

Kentucky Court of Appeals
Cases of Note
[November-December, 2009](#)

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TORTS

Bohl v. City of Cold Spring

[2008-CA-002162](#) 11/13/09 2009 WL 3786633

Opinion by Senior Judge Lambert; Judges Nickell and VanMeter concurred. The Court affirmed a summary judgment in favor of the appellee city on appellant’s claims for disability discrimination, retaliation, constructive discharge, intentional infliction of emotional distress (IIED), and disability harassment. The Court ultimately held that summary judgment was properly granted.

In reaching that conclusion the Court first held that the trial court correctly granted summary judgment on appellant’s disability discrimination claim. Although appellant made a prima facie showing that he was “otherwise qualified” to perform his job when he produced evidence that he continued to perform his job to the satisfaction of the employer after he was diagnosed with multiple sclerosis (MS) and that he suffered an adverse employment action due to the disability when he was removed from his shift as detective, he failed to provide any proof that the city’s explanation that it had a legitimate business purpose in acting for the safety of appellant, other police officers and the community, in removing appellant from his shift was false.

The Court next held that summary judgment on the IIED claim was proper because the IIED claim was subsumed by the KRS Chapter 344 claims of disability discrimination, retaliation and disability harassment.

The Court next held that summary judgment was proper on the retaliation claim when appellant failed to overcome appellee’s proof that it had a legitimate, non-discriminatory reason for its actions.

The Court next held that the trial court properly granted summary judgment on the disability harassment claim because the actions complained of did not create a pervasive abusive work atmosphere.

The Court finally held that the trial court properly granted summary judgment on the claim for constructive discharge because the conditions complained of were not intolerable and did not compel appellant’s resignation.

Childers v. Geile

[2008-CA-002114](#) 11/06/09 2009 WL 3672891

Opinion by Judge Stumbo; Judge Lambert and Senior Judge Henry concurred. The Court affirmed a summary judgment in favor of appellees on appellants’ claim for the tort of outrage related to emergency treatment appellant received, after which she miscarried.

The Court held that the trial court did not err in granting summary judgment. In doing so, the Court held that the holdings in *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993), and *Banks v. Fritsch*, 39 S.W.3d 474 (Ky. App. 2001), were not inconsistent with the holding in *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). The cases collectively recognized the application of the tort of outrage in Kentucky to facts where the conduct was intended only to cause extreme emotional

distress in the victim, and where those facts would not otherwise sustain a cause of action for a traditional tort like negligence, assault or battery.

The Court further held that appellants failed to demonstrate that the facts only supported a wrongful death claim, without emotional distress as an element of damages, and not an action alleging one of the traditional torts such as negligence.

Faller v. Endicott-Mayflower, LLC

[2008-CA-001506](#) 11/20/09 2009 WL 3878062

Opinion by Judge Nickell; Chief Judge Combs and Judge Taylor concurred. The Court affirmed a summary judgment in favor of appellees on appellant's claims related to injuries she sustained when she fell while leaving a restaurant. The Court ultimately held that the trial court properly granted summary judgment because appellant could not prove that any act or omission by any of the appellees substantially caused her to fall.

In reaching that conclusion, the Court first held that statements in appellant's deposition were judicial admissions that the condition of the threshold of the restaurant was known to her.

The Court next held that appellees had no reason to expect appellant would fall at the threshold after her numerous visits without incident and that, based on her admitted knowledge of the condition, she assumed the risk of crossing the threshold and appellees had no duty to warn her of the condition of the threshold.

The Court next held that because no duty was owed and no duty was breached, appellant's claim that the trial court misapplied the doctrine of contributory negligence was without merit.

The Court next held that summary judgment was appropriate on appellant's claim that the premises violated the Kentucky Building Code. Appellees' testimony created a presumption of non-deficiency under KRS 198B.135 and because the building was completed in 1926 and the threshold was unchanged from the time the restaurant was opened in 1992 until the time of appellant's fall, compliance with the current code provisions was not mandatory.

The Court finally held that summary judgment was not premature when appellant had nearly three years to complete discovery, significant discovery had occurred, and no additional discovery was sought after a notice of submission for final adjudication was filed.

Hawkins v. Miller

[2008-CA-001224](#) 11/06/09 2009 WL 3672873

Opinion by Judge Acree; Judges Taylor and Thompson concurred. The Court affirmed a judgment of the circuit court dismissing appellant's defamation action against his former supervisors and managers at his former place of employment. The Court reviewed the claims for manifest injustice after striking appellant's briefs for failure to conform to CR 76.12(4). The Court then held that dismissal was appropriate. The trial court properly found that appellees had a qualified privilege because the statements complained of were made in response to appellant's claim for unemployment benefits and his complaint with the Equal Employment Opportunity Commission (EEOC), which were quasi-judicial settings.

McDonald's Corporation v. Ogborn

[2008-CA-000024](#) 11/20/09 2009 WL 3877533

Opinion by Judge Acree; Judges Taylor and Thompson concurred. The Court affirmed in part, and reversed in part, a judgment of the circuit court awarding both compensatory and punitive damages. The claims arose when a hoax caller, identifying himself as a police officer, successfully convinced restaurant managers, employees, and third parties to conduct a strip search and sexual assault of an employee the caller said had stolen a wallet or purse at the restaurant. The employee filed claims

against the restaurant for sexual harassment, false imprisonment, premises liability, and negligence. The assistant manager on duty the night of the events, who was later fired, filed a cross-claim against the restaurant for intentional infliction of emotional disturbance (IIED).

The Court first held that the Workers' Compensation Act, KRS 342.590(1), did not preclude the employee's pursuit of common law causes of action when the employer failed to prove it complied with KRS 342.341(1) by showing prima facie evidence of workers' compensation coverage. Further, there was no manifest injustice in the trial court's ruling that the employee was not acting in the scope and course of her employment during the events.

The Court next held that the Kentucky Civil Rights Act (KCRA) did not preempt the employee's claims. The common law claims, unlike those based on discriminatory practices, stood independently and were not subsumed by the KCRA.

The Court next held that the KCRA claim did not fail as a matter of law. The jury's finding of no negligence on the part of the assistant managers did not insulate the restaurant from liability for the intentional acts of its employees.

The Court next held that the evidence supported the employee's claim for false imprisonment when she did not sign a release, was deprived of her clothing, she repeatedly objected to the search and seizure of her body, she was threatened with further police involvement, she was under the impression the door was locked and she had a constant guard between herself and the door.

The Court next held that the employee's premises liability claim did not fail as a matter of law as the restaurant could be held liable for the foreseeable tortious acts committed against the employee by its own employees, by a third-party and by the caller.

The Court next held that the employee's negligence claim did not fail as a matter of law. But for the restaurant's failure to satisfy its duty to supervise or train its employees regarding the risk of which it was aware, the employee would not have been injured.

The Court next held that the criminal actions of the assistant manager's fiancé did not prevent the imposition of liability on the restaurant when the criminal activity was a foreseeable danger, resulting from the decision not to warn, train or supervise managers and owners that the hoax calls were an ongoing problem.

The Court next held that the evidence supported the award of punitive damages under KRS 411.184(3). The instruction properly limited the jury's consideration of the evidence to that contemplated by the statute and it was a question of fact for the jury as to whether the restaurant could have anticipated the conduct in response to the hoax.

The Court next held that the assistant manager properly pleaded a cause of action for IIED. After noting that the restaurant failed to preserve the issue, the Court held that although the assistant manager did not specifically enumerate the four elements of the cause of action, she adequately gave notice of her claim with ample reference to each element.

The Court next held that the trial court properly denied a directed verdict on the IIED claim. The jury's verdict was not so flagrantly against the weight of the evidence so as to indicate passion or prejudice when there was sufficient evidence to support the allegation that the restaurant failed to warn, resulting in severe emotional distress.

The Court next held that the trial court properly apportioned liability to the restaurant. Although the verdict forms did not comply with KRS 411.182(1), by allowing apportionment to a non-settling party, the language in the instructions was proper and the trial court corrected any potential error in

its judgment. The Court further held that this reasoning applied equally to the compensatory and punitive damages awarded.

The Court finally held that the punitive damages awarded to the employee were not unconstitutionally excessive but that the punitive damages awarded to the manager were constitutionally excessive and ordered them reduced.

Moore v. Saint Joseph Healthcare, Inc.

[2008-CA-002340](#) 11/06/09 2009 WL 3672900

Opinion by Judge Stumbo; Judges Thompson and Wine concurred. The Court affirmed a summary judgment entered in favor of the appellee hospital on appellant's claim that the hospital was negligent in failing to obtain informed consent before administering a thrombin injection. The Court held that the trial court properly granted summary judgment after finding that appellant's written consent to an ultrasound compression encompassed his consent to the injection. Further, this finding comported with KRS 304.40-320(2).

Kelley v. Poore

[2008-CA-002409](#) 12/18/2009 2009 WL 4877707

Opinion by Chief Judge Combs; Judge Moore and Senior Judge Lambert concurred. The Court affirmed a jury verdict and judgment dismissing appellant's personal injury claim, which was filed following a collision between appellee's fishing boat and a personal watercraft operated by appellant. The Court first held that the trial court did not err by refusing to grant a directed verdict against appellee based on his failure to keep a proper lookout when the evidence allowed the jury to reasonably find that appellee consistently maintained a proper lookout but that appellant failed to keep a proper lookout, failed to yield the right-of-way, and approached appellee's vessel so suddenly that he did not have sufficient time to react before the collision.

The Court next held that the trial court did not err by failing to instruct the jury on the federal rules of the waterway as they related to an overtaking vessel's intention to overtake. There was no testimony that the fishing boat was overtaking or intended to overtake the personal watercraft and therefore, it was not unreasonable for the court to reject complex and technical proposed instructions defining appellee's duties as to overtaking the personal watercraft in favor of an instruction adequately explaining appellee's general duty. The Court finally held that the trial court did not err by denying a motion *in limine* to exclude evidence indicating that appellant was an inexperienced boater along with evidence to suggest that appellee was a practiced one. The challenged evidence concerned the nature and quality of the parties' experience, not evidence of their character excludable pursuant to KRE 404(a).

Murray v. Eastern Kentucky University

[2008-CA-000561](#) 12/11/2009 2009 WL 4722760

Opinion by Judge Acree; Judge Lambert and Senior Judge Harris concurred. The Court affirmed a summary judgment of the circuit court dismissing appellant's claims of gender and disability discrimination against a Kentucky university. The Court first declined to analyze the claim under mixed-motive summary judgment analysis when appellant presented her discrimination claims to the trial court as single-motive claims. The Court then held that the trial court properly granted summary judgment because appellant failed to present sufficient evidence to establish she was qualified for the position she sought and failed to present evidence of similarly situated, non-protected employees who were treated more favorably. The Court also held that the circuit court's requirement that appellant find similarly situated employees among the faculty of a limited pool of approximately 100 faculty members in the university's College of Health Sciences was not unreasonable.

WORKERS COMPENSATION

Journey Operating, LLC v. Zurich American Insurance Company

[2009-CA-000279](#) 11/06/09 2009 WL 3673007

Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The Court reversed an opinion and order of the Workers' Compensation Board reversing a decision by the Chief Administrative Law Judge reopening a final decision and finding that an insurer was estopped from terminating benefits. The Court held that KRS 342.125 provided authority for reopening to protect the verity of the administrative proceeding. The Court distinguished the holding in *Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284 (Ky. 2001), as this was not simply an attempt to enforce the prior judgment but was necessary to determine whether the insurer had committed constructive fraud in the original proceeding.