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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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Contents

The Positive Impact of What We Do.....	4
By Paul Kelley, KJA President	
Thank You to All You ‘Rudy Bayers’ Out There.....	6
By Maresa Taylor Fawns, Chief Executive Office	
Washington Update.....	8
By Tad Thomas, President, American Association for Justice	
The Modern Puzzle of PJ, Chapter II: How to Make the International Shoe Fit for You	10
By Gregory J. Bubalo	
Supreme Court Adopts New Kentucky Rules of Appellate Procedure.....	16
By Euva May	
BOOK REVIEW: Witness Preparation: How to Tell the Winning Story.....	21
By Frederick W. Moore III	
League of Justice.....	22, 23
How to Avoid Having Dead Defendants Kill Your Case.....	24
By John Slack	
2023 Friends of KJA	25
KJA Welcomes New Members as of February 27, 2023	27
Kentucky Supreme Court and Court of Appeals Key Decisions for December 2022 and January 2023.....	30
By Jeff Adamson	

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By Paul Kelley, KJA President

The Positive Impact of What We Do

Our lives are under assault every day—some things we know about now—some we’ll find out about many years in the future. Corporate greed, cover ups, lack of compassion and arrogance led to catastrophic consequences for our clients and people throughout the Commonwealth of Kentucky and the country. Unchecked, corporations can get away with just about anything. Criminal penalties are often unsatisfying and don’t provide relief to those aggrieved. Just within the 21 years I have been practicing law, we’ve seen fraud and atrocious conduct perpetrated upon people in the most insidious ways.

Many children have suffered sex abuse from clergy of various religious organizations. Boy Scout leaders have abused children. We’ve also seen widespread consequences from defective products, which were knowingly sold and marketed despite containing harmful chemicals (Roundup), asbestos (cosmetic products) and many others caused traumatic injuries to hundreds of thousands of people. The opioid epidemic has destroyed lives. Unfortunately, Kentucky suffers disproportionate impact from the opioid crisis. There are many more examples of institutions and people who engaged in conduct that harmed thousands of people and destroyed families. Inevitably, the cover-ups occurred. Then the denials occurred. They attacked and shamed the victims. They attacked the science. In many instances, they paid for favorable studies, which supported their defenses. Inevitably, they attacked the attorneys representing the victims. Frequently, when all else failed, they concocted schemes to avoid taking full responsibility for the harms they caused without having to suffer a business consequence.

So, what is the common denominator with these scandals and crises? Lawyers like you willing to defend their clients and the 7th amendment rights of all Kentuckians. Without dedicated lawyers, bad actors would frequently not be held

accountable for their malfeasance. Lack of accountability and consequence leads to more bad conduct and more undeserving victims. Whether we’re handling automobile collisions, or mass tort cases, the work we do makes a difference in the lives of our clients and the public, generally. It is something of which we should all be proud. In fact, the pride associated with what we do, along with the privilege of being lawyers who have dedicated our lives to protecting the rights of people and the civil justice system, should always serve as a reminder when the case is tough, and the obstacles seem insurmountable. Being attacked by your adversary is never fun. Dealing with obstructive tactics is frustrating and frequently draining. Our job is to search for and expose the truth. The truth is often inconvenient and damning to our adversaries. Thwarting our efforts to find it is usually their primary mission. Thus, without us, our clients wouldn’t stand a chance. Representing our clients carries a tremendous responsibility and imposes a significant burden. But we make a difference even when it does not feel that way. Indeed, accountability does not always come in the form of a jury verdict or settlement. Simply exposing bad conduct, forcing answers to difficult questions, and inducing change is a form of justice.

I hope it goes without saying that the Kentucky Justice Association has been and will continue to be our greatest ally during our continuing quest to safeguard the constitutional rights of our clients. So many of our members have been at the forefront of fighting the problems addressed herein and many others. As an organization, we continue to fight to protect the 7th Amendment so all of us can continue fighting for our clients. Keep doing what you’re doing. We make a difference.





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By Maresa Taylor Fawns, Chief Executive Officer

Thank You to All You ‘Rudy Baylors’ Out There

KJA held its regular board meeting on February 17 at Central High School in Louisville. The school has a Law and Government Magnet program where students are exposed to the law and participate in mock trials. Meeting the students in the program was a wonderful experience; I was so impressed at their ambition, their communication, and their determination to impress. Unlike most teenagers, they didn’t keep quiet in an effort to look cool with their peers; instead, they dove into the experience and showed how smart and committed they were to following their dreams.

They took us on a tour of the courtroom, which is named for Alberta O. Jones, one of the first African American women to pass the bar. She was murdered in 1965, and her murder remains unsolved.

Joe Gutmann has been the students’ advisor and teacher for many years—and he just had them read *The Rainmaker* by John Grisham! As he relayed to us at our meeting, the students were curious about our group coming to their school and asked him who we were and what we do. According to Mr. Gutmann, he assured the students that the lawyers coming to their school were all “Rudy Baylors” and not “Leo Drummonds.” *The Rainmaker* is one of my favorite movies, and I swelled with pride that someone outside KJA recognizes that you all are the heroes—the Rudy Baylors!


The 2023 General Assembly is in session until the end of March, and quite a bit of legislation has been filed that affects you and your practice. Of note are the following:

SB 137 is a bill that requires the judge to reduce a jury award to the amount paid for medical bills, not the amount billed. As you know, this proposal would create a major problem with your clients receiving adequate justice and takes away the jury’s autonomy in deciding damages, paramount to the integrity of the 7th Amendment.

HB 51 takes away patients’ rights to a free copy of their own medical records, attempting to change the law that has been in effect since the 90s.

HB 135 would legalize fully autonomous vehicles and specifies that the driver of the vehicle is the automated driving system (ADS). Those simple words can create lengthy and highly complex litigation for years to come sorting out how simple negligence is handled (or not handled) when one of these vehicles causes damage to Kentuckians. Because you can’t hold the ADS accountable since it isn’t a person, all claims against autonomous vehicles may have to be brought as products liability claims, costing hundreds of thousands of dollars to prosecute. If an ADS causes damage to a Kentuckian or his or her vehicle and the damage is not significant, then they will be forced to collect on their own insurance to repair themselves and their vehicles.

To illustrate, currently, if I fly through a red light and hit another person, I am negligent. My insurance pays for the damage to the other person and his or her vehicle. If an ADS flies through a red light hitting another person, it isn’t a matter of whether the ADS was negligent and caused the damage. You may have to prove it was a design defect or other products issue—again barring most people the ability to get the wrongdoer to pay for the damage.

Please respond to our Legislative Alerts, and please talk to your legislators about these bills. They have significant impact on your clients’ 7th amendment rights. And tell them **Rudy Baylor** sent you. 

upcoming KJA Seminars 2023



IN-PERSON SEMINARS	DATE AND LOCATION	CHAIR(S) & CLE HOURS
Ethics & Day at the Races	Friday, April 21 Ethics at Castle & Key Distillery Day at the Races at Keeneland	Jay Prather 2 Ethics Hours
KJA Golf Scramble	Monday, April 24 Persimmon Ridge Golf Course	John Bahe
Bourbon Tour and CLE (Sponsored by Ringler Associates)	Friday, May 19 Bourbon Distilleries	Mike Schafer 2 CLE Hours
Two-day Auto Summit	Thursday, June 1– 2 Embassy Suites Downtown Louisville	Jay Vaughn 10 CLE Hours
Women Trial Attorney’s Retreat (Sponsored Lawyers Mutual Insurance Company)	Thursday, June 15–16 West Baden	Hannah Jamison 6 CLE Hours
Annual Convention	Wednesday, September 6–8 Omni Louisville	Paul Kelley 10 CLE Hours
Deposition College	Thursday, November 2–3 Justice Plaza, Louisville	Frederick Moore 10 CLE Hours
#StreamingKJA (WEBINAR SERIES)	PRE-RECORDED EPISODES	CHAIR(S) & CLE HOURS
Basics for All PI Attorneys (Sponsored Lawyers Mutual Insurance Company)	4 Episodes Binge or watch individually	Kevin Weis 5 CLE Hours
Discovery in PI Cases (Sponsored by Physicians Life Care Planning)	5 Episodes Binge or watch individually	Wilson Greene 5 CLE Hours
Medicine for ALL PI Cases (Sponsored by Ringler Associates)	8 Episodes Binge or watch individually	Abby Green 8 CLE Hours
Pitfalls in PI Practice	5 Episodes Binge or watch individually	Jon Hollan 5 CLE Hours
LIVE ZOOM WEBINARS	DATES AND TIMES	CHAIR(S) & CLE HOURS
Wilson Greene — Trial Verdicts Webinar <i>Floyd v. West Bend — A Case Review</i>	Tuesday, March 14 (12:30 to 4:00)	Jay Vaughn, Rob Mattingly 3-CLE Hours
Handling Subrogation and Lien Issues	Tuesday, April 18 (12:45 to 4)	Clayton Merschbrock 3 CLE Hours
Litigating Nursing Home Negligence	Wednesday, April 19 (9 to 12:30)	Lisa Circeo 3 CLE Hours
Making a Successful Premises Liability Case	Monday, May 8 (12 to 2:15)	Chris Goode 2 CLE Hours
Personal Injury/Products Liability: Apportionment vs. Indemnification (Sponsored by Physicians Life Care Planning)	Tuesday, May 9 (12 to 1:15)	Kirk Laughlin, Taylor Richard 1 CLE Hour
Hans Poppe — Trial Verdict Webinar <i>Slone v. Commonwealth — A Case Review</i>	Wednesday, May 10 (12:30 to 4:00)	Jay Vaughn, Rob Mattingly 3 CLE Hours
Exploring Bad Faith Cases	Wednesday, May 17 (11 to 2:30)	Scarlette Kelty 3 CLE Hours
Mike Schafer, Trial Verdicts Webinar—A Case Review	May 24 (12:30 to 4:00)	Jay Vaughn, Rob Mattingly 3 CLE Hours
Understanding Colossus to Maximize Your Client’s Case	Thursday, May 25 (11 to 2:30)	Mike Schafer 3 CLE Hours
30(b)6 Deposition Strategies and Updates	Tuesday, June 6 (11 to 1:30)	Paul Kelley 2 CLE Hours
Using Mediation to Maximize Your Case	Friday, June 9 (9 to 12:30)	Kelly Reeves 3 CLE Hours
Identifying Different Causes of Action	Tuesday, June 27 (12 to 1:15)	Richard Hay 1 CLE Hour
Effectively Marketing Your Own Practice	TBA	Julie Tackett 3 CLE Hours
Proving Your Invisible Injuries Cases (Sponsored by Physicians Life Care Planning)	TBA	TBA 3 CLE Hours

Check www.KentuckyJusticeAssociation.org for updated dates and times.



By Tad Thomas, President, American Association for Justice

Washington Update

With the start of the 118th Congress, America has a 51-49 Democrat-controlled Senate. Judicial nominees can now be confirmed without facing the procedural hurdle of a discharge motion, which was a product of a previously evenly divided Senate Judiciary Committee and required additional floor time.

In his first two years in office, the President confirmed almost 100 federal judges, including one Supreme Court justice, 28 circuit court judges, and 68 district court judges.

The President made significant strides in diversifying the face of the federal judiciary, both professionally and demographically. 67 percent of the President's nominees are racially diverse, and 55 percent are professionally diverse, steering away from the trend of nominating mostly prosecutors or Big Law corporate lawyers. Of those confirmed so far, 15 are former plaintiff lawyers, and 10 more await confirmation. Many more have pro-civil justice backgrounds with experience representing individuals and are supported by AAJ.

The challenge that remains for the Administration is filling all the district court vacancies, which still require both home state Senators' approval—by way of a blue slip—no matter the party. AAJ will continue to seek out and support excellently qualified candidates to continue to build on the success of the past two years.

Congressional Climate

In the new Congress, AAJ will educate lawmakers from both sides of the aisle on issues of importance to trial lawyers and their clients. AAJ's continued bipartisan outreach is crucial and has led to much success in restoring rights for clients.

Each year, AAJ monitors more than 1,000 federal bills across dozens of issue and practice areas, examining the text for tort reform language. Our vigilance is constant and necessary because our opponents continue to lobby for laws that diminish or eliminate the rights of your clients and preempt state remedies.

State Affairs

Every state legislature convenes in 2023. AAJ State Affairs closely monitors legislation at the state level and assists trial lawyer associations (TLAs) with talking points, state-by-state comparisons, and other resources. We anticipate that many issues tackled in recent years will continue to be active in the coming year.

In the 2022 state legislative sessions, AAJ responded to nearly 100 requests from TLAs while tracking more than 1,600 bills.

Automated vehicles, privacy, UM/UIM insurance limits, and asbestos were some of the highest-profile bills for which the TLAs requested assistance. Other topics included damage caps, civil procedure, insurance, medical negligence, and transportation.

The tort reform community indicated that their priorities in 2023 will target litigation financing, preventing plaintiffs' counsel from anchoring noneconomic damages to jurors, creating new restrictions on the ability of local governments from contracting with outside counsel, and limiting the ability of plaintiffs' attorneys to rely on public nuisance doctrines in litigation.

If you have questions, please contact state.affairs@justice.org for support and assistance.

Legal Affairs

AAJ filed 30 amicus curiae briefs in 2022, many of which were filed in collaboration with state trial lawyer associations and other organizations committed to protecting access to justice. These briefs were filed in the United States Supreme Court, state supreme courts, and federal courts of appeal on more than 16 different issue areas.

The AAJ Legal Affairs team also continues to monitor recent certiorari petitions filed during the Supreme Court's current term and eagerly awaits the Court's opinions in *Mallory v. Norfolk S. Rwy. Co.* (No. 21-1168) and *Health & Hosp. Co. of Marion Cty., Ind. v. Talevski* (No. 21-806), which were heard in October 2022 and in which AAJ participated.

Recent Court Opinions

Damages Cap Unconstitutional as Applied in Ohio CSA Case

The Supreme Court of Ohio recently lifted a significant limit to justice for survivors of child sex abuse in holding that the state's statutory damages cap, as applied, violates state constitutional due process guarantees. In October 2021, AAJ filed an amicus brief in the case to challenge the state's compensatory-damages cap facially and as applied. *Brandt v. Pompa*, 2022 WL 17729469, No. 2021-0497 (Ohio Dec. 16, 2022), *reconsideration denied*, 2022 WL 18028654 (Ohio Dec. 29, 2022).

Victory in West Virginia Collateral Estoppel Case

The U.S. Court of Appeals for the Sixth Circuit upheld judgment in favor of residents who were exposed to

"forever chemicals" emitted by DuPont factories on December 5, 2022. The court held that plaintiffs were entitled to assert nonmutual offensive collateral estoppel, as AAJ had urged in its brief as amicus curiae in September 2021. *See In re E.I. du Pont de Nemours & Co. C-8 Personal Injury Litigation*, No. 21-3418, 2022 WL 17413892 (6th Cir. Dec. 5, 2022).

Circuit Enters Judgment for Plaintiff in Duty-to-Warn Case

On November 7, 2022, the U.S. Court of Appeals for the Eleventh Circuit held in favor of an advanced-stage kidney disease patient seeking damages for Shire Pharmaceuticals' failure to instruct doctors to monitor patients' kidney function while using the company's mesalamine drug, LIALDA. *See Blackburn v. Shire U.S., Inc.*, No. 20-12258, 2022 WL 16729466 (11th Cir. Nov. 7, 2022). The Circuit Court

denied Shire's petition for rehearing en banc on January 5, 2023. AAJ previously filed an amicus brief in the Alabama Supreme Court in the case, arguing that the duty to warn included a duty to provide instructions for safe use.

AAJ amicus curiae briefs are available on our amicus curiae web page. For more information about AAJ's legal affairs program, please email legalaffairs@justice.org.

Fighting for You and Your Clients

Thank you for your ongoing support. AAJ will continue to fight for access to justice for your clients. We will keep you informed about important developments and welcome your input. You can reach me at 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?
Make your contribution today.

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to make your contribution





By Gregory J. Bubalo¹

The Modern Puzzle of PJ, Chapter II: How to Make the International Shoe Fit for You

In the last issue of *The Advocate*,² I detailed why *BMS* and *Ford*, two³ relatively recent cases from SCOTUS⁴ and *Caesars*, one case⁵ from SCOKY,⁶ make issues of personal jurisdiction (PJ) confusing for Kentucky lawyers. However, the editors of *The Advocate* demanded I stop my academic tirades and give the readers some practical advice. Here is my humble attempt.

Don't Pay Much Attention To The "Canonical Phrases"

Based on the most recent *Ford* decision, if your plaintiff was injured in the forum state by the wrongful acts of the defendant either inside or outside of our commonwealth, and the defendant has a substantial presence in our state, PJ probably exists. This may be true despite the so-called "canonical phrases," contained in *International Shoe*⁷ and *Goodyear*.⁸

In *Goodyear*, Justice Ginsberg delineated the definitions of Case Specific PJ through these so-called "canonical phrases," such that no PJ exists unless the suit, "*aris[es] out of or relate[s] to the defendant's contacts* with the forum."⁹ Moreover, "even regularly occurring sales of a product in a State [do not] justify the exercise of jurisdiction over a claim unrelated to those sales."¹⁰

However, the holding in *Ford* did not hinge on these "canonical phrases." As explained in "The PJ Puzzle," Chapter I, *Ford* involved two separate car wrecks (one in Minnesota and the other in Montana) asserting products liability claims. Neither car was designed or built by Defendant Ford in the forum states and the wreck was not directly connected to Defendant Ford's activities in the forum states. "According to [Defendant 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."¹¹ Justice Kagan writing for the majority in *Ford* rejected this argument and did so despite the holding in *BMS*.¹² According to Justice Kagan, it was the plaintiffs' contacts "at home" and injured in the forum states, and that Defendant Ford plainly

availed itself of the privileges of doing business through its substantial presence in the Forums.

This result was incongruent with *BMS*. Even though both Defendants *BMS* and *Ford* had substantial and continuous business contacts in the forum states, opposite results were reached. SCOTUS recognized that Defendant *Ford* was only "at home" in two states, namely where it was incorporated in Delaware and headquartered in Michigan. Although *causally* unrelated to the accident or even the case, SCOTUS emphasized that Defendant *Ford* maintained an impressive continuous presence in both forum states by selling and marketing cars, and sustaining a dealership network, which were activities "related to" the case. As stated in the opinion, "[Ford's] business is everywhere."¹³ Implicitly, this must mean that although the cases did not "arise from" Ford's business in the forum states, the case was still "related to" such business, and this was sufficient to sustain jurisdiction where the injuries occurred in those states.

SCOTUS distinguished *Ford* from *BMS* because the plaintiffs in *BMS* were forum shopping, "suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State."¹⁴ However, Defendant *BMS* also had ongoing substantial business operations selling its products in the forum State of California, like Defendant *Ford* sold its cars in the forum states. What killed PJ for SCOTUS in *BMS* was the lack of contacts *by the plaintiffs*, despite the holding in *Goodyear* that *defendants' contacts* (not the plaintiffs') should be determinative.¹⁵

Perhaps some predictability can be gleaned by remembering that the ultimate destination for due process has always been, and should be about, fundamental fairness. Thus, *International Shoe* was perhaps more about an "estimate of the inconveniences" which would result to the corporation from a trial away from its 'home' or principal place of business...,"¹⁶ rather than strict adherence to whether the suit "arose out of" or was "related to" the defendants' minimum contacts. Estimating inconveniences for both parties,

in balancing the “fundamental fairness” of forcing one or the other party to sue or defend away from “home,” may be the correct, ultimate destination.

Always Have A Plan B

Although *Ford* was “unanimous,” the consensus among the Justices about what *International Shoe* and its progeny means, was not. For this reason, always have a Plan B to file elsewhere if you expect a PJ challenge.

For instance, *BMS* was handed down in the middle of our Essure® products liability action.¹⁷ Cases nationally were filed in state courts in California, St. Louis, and Missouri, as well as the Eastern District of Pennsylvania. Our firm filed hundreds of cases in The City of St. Louis, Missouri because: 1) St. Louis, at that time, presented a good joinder opportunity for multi-plaintiff mass torts lawsuits, which was economical for our clients; 2) Missouri was the location of essential clinical trials and key witnesses; and 3) The first commercial release of Essure® occurred there.

After *BMS* was decided, our firms confronted motions to dismiss based on PJ which would have never been expected to succeed before *BMS*. *BMS*, at least on its face, had similar facts to our St. Louis Essure® cases. But our Missouri Essure® cases differed from *BMS* because Missouri had significant transactions in the state “arising out of” and “related to” our non-resident plaintiffs’ claims. Indeed, we filed expert affidavits asserting that the clinical trials of Essure® in Missouri played a significant role in mischaracterizing the safety and effectiveness of the device for our non-resident clients. On this basis, despite *BMS*, the Missouri state courts found PJ over Defendant Bayer, and this ruling survived Bayer’s Writ to the Missouri Supreme Court.¹⁸ In contrast, hundreds of cases filed in St. Louis that had been removed to federal court

were dismissed *en masse* as non-resident claims, like *BMS*.¹⁹ Thus, the federal and state courts were inconsistent in their interpretation of PJ post-*BMS*.

Distressingly, dismissing for PJ does not toll the statute of limitations in many states. After extensive jurisdictional research, we made the strategic decision to re-file many of the dismissed cases in Indianapolis (Marion County), Indiana. Bayer Corporation was incorporated in Indiana, and Indiana’s “savings statute” allowed us three years after the date of dismissal to refile many of our cases there.²⁰ Ultimately, our prosecution for our clients was successful.

Allege Facts To Support PJ in the Complaint and Ask For Discovery

PJ is fact specific—so, it’s necessary to allege jurisdictional facts up front,

in the Complaint. From the onset, in drafting the Complaint, remember that in Kentucky, finding PJ is a two-step process.

First, review must proceed under [the Long Arm Statute] KRS 454.210 to determine if the cause of action arises from conduct or activity of the defendant that fits into one of the state’s [nine] enumerated categories. ... [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.²¹

Unfortunately, for a Kentucky lawyer, alleging PJ in conformity to

Continued on following page



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Modern Puzzle of PJ

Continued from previous page

one or more of the nine parts of our Long Arm Statute is difficult because the statute is arguably vague and ambiguous. Further, our statute has been interpreted as being *more restrictive* than federal due process requirements, despite the purpose of the statute being, “to grant jurisdiction, not to deny it.”²²

In *Clark v. Kolbell*,²³ Judge Thompson may have resolved some of the ambiguities²⁴ by interpreting Long Arm §(2)(a), Part 4 for “an act taken outside of the Commonwealth to subject a defendant to personal jurisdiction if it is part of a larger course of conduct directed at the Commonwealth.”²⁵ The plaintiff in *Clark* sued Defendant Dr. Kolbell, a licensed psychologist in Oregon, for reviewing medical records in relation to the plaintiff’s disability claim brought in Kentucky. She claimed, among other things, that: (1) Dr. Kolbell committed negligence *per se* by performing a medical (psychological) examination without a license to do so in Kentucky; and, (2) the opinion rendered by Dr. Kolbell was “defamatory *per se*” because it implied Clark was untruthful concerning her disabling condition.²⁶ Defendant Dr. Kolbell argued that the single act—outside the commonwealth—of Defendant Dr. Kolbell evaluating Plaintiff Clark was not sufficient for PJ.²⁷

However, Plaintiff Clark alleged that Defendant Dr. Kolbell “likely” engaged in a course of conduct evaluating multiple Kentucky claimants regarding disability claims, which should be sufficient to sustain jurisdiction under Part 4, as follows:

...if a defendant both [causes a] tortious injury in this Commonwealth by an act or omission outside this Common-

wealth” and that defendant “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from . . . services rendered in this Commonwealth[.]” This ground for personal jurisdiction allows an act taken outside of the Commonwealth to subject a defendant to personal jurisdiction *if it is part of a larger course of conduct directed at the Commonwealth*.²⁸

The *Clark* Court further held that without discovery, it was impossible to determine whether Dr. Kolbell’s interaction with Kentucky is limited to the single act of reviewing Clark’s records... or whether he has conducted the same type of review regarding Kentucky residents on an ongoing basis that might be sufficient for personal jurisdiction....²⁹

Therefore, it is prudent to ask for jurisdictional discovery before the issue of PJ is heard by the trial court. If a trial court rules on a motion to dismiss for lack of PJ *without* conducting an evidentiary hearing on the matter, a nonmoving party “need only make a prima facie showing of jurisdiction.”³⁰ When a trial court is presented with a CR 12.02 motion to dismiss, the Court must take every well-pleaded allegation of the complaint as true and construe it in the light most favorable to the opposing party.³¹ As such, “[t]he court should not grant the motion unless it appears the pleading party *would not be entitled to relief under any set of facts which could be proved in support of his claim*.”³²

But if the Court determines jurisdiction based on matters outside the pleadings, such as affidavits or other

evidence, “...the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.”³³ “Broad discretion in discovery matters has long been afforded trial courts in both civil and criminal cases.”³⁴ However, in a complex case, discovery is not only allowed, *but is required*³⁵ before entry of a summary judgment.

In essence, a motion regarding jurisdiction may become a trial within a trial, where the Court must make findings of fact and law to determine its own jurisdiction.

PJ Can Be Used in the Corporate Shell Game to Evade Liability

Corporate defendants related to healthcare in medical negligence cases, nursing homes, and even multi-national publicly traded companies typically string together chains of subsidiaries, with parent companies located at a distance to hold their profit from the people they wrongfully injure. PJ is an integral part of that defense. We encountered a stark example of this, suing General Motors Co. (GM) and its subsidiary, General Motors LLC, in an exploding airbag case filed in Montgomery County.³⁶ In its CR 12.02(b) motion to dismiss, GM averred in a conclusory affidavit from John Kim that it, “does not conduct automotive business operations in the United States.”³⁷ Kim claimed that the work of designing, engineering, manufacturing and distributing GM cars is done by subsidiaries of GM, 100 percent owned and controlled by GM; that GM is merely a “holding company” owning and controlling General Motors Holdings Company and General Motors LLC; and that these subsidiaries do the work of making the motor vehicles and selling them in the U.S.³⁸

This type of separation of profit from responsibility has become an unfortunately typical corporate tactic to

avoid responsibility, such as “the Texas Two-Step” by Johnson & Johnson, recently rejected by the 3rd Circuit.³⁹ To oppose these motions, it’s good practice to review reports made to the United States Security and Exchange Commission (SEC) on Forms 10-K, where public companies like GM report their profit to the SEC and to shareholders. Attorneys should also look to quarterly letters to shareholders, and annual reports to shareholders.⁴⁰

Although *Kim’s Affidavit* depicted GM as an “empty shell,” this has not been how GM presents itself to the world. GM’s Form 10-K (2015) directly contradicted *Kim’s Affidavit*, stating, “General Motors Company (sometimes referred to as we, our, us, ourselves, the Company, General Motors, or GM) . . . design, build and sell cars, trucks, crossovers and automobile parts worldwide.”⁴¹ This quote is repeated

verbatim in each of GM’s Form 10-K’s (2015–2021).⁴² Further, GM holds itself out as an auto manufacturer to its investors.⁴³

Given these tactics, it’s important to anticipate and defend these types of challenges in the Complaint, by including piercing the corporate veil allegations, such as follows:

There exists, and at all times herein mentioned, there existed, a unity of interest in ownership between the certain Corporate Defendants and other Corporate Defendants such that any individuality and separateness between them has ceased and these Defendants are the alter ego of the other certain Corporate Defendants and exerted control over those Defendants. Adherence to the fiction of the

separate existence of these certain Corporate Defendants as any entity distinct from other certain Corporate Defendants will permit an abuse of the corporate privilege and would sanction fraud and/or would promote injustice.

Applying the appropriate standard of review in a CR 12.02 motion, the paragraph quoted above must be taken as true (as explained above).

In *Goodyear*, the Court entertained the prospect of treating Goodyear USA and its subsidiaries as a single enterprise for jurisdiction purposes, but ultimately held that the issue unfortunately had not been properly preserved.⁴⁴ Although SCOTUS has not directly addressed this issue, *Goodyear*

Continued on following page

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Modern Puzzle of PJ

Continued from previous page

recognized in dicta that the inquiry in doing so would be like an allegation of “piercing the corporate veil” in state law. Fortunately, it is settled Kentucky law that when one corporate entity is merely the alter ego or instrumentality of another entity, the corporate veil may be pierced.⁴⁵ As SCOKY held in *Inter-Tel*, “the limited liability which is the hallmark of a corporation is disregarded and the debt of the pierced entity becomes enforceable against those who have exercised dominion over the corporation to the point that it has no real separate existence.”⁴⁶

A thoughtful, well-pled complaint should anticipate these defenses and make specific allegations to support jurisdiction over all defendants.

For the first decades of my legal practice, I thought very little about *International Shoe*. But my attention has been dramatically re-directed in the past six years, as we all have come closer together and further away at the same time, through the internet, Zoom, and the pandemic. Justice Gorsuch in *Ford*⁴⁷ perhaps wrote the most relevant and compelling observation in the seventy-eight years since *International Shoe*, in his Concurring Opinion:

Since *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), this Court’s cases have sought to divide the world of personal jurisdiction in two. A tribunal with “general jurisdiction” may entertain any claim against the defendant. But to trigger this power, a court usually must ensure the defendant is “at home” in the forum State.⁴⁸ Meanwhile, “specific jurisdiction” affords

a narrower authority. It applies only when the defendant “purposefully avails” itself of the opportunity to do business in the forum State and the suit “arise[s] out of or relate[s] to” the defendant’s contacts with the forum State.⁴⁹

While our cases have long admonished lower courts to keep these concepts distinct, some of the old guardrails *have begun to look a little battered*.⁵⁰

As Justice Gorsuch recognized, *Ford* revealed a big hole in the old shoe. The old shoe came in only two sizes and *Ford* did not “fit” into either. We’ll have to wait to see if SCOTUS tries to repair the hole or goes shopping for a new pair. The question for the Court will be whether it can make the old *International Shoe* still fit, or whether it will be looking for some new shoes, better styled for the modern world and built for 2023, not 1945.



— 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 The author would like to thank his law partner, Kate Dunnington, and John Slack for their helpful edits and suggestions and is grateful to practice law with two such great lawyers.
- 2 Bubalo, Gregory J., *The Modern Puzzle of Personal Jurisdiction: Does the International Shoe Still Fit?* The Advocate, Jan./Feb. 2023, at 11 (hereafter “The PJ Puzzle” Chapter I).
- 3 *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (hereafter “BMS”); and, *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021) (hereafter “Ford”).
- 4 Hereafter, the Supreme Court of the

United States Supreme Court is called “SCOTUS.”

- 5 *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51 (Ky. 2011) (hereafter “Caesars”).
- 6 Hereafter, the Supreme Court of Kentucky is called “SCOKY.”
- 7 *International Shoe Co. v. Washington* 326 U.S. 310 (1945) (hereafter “*International Shoe*”).
- 8 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (hereafter “*Goodyear*”).
- 9 *Id.* at 923-24 (internal citation omitted) (emphasis added).
- 10 *Id.* at 930 n.6.
- 11 *Ford*, 141 S. Ct. at 1023 (emphasis added).
- 12 *Id.* at 1031.
- 13 *Id.* at 1022.
- 14 *Id.* at 1031.
- 15 See FNs 9 & 10, *supra*.
- 16 *Int’l Shoe Co. v. Washington* 326 U.S. 310, 317 (1945).
- 17 Essure® was a medical device intended to be implanted in a woman’s fallopian tubes. It was designed to take the place of the gold standard for permanent birth control, tubal ligation. Conceptus, Inc. (“Conceptus”) was the original manufacturer of Essure® but was acquired in 2013 by Bayer AG and its subsidiaries.
- 18 See *State ex rel. Bayer Corp., et al. v. The Honorable Michael K. Mullen*, Mo., No. SC96765 (Petition for Writ of Prohibition, Nov. 1, 2017); *State ex rel. Bayer Corp., et al. v. The Honorable Michael K. Mullen*, Mo., No. SC96765 (Order Denying Writ for Prohibition, Dec. 19, 2017).
- 19 See, e.g., *Moore v. Bayer Corp.*, 2018 U.S. Dist. LEXIS 147020 (E.D. Mo. Aug. 29, 2018). These decisions emphasized the lack of a connection of the plaintiffs to Missouri and ignored the obvious connection of Bayer and the case to Missouri. These cases were clearly inconsistent for that reason with past interpretations of *International Shoe*, despite lip service to applying those principles.
- 20 See Ind. Code § 34-11-8-1.
- 21 *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 57 (Ky. 2011) (emphasis added).
- 22 *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 nonresident defendants while complying with federal constitutional due process.”).
- 23 No. 2014-CA-000747-MR, 2016 Ky. App. Unpub. LEXIS 905*13 (Ky. Ct. App. Jan. 22, 2016).
- 24 *Id.*
- 25 *Id.* (Emphasis added). Part 4 allows jurisdiction based on acts “outside this Commonwealth” but then seems to contradict itself by requiring that “the tortious injury occurring in this Commonwealth *arises out of the doing* or soliciting of business *or a persistent course of conduct or derivation of substantial revenue within the Commonwealth.*” In other words, Part 4 could be read as allowing jurisdiction for acts committed “outside this Commonwealth” but only through those acts that “arise out of” activity listed “within this Commonwealth.” Justice Thompson’s interpretation of Part 4 is rooted in common sense and may save Part 4 from being contradictory.
- 26 *Id.* at *3.
- 27 *Id.* at *14 (citing *Bondurant v. St. Thomas Hosp.*, 366 S.W.3d 481, 486 (Ky. 2011) (“...[t]he mere fact that [a physician] may have known that [his] actions in [another state] might have an effect in Kentucky is alone insufficient to exercise personal jurisdiction.”)).
- 28 *Id.* at *13 (emphasis added).
- 29 *Id.* at *15.
- 30 *Hinners v. Robey*, 336 S.W.3d 891, 895 (Ky. 2011) (quoting *CompuServe Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996)).
- 31 *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987).
- 32 *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977) (emphasis added). *See also Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 429-30 (Ky. 1959); *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009); and *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002)).
- 33 336 S.W.3d at 893 n.1 (citing CR 12.02); and *see Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).
- 34 *Commonwealth v. Nichols*, 280 S.W.3d 39, 43 (Ky. 2009); *see also Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. Ct. App. 2001); *Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov’t*, 317 S.W.3d 23, 39 (Ky. 2010). Further, under CR 12.04, “[t]he defenses and relief enumerated in Rules 12.02 and 12.03, whether made in a pleading or by motion, shall be heard and determined before trial on application of any party unless the court orders that the hearings and determination thereof be deferred until the trial.”
- 35 *See Suter v. Mazyck*, 226 S.W.3d 837 (Ky. Ct. App. 2007).
- 36 *Wanda G. Benham v. Gen. Motors Co.*, Montgomery Circuit Court, Civil Action No. 22-CI-90170. The decision on PJ is still pending. Briefs in MSWord are available from gubalo@legalresults.com.
- 37 Hereafter called “*Kim’s Affidavit*,” filed Dec. 19, 2022, at ¶ 4.
- 38 GM is the 25th largest company by revenue on the Fortune 500 List grossing \$127 Billion. *See List of largest companies in the United States*, WIKIPEDIA (Dec. 26, 2022), https://en.wikipedia.org/wiki/List_of_largest_companies_in_the_United_States_by_revenue.
- 39 *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC)*, Nos. 22-2003, 22-2004, 22-2005, 22-2006, 22-0007, 22-2008, 22-2009, 22-2010, 22-2011, 2023 U.S. App. LEXIS 2323 (3d Cir. Jan. 30, 2023).
- 40 *See, e.g., Bayer Annual Report 2020*, BAYER (Feb. 25, 2021). <https://www.bayer.com/sites/default/files/2021-02/Bayer-Annual-Report-2020.pdf>.
- 41 *See GM’s Form 10-K (2015)* at 1 (emphasis added).
- 42 *See generally*, GM’s Forms 10-K (2015-2021).
- 43 *GM Delivers a Years of Firsts*, GM (Jan. 4, 2023), <https://investor.gm.com/news-releases/news-release-details/gm-delivers-year-firsts>. On its investor website, GM earlier this year declared, “General Motors Co. (NYSE: GM) and its dealers delivered 2.2 million vehicles in the U.S. in 2022, leading the industry in total sales, and extending its leadership in key market segments including full-size pickups, full-size SUVs and more.”
- 44 *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 930 (2011). The Court cited Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 14, 29-30 (1986), observing that “merging parent and subsidiary for jurisdictional purposes requires an inquiry ‘comparable to the corporate law question of piercing the corporate veil.’”
- 45 *Bear, Inc. v. Smith*, 303 S.W.3d 137, 147-48 (Ky. Ct. App. 2010); *Inter-Tel Techs, Inc. v. Linn Station Props, LLC*, 360 S.W.3d 152, 155 (Ky. 2012).
- 46 360 S.W.3d at 155
- 47 *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1034 (2021) (emphasis added).
- 48 *Id.* (citing *Daimler AG v. Bauman*, 571 U. S. 117, 137 (2014)).
- 49 *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 472, 475 (1985)).
- 50 *Id.*

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By Euva May

Supreme Court Adopts New Kentucky Rules of Appellate Procedure

Recently, the Kentucky Supreme Court adopted the Kentucky Rules of Appellate Procedure. Cited “RAP,” these rules supersede the Kentucky Rules of Civil Procedure regarding appeals. Effective January 1, 2023, the RAP rules combine prior rules of Civil Procedure and new provisions governing appellate practice in the courts in all cases. This article highlights some significant changes in the rules. This author recommends a thorough review of the RAP rules in their entirety before filing a pleading initiating an appeal. The RAP rules are available at the Kentucky Supreme Court’s home page appellate procedure link.

Change to Notice of Appeal. RAP 2, 3, 4

RAP rules 2, 3, and 4, govern. RAP 2(A)(2) and 2(B) (1) make every party in the case, at the time of the final order subject to review, a party to the appeal. Thus, while the Notice of Appeal must be served on every party in the trial court, the Appellant need no longer designate parties as an “Appellee” in the Notice itself.

Under RAP 3, the time for filing the Notice of Appeal remains within 30 days from the date of the notation of service of the judgment or the order appealed. However, the rule clarifies that filing a motion per CR 50.02, 52.02 or 59 tolls the 30-day deadline until the trial court has ruled on the motion. Under RAP 3(E), a party may file a Notice of Appeal prior to the court’s ruling on the motions; however, the party must then move the appellate court to hold the appeal in abeyance pending the trial court’s decision on the motion.

Additionally, the rules clarify that a Notice of Appeal should not be “docketed” or “filed” by the circuit court clerk until the filing fee is paid or a *Motion to Proceed in Forma Pauperis* is filed. See also *Mekuria v. James Martin et al.*, 2020-CA-0926 (Ky. App. May 27, 2022) (TO BE PUBLISHED). RAP 13 outlines costs and filing fees.

Prehearing Statement and Designation of Record

RAP rules 22 and 24 govern. The prehearing statement

is due 20 days after filing the Notice of Appeal. The Designation of Record is due 10 days after the appellate clerk enters the order concluding the prehearing procedure.

NEW — Entry of Appearance, Notice of Substitution, Motion to Withdraw. RAP 12

Counsel must file an Entry of Appearance in the appellate court after filing the initiating documents for the appeal.

If during the appeal, counsel discontinues representing the client, the new attorney must file a Notice of Substitution. The Notice of Substitution serves as the predecessor attorney’s Motion to Withdraw and further action by the withdrawing attorney is not required.

If the new attorney is unknown or to be determined, counsel seeking to withdraw must file the Motion to Withdraw. Counsel must serve the motion on the client at his/her last known address and list the client on the certificate of service for the motion.

Unbound Original and the Number of Copies of a Pleading

RAP 7 governs motions. RAP 14 contains a chart of the number of copies of a pleading required to be filed in each Court. The numbers required are the same as under the previous rules; however, the RAP rules refer to the copies as “one unbound and [X] bound copies.” The unbound document is the original pleading signed by counsel. Counsel should use blank pages to denote separations in the appendix instead of “extruding tabs.” Extruding tabs are still required for copies.

Designation of Record, Certification, Narrative Statement, and Access To The Entire Record (Sealed Documents). RAP 24, 25, 26, and 28.

RAP 24, 25, and 26 govern the requirements for a Designation of Record, the clerk’s certification of the record,

Continued on page 18



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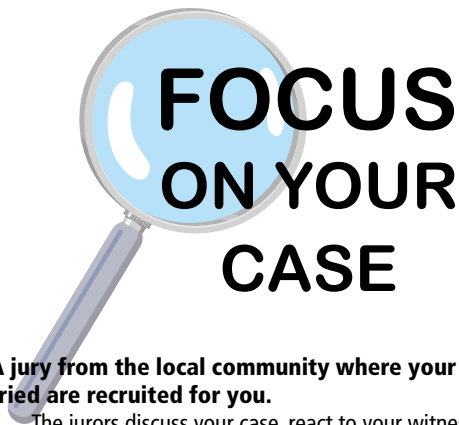
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RAP

Continued from page 16

narrative statements, and appellate counsel's access to the record.

Narrative statements now fall under RAP 25.

Under RAP 26(D)(2) appellate counsel may check out the trial court record from the circuit court clerk. This record will not include exhibits. Exhibits are available for review in the circuit court clerk's office.

Per RAP 28(B)(1), counsel *automatically has access* to sealed documents in the trial court record *unless* the document was submitted for *in camera* review. Viewing *in camera* items requires counsel file a Motion to View in the circuit or appellate courts.

Change to Page Limits and Word Count Certificates.

Under the Civil Rules, briefs and motions were subject to page limitations. The RAP rules re-codify the Civil Rules page limits only for *hand-written or type-written briefs*. The RAP rules contemplate *pro se* parties filing these briefs.

Computer generated briefs are now limited by either word count or page limit. If counsel intends to file a brief that exceeds the page limit afforded under RAP, counsel's brief must contain a "Word Count Certificate" stating the pleading complies with the word limit afforded by the rules. *RAP rule page limits are less* than those contained in the prior rules. (See Word Count Charts at right.)

RAP 15 provides a sample Word Count Certificate

This document complies with the word limit of RAP [insert RAP citation to the rule governing the document, e.g.,

Court of Appeals	Word Count	Page Limit	Rule
Appellant's Brief	8,750 words	20 pages	RAP 31(G)(2)(a)
Appellee's Brief	8,750	20	RAP 31(G)(2)(a)
Appellee+Cross Appellant Brief	14,000	30	RAP 31(G)(2)(c)
Reply Brief	1,750	4	RAP 31(G)(3)
Appellant Reply+Cross Response	10,500	25	RAP 31(G)(2)(c)
Petition for Rehearing, Modification, Publication	3,500	8	RAP 43
Motion for Discretionary Review	5,250	13	RAP 44

Supreme Court	Word Count	Page Limit	Rule
Appellant's Brief	17,500 words	40 pages	RAP 31(G)(3)(a)
Appellee's Brief	17,500	40	RAP 31(G)(3)(a)
Appellee Response+Cross Appellant initial	22,750	50	RAP 31(G)(3)(c)
Reply Brief	3,500	7	RAP 31(G)(3)(b)
Appellant's Reply + Cross Appellee Response	8,750	20	RAP 31(G)(3)(c)
If Appellant must respond to more than one Appellee Brief	1,750 additional words per Appellee Brief	4 pages additional per Appellee Brief	RAP 31(G)(3)(b)
Petition for Rehearing, Modification, Publication	3,500	8	RAP 43
Motion for Discretionary Review	5,250	13	RAP 44

31(G)(1)] because excluding the parts of the document exempted by RAP 15(D)¹ [and additional RAP citation, if any, such as RAP 31 (G)(1)], this document contains [state the number of words].

RAP 15(D) and RAP 31(G)(5) exclude from the word count covers, captions, signature blocks, certificates of service, word count certificates, exhibits, and appendices.

Change to Citations: Case Law and the Trial Court Record. Font. RAP 31

RAP 31 requires *italicized* case names. Cite the written record as “TR [page number(s)]. Cite the video record as “VR, month/day/year, hour and minute” at which the reference

begins. Citation to seconds is optional.

Footnotes must be in 12-point font and should be “easily readable.” Recommended fonts include Century Schoolbook, Century, and Times New Roman.

Change to Organization and Content of Briefs. RAP 32

(A)(1) limits the Introduction and Statement Concerning Oral Argument to *one page*.

(E) creates *two appendices* — the Record appendix and the Evidentiary appendix. The first item in the Record Appendix is an index of all documents contained therein setting forth where each document may be found in the record cited as “TR [page number(s)].”

The second item in the Record Appendix is the judgment, opinion,

or order under review. This appendix “shall” also contain findings of fact, conclusions of law and judgment of the trial court, any written opinions filed by the trial court in support of the judgment, and opinions from the court from which the appeal is taken. RAP 31(E)(1)(a).

Worker’s Compensation appeal briefs “shall” contain the opinions of the Administrative Law Judge, the Workers’ Compensation Board, and the Court of Appeals. RAP 31(E)(1)(a).

In addition to these required documents, the Record Appendix may contain other documents contained in the trial court record that the party finds important to the Court’s con-

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RAP

Continued from previous page

sideration of the issues on appeal. The Appendix should not contain documents previously attached to a Brief unless the documents are required RAP 32(E)(1)(a).

The parties may attach an Evidentiary Appendix which contains transcription of those parts of the video record that support the specific issues in the brief or relate to whether an issue is properly preserved. RAP 32(E)(2)(a). This appendix has a 50-page limit in the Kentucky Supreme Court and a 25-page limit in the Court of Appeals. A Reply Brief Appendix may contain up to 15 pages.

The Evidentiary Appendix must contain either an index or a reference at the top of each page to the witness whose testimony is transcribed and citation to the video record referencing the beginning and ending of the transcription, cited “VR, month/day/year, hour: minute.”

NEW Electronic Service. RAP 30

Under RAP 30, counsel may serve trial judge and any party who consents to electronic service by e-mail.

Change to Supplemental Authority. RAP 35

Per RAP 35, a Motion to Cite Supplemental Authority referencing case law that became final after the filing of a party’s final brief is limited to 250 words. The motion should describe how the case applies to the issues on appeal and attach a copy of the opinion.

A Motion to Cite Supplemental Authority that pre-dates the filing of the party’s final brief is limited to 400 words. It must explain how the opinion relates to the issues and why the original brief

omitted it. Attach a copy of the opinion to the motion.

Changes to Oral Argument.

RAP 38

RAP 38 no longer requires 10 days pass between the Notice of [No] Oral Argument and rendition of the Court’s opinion. Conceivably, parties to a Kentucky Supreme Court appeal could receive a “No Oral Argument” notice on Tuesday of Rendition Week and the Court’s opinion two days later.

A “Notice of Issues to Be Argued” is only required in death penalty cases.

“Opinion and Order” Renditions. RAP 40

An “Opinion and Order” is treated as an “Opinion” which is effective upon finality. Orders are effective upon entry and filing by the Clerk.

Change to Citation to Unpublished Opinions. RAP 41

The citation must include the style, date, and case number, e.g., *Doe v. Roe*, 2019-SC-1234 (Ky. Feb. 20, 2020).

Counsel may include the Westlaw and Lexis citations; however, the Court presumes the opinion is available on a “free publicly available electronic database,” to wit: the Court’s searchable database found on its home page.

Citations to cases from other jurisdictions must include a URL or other identifier permitting easy access to the opinion. If the opinion is not available on “a freely public electronic database,” counsel must include a copy of the entire opinion in the Brief’s Record Appendix.


Clarification to Motions for Discretionary Review. RAP 40, 44, 45

RAP 40(D)(2) and (G)(2) clarify that if discretionary review is granted,

the “opinion of the court finally disposing of the matter *supersedes all lower court opinions* arising from the appeal.” Thus, no part of the Court of Appeals’ opinion has effect once the Kentucky Supreme Court grants review. Counsel must consider whether Cross-Motions and Cross-Appeals are necessary. If counsel won on an issue in the lower court not raised on appeal, cross pleadings may be necessary.

RAP 45 permits *Amicus Curiae* Motions for or against Discretionary Review.

NEW Failure to Comply with RAP Rules. RAP 10

The Court may issue a deficiency notice, a show cause order, or direct a party to take certain action. The Court may strike the pleadings, briefs, records, or portions thereof. The Court may impose monetary sanctions on counsel from \$500 to \$1,000. The Court may dismiss the appeal or deny the Motion for Discretionary Review or impose any further remedies specified in any applicable rule. 

— *Euva May works for Hessig & Pohl as a litigation attorney. Prior to Hessig & Pohl, she spent three years as a staff attorney for the Kentucky Supreme Court and eighteen years with the Department of Public Advocacy and Louisville Metro Public Defender’s Office where she handled appeals, original actions, and post-conviction proceedings in state and federal courts. She may be reached at euva@hessigandpohl.com.*

1 The author has substituted “(D)” for “(E)” since rule 15(D) contains the provision governing exclusions from word count and page limits.

BOOK REVIEW: Witness Preparation: How to Tell the Winning Story

By Frederick W. Moore III

Something weird happens to aspiring plaintiff's lawyers after their first day of torts. We develop some sort of condition where we forget that behind every opinion we read and brief we write is a *real* story about *real* people. If left untreated, the condition progresses after we pass the bar exam. Symptoms include looking at every prospective client's story through a shallow assessment of damages, or even worse, the loss of the ability to effectively tell your client's story to a jury of her peers.

Jesse Wilson provides the cure in his book, "Witness Preparation: How to Tell the Winning Story." Jesse is a consultant and communications specialist with a background in theatre. He uses methods he learned through the theatre and his experiences with some of the nation's most renowned trial lawyers to teach lawyers how to be the directors of their clients' stories.

As a practicing trial lawyer, I find that direct examination can be the most difficult part in trial. I have full control over what I say in opening and closing, and for the most part, can control answers given in voir dire and cross examination with carefully crafted questions. But on direct, the witness is the star of the show. That I had no control over what she may say or how she may say it always caused me to sweat a little more during that portion of trial. Jesse's book taught me that, if I am to be an effective director of my client's story, I must let my inner lawyer voice fade away and find a deeper connection with my witness. (Wilson refers to this as "becoming the ball.") All effective direct examinations of plaintiffs create a personal relationship between the witness and the jury. Jesse's book taught me that, if I am to conduct an effective direct examination, I must first develop that personal connection with her. Once that relationship is established, I can then use the story telling methods Jesse provides to help the jurors create their own relationship with the witness.

Wilson's book also asks its readers to abandon the traditional method of focusing your client's story on her harms and losses. Instead, he proves that the most compelling stories

are about people who do not give up—people who, even against impossible odds, fight bravely and do not give up. This method of storytelling, which Wilson dubs 'From victim to vic-

tor,' helps inspire the jury. As jurors see what your client is fighting for, they are more likely to also subconsciously notice what was taken from her. Damages will be measured more accurately if they are perceived as taken, as opposed to lost.

This book is one of a kind. In a world where virtually every book suggests adopting a specific method for success, Jesse Wilson, rightfully, acknowledges that the plaintiffs are the start of the proverbial show at trial. And the only way to effectively tell their stories at trial is for the lawyer to get out of his or her own way. I highly recommend it to any trial lawyer looking to hone his or her craft!



— Frederick Moore, *Friend's Club*, represents people who have been injured by medical negligence, nursing home neglect and abuse, product liability, car wrecks, and premises liability. Before joining Grossman & Moore, Frederick was a Deputy Division Chief at the Louisville-Metro Public Defender's Office. He may be reached at fmoore@grossmangreen.com.



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By John Slack

How to Avoid Having Dead Defendants Kill Your Case

As Benjamin Franklin taught us, there are two things truly unavoidable in life: death and taxes. In terms of a filed case, while taxes may be an important factor at the end of a case's life, death, in particular of a party, can have a much more immediate effect on your litigation. Specifically, if a defendant dies before you can file your case, this can have a disastrous effect on your client's claims and even result in your case being dismissed before it ever reaches a jury. The most common reason for such a dismissal is because plaintiff's counsel will not know the defendant has died until after the statute of limitations has passed, which can cause relation back issues and prevent your case from going forward. However, you can take steps to avoid this problem and keep your case moving forward.

Case Law and Statutes Related to Dead Defendants

To begin with, as any good personal injury attorney knows, the first statute you must always consider is the applicable statute of limitations. For example, when dealing with a cause of action related to an automobile accident, the statute of limitations allows the plaintiff up to two years from the date of injury or the last payment of basic reparation benefits (BRB) to file their cause of action.¹ Beyond this, however, to file any complaint, whether it is an automobile accident case to a products liability case, research into a defendant is also key. This research usually includes looking into where a defendant resides, and more morbidly, whether the defendant is still alive. If you determine that a defendant died since the central events of the case, then the case can proceed in a few ways. If an estate has already been opened by the defendant's family, then you may be able to proceed with just naming the estate as the defendant in your case. In addition, KRS 396.011(1) establishes that, unless the claims against the estate are barred by an earlier statute of limitations, you have six months after the appointment of the personal representative to bring a claim against the estate. If, however, no estate has been opened, and if it appears that no estate will be opened, you have the option of petitioning

to have an estate opened and have a public administrator appointed so you may proceed with suing the estate.

However, even for the most diligent attorney, it is not always possible to determine if a defendant has died before you file your complaint. If the defendant died before you file the complaint, but before the statute of limitations has expired, this situation can raise many interesting questions. Assuming the deceased defendant is the only named defendant, naming the decedent can cause the court to declare that the complaint is a nullity.² If the statute of limitations has not expired, however, you may be able to undergo the procedure to have an estate opened for the defendant and then move to amend the complaint to name the proper party pursuant to CR 15.03. To do such an amendment to add a party, CR 15.03(2) holds the following:

An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, *within the period provided by law for commencing the action against him*, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.³

As indicated by the wording of CR 15.03(2), whether or not the amendment to bring in the estate is brought within the time period specified in the statute of limitations is a key consideration. If this amendment is not brought within that specified time range, the Court may find that the amendment does not relate back to the filing date of the original complaint and may find the case is time barred.

This very situation occurred in one of the seminal cases on this issue, *Gailor v. Alsabi*.⁴ In *Gailor*, the plaintiff was

Continued on page 26

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Dead Defendants

Continued from page 24

involved in a motor vehicle collision with an alleged tortfeasor, Fred Whalen (Whalen) on June 3, 1991.⁵ The plaintiff was covered under a policy of insurance that provided BRB benefits, the last of which was paid on February 4, 1992.⁶ Whalen died on February 5, 1992.⁷ Whalen's will was admitted to probate on March 2, 1992 and the probated will was filed as a public record in the office of the Jefferson County Court Clerk on March 10, 1992.⁸ On February 3, 1994 the plaintiff filed an action against Whalen, one day before the running of the statute of limitations on February 4, 1994.⁹ A summons was issued to Whalen and was returned on February 16, 1994 with a notation that Whalen was deceased.¹⁰ Despite this, the plaintiff's attorney claimed he did not learn of Whalen's death until April 6, 1994.¹¹ Regardless, the plaintiff's attorney waited until September 22, 1994 to move that the public administrator be appointed as administrator of Whalen's estate.¹² "The appointment was made on November 17, 1994."¹³ The plaintiff's attorney then filed an amended complaint substituting the public administrator of Whalen's estate as party defendant in place of Whalen on January 19, 1995.¹⁴ The Kentucky Supreme Court held that the plaintiff's claim against the administrator of Whalen's estate was time barred by the statute of limitations because the amended complaint substituting the administrator of Whalen's estate as defendant was not filed until after the statute of limitations period expired.¹⁵ Specifically, the Supreme Court found that:

The period of limitations expired on February 4, 1994. Fred Whalen had been de-

ceased for almost two years when this action was filed. The administrator of his estate did not exist as a legal entity until November 17, 1994, more than nine months after the expiration of the period of limitations...¹⁶

In this case, Appellee did not sue the proper defendant; and the proper defendant (the administrator) could not have had notice within the period of limitations, because he had not yet been appointed.¹⁷

Despite being decided more than twenty years ago, *Gailor* remains one of the controlling cases on this issue.¹⁸ Further, the Supreme Court has held that doctrines such as equitable estoppel cannot be used to excuse a plaintiff's failure to ascertain a party's vital status before filing their Complaint. For example, in *Williams v. Hawkins*,¹⁹ the plaintiff argued on appeal that their case should not be dismissed on the basis of equitable tolling and estoppel.²⁰ While equitable tolling can be used to toll the statute of limitations when there is no wrongdoing, but a plaintiff is unable to obtain vital information despite exercising due diligence, the Supreme Court found that this doctrine was inapplicable in this case because "this case does not involve a procedural technicality nor circumstances beyond Williams' control. The information necessary to pursue a timely claim against Charlotte Hawkins' estate was readily and publicly available and no extraordinary circumstances exist to justify equitable tolling."²¹ As for equitable estoppel, the plaintiff argued that the insurer's failure to disclose the insured's death should have been adequate grounds to prevent the estate from invoking the statute of

limitations.²² However, the Supreme Court also rejected this argument, holding that "readily available public information documented Charlotte's death approximately seven months after the motor vehicle accident. Williams's reliance on KFB to investigate Charlotte's vital status and then inform her is misplaced. Absent facts justifying equitable estoppel and thus a departure from the bright-line statute, the trial court's dismissal must stand."²³ Based on this recent case law, it makes sense that the courts expect plaintiff's counsel to engage in thorough research to determine if a defendant is alive or dead before they file their complaint. Reliance on the insurer to disclose this information is not enough now that access to the internet is readily available and this information is generally available if one does an internet search on the party. While there may be unique circumstances that may alter this analysis, such as if news of the party's death is not widely available, the takeaway seems clear: *always do internet research on the parties to your case before you file and before you start running up on statute of limitations deadlines.*

However, the Supreme Court indicated that one possible argument could be used to avoid dismissal of your case in this situation, specifically the virtual representative argument. As explained by the Supreme Court, "[t]he doctrine of virtual representation 'recognizes that a party joined in a law suit may effectively represent another not so joined, where they have a common interest and the former may be depended upon to present the merits of the controversy which would protect the rights of the latter.'"²⁴ In fact, the Supreme Court has recognized that an insurer would have the same interests in protecting its obligations under its insurance policy as the insured or its estate would have in defending itself,

thus virtual representation could be an adequate defense if a plaintiff failed to properly name the estate of the deceased defendant before the limitations period expired.²⁵ Therefore, when possible, be sure to name the insurer in your case to allow for this defense should there be any issues with naming the individual defendant.

Defendant Dies after the Complaint has been Filed

As a brief aside, it is also worth noting another situation that may occur after you file a case; namely that a defendant may be alive when you file a complaint and serve them, but pass away afterward before the case is resolved. Pursuant to KRS 395.278, “[a]n 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.”²⁶ As recently explained by the Supreme Court, “KRS 395.278 is a statute of limitation, and that a motion for substitution properly filed with the court in accordance with CR 25.01(1) within the one-year allotted by the legislature constitutes revival.”²⁷

The *Harris* case is very illuminating on this issue, as in that case the defendant was alive when the case was initiated and during the early parts of discovery, but died before the case was resolved.²⁸ The defendant’s attorney later learned of this death and moved to dismiss the case for plaintiff’s failure to timely revive the action in the name of the defendant’s estate.²⁹ The trial court dismissed the cause of action, but on appeal with the Supreme Court, the Court reversed the trial court’s decision on the grounds of virtual representation (as discussed above) and emphasized that when a lawyer discovers the client passed away during the pendency of a

suit, “the lawyer has a duty to inform opposing counsel and the Court in the lawyer’s first communications with either after the lawyer has learned of the fact.”³⁰

Therefore, the situation if a defendant dies after a case has been initiated against them is much simpler. In that situation, defense counsel has an affirmative duty to disclose this fact to the Court and the plaintiff’s counsel so the

plaintiff’s counsel may revive the action against the defendant’s estate.³¹ Failure to do so on defense counsel’s part can be considered a violation of the ethical rules and can even be considered a fraud on the Court itself. Thus, if defense counsel attempts to hide this fact from you and the Court past the limitations period to revive the action,

Continued on following page

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Dead Defendant

Continued from previous page

the case law and ethical rules are clear that this action is improper and cannot be considered as sufficient grounds to dismiss the action. In addition, if the insurer is named in the suit, virtual representation can apply and allow the case to continue even if, for whatever reason, the action is not revived in a proper manner.

In summation, the case law and civil rules are clear that the plaintiff's counsel has an affirmative duty to determine the status of any named defendants before filing their complaint.³² This means diligently checking to see if the defendant is still alive when the case is filed. This type of work means that counsel needs to check local obituaries and possibly employ investigators to confirm the defendant's status. While this is a lot of work on the front end, doing this legwork is still the best way to ensure you have named the proper defendants in a case and that you will have no issues with statutes of limitations or with naming a defendant who cannot be sued.³³ In addition, service or attempted service of the defendant can help confirm their status, as there will sometimes be a notation after attempted service of the defendant that the individual is deceased. This will not always be obvious from CourtNet, however. Checking the physical case file is sometimes necessary to confirm the reason why service on the defendant was not accomplished.³⁴

If you confirm the defendant is not alive, either before or after filing the complaint, you need to open an estate to proceed with the case if one has not already been opened by the defendant's family. Even if the estate is not opened before the statute of limitations has expired, virtual representation can

save your case if you named the insurance company as a defendant as well.³⁵

Finally, if the defendant dies after the complaint was filed, defense counsel has an affirmative duty to inform you of this development so you can revive the action, and failure to do so can be considered an ethical violation and a way to save your case from dismissal.³⁶ Keep each of these facts in mind as you begin working on your cases to make sure your client's claims are not dead on arrival after they have been filed with the Court.



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1 See KRS 304.39-230(6).

2 See *Ratliff v. Oney*, 735 S.W.2d 338 (Ky.

Ct. App. 1987); *Mitchell v. Money*, 602 S.W.2d 687 (Ky. Ct. App. 1980).

3 Emphasis added.

4 990 S.W.2d 597 (Ky. 1999).

5 *Id.* at 599.

6 *Id.* at 600.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 605.

16 *Id.* at 601.

17 *Id.*

18 See *Jackson v. Estate of Gary Day*, 595 S.W.3d 117, 122-23 (Ky. 2020) (“Marshall and Jackson’s case is essentially a more recent version of *Gailor*. A suit filed against a party who is deceased at the time of filing is a nullity as to that party. Unless proper amendments are made prior to the expiration of the statute of limitations, or the requirements of the relation back rule are satisfied, the claim is generally barred. The plaintiff has an affirmative obligation to locate the correct party defendants and determine

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their vital status, a status that could have been easily determined in this case by simply examining the court file.”) (emphasis added) (footnotes omitted); see also *Williams v. Hawkins*, 594 S.W.3d 189, 198-99 (Ky. 2020) (“As in *Gailor*, Williams did not sue a proper defendant within the two-year statute of limitations period. Here, Charlotte passed away sixteen months before the complaint was filed against her. While it is unfortunate that all parties learned of Charlotte’s death one day prior to expiration of the limitations period, *the plaintiff has an affirmative obligation to locate the correct party defendants and determine their vital status in a timely manner. In this case, a simple internet search could have easily determined Charlotte Hawkins’s status. Although the result may seem unfair, it could have been avoided with due diligence, something Kentucky law has always required in cases such as this.*”) (emphasis added).

19 594 S.W.3d 189 (Ky. 2020).

20 *Id.* at 192-93.

21 *Id.* at 196.

22 *Id.*

23 *Id.* at 198.

24 *Jackson v. Estate of Gary Day*, 595 S.W.3d 117, 125-26 (Ky. 2020) (quoting *Harris v. Jackson*, 192 S.W.3d 297, 303 (Ky. 2006)).

25 See *Harris v. Jackson*, 192 S.W.3d 297, 304 (Ky. 2006).

26 Emphasis added.

27 *Marcum v. Currin*, 615 S.W.3d 34, 39 (Ky. 2021).

28 *Harris*, 192 S.W.3d at 299.

29 *Id.* at 301.

30 *Id.* at 305 (quoting *Kentucky Bar Ass’n v. Geisler*, 938 S.W.2d 578, 580 (Ky. 1997)) (internal quotation marks omitted).

31 See CR 25.01 (“Upon becoming aware of a party’s death, the attorney(s) of record for that party, as soon as practicable, shall file a notice of such death on the record and serve a copy of such notice in the same manner provided herein for service of the motion for substitution.”).

32 See *Ratliff v. Oney*, 735 S.W.2d 338, 341 (Ky. Ct. App. 1987) (“It is incumbent upon a plaintiff, when he institutes a judicial proceeding, to name the proper party defendant. It is fundamental to our jurisprudential system that a court cannot, in an in personam action acquire jurisdiction until a party defendant is brought before it. The party defendant must actually or legally exist and be legally capable of being sued.”).

33 See *Jackson v. Estate of Day*, 595 S.W.3d 117, 122-123 (Ky. 2020) (“A suit filed against a party who is deceased at the time of filing is a nullity as to that party. Unless proper amendments are made prior to the expiration of the statute of limitations, or the requirements of the relation back rule are satisfied, the claim is generally barred.”).

34 *Id.* at n. 3.

35 See generally *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006).

36 *Id.*

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By Jeff Adamson

Kentucky Supreme Court and Court of Appeals Key Decisions for December 2022 and January 2023

Immunity

Sheronda Bailey, as Mother and Next Friend of Katlin Edwards v. Christopher Collins, et al.

--- S.W.3d --2022 WL 17365870 (Ky. App. 2022)

The plaintiff appealed from summary dismissal of statutory, negligence, and battery claims against the Jefferson County Board of Education (Board), an Assistant Principal Christopher Collins (A.P. Collins), and school security guard Floyd Alexander (Alexander). The claims arise out of the 10-day suspension of eleventh grade Iroquois High School student, Katlin Edwards (Edwards) who was physically restrained by A.P. Collins and Alexander in the wake of multiple fights following a school pep rally. The school officials allege Edwards had to be restrained after she shoved A.P. Collins multiple times. Edwards alleged injuries due to being physically restrained.

After Edwards and her mother, Sheronda Bailey's (Bailey) appeals from the suspension were denied within the school system, Bailey's mother, on behalf of Edwards, filed suit in Jefferson Circuit Court against the Board, A.P. Collins, and Alexander asserting claims for (1) judicial review of the denied appeals pursuant to KRS Chapter 13B; (2) negligence by A.P. Collins and Alexander; and (3) battery by A.P. Collins and Alexander.

On summary judgment the trial court dismissed the plaintiff's claim against the Board under KRS Chapter 13B as they do not fall under the scope of a formal administrative hearing and subsequently the court likewise dismissed the negligence and battery claims as barred by qualified immunity.

As an initial matter, the school defendants argued the appeal should be dismissed for failure to name an indispensable party because Edwards reached the age of majority before the appeal but was not named in the notice of appeal. The Court of Appeals disagreed, noting that a motion to substitute Edwards as the plaintiff was pending before the appeal but the trial court never ruled upon the motion and thus

the mother Bailey remained the proper named appellant.

With regard to the dismissal of the claim against the Board under KRS Chapter 13B, the Court of Appeals found such claim moot. Edwards had already served the suspension and was no longer a high school student. Neither the Court of Appeals nor the trial court could grant either Bailey or Edwards any meaningful relief under KRS Chapter 13B. The Court also concluded none of the exceptions to the mootness doctrine applied.

The Court of Appeals also affirmed the trial court's finding that the plaintiff's negligence and battery claims were barred by qualified immunity. A.P. Collins and Alexander's decision to use physical restraint on Edwards was an exercise of their discretion and judgment within the scope of set policies in a specific situation. When shifting the burden to the plaintiff to prove the school officials acted in bad faith, the Court of Appeals found no such showing by the plaintiff. While acknowledging battery is an intentional tort for which malice or bad faith is an element and qualified immunity does not apply, the Court of Appeals nonetheless affirmed summary judgment due to the plaintiff's failure to show that A.P. Collins or Alexander acted with malice or in bad faith or that their physical restraint of Edwards was otherwise unlawful.

Carucci v. Northern Kentucky Water District

-- S.W.3d --, 2022 WL 17724565 (Ky. App. 2022)

Plaintiff appealed from the trial court's summary judgment in favor of Defendant Northern Kentucky Water District on her negligence claim arising from injuries sustained after stepping and falling on an unsecured water meter cover on a public sidewalk in June 2015. Summary judgment had previously been reversed in *Northern Kentucky Water District v. Carucci*, 600 S.W.3d 240 (Ky. 2019), precluding suit based on governmental immunity. The trial court granted the second summary judgment upon finding no affirmative evidence the water utility had actual or constructive notice of the unsecured water meter cover.

On appeal, the Court of Appeals acknowledged that the water utility has a duty to maintain water meters on public sidewalks “in a reasonably safe condition for the safety of pedestrians and the traveling public[,]” but nonetheless held the plaintiff must make a showing that the utility had actual or constructive notice of the dangerous condition.

The Court affirmed the trial court upon finding no evidence of actual notice in the record that the water meter was improperly secured. There was no reporting of the water meter causing the plaintiff’s fall was loose prior to the fall. Nor did the Court find evidence of constructive notice. There was no evidence in the record of anyone having observed the meter cover loose for any length of time before the plaintiff’s fall.

The Court rejected the plaintiff’s argument that reports of unauthorized water use on the property in May 2015 is evidence of actual or constructive notice. The water utility argued it promptly dispatched an employee to inspect the meter and while there its employee had a duty to secure the cover after working on the meter. While the plaintiff pointed out there was no testimony that the employee secured the meter when completing work, the Court held such evidence of detected unauthorized water use did not satisfy the actual or constructive notice requirement. Actual notice requires affirmative evidence of prior reports of the unsecured meter and constructive notice requires evidence of how long the cover was unsecured prior to the fall. Plaintiff made neither showing.

Lastly, the Court rejected the plaintiff’s inference that the employee did not secure the meter cover based on it being unsecured when she was injured a month later. The record on appeal lacked evidence to show it was more likely that the water utility’s em-

ployee failed to secure the meter than a member of the public accessing the meter and leaving the cover unsecured. The Court found summary judgment proper because the plaintiff only offered speculation and argument in lieu of affirmative evidence that the employee failed to secure the cover.

Insurance Bad Faith

Belt v. Cincinnati Ins. Co.

--- S.W.3d – 2022 WL 17726200 (Ky. 2022)

Member-managers of K-2 Catering, LLC (K-2), Chuck and Melissa Kersnick, hosted an event at their home and during the event allowed their teenage son, Zachary Kersnick, to give rides on their newly purchased utility terrain vehicle (UTV). While giving Plaintiff Haley Belt (Belt) a ride, Zachary crashed the UTV causing Belt

to suffer permanent and disfiguring injuries. Upon receiving the Belt claim and conducting an investigation, K-2’s commercial general liability insurer, Cincinnati Insurance Company (CIC), issued a reservation of rights letter to the Kersnicks outlining terms of the policy and denying the claim. CIC then filed a declaratory judgment asking the trial court to determine whether coverage existed under the policy.

Belt filed a separate complaint against K-2 and the Kersnicks alleging negligence and negligent entrustment and seeking compensatory and punitive damages. CIC defended the K-2 and the Kersnicks, reserving the right to deny coverage later.

The actions were consolidated, and Belt amended the complaint to

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Court Decisions

Continued from previous page

assert common law and statutory bad faith against CIC under the Kentucky Unfair Claims Settlement Practices Act (KUCSPA) and the Kentucky Consumer Protection Act (KCPA). The court bifurcated the coverage and bad faith claims and later found coverage under CIC's policy after a bench trial. CIC opted to pay the policy limits instead of appealing the court's judgment.

Upon settlement K-2 and the Kersnicks' assigned their potential bad faith, KUCSPA and KCPA claims against CIC to Belt. The bad faith claims proceeded to a jury trial during which CIC moved for a directed verdict and was denied. The jury returned a large verdict in favor of Belt and the Kersnicks.

On appeal, the Court of Appeals reversed, finding that coverage, the first element of the *Wittmer* test, was not established until after the trial court's judgment on coverage, at which time CIC promptly paid limits to Belt in accordance with the judgment. The Supreme Court granted discretionary review.

Following *Wittmer*, the Supreme Court reiterated that when faced with a motion for directed verdict on common law and statutory bad faith claims, the trial court must direct verdict in favor of insurer only when no reasonable juror could find all three *Wittmer* elements to be satisfied: (1) the insurer is obligated to pay the claim under the terms of the policy; (2) the insurer lacks a reasonable basis in law or fact for denying the claim; and (3) the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

With the evidence of the trial court's judgment on coverage admitted at the bad faith jury trial, the Court found the first element satisfied.

On the second element, the Court found ample evidence of CIC's reasonable basis in fact for disputing the claim. At trial the evidence showed CIC's concerns about whether the UTV was purchased for K-2's business, the UTV crash occurred within the course and scope of K-2's business, and Zachary was an insured under CIC's policy. CIC relied on coverage counsel's recommendations when seeking declaratory judgment on coverage. Furthermore, the legal question of whether the Kersnicks had authority to delegate use of the business property for a non-business purpose provided substantial evidence that CIC had a reasonable basis in law for disputing coverage. Relying on this evidence, the Court found that no reasonable juror could find the second element satisfied, and therefore, the trial court should have directed verdict for Belt's failure to satisfy all *Wittmer* elements.

Rejecting Belt's argument to the contrary, the Supreme Court declined to hold that the trial court's declaratory judgment in Belt's favor and CIC's decision to pay policy limits instead of appeal provides an evidentiary basis for a reasonable juror to conclude that coverage was not fairly debatable. "[A]n insurer is entitled to challenge a claim and litigate it if the claim is debatable on the law or facts [,]" and an insurer's strategy to pay policy limits instead of appealing "does not constitute evidence of bad faith in bringing the coverage action."

Lastly, the Court found insufficient evidence of CIC's intentional misconduct or reckless disregard of the rights of its insured in denying Belt's claim. Upon receiving notice of the claim, CIC investigated, interviewed claim-

ants, consulted with outside counsel, promptly filed the declaratory judgment action five months later, and provided a defense to K-2 and the Kersnicks under a reservation of rights. As discussed with the second element, there were genuine questions of law and fact making coverage fairly debatable. An insurer's duty to pay a claim under the policy does not begin until coverage is reasonably clear.

Upon finding insufficient evidence to satisfy the second and third elements, the Court affirmed the Court of Appeals and directed the trial court to dismiss Belt's bad faith claims.

Premises Liability

Walmart, Inc. v. Reeves

--- S.W.3d – 2023 WL 2033691
(Ky. 2023)

Two unknown men attacked the plaintiff in her car parked in a Wal-Mart parking lot in Lexington, Kentucky. The men attempted the robbery while a third unknown man waited in a getaway car. She was struck twice before a bystander intervened and the assailants fled. The plaintiff filed suit asserting that Wal-Mart was negligent for not having a security presence outside the store to protect patrons from third-party criminal acts.

After some discovery, Wal-Mart moved for summary judgment. The plaintiff produced police reports from the Wal-Mart's own CAP Index, Inc. Crimecast Report to show that Wal-Mart had a duty to protect the plaintiff from third-party criminal acts. However, the Court found none of the records indicated similar crimes close in time to her attack or of sufficient character and number to make her particular incident and harm reasonably foreseeable to Wal-Mart. Absent foreseeability, the trial court determined Wal-Mart owed no duty to the plaintiff and granted summary judgment.

The Court of Appeals reversed, and the Supreme Court granted discretionary review.

The Court noted the premises owner owes a duty to protect patrons from third-party criminal acts if the owner “knows of activities or conduct of other patrons or third persons which would lead a reasonably prudent person to believe or anticipate that injury to a patron might be caused” ... and can reasonably safeguard against such third-party acts. Wal-Mart argued that the Court of Appeals improperly extended the Supreme Court’s holding in *Shelton v. Kentucky Easter Seals Society, Inc.*, which the Court mentioned had never been applied beyond cases involving open and obvious hazards. Under *Shelton*, the foreseeability analysis is normally a jury question rather than part of the threshold duty determination made by the Court. In such cases, the duty of reasonable care is a general one imposed upon the premises owner and the fact-dependent foreseeability analysis will therefore “almost always begin with the (fact-finder’s) breach question.”

The Court agreed with Wal-Mart and declined to extend *Shelton*’s general duty and foreseeability analysis to premises cases involving third-party criminal actions. “Landowners cannot control the actions of third parties on their property, making these cases markedly different from those involving the man-made or naturally occurring aspects of a property capable of maintenance or curative measures.” The Court further noted to impose “an ever-present duty to protect patrons” would impose too great a cost on small business owners and their customers.

The Court found its holding consistent with the Restatement (Second) of Torts (1965) § 344 and supporting commentary, which provides that a premises owner “is ordinarily under no duty to exercise any care (in cases involving third party acts) until he knows or has reason to know that the acts of the third person

are occurring, or are about to occur.”

Upon holding that the trial court applied the correct law, the Court proceeded to review the trial court’s grant of summary judgment *de novo*. In order to prevail, the Court required the Plaintiff to show the prior crimes committed by third persons at this Wal-Mart were sufficiently similar to her incident to make her harm foreseeable. While the Plaintiff presented evidence of crime in the area of the Wal-Mart and some cases of violent crime at the store, the Court found the prior incidents were either insufficiently similar or too remote in time for third-party criminal acts involving robbery and assault to be reasonably foreseeable to this Wal-Mart store. Absent foreseeability, there was no duty on Wal-Mart to have a security presence outside the store to protect patrons from such third-party criminal acts.

Contract Interpretation

Jones v. Acuity

658 S.W.3d 492 (Ky. App. 2022)

The matter involves an appeal from the trial court’s summary judgment in favor of commercial general liability (CGL) insurer, Acuity. Donald Bottoms (Bottoms) owned Three D Plumbing insured by Acuity. On the night in question Bottoms had food and drinks with Nicole Wagner (Wagner) and her friends at his place of plumbing business. The business also contained an apartment inside.

After the night ended, Bottoms drove Wagner and her friends to Wagner’s home. Once reaching her home, Wagner refused to exit Bottoms’ vehicle, so he pulled his gun and attempted to scare her away. The gun discharged and Wagner was shot and killed.

Bottoms pled guilty to second-degree manslaughter which estab-

lished he acted wantonly in causing Wagner’s death. Heather Jones (Jones), as the Administratrix of Wagner’s estate, filed a complaint against Bottoms for wrongful death. Acuity intervened to dispute coverage under Bottoms’ Three D Plumbing CGL policy. Bottoms settled and assigned his rights under the Acuity CGL policy to Jones. The parties filed cross-motions for summary judgment, and the trial court ruled in favor of Acuity under the terms of the CGL policy.

The CGL policy defined insured as Bottoms “but only with respect to the conduct of a business.” Acuity covers bodily injury only if the occurrence causing injury “takes place in the coverage territory” but excludes coverage when “[b]odily injury is expected or intended from the standpoint of the insured.”

The Court of Appeals affirmed finding first that coverage was intended to cover events occurring within the conduct of the business. Jones argued that Bottoms often hosted social gatherings to promote his plumbing business and the events leading up to the shooting death of Wagner occurred at one of those social gatherings. The Court rejected this argument, finding Jones failed to present affirmative evidence to support her contention that Bottoms was conducting plumbing business at the social gathering. In addition, Bottoms admitted by affidavit that none of his activities that night “were related in any way to [his] occupation or business as plumber.” Rather it was “for purely personal, social, and non-business reasons.”

The Court further found that Bottoms’ criminal plea serves as collateral estoppel in the later civil action. Bottoms pled guilty to wanton manslaughter which establishes that he was aware

Continued on following page

Court Decisions

Continued from previous page

of and consciously disregarded the substantial and justifiable risk of harm his conduct presented and that the injury was expected. Thus, Bottoms' guilty plea precludes any re-litigation of whether his conduct falls under the "expected or intended" injury exclusion under Acuity's CGL policy.

Rieff v. Jesse James Riding Stables Inc.

656 S.W.3d 225 (Ky. App. 2022)

The matter arises from injuries Sylvia Rieff (Rieff) sustained from sliding off the side of a horse. Rieff filed suit against Jesse James Riding Stables, Inc. (JJ Stables) alleging that the stable negligently failed to properly secure saddle, failed to recognize faulty saddling of the horse, provided unsafe equipment, and failed to properly warn her of the risk of a loosening saddle.

Prior to beginning a guided horseback riding tour at JJ Stables with her children, Rieff signed the "Horse Rental Agreement and Liability Release Form" (Release) which detailed potential risks of the riding tour and provided guidance on how to avoid injury, including recommending customers wear a helmet and notify employees if

concerned about saddles. In addition, the Release outlined the customer's assumption of risk and included a liability release for bodily injury and medical expenses.

The assumption of risk provision included references to loosening saddles and the importance of alerting the nearest tour guide to avoid any slippage of the horse saddle.

In its summary judgment motion, JJ Stables argued that Rieff's claims were barred because she signed the release which served as a valid exculpatory, pre-injury liability waiver. The trial court granted JJ Stables summary judgment on the grounds that the release met the *Hargis* tests and that Rieff, individually, was bound by the Release.

On appeal Rieff argued that the release failed to meet any *Hargis* alternative and was ambiguous. Under *Hargis*, the release will be upheld only if (1) it explicitly expresses an intention to exonerate by using the word "negligence;" or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision.

JJ Stables' release provided a release for bodily injury "except in event of THIS STABLES' gross negligence." Rieff argued the Release's language does not establish the express intention to exonerate using the word "negligence." JJ Stables argued use of "gross negligence" was clear and understandable because an ordinary person understands liability would be waived for all conduct short of gross negligence.

Finding binding precedent in *CLK Multifamily Management, LLC v. Greenescapes Lawn & Landscaping, Inc.*, 563 S.W.3d 706 (Ky. App. 2018), the Court agreed with JJ Stables that the release met the *Hargis* tests. Specifically, the Court affirmed on the ground that the Release in question met alternatives one, three and four, and it only needed to meet one.

The Court further held the waiver was enforceable against Ms. Rieff, individually. Ms. Rieff argued the sentence fragment in the release that states "Sylvia Rieff who will sign below for and on behalf of all under-age family members, and those for whom [she is] guardian" was ambiguous as to whether it applied to her individually.

The Court rejected Rieff, finding an "abundance of clear recitations that Ms. Rieff, individually, was a party to

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the release and the numerous instances in which Ms. Rieff signed her name as a party to the Release void any possibility of ambiguity as to the Release's enforceability against her." Rieff's appeal lacked affirmative evidence, e.g., deposition testimony she only intended to sign on behalf of her children, and instead was based on a select portion of the agreement which, when read *in toto*, contained language specifically identifying her as bound by the release.

Workers' Compensation— Coming-And-Going Rule

Pers. Cabinet v. Timmons

--- S.W.3d – 2022 WL 17726204
(Ky. 2022)

Claimant, Aimee Timmons (Timmons), was a social-services clinician employed by the Commonwealth of Kentucky (Commonwealth). Timmons left her home to conduct a training session at a church located a short drive from her home. While leaving through her front door, she fell on the front steps of her house and suffered injury. Timmons filed a workers' compensation claim.

The Commonwealth contested the claim under the "coming-and-going" rule, which provides that injuries sustained while an employee is coming or going from the place of employment do not "arise out of" or "in the course of" employment and thus are not covered claims. Timmons argued that the "traveling-employee" exception applied, which provides that when an employee's job requires travel away from the employer's premises, such travel is performed for the benefit of the employer and is thus considered to be within the course and scope of employment and covered by workers' compensation.


The ALJ denied the claim. Timmons appealed to the Workers' Compensation Board, which reversed the

ALJ's decision, reasoning that Timmons was acting in service of her employer by leaving her home to travel to the off-site training event and her case fell within the "traveling-employee" exception to the coming-and-going rule. The Court of Appeals affirmed. Appeal to the Kentucky Supreme Court followed.

The Supreme Court reversed noting that the "coming-and-going" rule is meant to limit employer liability for "common risks of the street" that an employee encounters while traveling to and from work. In Timmons' case, her employment with the Commonwealth was not the reason for her presence at the place of danger—her front steps. Rather, Timmons' personal choices about where to live was the reason for her presence at her home on the date of her injury. Timmons had sole control over the conditions present at her home, and her employer had neither the right nor the obligation to correct or warn against potentially dangerous conditions there.

The Court further held that travel for the benefit of the employer (such that the "traveling-employee" exception applies) "does not begin until an employee leaves her property and exposes herself to the common risks of the public street." The Court acknowledged instances where employer's control may extend to an employee's home but those questions are for a fact finder to determine in rare circumstances. The "further the employer's control extends, the further its liability extends as well."

The Court also expressly limited its holding to workers' compensation claims in which the coming-and-going rule and its exceptions are invoked. Its decision does not apply to injuries sustained by an employee while working from home.

Because Timmons had not yet begun her work-related travel when she fell, the "traveling-employee" exception to the "coming-and-going" rule does not apply. 

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