Minnesota) had jurisdiction only if the company’s conduct in the State had given rise to the plaintiff’s claims. And that

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## Personal Jurisdiction

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causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Ford had designed the Explorer and Crown Victoria in Michigan, and it had manufactured the cars in (respectively) Kentucky and Canada. Still more, the company had originally sold the cars at issue outside the forum States—the Explorer in Washington, the Crown Victoria in North Dakota. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. That meant, in Ford’s view, that the courts of those States could not decide the suits.<sup>36</sup>

Justice Kagan rejected Defendant Ford’s argument that *BMS* would require dismissal of Plaintiffs’ claims based on PJ, as follows:

We found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant’s activities there, lacked any connection to the plaintiffs’ claims. The plaintiffs, the Court explained, were not residents of California. They had not been prescribed Plavix in California. They had not ingested Plavix in California. And they had not sustained their injuries in California. In short, the plaintiffs were engaged in forum-shopping—

suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State. That is not at all true of the cases before us.<sup>37</sup>

Justice Kagan adamantly emphasized that causation was never a requirement in the canonical phrase “arise out of or relate to the defendant’s contacts with the forum.”<sup>38</sup> “The first half of that standard asks about causation; but the back half, after the “or,” contemplates that some relationships will support jurisdiction without a causal showing.<sup>39</sup>

Although causally unrelated to the accident or even the case, SCOTUS emphasized that Defendant Ford maintained an impressive ongoing presence in both states. True, the Court recognized that Defendant Ford was only “at home” in two states, incorporated in Delaware and headquartered in Michigan. However, “its business is everywhere.”<sup>40</sup> In both states, Defendant Ford had chains of dealers. And across the country, it advertised to “Keep your Ford a Ford” through a network of dealers. It was this presence that (although not providing the causal prong of the canonical phrase “arising out of”) did provide a nexus that “relates to” the case because of the business that Defendant Ford “regularly conducts in Montana and Minnesota,”<sup>41</sup> the forum states where the claims were brought.

Strikingly, the opinion was unanimous but with two very interesting concurring opinions. First, Justice Alito, who rendered the *BMS* opinion, agreed with the result and stated that the answer to *Ford* “is settled by our case law.”<sup>42</sup> But he went on to agree with Justice Gorsuch’s Concurring Opinion that, “there are grounds for questioning the standard that the Court adopted in,” *International Shoe*.<sup>43</sup> “And there are

also reasons to wonder whether the case law we have developed since that time is well suited for the way in which business is now conducted.”<sup>44</sup> Justice Alito goes on to state: “Can anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?”<sup>45</sup>

Well, Ford makes that argument. It would send the plaintiffs packing to the jurisdictions where the vehicles in question were assembled (Kentucky and Canada), designed (Michigan), or first sold (Washington and North Dakota) or where Ford is incorporated (Delaware) or has its principal place of business (Michigan).<sup>46</sup>

But then Justice Alito further asserted that some sort of causation was always a part of *International Shoe* and lamented that the majority opinion creates a new category of cases, where causation is not required: “those in which the claims do not “arise out of” (*i.e.*, are not caused by) the defendant’s contacts but nevertheless sufficiently “relate to” those contacts in some undefined way.”<sup>47</sup> Apparently, Justice Alito believed the phrase “arise out of” always meant “are caused by.” Justice Gorsuch agreed with Justice Alito, as follows:

Today’s case tests the old boundaries from another direction. Until now, many lower courts have proceeded on the premise that specific jurisdiction requires two things. First, the defendant must “purposefully avail” itself of the chance to do business in a State. Second, the plaintiff’s suit must “arise out of or relate to” the defendant’s in-state activities. *Typically, courts have read this*

*second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff's injuries.*<sup>48</sup>

However, Justice Gorsuch acknowledged that the “canonical phrases” of *International Shoe* and *Goodyear* had begun to look a little battered,<sup>49</sup> referring to General PJ and “at home:”

Take general jurisdiction. If it made sense to speak of a corporation having one or two “homes” in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple States. To cope with these changing economic realities, this Court has begun cautiously expanding the old rule...<sup>50</sup>

In sum, there appears to be a sparse consensus—at best—in SCOTUS regarding the exact meaning of *International Shoe*, and the cases interpreting it in the almost seventy-eight years since it was first rendered. In addition, in Kentucky as explained below, *Caesars* and its interpretation of the Ky. Long Arm Statue presents still an additional puzzling piece of PJ for Kentuckians.

### **Caesars and the Kentucky Long Arm Statute**

#### **History of the Kentucky Long Arm Statute**

Since at least 1975 and for 36 years thereafter, Kentucky courts interpreted the Kentucky Long Arm Statute as extending PJ co-extensive with federal due process. This interpretation hinged on the Kentucky Long Arm Statute, referring to the “doing of business” provision of the statute, to claims “arising from the [nonresident]...,” “Transacting any business in this Commonwealth.” KRS § 454.210(2)(a)(1).

This “doing business” provision was viewed as a “catch all” provision provided by the legislature. Presumably, the General Assembly in enacting the Kentucky Long Arm Statute meant to provide citizens of the commonwealth with their full 14th Amendment Rights under the US Constitution to sue those who are not residents of this state if a citizen of this commonwealth is wronged and suffers injury by a non-resident.

When reading the statute, its language can be seen as an attempt (albeit a rather sloppy one) to codify *International Shoe*. Unfortunately, SCOKY saw it differently in *Caesars* holding that: “[i]n a series of cases addressing KRS §454.210, it appears the perception has developed that our long-arm statute has lost its identity, having been subsumed, and in effect, overridden

by federal due process jurisdictional standards.”<sup>51</sup> SCOKY then proceeded to overrule those cases.<sup>52</sup>

By overruling those cases, SCOKY presented two separate PJ barriers for the plaintiffs. Before *Caesars*, the only inquiry required in Kentucky was whether PJ satisfied the requirements of *International Shoe* and minimum contacts. After *Caesars*, the simple “one step” analysis became a two-step dance, as explained by SCOKY:

In summary, the proper analysis of long-arm jurisdiction over a non-resident defendant consists of a two-step process. First, review must proceed under KRS 454.210 to determine if the cause of action arises from conduct or activity

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## Personal Jurisdiction

*Continued from previous page*

of the defendant that fits into one of the statute's enumerated categories. If not, then *in personam* jurisdiction may not be exercised. When that initial step results in a determination that the statute is applicable, a second step of analysis must be taken to determine if exercising personal jurisdiction over the non-resident defendant offends his federal due process rights.<sup>53</sup>

### Two-Steps Applied in *Caesars* to Its Facts

SCOKY recognized the purpose of the statute was to grant jurisdiction, not to deny it.<sup>54</sup> Yet, a denial of jurisdiction was the ultimate result in *Caesars*, as reflected in the facts. Very similar to *Ford*, Defendant Caesars engaged in a “*a substantial, continuous, and systematic course of business*”<sup>55</sup> in Kentucky. Defendant Caesars was a Riverboat Casino docked near Louisville, Kentucky across the Ohio River in Elizabeth, Indiana. Due to heavy advertising and participation in Kentucky, “approximately fifty percent of [Caesar’s] revenue [was] derived from Kentucky residents,” and the plaintiff was one of those residents of the commonwealth unlikely to have been a customer of Caesars but for its promotion and efforts to recruit Kentuckians as customers. Indeed, the plaintiff was a “Total Rewards Gold Card Holder” at Defendant Caesars Casino when she slipped and fell on butter that was left on the floor.

SCOKY held that pursuant to KRS §454.210(2)(a)(1), Defendant Caesars was clearly “doing business” in Kentucky. However, that only met a

part of the long arm requirements and satisfied only one provision applicable to the facts, out of the nine possible to apply.

But the inquiry under the statute did not end there. KRS §454.210(2)(a) also required that “jurisdiction over” Defendant Caesars required, “acts directly or by an agent, as to a claim arising,” from its “doing business” in the commonwealth. So, the issue emerged as to the meaning of “arising from,” in the “statutory” context versus the “due process” analysis defined under *International Shoe*. It would have been easy enough for SCOKY to interpret “arising from” as a reference to “arising out of,” or “related to” as defined by SCOTUS in multiple cases. But instead, SCOKY rejected that solution, and turned to Websters Dictionary:

The phrase “arising from” may reasonably be subject to various interpretations. In this vein, Appellee alleges that her claim “arose from” Appellants’ activities in the state because, *but for* those activities attracting her to patronize the casino boat, she would not have been there that day to slip on the butter. However, for the reasons discussed below, we believe this view of the terminology stretches the phrase “arising from” beyond reasonable bounds.<sup>56</sup>

SCOKY cited *Merriam-Webster Dictionary Online* to define “arising from.” “As relevant here, the verb ‘to arise’ means: ‘2 a: to originate from a source; b: to come into being ...’ See *Merriam-Webster Dictionary Online*, <http://www.merriam-webster.com/dictionary> (last viewed Mar. 16, 2011).”<sup>57</sup> Based on that definition, SCOKY concluded that Defendant Caesars’ activities in the commonwealth was “far too

attenuated to fit within the [dictionary] definition of ‘arising from.’”<sup>58</sup> Plaintiff’s case was therefore dismissed. However, it is interesting to note that Judge Heyburn in *Ford v. RDI/Caesars Riverboat Casino, LLC*,<sup>59</sup> applied *International Shoe* to almost identical facts where Defendant Caesars was sued in a dram shop case and injury occurred in Indiana, coming to the *opposite* conclusion.

Although *Ford* came a decade after *Caesars*, even the most conservative Justices in *Ford* were not as stringent as the criteria imposed via the “ordinary language” of the dictionary in *Caesars*. The argument could be made that the Plaintiff “but for” Defendants Caesars’ promotion and presence in Kentucky would have never been at Caesars to slip and fall in Indiana. And, by Justice Gorsuch’s definition in *Ford*, “but for” Defendant Caesars’ Kentucky conduct is actually what “arising from” means in *International Shoe*.

If faced with navigating the uncertainty of PJ, always have a Plan B. Where there’s a question about jurisdiction, anticipate a dismissal and predict the next move. There is a precaution, not a lack of optimism, and necessary in recognizing the rules and their application are unclear. For instance, if you file in Kentucky, carefully consider what may happen next if forced to file in Texas, Indiana, or other states, after a motion to dismiss is granted. As a part of that anticipation, calculate how fatal a belated filing in the next forum may be after a dismissal in Kentucky. None of us can totally prepare for the *International Shoe* to come, whether the fit will be wide, narrow, short, or long. All we can do is prepare for the uncomfortable walk that is sure to come.



— Greg Bubalo, *President’s Club*, is owner and managing partner of Bubalo Law PLC and Becker Law Office. He is a member of the KJA Board of Governors.



- 1 326 U.S. 310 (1945).
- 2 See, e.g., *Estate of Vincent J. Gibson v. Daimler N. Am. Corp.*, No. 2:19-00095 (WOB-CJS), 2022 U.S. Dist. LEXIS 200434 (E.D. Ky. Nov. 3, 2022), discussing *Caesars*, *BMS* and *Ford* while granting dismissal of a products liability case. Kentucky has a “savings statute” which allows Plaintiff to refile within 90 days if, “an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action...” See KRS §413.270(1). See also *Schircliff v. Elliott*, 384 F.2d 947, 950 (6th Cir. 1967). The statute will do no good however, if Kentucky has no jurisdiction and Plaintiff is forced to sue in another state that has no savings statute.
- 3 336 S.W.3d 51 (Ky. 2011).
- 4 137 S. Ct. 1773 (2017).
- 5 141 S. Ct. 1017 (2021).
- 6 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)

(citations omitted) (emphasis added.)

7 “Canonical” is a perfect word to describe the obsession with these phrases because the obsession has more to do with history, rather than logic or fairness. To define PJ, the Supreme Court reaches back 78 years to *International Shoe*, decided in another time and another world, when international jet travel and the internet was, at best, science fiction. In other words, when geography was far more important to, “make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit.... An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). “Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction.” *Goodyear*, 564 U.S. at 919 citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,

414, nn. 8, 9 (1984). In our world today though, multi-national corporations are everywhere and nowhere. Many have no real “headquarters,” and those corporations may be managed “virtually” with employees working “at home” thousands of miles apart.

- 8 *Goodyear*, 564 U.S. at 919.
- 9 *Caesars*, 336 S.W.3d at 56.
- 10 *Id.*
- 11 *KFC Corp. v. Wagstaff*, 502 B.R. 484, 494-495 (W.D. Ky. 2013).
- 12 “Citizenship” has many flavors when attempting to determine where “home” may be for unincorporated entities. “The general rule is that all unincorporated entities--of which a limited liability company is one--have the citizenship of each partner or member.” See *Delay v. Rosenthal Collins Grp., LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187-92, (1990)). “However, courts have long recognized that residency, domicile and citizenship are not freely interchangeable synonyms.” *Holt*

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# Basic Probate and Guardianship Process

By Ashley Larmour

A probate practitioner should first determine if it is necessary and appropriate to file a probate case; if a probate case is determined to be appropriate then the practitioner must determine what type of probate case is appropriate.

## Real Property

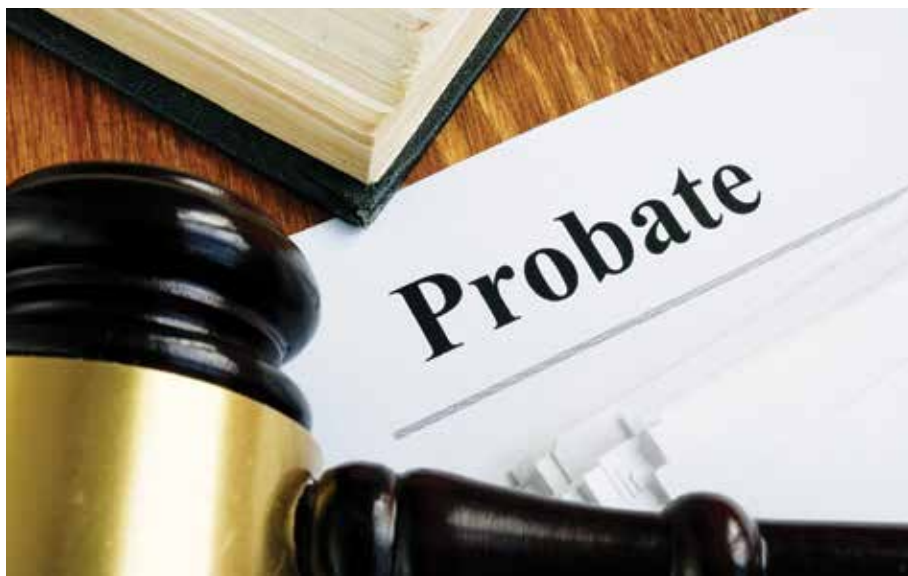
Real estate owned with joint rights of survivorship between individuals pass automatically. It is best, however, to file an Affidavit of Descent with the county clerk in the county where the real estate is located. Further, the surviving children of deceased parents can transfer real property via an Affidavit of Descent without going through the probate process if there is no other property requiring the probate process. If there is a mortgage or lien on the real property, it will follow the property even if the original debtor is deceased as the debt is “in rem.” Of note, some mortgage holders may have a life insurance policy on the mortgage debtor that pays off the mortgage debt upon the debtor’s death as part of the debt paperwork. Real property in general passes outside of probate with some exceptions: 1) When a decedent conveys a life estate interest in real property to a beneficiary and which then passes to a remainder beneficiary; 2) when the decedent wishes to devise the real property he or she owns to someone other than those persons that would inherit under KRS 391.010 (Intestate Succession Statute); or the real property must be sold in order to satisfy creditor claims against the estate.

## Probate Process

The Administrator or Executor should file a petition to probate the estate in the county where the decedent was a resident. After an individual is appointed, that individual should get a tax identification number for the estate and retain the services of an accountant to assist the personal representative with any tax issues.

If a lawsuit needs to be filed on the decedent’s behalf, a personal representative must be appointed through the

probate process. This representative may be an administrator or executor, but could also be a public administrator appointed by the Court. If a public administrator is appointed, that person is responsible for retaining a legal representative to assist the public administrator through the probate process and a personal injury



attorney to proceed on the lawsuit.

Within sixty days after appointment of an Administrator or Executor, an inventory must be filed with the Court outlining the assets in the decedent’s estate. The estate may not be closed before six months after the appointment of the Administrator or Executor. The estate shall be closed either by filing an informal settlement or formal settlement. If a claim is properly presented to the personal representative, then the personal representative should mail any claimant an allowance or disallowance of the claim.

A formal settlement must include an accounting of all expenses paid by the estate and disbursements issued by the estate. If there are funds still remaining to be disbursed, the settlement should state how these funds will be disbursed.

The formal settlement shall reflect the amount paid to the personal representative and the personal representative's attorney. Any creditor or heir should receive notice of hearing of the formal settlement.

If there are claims against the estate but the estate is insolvent and the creditors won't release the claims, then it is necessary for the personal representative's attorney to file a formal settlement pursuant to KRS 395.617 to get approval from the court to close the estate.

An informal settlement includes an accounting of all expenses paid by the estate and disbursements issued by the estate. If there are funds still remaining to be disbursed, the settlement should state how these funds will be disbursed. The formal settlement should reflect the amount paid to the personal representative and the personal representative's attorney. However, an informal settlement must also include waivers of settlement by the heirs and releases of any claims filed by creditors.

### Guardianships

A guardianship matter should be an appropriate action to be pursued when an adult or a child who is approaching their eighteenth birthday may no longer be considered to be a competent adult or could not be considered a competent adult when they turn eighteen years old. After the filing of the guardianship action, the court will appoint a three personal interdisciplinary team to evaluate the Respondent and make recommendations to the court. If the reports are in agreement, the Respondent, through counsel, may waive having a jury hear the disability case and the case may proceed with a bench trial.

If there are multiple qualified applicants petitioning the court to be named the individual's guardian, the court,

after the guardianship proceeding to determine if the individual is disabled, will hold a separate proceeding to determine who the guardian shall be.

There are different types of judgments that can be entered in which an individual can be appointed to be a full guardian/conservator. In a full guardianship, an individual makes all legal, medical, personal, and financial decisions for the Respondent. It is fairly assumed if an individual needs a full guardian, there is also a need for a conservator to make the financial decisions. A guardian may not consent to dramatic changes to the Respondent's body such as sterilization, psychosurgery, removal of a bodily organ, or amputation of a limb without prior approval of the court. When in doubt, seek prior court approval.

There may also be limited guardianships that limit the scope of the guardians decision-making abilities; in which case, the court would need to make a decision on whether a conservatorship is necessary as well. Although less common, it is possible to have one or more individuals be named as the guardian and have a third separate individual to be conservator.

A different type of guardianship case occurs when a minor receives a financial windfall, two such examples of situations where this could occur are when the minor is either bequeathed money or receives a personal injury settlement. However, in this circumstance, the minor is not under a disability beyond his or her age, and the guardian must turn over the estate to the minor who is now a legal adult, once proper steps have been taken to have a final accounting with the court, unless the minor is determined by law to be "incapacitated." If the guardian believes the minor will be incapacitated as an adult, the guardian is to initiate a proceeding for appointment of a fidu-

ciary pursuant to KRS 387.500 et seq.

In either circumstance, within sixty days of appointment of a guardian, the guardian must file an accounting of their ward's personal and financial resources with the court. Thereafter, the guardian must file an accounting on an annual or bi-annual basis depending on the size of the financial estate. As a practical matter, the court seems to prefer the annual accounting.

After the guardian has been appointed, he or she should set up a separate bank account in the name of the guardian on behalf of the Respondent. The Respondent's social security number should be used when opening the bank account.

If the Respondent's residence is moved from the state from which the guardianship is maintained, best practice would be for the guardianship judgment to be registered in the new state of residence. This can be facilitated by working with a local attorney in the state of the new residence. The state court holding the initial guardianship order should issue a provisional order allowing the transfer, which can then be taken to the court in the new state of residence to allow the judgment to be registered.



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By Jeff Adamson

## Qualified Protective Orders Authorizing *Ex Parte* Communications with Medical Providers: An Update

In these days, motions requesting trial courts to enter Qualified Protective Orders (QPO) authorizing *ex parte* communications with a plaintiff's medical providers read as though the Supreme Court of Kentucky's (SCOKY) decision in *Caldwell v. Chauvin*, 464 S.W.3d 139 (Ky. 2015) (*Caldwell*), and the few published and unpublished court decisions that follow, leave trial courts with little-to-no discretion to deny the request. This is simply not true. In fact, in its *Caldwell* decision, and in opinions issued since, the SCOKY has consistently held that trial courts remain vested with broad discretion to deny QPOs when finding that *ex parte* meetings with the plaintiff's medical providers would be imprudent in a particular case.

### *Caldwell* and CR 26.03(1) Grant Trial Courts Broad Discretion to Deny Motions for Qualified Protective Orders

While the SCOKY clearly held in *Caldwell* that no Kentucky law "inhibits litigants from seeking *ex parte* interviews with the opposing party's medical providers[,] it also found that such *ex parte* meetings fall outside the meaning of *lawful process* as defined in the Health Insurance Portability and Access Act (HIPAA), and therefore can only be sought after first obtaining an "order of a court or administrative tribunal [as set forth in 45 C.F.R. § 164.512(e)(1)(i)]."<sup>1</sup>

Motions seeking a QPO must not only comply with HIPAA, but must also comport with Rule 26.03 of the Kentucky Rules of Civil Procedure, which states in pertinent part:

*Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense... (emphasis added).*

CR 26.03(1) places the onus on the movant to show that "good cause" exists for a QPO to be entered. If the movant fails to show why *ex parte* meetings with a plaintiff's medical

providers would be prudent in a particular case, then the trial court has discretion to deny the motion, as the rule "does not require the trial court to grant such a protective order."<sup>2</sup> A court may enter a protective order directing, among other things, that discovery "be had only on specified terms and conditions, including a designation of the time or place;" "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;" "that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;" and even "that the discovery not be had" at all.<sup>3</sup>

Consistent with HIPAA and the Kentucky Rules of Civil Procedure, the SCOKY in *Caldwell* made it crystal clear that trial courts are not obligated to issue QPOs. While no law prohibits *ex parte* communication *per se*, "Kentucky law does not create an entitlement or right to conduct *ex parte* interviews with medical providers."<sup>4</sup> As when presented with any other motion for a discovery order, the trial court is vested with broad discretion. Trial courts are "the gatekeepers" and may grant, deny, or modify "a party's request for a HIPAA-compliant order authorizing *ex parte* disclosure of protected health information at their discretion."<sup>5</sup>

### Common Grounds for Denial of Qualified Protective Orders

Since the rendering of *Caldwell*, many trial courts across the commonwealth have indeed failed to find good cause for a QPO and exercised their discretion to find that authorization of *ex parte* meetings with the plaintiff's medical providers would be imprudent under the facts and circumstances of a particular case. There are certain common threads in these cases where good cause is lacking.

Many QPO motions rely on the conclusory assertion that *ex parte* meetings with the Plaintiff's medical providers are permitted under *Caldwell* because they would "streamline discovery" by helping the defendants identify which providers have relevant information before incurring the time and expense of formal discovery, *e.g.*, deposition testi-

mony. However, in many, if not most, wrongful death/personal injury cases the care of only a few or a handful of medical providers is pertinent to the case. As such, trial courts often find good cause lacking because there is simply no added benefit to be had by bypassing formal discovery methods, such as written discovery, deposition testimony, medical records subpoenas, etc., and authorizing private meetings between plaintiff's medical providers and defense counsel.

Some QPO motions rely primarily, if not exclusively, on the fairness, "level the playing field" argument; that entry of a QPO promotes fundamental fairness by allowing defense counsel to meet privately with the Plaintiff's medical providers just as plaintiff's counsel has already done or could do. This might have been true when medical providers freely met with their patient's or patient's representative's counsel when a personal injury/wrongful death claim was pending. But in today's times most medical providers refuse to meet privately with plaintiff's counsel outside of a deposition. In fact, some hospital networks and physician practice groups uniformly prohibit their medical staff from talking privately with any attorney, plaintiff or defense, while a claim is pending.<sup>6</sup> In these circumstances trial courts likewise fail to find good cause to authorize *ex parte* communication between plaintiff's medical providers and defense counsel since there are no inequities to be cured by a QPO.

Further, in the process of weighing the benefits of QPOs versus formal discovery methods, many trial courts give substantial consideration (and weight) to the potential ethical concerns presented by *ex parte* medical provider interviews. In *Caldwell*, the SCOKY recognized that medical providers are subject to professional duties of confidentiality which are separate and

apart from the proceeding to permit *ex parte* communication between defense counsel and medical providers. Specifically, the Court recognized that the Kentucky Board of Medical Licensure has adopted the American Medical Association's Code of Medical Ethics, including §5.05 of the Code, which guarantees a patient's right to confidentiality and expresses disapproval of the kind of *ex parte* disclosures requested in *Caldwell* and in this Motion.<sup>7</sup>

The relevant provision of the Code, § 5.05, reads as follows:

The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.

When a patient threatens to inflict serious physical harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, which may include notification of law enforcement authorities.

When the disclosure of confidential information is required by law or court order,

physicians generally should notify the patient. Physicians should disclose the minimal information required by law, advocate for the protection of confidential information, and if appropriate, seek a change in the law.<sup>8</sup>

Nurses are subject to similar constraints on disclosure of confidential patient health information under laws, rules, and regulations promulgated by the American Nurses Association's Code of Ethics for Nurses, the Kentucky Board of Nursing, and Kentucky statutory and regulatory law.<sup>9</sup>

The *Caldwell* Court also acknowledged that the Kentucky Board of Medical Licensure is the body with statutory authority to levy punishment upon physicians who violate the Code, noting that "the ethical dut[ies] may restrain the physician's willingness to agree to such an interview...."<sup>10</sup> Accordingly, the SCOKY emphasized that court orders permitting *ex parte* contact with a party's medical providers do not operate like a subpoena. Trial courts can only authorize defense counsel to request an *ex parte* meeting; the court cannot compel the medical provider to agree to participate in such meetings. A party's medical providers remain free to decline the request.<sup>11</sup>

Those seeking QPOs minimize these concerns by noting the *Caldwell* Court found that such ethical duties do not carry the force of law. However, in decisions following *Caldwell*, the SCOKY has reiterated its acknowledgment "that if a medical provider participates in an *ex parte* communication with defense counsel, ethical concerns outside of this tribunal could arise."<sup>12</sup> When trial courts are particularly keen on these ethical concerns, they

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## Qualified Protective Orders

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deny QPOs unless there is a uniquely compelling reason to grant one in a particular case. The risks of allegations of violating the fiduciary, ethical, statutory, and regulatory duties attendant to the medical provider-patient relationship are too great otherwise. This is especially true in cases where defendants make no provision for these concerns in the orders proposed to the court, *i.e.*, neglecting to mention the voluntary nature of the meeting and including language suggesting a QPO gives medical providers immunity from any allegations of violating fiduciary, ethical, statutory, and regulatory duties in the course of meeting with defense counsel, which is obviously misleading.

Lastly, the *Caldwell* Court held that *ex parte* communications with medical providers who have been identified by plaintiffs as witnesses expected to give expert testimony at trial are improper. “Once retained as experts, CR 26.02(4) lists exclusively the manner in which discovery may be obtained.”<sup>13</sup> In such circumstances, CR 26.02(4) limits the means of discovery of any kind to written and deposition discovery.<sup>14</sup> Obviously trial courts deny QPOs if the plaintiff has identified a particular provider or providers as a witness expected to give expert testimony at trial. And some plaintiffs argue this is grounds to deny a QPO *in toto* until the parties have had an opportunity to disclose experts or, alternatively, to modify the proposed QPO order to prohibit communications between defense counsel

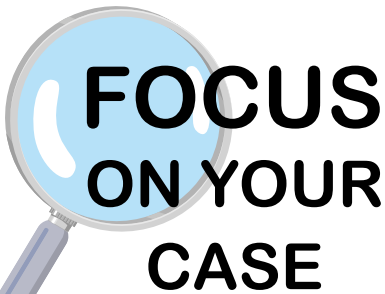
and the plaintiff’s medical providers on topics typically the subject of expert testimony, *i.e.*, opinions on standard of care, causation, and damages.

### Trial Court Discretion to Deny Qualified Protective Orders Remains Unchanged under *Beck v. Scorsone*, 612 S.W.3d 787 (Ky. 2020)

The most recent guidance on QPOs comes from the SCOKY’s published decision in *Beck v. Scorsone*, 612 S.W.3d 787 (Ky. 2020). Some have interpreted this decision to clip the wings of our trial courts on this issue. This is an incorrect interpretation.

In *Beck*, the SCOKY concluded that the trial judge arbitrarily denied a motion for a QPO “seemingly because,

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## Qualified Protective Orders

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using the trial court’s own words, ‘it’s not good policy to allow *ex parte* communications.’”<sup>15</sup> Unlike the above examples of trial courts failing to find good cause, the trial judge’s ruling in *Beck* appeared based solely on statements from the Bench that he had a policy predisposition to deny *ab initio* QPOs presented to him.

[F]or me to stamp approval on something like this—these *ex parte* communications—I really have a hard time doing that unless there’s some unique fact situation, whether it’s the behavior of the healthcare provider or the patient... But absent something unique... I think it’s not good policy to allow *ex parte* communications.

So, I appreciate the opportunity to do this, I’ve had this opportunity a number of times and I’ve declined every time because I didn’t think there was a unique fact situation that called for it. So, I appreciate your advocacy, but I’m going to deny the request.<sup>16</sup>

When the defendants asked what “unique fact situation” might persuade the trial court to authorize a similar request, the trial court responded: “I haven’t granted [these motions] yet because I haven’t seen any unique fact situations. I’m open to it, I don’t know, but it’s got to be something unique, you know, that would really convince me that *ex parte* is appropriate.”<sup>17</sup>

In granting a writ, the SCOKY found error in the trial court prohibiting all *ex parte* contacts with healthcare witnesses on the grounds that “it’s not

good policy to allow *ex parte* communications.” The trial court identified no other reason grounded in the facts of the case before it to prohibit all *ex parte* interviews with potential witnesses who are physicians or healthcare workers. The only basis given for the trial court’s order was its own personal policy preference rather than the application of law to facts.<sup>18</sup>

The SCOKY directed writ be issued without prejudice to either party to address the discovery matter again before the trial court. Contrary to the interpretation that the SCOKY has pulled in the reins of trial court discretion on QPOs, the SCOKY simply requested the factual and legal grounds for the trial court’s denial of the defendants’ motion, directing that “the trial court may, upon appropriate motion, revisit the issue of the [defendants’]

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Ethics & Day at the Races	April (TBD) Keeneland	Jay Prather 2 Ethics Hours
Subrogation	April 18 Zoom	Clayton Merschbrock 3 Hours
Premises Liability	May 8 Zoom	Chris Goode 2 Hours
Personal Injury/Products Liability — Apportionment vs. Indemnification	May 9 Zoom	Kirk Laughlin, Taylor Richard 1 Hour
Bourbon Tour and CLE	May 19 (Tentative)	Mike Schafer 2 Hours
Medical College Series for Lawyers	May 11, 12, 15, 16, 18, 19, 22, 23 — Zoom	Abby Green 8 1-Hour Sessions
Colossus	May 25 Zoom	Mike Schafer 3 Hours
Pitfall Series	June 19, 20, 21, 22, 23, 26 Zoom	Jon Hollan 6 1-Hour Sessions
Two-day Auto Summit with Twilight Thursday Social Event	Embassy Suites Downtown Louisville — June 1, 2	Rob Mattingly 10 Hours
30(b)6	June 6 Zoom	Paul Kelley 2 Hours
Basics for PI Attorneys Series	TBA Zoom	Kevin Weis 5 1-Hour Sessions
Women Trial Attorney's Retreat	June (Location and date TBA) In person	Hannah Jamison 6 Hours
Trial Verdicts Series	1 <sup>st</sup> Quarter Zoom	Jay Vaughn, Rob Mattingly 5 3-Hour Sessions
Daubert Challenges	TBA Zoom	Sheila Hiestand 1 Hour
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## Qualified Protective Orders

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ex parte contacts with [Plaintiff's] unnamed treating physicians and other healthcare providers and, in the exercise [of] its discretion, issue further orders as may be legally justified by the facts of the present case."<sup>19</sup>

In its *Caldwell* decision, and in decisions rendered since *Caldwell*, the SCOKY stands firm on the trial court's broad discretion to deny QPOs when finding that *ex parte* meetings with the plaintiff's medical providers would be imprudent under the particular facts and circumstances of a given case. Indeed, more and more trial courts are approaching QPO motions with extreme caution. Without a showing of good cause, trial courts should, and in fact routinely do, reject QPOs or, at a minimum, enter a carefully modified order that aims to address the limitations and conditions placed upon such orders by *Caldwell*, HIPAA, and the ethical and legal duties of the medical and legal professions.



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1 *Caldwell*, 464 S.W.3d at 143, 153. Under HIPAA, the procedural prerequisites are as follows:

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, *provided that the covered entity discloses only the protected health information expressly authorized by such order*; ...

\*\*\*

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 C.F.R. § 164.512(e)(1)(i), (v) (emphasis added).

HIPAA's litigation exception presupposes that orders permitting *ex parte* communications will reasonably limit the disclosures of protected health information to matters at issue in the litigation and further ensures that health information disclosed under the QPO is contained, i.e., disclosure outside the litigation is prohibited and return or destruction of all permitted disclosures of health information is required at the end of the litigation.

2 *Cook v. Eckerle*, No. 2018-SC-000435-MR, 2019 Ky. Unpub. LEXIS 20, at \*8 (Mar. 14, 2019); *see also, Fiorella v. Paxton Media Grp., LLC*, 424 S.W.3d 433, 437 (Ky. App. 2014) ("Logic necessarily leads us to conclude that the reverse also is true – if good cause is not shown, [a protective order need not be granted.]").

3 CR. 26.03(1).

4 *Caldwell*, 464 S.W.3d at 158.

5 *Id.* (citing *Holman v. Rasak*, 785 N.W.2d 98, 108-109 (Mich. 2010) ("HIPAA does not require a trial court to grant a motion for a protective order. Therefore, a trial court retains its discretion ... to issue protective orders and to impose conditions on *ex parte* interviews.")).

6 In some instances, there may even be the reverse unfairness at play when hospital networks and physician practice groups hire counsel, often a medical negligence defense attorney, to serve as the medical provider's counsel and that attorney may then engage in private discussions regarding the provider's knowledge and opinions with the defense attorney in the plaintiff's case without involving the plaintiff's coun-

sel. Further, some of the providers may be employees and/or agents of a defendant party. Obviously, plaintiff's counsel does not have unfair access to any of those medical providers and thus granting a QPO actually creates an "unlevel playing field" in favor of the defendants.

7 *Caldwell*, 464 S.W.3d at 155-156.

8 *See* American Medical Association, Council on Ethical and Judicial Affairs, CODE OF MEDICAL ETHICS § 5.05 (2007) (emphasis added). While the confidentiality provisions of the Code of Medical Ethics may change in form over time, the American Medical Association has consistently predicated its Code of Ethics on the patient's trust that physicians will protect information shared in confidence. Patients must be free to disclose sensitive information to enable their physician to most effectively examine, diagnose, and treat medical conditions. Physicians in turn have the obligation to preserve the confidentiality of information shared in the course of caring for a patient. And, when required to disclose protected health information by court order, the physician should restrict disclosure to the minimum necessary information and notify the patient of the disclosure.

9 *See* Kentucky Board of Nursing, AOS #34 Confidentiality (Revision 4/2018), Role of Nurses in Maintaining Confidentiality of Patient Information; *see also*, Chapter 3: Opinions on Privacy, Confidentiality & Medical Providers, 3.2.1 Confidentiality and 3.2.2 Confidentiality Post Mortem.

10 *Caldwell*, 464 S.W.3d at 156; *see also*, KRS 311.595(16) (allowing for sanctions against physicians who have "willfully violated a confidential communication"); KRS 311.597(4) (allowing for sanctions against physicians who depart from, or fail to conform to, "the principles of medical ethics of the American Medical Association").

11 *See id.* at 157.

12 *Coons v. McDonald-Burkman*, No. 2018-SC-000474, 2019 WL 1236265, at \*3 (Ky. Mar. 14, 2019).

13 *Caldwell*, 464 S.W.3d at 157.

14 *Id.*

15 *Id.* at 792.

16 *Id.* at 790.

17 *Id.*

18 *Id.* at 792.

19 *Id.*

## Happy 31

*Continued from page 6*

to members. They were newspaper clippings of issues of interest to the trial bar.

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By Taylor Richard

## Kentucky Supreme Court and Court of Appeals Key Decisions for October and November 2022

### Kentucky Supreme Court Decisions

*City of Barbourville v. Hoskins*,  
No. 2021-SC-0435-DG, 2022 Ky. LEXIS 339 (Ky. 2022).  
*Opinion by Chief Justice Minton. All Sitting. All Concur.*

Evelyn Hoskins, who suffers from diabetic neuropathy causing loss of protective sensation in her feet, sustained burns on the bottom of her feet after visiting Barbourville Water Park, owned by the City of Barbourville (the City). Hoskins sued the City under theories of premises liability, strict liability, and breach of contract.

The trial court granted summary judgment in favor of the City on all claims. On the strict liability claim, the trial court found the water park was not an ultra-hazardous activity creating strict liability. Then, on the breach of contract claim, the trial court found Hoskin's payment of admission did not create a contract upon which a claim arose. Last, the trial court found the premises liability claim failed because the sun-heated sidewalks did not pose an unreasonable risk of harm and the injury sustained was not foreseeable. The Court of Appeals reversed on the premises liability claim, concluding the questions of reasonability and foreseeability required submission to the jury.

First, the Kentucky Supreme Court had to determine the scope of the duty owed by classifying Hoskins as a trespasser, licensee, or invitee, finding Hoskins was an invitee of the water park because she was "an individual present on the premises at the explicit or implicit invitation of the property owner to do business or otherwise benefit the property owner." *Bramlett v. Ryan*, 635 S.W.3d 831, 837 (Ky. 2021). The resulting duty owed by the City to her was "to discover unreasonably dangerous conditions on the land and either eliminate or warn of them." *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010).

Next, the Court found that while it is generally a question of fact to be presented to the jury whether an unreasonably dangerous condition existed sufficient to trigger the duty to warn or ameliorate, the trial court was correct in finding

that no reasonable jury could conclude that sun-heated concrete walkways at the water park were an unreasonably dangerous condition. *Hoskins*, 2022 Ky. LEXIS 339, at \*6.

Hoskins provided no evidence that the walkways at the water park were negligently maintained or defectively designed. She provided no evidence that other water parks take steps to minimize the sun-generated heat of their concrete walkways. She provided no expert testimony regarding industry standards or practices with which Barbourville Water Park failed to comply. Hoskins simply produced no evidence that a reasonable person in the place of the City would have taken any action to eliminate the alleged risk created by the sun heating the concrete walkways.

*Id.*, at \*6-7. As such, the trial court did not err in deciding that as a matter of law the sun-heated walkways at the water park were not an unreasonably dangerous condition.

The court also addressed the foreseeability issue, finding Hoskin's injuries were not foreseeable to the City. "Under comparative fault, when an open-and-obvious hazard is identified, the land possessor is only liable for injuries caused by the hazard that are foreseeable. Only if such injury was foreseeable did the land possessor have a duty to eliminate the hazard." *Id.*, at \*7-8. Hoskins argued that even if the sun-heated walkways were open and obvious, the City still had a duty to eliminate the hazard if it was foreseeable that an invitee would be injured by the harm despite the inherent warning an open-and-obvious hazard provides.

Although foreseeability of the plaintiff's injury is part of the breach analysis for the jury, summary judgment may be proper "when a hazard cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable." *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, 297 (Ky. 2015). The Court found:

This case presents such a circumstance. Hoskins

produced no evidence of any feasible means the City could have undertaken to lessen the alleged risk created by heat radiating from sidewalks warmed by the summer sun. She did not produce any evidence that the City acted outside of industry standard practices. And she did not provide any evidence why the City would anticipate injuries like hers to take place. So we hold that the trial court appropriately concluded that Hoskins' injuries were not foreseeable to the City, and thus the City had no duty to eliminate the allegedly dangerous condition. *Hoskins*, 2022 Ky. LEXIS 339, at \*9.

The Court reiterated that this was a “rare circumstance” in which summary judgment was proper, where the plaintiff had “provided no evidence of the existence of an unreasonably dangerous condition.” *Id.*

## Kentucky Court of Appeals Decisions

*Cheatwood v. Kentucky Farm Bureau Mutual Insurance Co.*  
No. 2021-CA-0699-MR, 2022 Ky. App. LEXIS 96 (Ct. App. Oct. 21, 2022), To Be Published.  
*Opinion by Acree. Before Chief Judge Clayton, Judges Acree and Taylor. All Concur.*

This decision answers whether an certain underinsured motorist (UIM) policy exclusion precluded coverage for a wife's loss of consortium claim when her husband was injured while riding a motorcycle. The Court of Appeals held that it did.

Ronnie Cheatwood was driving his

motorcycle when an underinsured motorist struck him. He was thrown from the bike, suffered severe injuries, and eventually required a below the knee amputation of his left leg. His motorcycle was insured by another insurance company that did not include UIM.

Ronnie and his wife, Carrol Cheatwood, were named insureds on a Farm Bureau policy with UIM benefits covering a 2007 Chevrolet truck. That policy contained an exclusion to UIM benefits, providing: “We do not provide Underinsured Motorists Coverage for bodily injury sustained by any insured...while occupying or operating a motorcycle owned by any insured.”

Carrol Cheatwood asserted a claim for loss of consortium and Farm Bureau denied coverage. Both parties moved for summary judgment. The circuit court entered judgment in favor of Farm Bureau, relying on the persuasive authority in *Kentucky Farm Bureau Mutual Insurance Co. v. Armfield*, No. 2014-CA-001559-MR, 2016 Ky. App. LEXIS 23, at \*7 (Ct. App. Feb. 26, 2016). The circuit court held:

LOC [loss of consortium] is related, derivative, or dependent on a valid bodily injury claim of the spouse...It is not a reasonable interpretation of the [Farm Bureau] policy to hold Mrs. Cheatwood would expect UIM [underinsured motorist] coverage for a LOC claim arising from this bodily injury to her husband. Mr. Cheatwood was occupying or operating a motorcycle, and any claim for bodily injury while doing so is excluded from the [Farm Bureau] policy.

On appeal, Mrs. Cheatwood argued the policy expressly excludes bodily injury claims, but not loss of consortium claims and therefore

coverage exists for the different, independent, separate, and not expressly excluded claim. Farm Bureau argued an LOC claim only exists as a derivative of Mr. Cheatwood's bodily injury claim, which is expressly excluded, therefore the LOC claim is likewise excluded.

The Court of Appeals noted “an exclusion cannot grant coverage,” *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 873 (Ky. 2002), and looked to the provision granting UIM coverage in the policy. The “Insuring Agreement” provides Farm Bureau: “. . . will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury: (1) sustained by an insured; and (2) caused by an accident...”

The policy defines insured as “(1) you or any family member” or “any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in (1) ...”

Based on the policy language, the Court of Appeals determined the rationale urged by Mrs. Cheatwood regarding the exclusion provision—that failure to expressly exclude loss of consortium claims results in coverage—would also mean there is no coverage for loss of consortium claims because they are not expressly listed under the coverage provision. The Court also found that based on Farm Bureau's rationale, there would be coverage—absent an exclusion—under the “Insuring Agreement” for loss of consortium as a derivative claim of the expressly covered bodily injury claim.

The Court of Appeals found either: there is no coverage for LOC in the first place (if LOC is not derivative of bodily injury claim), or the LOC claim is excluded (if it is derivative of the excluded bodily injury claim when

## Court of Appeals

*Continued from previous page*

driving a motorcycle). It found the LOC claim is not separate, apart, and distinct from the bodily injury claim, but rather a derivative and dependent claim of the bodily injury claim, citing *Moore v. State Farm Mutual Insurance Company*, 710 S.W.2d 225 (Ky. 1986) and *Daley v. Reed*, 87 S.W.3d 247 (Ky. 2002). In sum, the Court of Appeals wrote: “Because a loss of consortium claim is dependent upon a bodily injury claim, an insurance provision limiting or excluding coverage for one individual’s bodily injury claim also operates to limit or exclude a related individual’s derivative loss of consortium claim.”

The Court of Appeals found unpersuasive the unpublished opinion in *Hoskins v. Kentucky Farm Bureau Mutual Insurance Co.*, No. 2011-CA-001454-MR, 2012 WL 4841094, at \*6-7 (Ky. App. Oct. 12, 2012), which concluded the identical bodily injury exclusion did not operate to exclude a loss of consortium claim.

*Kentucky v. Riley, et al.*  
NO. 2021-CA-1115-MR, Ky. App.  
LEXIS 95 (Ct. App. Oct. 21, 2022),  
To Be Published.  
*Opinion by Judge Caldwell. Before Chief  
Judge Clayton, Judges Caldwell, and K.  
Thompson. All Concur.*

The question in this case involves whether the commonwealth can be ordered to produce criminal discovery materials to a civil litigant suing the criminally accused. The Court of Appeals sidestepped, remanding to the trial court to determine whether the criminal accused’s motion to stay to the original order which required her to turn over the discovery materials, should be granted.

A December 2017 fire consumed an apartment building in south Louisville, killing and injuring residents. Estates and survivors of the injured filed suit against various entities, including Alltrade Service Solutions LLC (Alltrade), which “owned, operated, and managed” the apartment building. That matter was assigned to Jefferson County Circuit Court, Division One.

Daneshia Peden was charged with various criminal offenses arising from the apartment fire, and her case was assigned to Division Six. Alltrade filed a motion seeking from Peden discovery of all materials turned over to her by the prosecution in the criminal matter. A motion to compel was filed, which Division One granted, ordering the guardian *ad litem* assigned to Peden to obtain the materials from her criminal defense attorney.

Peden’s criminal defense attorney moved for a stay of the order, arguing irreparable injury could result from dissemination of information in an ongoing capital criminal matter. Instead of ruling on Peden’s motion, Division One entered an order requiring the Commonwealth Attorney’s office (the Commonwealth) to turn over the materials it had turned over to Peden. The Commonwealth Attorney’s office informed Division One that the question of discoverability of such materials before the Court of Appeals on another matter and an opinion was forthcoming. Division One took no immediate action. Division Six entered an order prohibiting the parties in the criminal matter from sharing the materials.

The action before the Court of Appeals was decided on procedural grounds so Alltrade filed another motion to compel. Division One ordered the Commonwealth to provide the materials for *in camera* inspection, after which Division One would distribute relevant documents to counsel. The

Commonwealth appealed that order.

First, the Court of Appeals determined that sovereign immunity did not prevent the trial court from ordering the Commonwealth to act. The Commonwealth argued that it is not just the imposition of a lawsuit against the sovereign, absent waiver, which is prohibited by sovereign immunity, but any judicial process cannot be instituted or carried out against the Commonwealth without its consent. Thus, according to the Commonwealth, the discovery order here purports to compel it to act, which implicates its immunity. The Court of Appeals disagreed, finding “sovereign immunity is limited to instances where the Commonwealth or a division thereof is being named in an action.” 2022 Ky. App. LEXIS 95, at \*7. Numerous examples of caselaw involve allegations of discovery violations by state agencies. If the Commonwealth’s argument were to have any merit, these cases wouldn’t exist.

Next, the Court of Appeals had to determine whether it was an abuse of discretion for Division One to order the Commonwealth as a non-party to the lawsuit to tender discovery from the criminal case. The Commonwealth argued the abuse of discretion occurred by ordering the non-party to turn over the discovery when a party to the civil action, Peden, possessed the same materials sought.

The Court of Appeals held that it was an abuse of discretion because Division One had failed to first determine whether Peden’s constitutional rights would be implicated by requiring the criminal case discovery to be turned over in the civil matter. Division One “abused its discretion, however, in not ruling on Peden’s motion to stay the order promulgated by it ordering her to turn over the discovery provided her, a party to the action before it.” *Id.*, at \*11. The case was remanded for



Division One to address “whether Peden’s constitutional rights would be violated by requiring the discovery materials from the criminal prosecution be turned over to the civil plaintiff before the resolution of the criminal case.” *Id.*, at \*12.

*Ditto v. Mucker*

No. 2021-CA-1488-MR, 2022 Ky. App. LEXIS 103 (Ct. App. Nov. 18, 2022).

To Be Published.

*Opinion by Cetrulo. Before Judges Acree, Cetrulo, and Goodwine. All Concur.*

This decision involves the proper procedure, party, and time frame for substituting a personal representative for a defendant who dies during litigation.

On November 7, 2015, Robert E. Murray, Jr. and Barbara Ann Ditto (Appellants) were involved in a two-vehicle accident with Jerry Mucker (Defendant). In November 2017, Appellants filed a complaint in circuit court claiming Mucker acted negligently while driving his vehicle. First Chicago Insurance Company (First Chicago), Mucker’s vehicle insurer, represented him in the action.

On September 16, 2020, at the end of an unsuccessful mediation, Appellants’ counsel informed First Chicago that Mucker had recently died of COVID-19. After confirming Mucker had died on September 9, 2020, First Chicago filed a notice of death of defendant with service to the Appellants. No personal representative was appointed for the deceased Mucker; no estate was opened for Mucker.

On September 24, 2021, First Chicago filed a motion for summary judgment, claiming Appellants’ failure to substitute a personal representative as a defendant to revive the action within a year of the death mandated dismissal of the action. The Breckinridge Circuit Court granted the motion for summary judgment and dismissed the underlying action. The trial court found that, despite having received

proper notice of Mucker’s death, the Appellants failed to revive their action by substituting a personal representative for Mucker within the one-year statute of limitations. Additionally, the trial court determined that any agency relationship that may have existed between First Chicago and Mucker terminated upon Mucker’s death. Finally, the trial court found no conflict of interest or ethical violations for a plaintiff to take action to revive claims against a deceased defendant.

On appeal, the Court of Appeals found KRS 395.278 and CR 25.01 act in tandem to provide the process of revival—when a defendant dies during litigation—as well as the window within which it must be completed.

KRS 395.278 provides that “[an application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party.” CR 25.01, operating in conjunction with the statute, provides, in pertinent part:

(1) If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party[.]

Ky. CR Rule 25.01.

On appeal, the Appellants ar-

gued that it was First Chicago that bore the duty to have an administrator appointed so that the negligence claim could proceed as “representative and “agent” of Mucker. Appellants also argued that they were ethically prohibited from filing for the appointment of administrator for the estate because Supreme Court Rule (SCR) 3.130 (1.7) prohibits attorneys from representing opposing parties in an action.

The Court of Appeals reiterated “[i]f a defendant dies after a complaint is filed but before legal resolution, the attorney for the deceased has a duty to disclose his or her client’s death to the opposing party.” *Harris v. Jackson*, 192 S.W.3d 297, 307 (Ky. 2006). However, quoting CR 25.01, which provides “the motion for substitution *may* be made by the successors or representatives of the deceased party or *by any party*” (emphasis added), the Court of Appeals held the “deceased’s attorney is not *required* to file the motion for substitution.” *Ditto v. Mucker*, 2022 Ky. App. LEXIS 103, at \*5-6. If the representative of the deceased *or* the other party decides to revive the action, KRS 395.278 provides they must file a motion for substitution within one year after the defendant’s death.

In *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006), the Kentucky Supreme Court held a defendant’s attorney had a duty to disclose the defendant’s death during the pendency of litigation. However, nothing suggests that duty extends beyond the duty to report to require the defendant’s attorney to file the motion for substitution. *Ditto v. Mucker*, 2022 Ky. App. LEXIS 103, at \*7. In fact, in *Jackson v. Estate of Day*, 595 S.W.3d 117 (Ky. 2020), while discussing the *Harris* opinion, the Kentucky Supreme Court referred to the fact that “plaintiffs in the case were required to revive the action

*Continued on following page*

## Court of Appeals

*Continued from previous page*

pursuant to KRS 395.278 within one year of [defendant's] death, which they failed to do." *Id.*, at 124. Again, the Supreme Court had emphasized the "clear direction" in CR 25.01, providing the motion for substitution "may be made by the successors or representatives of the deceased party or by any party." Direction in CR 25.01: the motion for substitution "may be made by the successors or representatives of the deceased party or by any party. . . ." *Ditto v. Mucker*, 2022 Ky. App. LEXIS 103, at \*7-8.

The Court of Appeals further found it unnecessary to discuss if any agency relationship existed between First Chicago and Mucker because if any did exist, the agency ended at Mucker's death. The Court of Appeals, being a precedent following court, was not at liberty to create a unique exception under these circumstances to the "well established rule that agency relationships terminate at the death of the principal." *Id.*, at \*9. Rather, First Chicago, as a non-party insurance provider is a real party in interest as the primary obligor and was thus continuing the action through virtual

representation by filing the motion for summary judgment.

Finally, the Court of Appeals disagreed with the argument that had Appellants filed a petition on Mucker's behalf that would have—in a limited capacity—be the same as representing both sides of the litigation, thereby violating SCR 3.130 (1.7). Rather, "not petitioning for the appointment is contrary to the Appellants' *own interest*

because without the appointment, as we have discussed, the litigation could be properly dismissed under CR 25.01 and KRS 395.278." *Id.*, at \*10 (emphasis in original). The appointment under these circumstances is more akin to joining an essential party than it is representing an opposing party.

Therefore, First Chicago, on behalf of Mucker, was entitled to judgment as a matter of law. 

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## Personal Jurisdiction

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- v. Thompson Hine, LLP*, No. 2017-CA-001245-MR, 2019 Ky. App. Unpub. LEXIS 509, at \*8 (Ct. App. July 12, 2019) (vacated by, and remanded by, on other grounds, *Holt v. Thompson Hine, LLP*, No. 2019-SC-0596-DG, 2020 Ky. LEXIS 510 (Dec. 9, 2020)). So, literally, an LLC may be everywhere and nowhere, having perhaps a member in all 50 states, making it “at home” in every state.
- 13 There are few, if any, cases where the “third” category has been applied, despite the fact that *Goodyear* defined being “at home” within this third category. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (where a mining company based in the Philippines was sued in Ohio for issues arising out of or related to activities which had happened in the Philippines. The defendant company stopped operations in WWII, but the president and principal owner of the company returned to his home of Ohio and carried on almost all the business of the company in Ohio. The Court held: “[w]ithout reaching that issue of state policy, we conclude that, under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding.” *Id.* at 448 (emphasis added)).
- 14 571 U.S. 117, 137 (2014).
- 15 *Goodyear, supra*, FN 6.
- 16 *Goodyear Luxembourg Tires, SA* (*Goodyear Luxembourg*), *Goodyear Lastikleri T.A.S.* (*Goodyear Turkey*), and *Goodyear Dunlop Tires France, SA* (*Goodyear France*).
- 17 *Goodyear*, 564 U.S. at 929 (internal citation omitted) (emphasis added).
- 18 *Id.* (quoting *Helicopteros*, 466 U.S. at 416).
- 19 *Id.* at FN 5.
- 20 *Id.* (quoting *Brown v. Meter*, 681 S.E.2d 382, 394 (N.C. Ct. App. 2009)).
- 21 *Id.*
- 22 *Id.* at FN 6. (Emphasis in the original.)
- 23 *Id.* at 923-24 (Emphasis added).
- 24 *Id.* at FN 6.
- 25 *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017).

- 26 *Id.*
- 27 Brief of Petitioner-Appellant, *Bristol-Myers Squibb Co. v. Superior Court*, 2017 U.S. S. Ct. Briefs LEXIS 801.
- 28 *Id.* (citing *Goodyear* at 564 U.S. at 919).
- 29 *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).
- 30 See *supra*, FN 26.
- 31 *BMS*, 137 S. Ct. at 1781.
- 32 *BMS*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).
- 33 *Id.*
- 34 *Id.* at 1785-86 (citations omitted).
- 35 *Id.* at 1787.
- 36 *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1023 (2021).
- 37 *Id.* at 1031 (citations omitted).
- 38 *Id.* at 1026 (quoting *BMS*, 137 S.Ct. 1773).
- 39 *Id.* at 1026.
- 40 *Id.* at 1022.
- 41 *Id.* at 1028.
- 42 *Id.* at 1032 (Alito, J., concurring).
- 43 *Id.*
- 44 *Id.*
- 45 *Id.*
- 46 *Id.*
- 47 *Id.* at 1033.
- 48 *Id.* at 1034 (Gorsuch, J., concurring) (emphasis added).
- 49 *Id.*
- 50 *Id.*
- 51 *Caesars*, 336 S.W.3d 51, 55 (Ky. 2011) (citing *Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002); *Mohler v. DoradoWings, Inc.*, Ky. App., 675 S.W.2d 404, 405 (1984); and, *Info-Med, Inc. v. Nat’l Healthcare, Inc.*, 669 F. Supp. 793 (W.D. Ky. 1987)).

- See also *Davis H. Elliot Co. v. Caribbean Utils. Co.*, 513 F.2d 1176, 1179-80 (6th Cir. 1975).
- 52 *Id.*
- 53 *Id.* at 57.
- 54 *Id.* at 54 (quoting *Cummings v. Pitman*, 239 S.W.3d 77, 84 (Ky. 2007) (The purpose of the statute “is to permit Kentucky courts to exercise personal jurisdiction over non-resident defendants while complying with federal constitutional due process.”)).
- 55 See *supra*, FNs 36 & 37.
- 56 *Caesars*, 336 S.W.3d at 58.
- 57 *Id.*
- 58 *Id.* at 59.
- 59 503 F. Supp. 2d 839, 844 (W.D. Ky. 2007). Judge Heyburn ruled: “The second prong, like the second prong of the relevant portion of Kentucky’s long-arm statute, asks whether the cause of action arises from the defendant’s contacts in this state. This case is not a situation where two patrons came to Caesars for the first time and where it is unclear what motivated them (i.e., was it Caesars’ advertisements, an Internet search, word of mouth, or something else?). In this case, Caesars’ advertisements not only may have brought these patrons to the casino in the first place for their initial visit, but Caesars continued direct mail and loyalty club relationships with Jayne and Burkhead ensured that the two would be repeat patrons.” *Id.*

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