7-9-84

Law Offices
Burke & Burke

Francis D. Burke
Kathryn Burke

310 Main Street
P. O. Drawer 511
Pikeville, Kentucky 41501
(606) 432-0181

July 9, 1984

Judge G. Wix Unthank
Federal Courthouse Building
Main Street
Pikeville, Kentucky 41501

In Re: Reffett v. Tug River Armature & Machine Co., Inc., et al
Action No. 82-323

Dear Judge Unthank:

In compliance with your request that counsel prepare and submit to you proposed Findings of Fact, Conclusions of Law and Opinion, I enclose a draft of such proposed document.

Since the pretrial conference herein Mr. Todd, attorney for defendant, has supplied me with certain photographs which he proposes to use at trial.

I have found these photographs somewhat confusing, but will have no objection to their introduction upon showing that they reasonably portray the situation as it existed at the time of the accident.

Because these photographs are potentially confusing, however, I have had two aerial photographs taken as well as three photographs on the ground which I will tender as exhibits, in addition to the sixteen exhibits offered by me at the final pretrial conference in this case. These exhibits would be numbered 17, 18, 19, 20 and 21.

If the photographs need to be examined in advance of actual commencement of the trial, perhaps we could do this on Thursday morning.

I am also including for your consideration and information photostatic copies of an opinion of the Supreme Court of Kentucky in the case of Davis v. Graviss and an opinion which was handed down last Friday abolishing the doctrine of contributory negligence and substituting the doctrine of comparative negligence in this state.

The Davis opinion is applicable to this case while the latter opinion is not.

Thank you for your consideration of this matter.

Very truly yours,

FRANCIS D. BURKE

FDB/kaye

CC: Hon. James B. Todd

Law Offices
Burke & Burke
310 Main Street
P. O. Drawer 511
Pikeville, Kentucky 41501

Judge G. Wix Unthank
Federal Courthouse Building
Main Street
Pikeville, Kentucky 41501

① Was there negligence in not seeing sign and being in wrong side grd ??

② Was there Contributory Negligence.

③ Was there permanent damage "fair" ???

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

CIVIL ACTION NO. 82-323

PAUL REFFETT PLAINTIFF

vs. **OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

TUG RIVER ARMATURE AND MACHINE CO., INC. DEFENDANT

* * * * * * * *

This case having been tried in open court by bench trial, and the Court having heard oral evidence, exhibits introduced, depositions filed, statements of counsel on argument, and being advised, now **finds, concludes** and **adjudges** as follows:

FINDINGS OF FACT

1. The plaintiff is a citizen and resident of Johnson County, Kentucky and within the eastern district of Kentucky. The defendant, Tug River Armature and Machine Co., Inc., is a citizen and resident of the state of West Virginia.

2. The third party defendant, Buell Spradlin, is a citizen and resident of Johnson County, in the eastern district of Kentucky.

3. On January 13, 1982, the third party defendant, was operating his 1979 Ford Bronco on a private road owned by Island Creek Coal Company.

4. The plaintiff, Paul Reffett, was riding as a passenger in the 1979 Ford Bronco being operated by the third party defendant, Buell Spradlin.

5. Both the plaintiff, Paul Reffett, and the said Buell Spradlin, were employed at mines on the property of Island Creek Coal Company, and were traveling to their place of employment at the time of the accident.

6. At the time and place of the accident, the defendant company owned a 1979 GMC one ton truck being used to deliver supplies, and at said time and place said truck was being operated by its employee.

7. It was the uncontradicted testimony of the plaintiff and the third party defendant, and clearly demonstrated by photographs, including two aerial photographs, that at the place on the private road maintained by Island Creek Coal Company, there were signs posted indicating that motor vehicles were to be operated on the left hand side of the highway. The explanation was given that this was to prevent heavily loaded coal trucks from proceeding along said private road at a point over a high precipice, apparently to lessen the possibility of a loaded coal truck going over such cliff and onto the railroad below. For whatever reason, however, the Court finds that road signs, and the custom of Island Creek Coal Company, required that motor vehicles at this point along the road be operated on the left hand side of the highway.

8. At the time and place of the accident, Buell Spradlin was operating his motor vehicle on the left hand side of the highway.

9. At the time and place of the accident, the motor vehicle of the defendant was being operated on the right hand side of the highway in a curve.

10. There was a collision between the motor vehicles on the left hand side of the highway in the direction in which Buell Spradlin was operating his motor vehicle. In other words, the collision took place in Spradlin's line of travel.

11. The plaintiff, Paul Reffett, was injured in said collision, was hospitalized thereafter, over a period of many months.

12. The plaintiff, Paul Reffett, incurred medical expenses in the sum of $6,472.25.

13. The plaintiff returned to work on December 8, 1982. Since that time he has missed work sporadically.

14. In 1981, as demonstrated by his federal income tax returns, the plaintiff earned $20,206.26. In 1982, again as demonstrated by his federal income tax returns the plaintiff only earned $6,807.00 in wages in that calendar year. In 1983, again as demonstrated by his income tax return, the plaintiff earned only $16,320.00.

15. The intervenor, Kentucky Farm Bureau Insurance Companies, paid basic reparation benefits under the appropriate Kentucky Revised Statutes in the full amount of $10,000.00.

16. Kentucky Farm Bureau Insurance Companies has asserted its right to recoupment from the defendant's insurer, General Accident and Fire Assurance Corporation.

17. The plaintiff suffered permanent injury and impairment to his bodily function as a direct result of the injuries received in said collision.

CONCLUSIONS OF LAW

1. Island Creek Coal Company maintains on its private property a system of roads in connection with its mining enterprise and has the right therefore to establish rules and regulations for the operation of motor vehicles thereon although they may differ from the ordinary rules of the road.

2. The Court concludes that the act of defendant's driver in operating the motor vehicle belonging to the defendant on the right hand side of the highway, and in violation of the rules established by Island Creek Coal Company, constituted negligence which was and is the official producing cause of plaintiff's injury and damage.

3. The Court concludes that the third party defendant, Buell Spradlin, was in compliance with the requirement of operating his motor vehicle on the left hand side of the highway and that he is free of negligence.

4. The plaintiff has met the threshold requirements of the Kentucky No-Fault Act, KRS Chapter 304, both as to the amount of medical expenses incurred and by having suffered permanent impairment. Fann v. McGuffey, Ky., 534 S.W. 2d 770 (1975).

5. The plaintiff sustained liability for $6,472.25 medical treatment and bills, these bills are presumptively correct. Bolin v. Grider, 580 S.W. 2d 490 (Ky. 1979).

6. The plaintiff suffered a direct wage loss as a direct result of his injuries of not less than $20,000.00.

7. Plaintiff suffered a permanent impairment of his power to earn money. Moreover a treating physician of the plaintiff has testified explicitly, and such evidence is uncontradicted, that the plaintiff suffered an injury resulting in an increased risk of future harm and under the law of Kentucky the plaintiff is entitled to compensation for that. Davis v. Graviss, 31 KLS 7, June 1, 1984.

8. The plaintiff is further entitled to recover for pain and suffering, past and future, both mental and physical.

9. The Court concludes that the plaintiff is entitled to an award for future impairment of his power to earn money in the amount of $_____.

10. The Court concludes that the plaintiff is entitled to an award for pain and suffering, past and future, both mental and physical, in the sum of $_____.

11. The Kentucky Farm Bureau Insurance Companies is entitled to be reimbursed from any judgment entered herein on behalf of the plaintiff to the extent of basic reparation benefits paid to plaintiff by it, that is, $10,000.00. This reimbursement is for the economic loss consisting of the medical expenses and permanent impairment of the power to earn money but cannot be applied to the non-economic loss, pain and suffering.

12. Plaintiff is now 28 years of age and the Court takes judicial notice of the fact that he has a life expectancy of 47.6 years, and a work life expectancy of 37 years.

13. The Court expressly finds that the plaintiff was not guilty of any negligence on his own part, either contributory or comparative.

JUDGMENT

IT IS THEREFORE **ORDERED AND ADJUDGED** that the plaintiff, Paul Reffett, recover of and from the defendant, Tug River Armature and Machine Co., Inc., the sum of $_____, representing medical expenses, impairment of the power to earn money, pain and suffering, mental and physical, together with interest at the rate of 10.6 percent (10.6%) per annum, from this date until paid.

IT IS FURTHER **ORDERED AND ADJUDGED** that the third party complaint of Tug River Armature and Machine Co., Inc., against the third party defendant, Buell Spradlin, be and the same is **dismissed.**

IT IS FURTHER **ORDERED AND ADJUDGED** that the intervenor, Kentucky Farm Bureau Insurance Companies, recover of and from the defendant, Tug River Armature and Machine Co., Inc., and its insurer, General Accident and Fire Assurance Corporation, the sum of $10,000.00, paid to the plaintiff, which shall be credited against the amount adjudged the plaintiff herein.

IT IS FURTHER **ORDERED AND ADJUDGED** that the plaintiff recover his costs, and that execution may issue for all of said sums adjudged.

This _____ day of July, 1984.

_____
G. WIX UNTHANK, DISTRICT JUDGE

"For reasons that will be stated following a recitation of the facts, we have concluded that:

(1) Properly construed this statute has no application here to what is essentially a products liability case.

(2) Otherwise construed, this statute would be 'special' legislation in violation of the Kentucky Constitution, §59."

. . . . . .

"The defendants have renewed their motion for summary judgment asserting that *Carney v. Moody*, Ky., 646 S.W.2d 40 (1982), is a definitive opinion overruling *Saylor v. Hall* and restoring the viability of KRS 413.135. Plaintiffs counter that the *Carney* decision was cited to the Sixth Circuit on defendants' Petition for Rehearing and was implicitly rejected by that court when it denied the Petition for Rehearing. It is at this juncture that the Federal District Court asks us to decide if KRS 413.135 is unconstitutional 'as applied to the facts of this case by virtue of Kentucky Constitution §§ 14, 54 and/or 241?' Memorandum Opinion and Order, Wilhoit, J., p. 5.

"In this case plaintiffs allege defendants are liable for the manufacture of a defective product, 'old technology' aluminum wire, subsequently used as a component part of a building. Presumably this aluminum wire has many foreseeable uses having no connection with improvements to real estate. When asked to consider whether KRS 413.135 is a bar to plaintiffs' claims, before passing on the constitutionality of KRS 413.135 as an abstraction, the threshold question is whether the statute includes a products liability claim of this nature in the first place. This was the approach of the trial judge before the first trial. We agree. The trial judge originally expressed the opinion that the Kentucky statute was not applicable to the facts of this case."

. . . . . .

"The majority of our sister states who have considered the matter have held that, absent express language covering materialmen or suppliers, these 'no-action' statutes enacted on behalf of architects and builders do not and shall not be interpreted to cover such persons. The reasoning supporting this position is sound. There is nothing in the words, history or intended purposes of the Kentucky statute, nor in any Kentucky decision, to compel the Sixth Circuit to conclude Kentucky would disagree with this point of view.

"The history and purpose of the statute is reviewed in an article in 60 Ky. Law Journal 462 (1971-72), 'Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders.' . . .

"It is evident from this history that products manufacturers and materialmen as such were not among the pressure groups initiating the legislation, nor within its comtemplation.

"Kentucky adopted § 402(A) of the Restatement 2d of Torts, setting up liability for the manufacture of a product in a defective condition unreasonably dangerous to the user, in *Dealers Transport Co. v. Battery Distributing Co.*, Ky., 402 S.W.2d 441 (1966), shortly after KRS 413.135 was enacted. Before that, liability of the manufacturer for a defect in a component part was practically nonexistent . . . . But architects and builders, the groups authoring the legislation in question, had little reason at that time to anticipate that at a later time manufacturers would be held liable for defective design of components whether or not incorporated into a building, and less reason to protect them.

"In considering the proper construction appropriate to KRS 413.135 we are motivated in part by our duty to render the acts of the legislature viable by interpreting such acts consistent with constitutional mandates, and to avoid construction that 'threatens unconstitutionality,' whenever reasonably possible. *George v. Scent*, Ky., 346 S.W.2d 784, 790 (1961). In *Fann v. McGuffy*, Ky., 534 S.W.2d 770, 777 (1975), our then recently enacted 'no-fault' Motor Vehicle Reparations Act faced various constitutional challenges which this Court avoided by interpreting the language of the statute in line with 'the duty of the court to save (the legislation) if possible.' In the present case, if the language of KRS 413.135 is interpreted to include product manufacturers within its protected class, the statute is placed in fundamental conflict with § 59 of the Kentucky Constitution . . . ."

. . . . . .

"Certainly a law that protects product manufacturers if or when their product is used in the design or construction of a permanent improvement to real estate, but not otherwise, would discriminate in favor of such a manufacturer in an arbitrary manner and create a classification that has no reasonable justification. No one yet has suggested any reason why a special classification should be created for products because they are used in construction of a building, as opposed to a motor vehicle or some other structure that is personalty. Many products, the present one included, are subject to foreseeable uses both in real estate improvements and otherwise. The statutory interpretation offered by the defendants would not only distinguish their product from other products in an arbitrary manner, it would result in the same product having immunity in some circumstances and not in others with no reasonable justification.

"The continuing viability of § 59 of our Kentucky Constitution has been recently expressed in *Miles v. Shauntee*, Ky., 664 S.W.2d 512 (1984), declaring unconstitutional the Residential Landlord and Tenant Act of 1974 because there was no rational basis for limiting the Act to those counties containing cities of the first class and urban-county governments. In *Board of Education of Jefferson County v. Board of Education of Louisville*, Ky., 472 S.W.2d 496 (1971), we state 'A special law is legislation which arbitrarily or *beyond reasonable justification* discriminates against some persons or objects and favors others.' (Emphasis provided.) 472 S.W.2d at 498. In short, KRS 413.135, if interpreted to include in its protection the manufacturer of a product simply because it was used as a component part in construction of a building, would discriminate in favor of such person arbitrarily and beyond reasonable justification in violation of § 59 of the Kentucky Constitution. We shall not so interpret it.

"We have not addressed the underlying question of the constitutionality of KRS 413.135 as to those persons who are within its purview. In response to the question certified to us from the United States District Court for the Eastern District of Kentucky, we answer that KRS 413.135 is not applicable to this case."

Vance, J., dissents and files a separate opinion in which Stephenson, J., joins.

TORTS

DAMAGES

Injured party has a right to compensation for an injury causing an increased risk of future harm and for mental suffering and impairment of earning power resulting from the "fear" caused by the increased risk of future harm—

Where there is substantial evidence of probative value, the jury may consider and compensate for the increased likelihood of future complications—Where that likelihood initiates serious mental distress, this is also compensable—

Excessiveness—The "first blush" rule is a mechanism to assist the trial court—Appellate courts are charged with the responsibility to review the record and decide whether, when viewed from a standpoint most favorable to the prevailing party, there is evidence to support the verdict and judgment—

WITNESSES

Expert witness—A qualified opinion based on reasonable probability is admissible—

Davis v. Graviss; On review from Court of Appeals; Opinion by Justice Leibson, *reversing.* (Ct. App. opinion not published.)

"The issue is whether the Court of Appeals erred in setting aside the verdict in this case as excessive. From our review of the record we conclude that the evidence was sufficient to support the jury's verdict and that the Court of Appeals' standard for review was inappropriate. We reverse the Court of Appeals and affirm the verdict and judgment of the trial court."

. . . . . .

"Appellant's claim arises out of a motor vehicle collision on December 1, 1978, in Jefferson County. It was an intersection collision between the car she was driving and appellee who approached from the opposite direction and made a left turn in front of her. She was taken injured from the scene and hospitalized for four (4) days. She was treated for a broken nose, dislodged teeth, contusions of the mouth, dizziness, disorientation and

concussion. Subsequently following episodes of drainage of a clear, watery fluid from her nose, she was diagnosed as suffering from a basilar skull fracture or other injury causing leakage of cerebral spinal fluid through the cribriform plate.

"A number of different doctors testified in the case, including two neurosurgeons, an ear, nose and throat specialist, a clinical psychologist, and a vocational expert. Their testimony establishes with reasonable probability[1] that as a result of the accident plaintiff has a permanent defect in the base of her skull which will result in episodes of cerebral spinal fluid leakage of indeterminate frequency. This condition creates a potential for future complications from infection including meningitis, brain abscess or other neurological problems. In short, the injury is potentially devastating. One neurosurgeon has advised the appellant to undertake surgery as a preventive measure and one has advised such surgery is too difficult and dangerous, involving risks of death, blindness, paralysis, speech disturbances or seizures."

"[1]'(A) qualified opinion based on reasonable probability satisfies the requirement . . . .' *Rogers v. Sullivan,* Ky., 410 S.W.2d 624, 628 (1967)."

. . . . . .

"A duly qualified doctor of psychology, after appropriate testing, testified that as a direct result of the injury appellant suffers significant emotional and psychological damage. Realistically, she fears both the dangers of surgery and the likelihood of future serious illness should she not undertake surgery. Further, she so fears serious consequences from a reinjury to her nose that it frustrates her ability to conduct normal activities.

"A duly qualified vocational guidance expert examined and tested the appellant as to future employability and impairment of earning capacity and concluded that she had experienced an 'occupational loss' of approximately forty (40) percent.

"The jury returned a verdict of $390,000. The trial court overruled the motion for new trial, which included appellee's claim that the award should be set aside as excessive, and entered judgment on the verdict. Approximately $224,500 of the award was for mental and physical suffering, past and future, and $157,500 was for the permanent impairment of earning power. The evidence underpinning most of this substantial award of general damages is the evidence of a permanent injury in the base of the skull causing episodes of cerebral spinal leakage, the potential for catastrophic complications, and the mental suffering and impairment of normal living that attends her condition.

"Thus the threshold question is the appellant's right to compensation for an injury causing an increased risk of future harm and for mental suffering and impairment of earning power resulting from the *fear* caused by the increased risk of future harm. The psychologist testified that 'her fears are reasonably understandable and are real,' and that 'she will continually get worse, and there will be more anxiety and depression.' The vocational guidance specialist testified as to 'occupational impairment' as a direct result of her fear, anxiety and depression. The question is whether damages of this nature are compensable as appellant contends or speculative as appellee contends.

"In *Wilson v. Redken Laboratories, Inc.*, Ky., 562 S.W.2d 633 (1978), we reversed an opinion by the Court of Appeals setting aside a jury verdict of $30,000 for permanent damage to the plaintiff's hair, a condition causing no physical pain and cosmetic in nature, stating:

> 'The uncontradicted evidence plainly demonstrates that Louise Wilson had a traumatic experience, and suffered humiliation and distress, which are phases of mental anguish.' 562 S.W.2d at 635.

"In *Murray v. Lawson,* Ky., 441 S.W.2d 136 (1969), we affirmed the relevancy of evidence as proof of damages that the plaintiff had suffered a disabling 'phobic reaction' to an injury from which she was otherwise fully recovered. Her doctor testified that he treated her for 'anxiety neurosis' and a psychiatrist 'testified that such *phobic reaction* is medically recognized and accepted as a psychiatric condition.' (Emphasis added.) 441 S.W.2d at 137.

"In *Deutsch v. Shein,* Ky., 597 S.W.2d 141 (1980), we recognized plaintiff's right to damages for mental suffering following a therapeutic abortion which she underwent voluntarily out of fear of future consequences to her unborn child. The negligence of the defendant physician was in causing the plaintiff to be x-rayed without first checking her for pregnancy, which in turn caused her to seek a therapeutic abortion. We stated:

> 'We find no difficulty in concluding that the physical contact necessary to support the claim for mental suffering occurred when, through Dr. Shein's negligence, Mrs. Deutsch's person was bombarded by x-rays.' 597 S.W.2d at 146.

"Thus we have previously recognized the right to substantial damages for mental suffering not directly related to physical pain where the injury was cosmetic (*Wilson, supra*), where the injury was a phobic reaction or function of the mind (*Murray, supra*), and where there was an abortion from fear of future consequences but physical injury was either debatable or nonexistent (*Deutsch, supra*). In the present case the appellant's mental suffering translates into fear, anxiety and depression both substantial and incapacitating that falls well within the parameters of these cases.

"Plaintiff's testimony depicted a woman caught up in the dilemma of two conflicting and terrifying courses of action. One doctor says her condition is so serious that she needs a dangerous operation. Another says the operative risks are worse than the risk of future complications. The appellant is left to twist in the wind every day of her life as to whether she ought to have the operation or whether she ought to run the risk that if she gets a common cold it may get into her spinal fluid and lead to meningitis or worse. Appellant's fear of complications is both understandable and reasonable. It is a direct result of her injury. The question is whether the jury's award for that kind of mental stress and disturbance should be considered as excessive.

"There is another aspect to the question before us. Where the evidence establishes a condition causing an increased likelihood of contracting a devastating illness, or an increased risk of future harm, and such likelihood or risk is substantial but the occurrence itself is not necessarily probable, is this a compensable injury? Otherwise stated, is enhanced or created susceptibility a separate ground for an award?

"In *Martin v. City of New Orleans,* 678 F.2d 1321 (5th Cir. 1982), plaintiff's injury was a bullet lodged in the base of his neck, a fraction of an inch from his spinal cord. The doctors testified his 'prognosis was good . . . (but) there would always be some risk of future complications, and that the consequences could be life-threatening . . . . (S)urgery was considered too dangerous.' The United States Court of Appeals said:

> 'In light of this emotional burden and the serious physical risks he will always have, we cannot say that $500,000 is "contrary to right reason," (citation omitted), or in excess of the amount that "*any* reasonable man could feel (Martin) was entitled to.'"

In *Feist v. Sears, Roebuck & Co.*, 517 P.2d 675 (Ore., 1973), the court sustained an award based on evidence that plaintiff's skull fracture was of such a nature as to 'increase her susceptibility to meningitis,' even though future meningitis was not probable but a mere possibility. The fact situation in these two cases is strikingly similar to the present case.

"A number of cases have upheld substantial awards for skull fractures on the basis of the increased risk of future epilepsy, even though such risk was substantially less than a probability. E.g., *Schwegel v. Goldberg,* 228 A.2d 405 (Pa., 1967); *McCall v. United States,* 206 F.Supp. 421 (E.D.Va., 1962).

"Somewhat closer to home, in a case from Kentucky appealed to the United States Sixth Circuit, *Traylor v. United States,* 418 F.2d 262 (6th Cir., 1969), the Federal court sustained an award for the increased likelihood of a future hernia developing from an injury that left internal scarring but only a possibility of future complications.

"There are similar Kentucky decisions, although none quite so close in fact situation. In *Oppenheimer v. Smith,* Ky., 512 S.W.2d 510 (1974), a plaintiff received compression fractures of two vertebrae which healed with no disability, but we sustained an award of $100,000 based in large measure on medical testimony that the vertebrae would experience early degenerative changes creating the potential for future traumatic arthritis.

"*Richard v. Adair Hospital Foundation Corp.*, Ky.App., 566 S.W.2d 791 (1978), held that the plaintiff stated a cause of action against the defendant hospital for refusing to admit a baby suffering from pneumonia who died hours later after being admitted at a second hospital, based on the following:

'[M]edical testimony was to the effect that the child's *chance of recovery* would have been substantially better had treatment been rendered when the child was presented to the Adair County Hospital.' (Emphasis added.) 566 S.W.2d at 793.

"While recognizing that it 'must be shown by medical testimony that causation is probable and not merely possible,' the court concludes:

'Given the medical testimony in this case, . . . it could safely be said that this child's chances of recovery would have been substantially greater and better had she been treated earlier . . .' 566 S.W.2d at 794.

"Thus, where there is substantial evidence of probative value to support it, the jury may consider and compensate for the increased likelihood of future complications. Where, as here, that likelihood initiates serious mental distress, this also is compensable.

"In considering whether the verdict should be set aside as excessive, the trial court and appellant court have different functions. When presented with a motion for new trial on grounds of excessive damages, the trial court is charged with the responsibility of deciding whether the jury's award appears 'to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.' CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

"In this case the Court of Appeals exercised the trial court's prerogative. The Court of Appeals decided 'the verdict herein (comes) within the "first blush rule."' But in *Wilson v. Redken Laboratories, Inc., supra,* at 635, we state that 'It is not the function of *this or any appellate* court to blush at any time when it considers the question of damages awarded by a jury to an injured person.' (Emphasis added.)

"The 'first blush' rule is a mechanism to assist the *trial court* in performing its responsibility when called upon to decide whether the award is so excessive as to appear 'to have been given under the influence of passion or prejudice.' CR 59.01(d). In its entirety it is that 'a verdict may be set aside as excessive only if "it is (so) to such an extent as to cause the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury."' *Wilson v. Redken Laboratories, Inc., supra,* 562 S.W.2d at 636.

"On the other hand, the appellate function is properly described in *Prater v. Arnett,* Ky.App., 648 S.W.2d 82 (1983):

'Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous. Further, the action of the trial judge is presumptively correct . . . .' 648 S.W.2d at 86.

"Our earlier opinion discussing review of the question of excessive damages in *City of Louisville v. Allen,* Ky., 385 S.W.2d 179 (1964) expresses essentially the same analysis as *Prater v. Arnett* of the different functions of trial and appellate courts. The basic guidelines for appellate review is set out in the *Allen* case as follows:

'It serves to emphasize the initial and primary role of the trial judge in determining these issues; that his decision shall be *prima facie correct* and final; and that only in rare instance when it can be said that he *has clearly erred,* i.e., abused his discretion, will he be reversed.' (Emphasis original.) 385 S.W.2d at 183-184.

"Once the issue is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals substitute our judgment on excessiveness for his unless clearly erroneous.

"In short, the rules governing appellate practice do not direct the appellate judge to decide if the verdict shocks his conscience or causes him to blush. Those rules charge us with the responsibility to review the record and decide whether, when viewed from a standpoint 'most favorable' to the prevailing party, there is evidence to support the verdict and judgment. *Rogers v. Kasdan,* Ky., 612 S.W.2d 133 (1981). There is sufficient evidence to support the jury's award in this case. Neither the Court of Appeals nor this Court is justified in setting it aside in such circumstances . . . ." Vance, J., dissents and files a separate opinion in which Stephenson, J., joins.

TORTS

INSURANCE

No-fault—Child injured in automobile accident—Two-year statute of limitations—Legal disability—Infant or person under disability having a cause of action arising from injuries received in a motor vehicle accident has two years after attainment of his majority or release from disability in which to file a tort liability claim—This right has not been affected by the no-fault statute—

Lemmons, Jr. v. Ransom; On review from Court of Appeals; Opinion by Justice Wintersheimer, *affirming.* (Ct. App. opinion, 30 K.L.S. 11, p. 4.)

"This appeal is from a decision of the Court of Appeals which reversed a summary judgment by the Jefferson Circuit Court dismissing the personal injury action of James C. Ransom as being barred by the two-year statute of limitations of the No-Fault Insurance Act. KRS 304.39-230(6).

"The principal issue is whether the provisions of Kentucky's 'saving' statute, KRS 413.170(1), are applicable only to actions designated in KRS 413.090-160, or whether those saving provisions extend to actions in tort brought under the no-fault law.

"James C. Ransom was injured in an automobile accident in 1975 at the age of 13. He reached the age of majority on September 8, 1980, and filed a lawsuit on August 31, 1982, to recover for his personal injuries. At the time of the accident, he was covered by the provisions of the no-fault insurance law. KRS 304.39. His injuries were such that his claim exceeded the threshold limits, thereby affording him the right to file a tort action against the negligent party.

"The circuit court dismissed James Ransom's complaint as barred by the two-year statute of limitations under the no-fault law, holding that the saving statute, KRS 413.170(1) was not applicable. The trial judge relied on *Hutto v. Bockweg,* Ky. App., 579 S.W.2d 382 (1979), as its authority. The Court of Appeals reversed the decision and remanded the case to circuit court. Both Louis E. Lemmons, Jr. and Wanda Ransom sought discretionary review.

"This Court affirms the decision of the Court of Appeals because an infant or person under disability having a cause of action arising from injuries received in a motor vehicle accident has two years after the attainment of his majority or release from disability in which to file a tort liability claim. The right has not been affected by the no-fault statute.

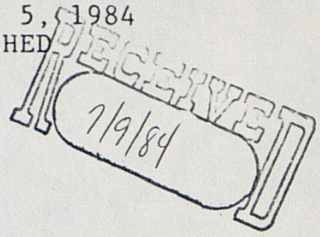
"The infant child's claim for tort damages has not been abolished under Kentucky's no-fault law, or KRS 304.39, and may be timely brought within two years of the infant's majority. KRS 304.39 does not create a new cause of action but limits a pre-existing claim for relief.

"Here, this claim arises from the common law which is not a statutory creation. It is a cause of action mentioned in KRS 413.140(1)(a). This action is distinguishable from the facts and type of cause of action set forth in *Hutto, supra.* Reliance on *Hutto* is misplaced because the rationale of that case is inapplicable here. *Hutto* involved a statute dealing with the sale of securities. KRS 292.480(3). It was held that the saving statute had no application and the claim was barred. The no-fault law is not to be construed to deny those under age or under disability the benefit of the general saving statute applicable to personal injury claims. KRS 413.140(1)(a) and KRS 413.170(1).

"The *Hutto* decision relates to a separate body of higly specialized commercial securities law. The law contains its own statute of limitations and has a principal concern to eliminate fraud in the sale of securities. The no-fault law does not constitute a separate body of law. It affects only a part of the personal injury field of tort relating to automobile accidents.

"Here the statute of limitations in KRS 304.39-230(6) modifies only that language contained in KRS 413.140 and does not abolish the entire statute of limitations for those torts arising from motor vehicle accidents. Consequently KRS 413.170 tolls the two-year statute of limitations under the no-fault statute in cases of minors and persons under

RENDERED: July 5, 1984
TO BE PUBLISHED



Supreme Court of Kentucky

83-SC-458-DG

MARGIE MONTGOMERY HILEN — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 82-CA-2566-MR
(Fayette Circuit Court - No. 81-CI-3151)

KEITH HAYS — APPELLEE

OPINION OF THE COURT BY JUSTICE LEIBSON

REVERSING

The appellant, Margie Montgomery Hilen, was severely injured when the automobile in which she was a passenger was driven into the back of another vehicle and overturned. She sued the driver, appellee Keith Hays. There was no question but that the cause of the accident was the driver's negligent operation of the vehicle. There was a factual dispute as to whether the passenger failed to exercise reasonable care for her own safety by riding with a person whom she knew or should have known to be too intoxicated to drive safely.

At the conclusion of the trial the judge directed a verdict as to appellee's negligence and submitted the case to the jury solely on the issue of appellant's contributory negligence. The jury was given the usual instruction that contributory negligence was a complete bar to any recovery. The appellant objected and tendered

an instruction based on the doctrine of comparative negligence, which was refused. The jury found for the appellee and this appeal followed. The Court of Appeals affirmed. We have granted discretionary review.

The sole issue before us is whether negligence on the part of the appellant contributing to her injury should be a complete bar to any recovery, as is the traditional rule in the Commonwealth, or whether the time has come for us to reject this rule and adopt the doctrine of comparative negligence allocating responsibility for the injury between the parties in proportion to their contributory fault.

There are a number of significant issues underlying the question before us. These include consideration of the origin and development of our present rule where contributory negligence is a complete defense, the doctrine of stare decisis, whether the judiciary should defer to the legislature in this matter, and the role of fundamental fairness in the development of the common law. Further, if changes are to be made, we must consider whether such changes should be broad or narrow in scope and when they should be implemented.

Contributory negligence developed as a defense to a negligence action at a comparatively late date. The earliest reported case is Butterfield v. Forrester, 11 East 60, 103 Eng.Rep. 926 (1809). The rule in Butterfield v. Forrester entered American jurisprudence in 1824 in the Massachusetts case of Smith v. Smith, 2 Pick. 621 (Mass. 1824). The first Kentucky case on record to apply this principle is Newport News & M.V.R. Co. v. Dauser, 13 Ky.L.Rep. 734 (1892), which is reported as holding:

> "(I)f the plaintiff so far contributed to the injury that but for his contributory negligence the injury would not have been received, he cannot recover, . . ."

Thereafter, in a series of cases extending through 1970,[1] our Court continued to recognize and apply the principle of contributory negligence as a complete bar to recovery without consideration to the relative merits of comparative negligence as an alternative. The last reported opinion from this Court making a clear statement of the rule is Houchin v. Willow Avenue Realty Co., Ky., 453 S.W.2d 560, 563 (1970), stating that "we have not adopted the comparative negligence doctrine in Kentucky . . ."

There have been several reported cases since Houchin in which our intermediate appellate court was asked to consider the comparative negligence alternative but held, quite properly, that if previous decisions upholding contributory negligence as a complete defense are to be overruled, the decision would have to emanate from the Supreme Court. Mackey v. Greenview Hospital, Inc., Ky. App., 587 S.W.2d 249 (1979); Vinson v. Gobrecht, Ky.App., 560 S.W.2d 242 (1977).

---

[1] Sandy River Cannel Coal Co. v. Caudill, 22 Ky.L.Rep. 1176, 60 S.W. 180 (1901); Peerless Mfg. Corp. v. Davenport, 281 Ky. 654, 136 S.W.2d 779 (1940); Price v. T.P. Taylor & Co., Inc., 302 Ky. 736, 196 S.W.2d 312 (1946); Myers v. Ben Snyder, Inc., 313 Ky. 832, 333 S.W.2d 1016 (1950); Felix v. Stavis, Ky., 385 S.W.2d 72 (1964); Williams v. Chilton, Ky., 427 S.W.2d 586 (1968); Houchin v. Willow Ave. Realty Co., Ky., 453 S.W.2d 560 (1970).

This brief historical review illustrates several important points. Section 233 of the Kentucky Constitution provides:

> "All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature . . . shall be in force within this State until they shall be altered or repealed by the General Assembly."

This provision had the effect of adopting as the law of this state the common law of England that was part of the law of the State of Virginia at the time. Coleman v. O'Leary's Exr., 114 Ky. 388, 70 S.W. 1068 (1902); Jenkins v. Berry, 119 Ky. 350, 83 S.W. 594 (1904). But contributory negligence as a bar to recovery was not part of the law of the State of Virginia nor part of the English common law in 1792. It is court-made law originating after the applicable constitutional provision.

The next important fact, historically, is that the Kentucky General Assembly has failed to address this subject. The only statutes which appear to have any relevance to our consideration are: (1) KRS 454.040 which provides that a jury "may" elect to apportion damages among defendants jointly or severally liable; (2) KRS 411.320 which provides that contributory negligence is a defense to a product liability action; and (3) KRS 277.320 which adopts comparative negligence as the rule for railroad employees in actions against their employers, extending the same provision as found in the Federal Employers' Liability Act (FELA), 45 USCS §53, to Kentucky causes of action if not covered by the federal act.

The first statute, KRS 454.040, if it has a bearing, seems

to favor a policy of liability apportioned according to fault. The second statute, KRS 411.320, was intended to settle an ongoing controversy as to whether contributory negligence is a defense to a products liability action. It may be arguable that the statute is capable of being construed as providing for contributory negligence as a complete defense to a products liability action (a question which remains open for a case in point), but from its background it is clear that the legislative purpose was to deal with the availability of contributory negligence as a defense in products cases and not with whether contributory negligence should result in a complete bar or a proportionate recovery. The third statute, KRS 277.320, not only expresses a preference for comparative negligence in a suit by an employee against a common carrier by railroad, but also a preference for the pure form of comparative negligence.

Thus an historical review compels the conclusion that the contributory negligence rule as it applies to this case is court-made law that bears the imprimatur of neither the Kentucky constitution nor the General Assembly.[2] After conducting a similar historical review, Prosser states in the Law of Torts, (4th Ed., 1971), p. 434:

> "There never has been any essential reason why the change could not be made without a statute by the courts which made the contributory negligence rule in the first place . . ."

---

[2]It is an interesting aside that the form of contributory negligence involved in this case is the old common law doctrine of assumption of the risk. We have abolished the separate defense of assumption of the risk in Parker v. Redden, Ky., 421 S.W.2d 586 (1967), one example of fact that this court has the power and the obligation to change a long established court-made rule in appropriate circumstances.

Having deference to the doctrine of stare decisis, the courts of the several states have been understandably reluctant to abandon contributory negligence as a complete defense notwithstanding the relative merits of the two competing positions. The tendency was to defer consideration of comparative negligence to the legislatures of the several states, although there was no statute mandating the traditional rule and thus no question of separation of powers involved. Courts were leaving to the legislature responsibility for undoing what the courts had done in the first place.

So the evolution towards comparative negligence began in the various state legislatures first in a trickle and then in an avalanche. The first comparative negligence statute was enacted in Mississippi in 1910. Wisconsin and Nebraska followed in 1913, South Dakota in 1941, Arkansas in 1957, Maine in 1964. Following a full-scale public debate of the relative merits of comparative negligence in textbooks and treatises, twenty-six more states followed between 1969 and 1983. At present count thirty-two states, Puerto Rico, and the Virgin Islands have adopted comparative negligence or comparative fault by statute.[3]

---

[3](1) Arkansas, Ark. Stat. Ann. §§ 27-1763 to -1765 (1979). (2) Colorado, Colo. Rev. Stat. § 13-21-111 (1973 & Supp. 1982). (3) Connecticut, Conn. Gen. Stat. § 52-572h, -572o (1983). (4) Georgia, Ga. Code Ann. § 105-603 (supp.1982). (5) Hawaii, Haw. Rev. Stat. § 663-31 (1976). (6) Idaho, Idaho Code §§ 6-801 to -806 (1979). (7) Indiana, Ind. Code Ann. § 34-4-33-1 to 8 (Burns Supp.1983). (8) Kansas, Kan. Stat. Ann. § 60-258a, 258b (1976). (9) Louisiana La. Civ. Code Ann. art. 2323 (West Supp.1983). (10) Maine, Me. Rev. Stat. Ann. tit. 14, § 156 (1964). (11) Massachusetts, Mass. Gen. laws Ann. ch. 231, § 85 (Michie/Law. Coop.Supp. 1983). (12) Minnesota, Minn. Stat. Ann. § 604.01-.02 (West Supp. 1983). (13) Mississippi, Miss. Code Ann. § 11-7-15 (1972). (14) Montana, Mont. Code Ann.

In addition, between 1975 and the present, courts in nine other states have refused to wait further for their legislatures to act and have adopted comparative negligence by judicial decision.[4] Thus the doctrine of contributory negligence as a complete bar, challenged by most legal scholars in the 50's and 60's, has been generally rejected since then, first legislatively, and then judicially where the legislature has refused to act. As the Supreme Court of Missouri stated in Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983):

---

§§ 27-1-702, -703 (1981). (15) Nebraska, Neb. Rev. Stat. § 25-1151 (1979). (16) Nevada, Nev. Rev.Stat. § 41-141 (1979). (17) New Hampshire, N.H. Rev. Stat. Ann. § 507:7-a (Supp. 1979). (18) New Jersey, N.J. Stat. Ann. §§ 2A:15-5.1 to -5.3 (West Supp. 1983-1984). (19) New York, N.Y. Civ. Prac. Law § 1411 (McKinney 1976). (20) North Dakota, N.D. Cent. Code § 9-10-07 (1975). (21) Ohio, Ohio Rev. Code Ann. § 2315.19 (Page 1982). (22) Oklahoma, Okla. Stat. Ann. tit. 23, §§ 13-14 (West Supp. 1982-1983). (23) Oregon, Or. Rev. Stat. § 18-470 (1981). (24) Pennsylvania, Pa. Stat. Ann. tit. 42, § 7102 (Purdon 1982 and Supp. 1983-1984). (25) Rhode Island, R.I. Gen. Laws §§ 9-20-4, -4.1 (Supp. 1982). (26) South Dakota, S.D. Comp. Laws Ann § 20-9-2 (1979). (27) Texas, Tex. Rev. Civ. Stat. Ann. art. 2212a (Vernon Supp. 1982-1983). (28) Utah, Utah Code Ann. §§ 78-27-37 to -43 (1953). (29) Vermont, Vt. Stat. Ann. tit. 12, § 1036 (Supp. 1983). (30) Washington, Wash. Rev. Code Ann. §§ 4.22.005-.920 (Supp. 1983-1948). (31) Wisconsin, Wis. Stat. Ann. § 895.045 (West 1983). (32) Wyoming, Wyo. Stat. § 1-1-109 (1977).

Puerto Rico, P.R. Laws Ann. tit. 31, § 5141 (1968). Virgin Islands, V.I. Code Ann. tit. 5, § 1451 (Supp. 1982).

[4](1) Alaska, Kaatz v. State, 540 P.2d 1037 (Alaska 1975). (2) California, Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal.Rptr. 858 (1975). (3) Florida, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). (4) Illinois, Alvis v. Ribar, 85 Ill.2d 1, 52 Ill. Dec. 23, 421 N.E.2d 886 (1981). (5) Iowa, Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982). (6) Michigan, Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400 (1977). (7) New Mexico, Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981). (8) West Virginia, Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979). (9) Missouri, Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983).

> "We have remained quiescent more than five years while waiting for the legislature to act. . . .
>
> . . . legislative failure to enact this reform reflects inertia rather than community sentiment." Id. at 14-15.

A comparative negligence bill was introduced at the 1968 session of the Kentucky General Assembly and a similar bill has been introduced in most, if not all, sessions since then. Two bills were introduced in 1984 and neither got out of committee. Senate Bill 172, 84 BR 1593; Senate Bill 211, 84 BR 1734.

In broad outline, stare decisis directs us to "stand by" our previous decisions unless there are sound legal reasons to the contrary. Every case must be decided with a respect for precedent. But the doctrine of stare decisis does not commit us to the sanctification of ancient fallacy. In Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1983), the Supreme Court of Iowa observed:

> "(S)tare decisis does not preclude the change. That principle does not require blind imitation of the past or adherence to a rule . . . We must reform common law doctrines that are unsound and unsuited to present conditions. Id. at 753.

The common law is not a stagnant pool, but a moving stream. City of Louisville v. Chapman, Ky., 413 S.W.2d 74, 77 (1967). It seeks to purify itself as it flows through time. The common law is our responsibility; the child of the courts. We are responsible for its direction. In International News Services v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918), Mr. Justice Brandeis wrote:

> "The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle." 248 U.S. at 262.

Mr. Justice Sutherland wrote in Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369 (1933):

> "(T)o say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin." 290 U.S. at 383.

Thus, with forty-one out of fifty states having adopted comparative negligence, nine by judicial decision after showing due regard for stare decisis and due deference to their legislatures, the time has come for us to address the real question in this case: whether there are principles of fundamental fairness, underlying the application of contributory negligence as a defense, so compelling that contributory negligence as a complete defense should be discarded as part of the common law of this state in favor of comparative negligence.

A list of the critics of contributory negligence as a complete bar to a plaintiff's recovery reads like a tort hall of fame. The list includes, among others, Campbell, Fleming, Green, Harper and James, Dreton, Leflar, Malone, Pound and Prosser. In 1953 Prosser wrote:

> "The attack upon contributory negligence has been founded upon the obvious injustice of a

> rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot-free. No one has ever succeeded in justifying that as a policy, and no one ever will." Prosser, Comparative Negligence, 51 Mich.L.Rev. 465, 469 (1953).

In Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226 (1975):

> "The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised arguments in justification, but none have proved even remotely adequate to the task. . . . In a system in which liability is based on fault, the extent of that fault should govern the extent of liability. . . ." 532 P.2d at 1230-31.

At oral argument in the present case appellee's counsel conceded that the present system creates certain "inequities," claiming that these inequities are supposedly cured by juries acting in disregard of their instructions to make comparative findings. Assuming there is any truth to this speculation, it only confirms that the concept of allocating liability proportionate to fault remains "irresistible to reason and all intelligent notions of fairness." Li v. Yellow Cab Co., supra, 532 P.2d at 1231.

Comparative negligence is not "no-fault," but the direct opposite. It calls for liability for any particular injury in direct proportion to fault. It eliminates a windfall for either claimant or defendant as presently exists in our all-or-nothing situation where sometimes claims are barred by contributory negligence and sometimes claims are paid in full regardless of contributory negligence such as in cases involving last clear chance or defendant's

willful or wanton negligence. See Vasseur v. Rose, Ky., 415 S.W.2d 361 (1967), last clear chance; First National Ins. Co. of America v. Harris, Ky., 455 S.W.2d 542 (1970), willful or wanton negligence.

The answer to the charge that in a comparative negligence system the claimant recovers for his own wrong is that the opposite is true. Even where comparative negligence is applied 100% (the so-called "pure" form of comparative negligence), the claimant who is 95% negligent recovers from the defendant only for that small portion of the injury, 5%, which is fairly attributable to the defendant's fault. In theory, the system is 100% fair.

The arguments against comparative negligence are directed only to speculation that it will be less fair in practice. There is no hard evidence to support such speculation. We do not proceed from the premise that defendants any more than claimants will be treated dishonestly by juries.

> "By 1850 England had become heavily industrialized. This unprecedented development of industry and the general realization that it was related to Britain's continuance as the dominant world power brought out the protective instincts of her judiciary. The English courts eagerly seized upon Lord Ellenborough's holding in Butterfield as a most effective protective device. The American judiciary was no less enthusiastic." Woods, Comparative Fault, (Lawyers Coop. & Bancroft-Whitney, 1978), #1:4, pp. 7-8.

It may well be that the 19th century judicial mind perceived of the need for courts to tilt the scales of justice in favor of defendants "to keep the liabilities of growing industry within some bounds." Prosser, The Law of Torts, supra, p. 418. But assuming such a rule was ever viable, certainly it no longer comports to present day

morality and concepts of fundamental fairness.

Above all else, court-made law must be just. It must accommodate justice by evolution or anticipate revolution.

> "Justice, justice shall you pursue, that you may live in the land which God gives you." Deuteronomy 16,20.

To those who speculate that comparative negligence will cost more money or cause more litigation, we say there are no <u>good</u> economies in an <u>unjust</u> law.[5]

There are a number of further arguments presented to us in defense of the status quo. In each instance these arguments have been discussed and rejected by various courts and commentators to which we have referred in this opinion. It would prolong this opinion unduly without adding anything new to the body of law on the subject to further discuss the fairness issue. As with the first question as to this Court's authority and responsibility to make such a decision, the answer to the second question as to the fundamental fairness of comparative negligence also weighs overwhelmingly in favor of the appellant.

Having concluded that contributory negligence as a complete defense in Kentucky should give way to comparative negligence, the next question is what form of comparative negligence should be adopted. Although there are variations in the types of comparative negligence, the two basic systems are the "modified" form and the "pure" form,

---

[5]Prosser, <u>Law of Torts</u>, (4th Ed., 1971), p. 438: "There has been much controversy over the prospective effect upon liability insurance rates, which, so far as appears, has been nothing very unsettling in the states where the statutes have been adopted." (Studies cited).

"modified" meaning "limited" and "pure" meaning "complete." Under the "modified" form, with variations depending on the system, the claimant can recover if his percentage of fault is not equal to or greater than that of the defendant(s). Under the "pure" form, the claimant's recovery is reduced by the amount of fault attributable to him, but he may recover regardless of whether his fault is equal to or greater than than of the defendant(s).

Opponents of the "modified" form of comparative negligence argue that this system encourages appeals on the narrow but crucial issue of whether plaintiff's negligence was equal to or greater than defenant's, and further argue that it does not abrogate contributory negligence but "simply shifts the lottery aspect of the rule to a different ground." Li v. Yellow Cab Co., supra, at 1242. See also Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886, 898 (1981); Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400, 428 (1977); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234, 1243 (1981).

> "They(limited comparative negligence statutes) have led, under all of the statutes, to an excessive number of appeals, in which the court is asked to review the jury's findings as to the comparative fault." Prosser, Law of Torts, supra, 437-8.

In eight of the nine states where comparative negligence has been adopted by judicial decision, the courts have opted for the "pure" form. Only West Virginia has held to the contrary. Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W.Va. 1979). The supreme courts of the eight states adopting the "pure" form concluded that it is fairer, simpler to administer, more just, and the most equitable.

Judicial history in Wisconsin where modified comparative negligence was legislatively adopted in 1913 is the most extensive of any state. Previous history in Wisconsin indicates a large number of appeals focused on the narrow question of whether plaintiff's negligence amounted to 50% or less of the aggregate. Prosser, Comparative Negligence, 41 Cal.L.Rev. 1, 23 (1953). "(I)t is more compelling to appeal when you have been awarded nothing than when you have received some compensation." Kirby v. Larson, 400 Mich. 585, 256 N.W.2d 400, 428 (1977).

In contrast to change by the judiciary where pure comparative negligence has been the overwhelming choice, the majority of state legislatures adopting comparative negligence have favored some modified form. After researching this difference, Prosser concludes:

> "All of these restrictions (modified forms) are obviously the result of compromise between conflicting interests in the legislatures, and smack of political expediency rather than of any reason or logic in the situation." Prosser, Law of Torts, (4th Ed., 1971), 437.

The treatise by Judge Henry Woods, Comparative Fault, supra p. 11, includes an extensive review of both the legislative and judicial experience of our sister states with comparative negligence. Such a review compels us to conclude that the pure form of comparative negligence is preferable over any of the variety of modified forms that have been suggested. Having so concluded, we must now decide how to implement this decision for this case and for other cases now in the system where this decision will have a bearing.

Henceforth, where contributory negligence has previously been

a complete defense, it is supplanted by the doctrine of comparative negligence. In such cases contributory negligence will not bar recovery but shall reduce the total amount of the award in the proportion that the claimant's contributory negligence bears to the total negligence that caused the damages. The trier of fact must consider both negligence and causation in arriving at the proportion that negligence and causation attributable to the claimant bears to the total negligence that was a substantial factor in causing the damages.

In order to apply this rule in the present case, we extract the following jury instructions from the Uniform Comparative Fault Act, § 2, 12 U.L.A., Civ. Proc. & Rem. Law, 39 (Cum. Supp. 1984), for the jury to use in the event it finds both parties at fault:

> "(a) . . . the court . . . shall instruct the jury to answer special interrogatories . . . indicating:
>
> (1) the [total] amount of damages [the] claimant would be entitled to recover if contributory fault is disregarded; and
>
> (2) the percentage of the total fault . . . that is allocated to [the] claimant [and] defendant, [the total being 100%].
>
> (b) In determining the percentages of fault, the [jury] shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed."

We adopt only this part of the Uniform Comparative Fault Act which is directly applicable to this case and we express no opinion as to future application of any portion of the Act not quoted expressly in this opinion.

The final question that remains to be addressed is the application of the present decision to this case and others where contributory negligence is an issue. Other courts that have adopted comparative negligence have all made the doctrine effective to pending cases to some extent. The appellant complains that the rules should not be changed in his case. But unlike contract law the appellant here did not act in reliance on the state of the law at the time of the act, and has no legitimate complaint against the retroactive application of a change. We conclude, as did the Missouri court in Gustafson v. Benda, supra, and the Iowa court in Goetzman v. Wichern, supra, that the comparative negligence doctrine shall apply to:

1) The present case;

2) All cases tried or retried after the date of filing of this opinion; and

3) All cases pending, including appeals, in which the issue has been preserved.

The decision of the Court of Appeals and the trial court is reversed, and the within action is remanded to the trial court for proceedings in conformity with this opinion.

Stephens, C.J., and Aker, Gant, Leibson and Wintersheimer, JJ., concur. Stephenson and Vance, JJ., dissent, and will file dissenting opinion.

ATTORNEY FOR APPELLANT:

William R. Garmer
PERLMAN & GARMER, PSC
388 S. Broadway
Lexington KY 40508

ATTORNEY FOR APPELLEE:

C. William Swinford
STOLL, KEENON & PARK
1000 First Security Plaza
Lexington KY 40507

ATTORNEY FOR PEERLESS COAL CO.:

Bert T. Combs
Lawrence E. Forgy, Jr.
1100 Kincaid Towers
Lexington KY 40507

RENDERED: July 5, 1984
TO BE PUBLISHED

Supreme Court of Kentucky

83-SC-458-DG

MARGIE MONTGOMERY HILEN — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 82-CA-2566-MR
(Fayette Circuit Court - No. 81-CI-3151)

KEITH HAYS — APPELLEE

CONCURRING OPINION BY JUSTICE LEIBSON

I concur with the majority opinion. But, in addition I would provide guidelines for application of the new rule to other situations that will be affected by the change to comparative negligence. As a general rule we do not decide in advance collateral issues which eventually will be forthcoming. Those issues are resolved later on in the context of concrete cases. Nevertheless trial courts should have some point of departure for dealing with the complicated issues that will be precipitated by a change of this magnitude.

As stated by the Supreme Court of Missouri in Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983), the most recent case judicially adopting comparative negligence:

> "All that remains is for us to find the simplest and most clear, concise, and direct method for adopting a comprehensive system of comparative fault for the trial of tort cases and a procedure for accomplishing the transition to comparative fault." 661 S.W.2d at 15.

The Missouri court then designated the comparative fault system structured in the Uniform Comparative Fault Act, §§ 1-6, 12 U.L.A., Civ. Proc. & Rem. Law, 35-46 (Cum. Supp. 1984), to provide the trial court instructions for the pending case and to provide guidance "insofar as possible" in future cases.

The Missouri approach is well suited to our problems in the present case and the needs of our system. The Uniform Comparative Fault Act was the product of five years of work by a special committee of the National Conference of Commissioners on Uniform State Laws. It was approved by the National Conference in 1977, with one amendment in 1979. The Commissioners' Prefatory Note states:

> "Careful consideration has been given to all potential problems, and specific provisions are made for most of them."

In his comprehensive treatise on Comparative Fault, Judge Henry Woods states:

> "Sections 1-6 of the Uniform Comparative Fault Act on the whole are superior to any existing comparative negligence statute." Woods, Comparative Fault, (Lawyers Coop. & Bancroft-Whitney, 1978) § 22:12, p. 420..

The Uniform Comparative Fault Act with Commissioners' Comment provides appropriate guidance where suitable. Those instances where it is not suitable can be decided on a case-by-case basis.

The Uniform Act has the salutary effect of reducing complicated legal theories regarding types and degrees of fault to relatively simple factual determinations. As stated by Judge Woods, "This is a great step forward." Woods, Comparative Fault, supra, § 22:12, p. 420. Three states, Washington, Minnesota, and now Missouri,

have already gone to the Uniform Act as a model. If there can be an advantage to our being among the last to adopt comparative negligence, it should be the advantage of being able to use the broad experience provided by our predecessors to point the way to the best solutions available.

Civil Action 82-323 REFFETT V. TRAMCO

Plaintiff filed complaint based on Police officer's report in which TUG RIVER ARMATURE AND MACHINE CO. was abbreviated to TRAMCO.

T RAMCO is a defunct and dissolved(in 1980) former Illinois corporation.

Plaintiff now wishes to re-style the case and amend his complaint to show the real defendant. Summons has already been issued on the amended complaint.

GLP

Jack KLABER et al., Appellants,

v.

WILLIAMS TRACTOR CO., Inc., Appellee.

Court of Appeals of Kentucky.

Nov. 15, 1957.

Action by employee of stone company and employer's compensation carrier against tractor company for personal injuries alleged to have been received by employee as he grabbed for emergency brake to avoid collision on employer's premises with pick up truck owned by tractor company and driven by employee of tractor company on theory that employee of tractor company had duty, before driving about premises, to seek out manager of stone company and make inquiry concerning special custom of quarry pit road drivers to use left side of road. The Jefferson Circuit Court, Common Pleas Branch, Third Division, Ben F. Ewing, J., entered summary judgment for tractor company and employee and his employer's compensation insurer appealed. The Court of Appeals, Cullen, C., held that employee of tractor company did not have duty, before driving about premises of stone company to seek out manager and make inquiry concerning special customs.

Judgment affirmed.

1. Automobiles ⇐170(3)

Although stone company, because of special nature of quarry operation involving considerable movement of vehicles, had custom that vehicles using quarry road would use left hand side of road, business invitee, who had come on premises for purposes of repairing or servicing tractor of stone company, did not have duty, before driving about stone company premises, to seek out manager and make inquiry concerning special customs and was not liable to stone company's employee for personal injuries sustained when employee grabbed for brake to avoid head-on collision with business invitee on quarry pit road.

2. Automobiles ⇐152

Negligence ⇐30

Where business premises are opened for use of invitees, with no restrictive barriers or warnings, the invitee cannot be charged with duty of informing himself of a special custom governing movement of persons, machines or vehicles on premises, particularly one completely opposite of universal custom.

3. Judgment ⇐181(33)

In action by employee of stone company and his employer's insurance carrier against tractor company for personal injuries sustained when employee grabbed for brake to avoid head-on collision on premises of stone company between truck being driven by employee and another truck being driven by tractor company's employee, reasonable minds could not differ on fact that tractor company's employee was not negligent and therefore summary judgment for tractor company was proper.

Athol Lee Taylor, Taylor & Ray, Louisville, for appellant.

Boehl, Stopher, Graves & Deindoerfer, Louisville, A. J. Deindoerfer and John C. Fogle, Louisville, for appellee.

CULLEN, Commissioner.

Jack Klaber and his employer's compensation insurer (National Surety Corporation) sued the Williams Tractor Company for damages for personal injuries alleged to have been received by Klaber as the result of the negligence of Robert Thomas, an employe of the defendant. Summary judgment was entered for the defendant, and the plaintiffs have appealed.

The alleged injuries arose out of a collision, on the premises of Klaber's employer, the Falls City Stone Company, between a

large gravel truck known as a "Euclid" driven by Klaber, and a pick-up truck driven by Thomas. Klaber was driving up grade on a road coming out of a quarry pit, on the *left* side of the road. Thomas was driving down the road, on his *right* side. Thomas observed the "Euclid" coming around a sharp bend in the road, some 50 feet away, and applied his brakes. Klaber saw the pick-up truck at about the same time, and endeavored to stop his vehicle. Both vehicles had almost come to a stop when they hit head on, with a very slight impact, resulting only in a dented fender and broken headlight on the pickup truck. Klaber did not claim to have been injured by the impact, but claimed that his back was wrenched when he grabbed for his emergency brake.

Klaber's action for damages is predicated solely upon the proposition that Thomas was negligent in driving his truck on the road leading down into the quarry pit without first informing himself of a *custom* of the stone company that loaded trucks coming up the road would drive on their left side, and empty trucks would go down the road on their left side.

Thomas was on the premises as a business invitee, for the purpose of repairing or servicing a tractor of the stone company. On the preceding day, he had come on the premises for the same purpose, but had traveled a different roadway on which the custom did not prevail. He had talked with the company manager on that day, and the manager had said nothing about the custom governing the road leading down to the quarry pit.

[1] Klaber maintains that because of the special nature of a quarry operation, involving considerable movement of vehicles, Thomas had the duty, before driving about the premises, to seek out the manager and make inquiry concerning any special customs. This is a novel theory, and is not supported by any authority.

[2] Thomas was not entering into a specially restricted area of the premises, and there were no signs or other warnings of the special custom of driving. As far as normal observation would disclose, the quarry pit road was an ordinary two-lane road. Driving on the right side of a road, whether the road is public or private, is a universal custom. See Sills v. Forbes, 33 Cal.App.2d 219, 91 P.2d 246. We think that where business premises are open for use by invitees, with no restrictive barriers or warnings, the invitee cannot be charged with the duty of informing himself of a special custom governing movement of persons, machines or vehicles on the premises, particularly one completely the opposite of universal custom.

[3] The only basis upon which it could be said that there was a genuine issue of material fact in this case is that reasonable minds could differ as to whether Thomas exercised the care of a reasonably prudent man. We think reasonable minds could not differ, and the only conclusion that rationally could be drawn is that Thomas was not negligent. Accordingly, the court properly entered summary judgment for the defendant.

The judgment is affirmed.

WEST KEY NUMBER SYSTEM

Wallace JONES, Sheriff of Fayette County, et al., Appellants,

v.

Margaret L. RECORDS, Appellee.

Court of Appeals of Kentucky.

Nov. 15, 1957.

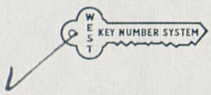
Proceeding by taxpayer for injunctive relief. From a judgment of the Fayette Circuit Court, Common Law and Equity Division, Chester D. Adams, J., enjoining sheriff from collecting county

a separate, independent communication; hence it was privileged.

[5] Through most of the proceeding in circuit court, including the trial, Massengale was without counsel, and the record is replete with procedural confusion of about the same kind and quantity as described in Massengale v. Lester, Ky., 403 S.W.2d 697. In addition, in this case, which went to the jury, Massengale failed to move for a directed verdict. Nonetheless, he did offer 13 instructions, 11 of which were rejected, and among those rejected were four instructions on the theory of privilege. This was enough to require a proper instruction on that theory, even if it would have had the practical effect of directing a verdict for Massengale. Cf. Clay's Kentucky Practice, CR 51, Comment 6. The court did not instruct on privilege, and it is our conclusion that the omission was a prejudicial error.

[6] Massengale having failed to move for a directed verdict, his motion for a judgment n. o. v. was not sustainable. CR 50.02; Claspell v. Brown, Ky., 332 S.W.2d 851 (1960). However, his motion for new trial should have been sustained on the ground of error in the instructions.

The cause is reversed with directions that a new trial be granted.



Sellie G. LEE, Jr., Appellant,
v.
August E. DUTLI, Appellee.
Court of Appeals of Kentucky.
March 25, 1966.
Rehearing Denied July 1, 1966.

Personal injury action. The Common Pleas Branch, Jefferson County, Fourth Division, Wallis Downing, J., entered judgment on jury verdict in favor of defendant, and the plaintiff appealed. The Court of Appeals, George O. Bertram, Special Commissioner, held that defendant who got into his parked automobile with windows fogged up and backed up 35 to 40 feet and hit plaintiff's parked automobile in shopping center private parking lot was guilty of negligence which was sole proximate cause of accident.

Reversed with directions.

1. Automobiles ⇐243(4)

Evidence as to alleged custom of parking automobiles in private parking lot at rear of store in shopping center was inadmissible as bearing on question of negligence in collision which occurred when one parked automobile backed into another parked automobile.

2. Negligence ⇐67

Where business premises are open for use by invitees with no restrictive barriers or warnings, invitee cannot be charged with duty of informing himself of special custom governing movement of persons, machines or vehicles or parking of machines or vehicles on premises.

3. Automobiles ⇐155, 201(1)

Defendant who got into his parked automobile with windows fogged up and backed up 35 to 40 feet and hit plaintiff's parked automobile in shopping center private parking lot was guilty of negligence which was sole proximate cause of accident

4. Automobiles ⇐226(2)

Negligence of plaintiff, if any, in parking outside of marked area of private parking lot in shopping center had no proximate causal connection with accident which occurred when defendant backed into plaintiff's automobile.

John L. Harbolt, Louisville, for appellant.

Fielden Woodward, Louisville, for appellee.

GEORGE O. BERTRAM, Special Commissioner.

Appellant as plaintiff in the trial court filed his complaint seeking damages of $15,000 for personal injuries claimed as the result of the negligence of appellee in the operation of his automobile. Appellant parked his car about 9:00 P.M. March 3, 1964, in the private parking lot at the rear of the Ben Snyder Store in the Algonquin Manor Shopping Center in Jefferson County. Appellant was there with his daughter to pick up his wife who worked at the Ben Snyder Store. While waiting for his wife appellant got out of the car and went to the rear to get an old sock from the trunk to wipe the windshield, which had fogged up. Appellee at about this time left a bowling alley located in the shopping center and entered his car, which was parked some 35 or 40 feet in front of appellant's car. While appellant was still at the rear of his car appellee backed his car and struck the front of appellant's car. Appellant contends his car was knocked backwards about ten feet by the impact and he was injured by reason thereof. Appellant's contention is supported by the evidence of two police officers, his wife, the testimony of two medical doctors, and a hospital employee. One officer testified his investigation showed appellant's car had been knocked backward about ten feet from the original point of the impact. All other evidence for appellant was in support of his claim for injuries.

Appellee contends he just bumped the car of appellant. However, he did admit that he had about two beers over a period of three hours while at the bowling alley; that when he got into his car the windows were fogged up; that he backed some 35 or 40 feet, and that he heard some screams and when he investigated, appellant "was laying on the ground, that's the first I knew he was there."

There was evidence, and we think undisputed, that appellant was not parked inside the parking area designated for parking. Appellant offered evidence as to the alleged custom of parking automobiles in the parking lot, to which the trial court sustained objections and excluded it from the jury.

On submission of the case the jury returned a verdict in favor of appellee. This appeal presents three questions:

(1) General custom, practice or usage is admissible in evidence as bearing on the question of negligence.

(2) The trial court erred in submitting the issue of appellant's contributory negligence to the jury, because no such negligence was shown.

(3) Appellee was negligent as a matter of law and the trial court erred in submitting the issue to the jury.

[1] We think the last two questions raised on this appeal are well taken. However, we think exclusion of the general custom, practice or usage evidence offered was correct. See Klaber v. Williams Tractor Co., Ky., 307 S.W.2d 204, in which this court said:

> "We think that where business premises are open for use by invitees, with no restrictive barriers or warnings, the invitee cannot be charged with the duty of informing himself of a special custom governing movement of persons, machines or vehicles on the premises, particularly one completely the opposite of universal custom."

[2] We think the rule of the case on this appeal, so far as the first question presented, should be adapted from the Klaber case as follows:

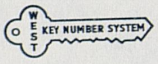
> "[W]here business premises are open for use by invitees, with no restrictive barriers or warnings, the invitee cannot be charged with the duty of informing himself of a special custom governing movement of persons, machines or vehicles [or the parking of machine or vehicles] on the premises."

[3, 4] We think the evidence in this case clearly shows that the negligence of

appellee in getting into his automobile with the windows fogged up and backing 35 or 40 feet was the sole proximate cause of the accident; that it is equally clear that if there was any negligence on the part of appellant in parking outside the marked area, it had no proximate causal connection with the accident; that there could hardly be a plainer case of negligence as a matter of law than was established by appellant's evidence, and that appellant was entitled to a peremptory instruction leaving only the question of damages for the jury. See Lawhorn v. Holloway, Ky., 346 S.W.2d 302, and the cases cited therein; Duff v. Lykins, Ky., 306 S.W.2d 252; Vaughn v. Jones, Ky., 257 S.W.2d 583, and Farris v. Summerour, Ky., 296 S.W.2d 708. The case of Carlisle v. Reeves, Ky., 294 S.W.2d 74, is not applicable.

It is our opinion that the trial court should have sustained appellant's motion for a directed verdict on the issue of liability and submitted to the jury the question of damages only.

The cause is reversed with directions for a new trial on the sole issue of damages.



Francis WILSON, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

May 6, 1966.

Rehearing Denied July 1, 1966.

Defendant was convicted in the Circuit Court, Monroe County, James C. Carter, Jr., J., of storehouse breaking and he appealed. The Court of Appeals, Williams, J., held, inter alia, that defendant was not denied due process of law or trial by an impartial jury although two former convictions were introduced before jury for purpose of enhancing punishment pursuant to Habitual Criminal Act for joint consideration with issue of specific crime alleged.

Judgment affirmed.

Milliken, J., dissented.

See, also, Ky., 403 S.W.2d 710.

1. Criminal Law ⇐369(7), 1169(5)

Introduction on cross-examination of defendant, charged with storehouse breaking, of testimony tending to show that defendant had committed another crime which was independent of and unrelated to one for which he was on trial was improper, however, admonition of trial court to jury to disregard testimony with reference to such crime cured error. RCr 9.24, 9.26.

2. Arrest ⇐63(4)

Criminal Law ⇐394.4(9)

Where police officers were searching roads incident to investigation of storehouse break in and observed out-of-county automobile parked about one quarter mile from scene of break in on dead end road, at 1:30 or 2:00 a.m., observed defendant switching license plates on automobile, observed a man approaching automobile 15 minutes prior to time that defendant approached it and observed defendant attempt to drive automobile away, there was reasonable grounds to make lawful arrest of defendant without a warrant and evidence obtained incident to such arrest was admissible.

3. Criminal Law ⇐641(1)

Where defendant, charged with storehouse breaking, had counsel at arraignment and at his trial, his constitutional right to counsel was not violated although three requests to consult with his attorney immediately after his arrest were denied since no incriminating statements or items of evi-

Civil Action No. 82-323, Paul Reffett, plaintiff
Ky. Farm Bureau Ins, intervening plaintiff

vs:

Tug River Armature and Machine Co, and
General Accident and Fire Assurance corp

Preliminary Conference 27 May 1983 at 9:30 AM

Plaintiff, passenger in a vehicle, was injured in an accident in Martin County when defendant's truck struck the vehicle he was riding in. He sues for $220,000. Represented by FRANCIS D. BURKE

Ky. Farm Bureau intervenes as the insurer of the vehicle in which plaintiff was injured. Having paid (or being responsible for) Basic Reparation Benefits in the amount of $10,000, it seeks to enforce its subrogation rights.

Not much question of law. Plaintiff asserts negligence. Defendant asserts contributory negligence, last clear chance.

Discovery is partially complete.

Goomba

Reffett

Pl Ex 1-21, with 11 + 21 being w/ drawn
admitted into evidence

En Mass

1st
W. sworn

Andy Lowe
D/ Sheriff - Martin Co.

Ex 18 - Sides 5

3:30 pm - 13 Jan 1982
3.10 pm - - middle fork Rd - 9 rds

Unit 1 - Maynard Vehicle on left side of Rd - -

Unit 2 - -

Unit 1 - down hill
Unit 2 - up hill toward mine

vehicles on right going toward
ment -
Signs on rd.

Maynard on right side of rd -
in direction he was going, he
would have passed signs saying
Keep left.

at guard gate - drive right

Sign near guard gate says Keep left

Cars on left side as he went in to accident - he pulled in behind 1979 Ford. (This witness very unsure)
Spindler vehicle #2. - 1st vehicle he came to.

"he talked to Maynard. he said he wasn't paying any attention."

Was there a sign on both sides of the Curve??

He said Ex 19 was picture of sign on side of Curve immediately before entering the Curve.

Todd Inglis ~~was~~ this sign (in Ex 19) was on side of Curve going out of Curve.

#2.

Jim
West Va. Solid Energy
Contract Mining
Sprodlin + Pruett employees
24 hour Security gate.

Ruffett –
Worked as mechanic
electrician for appx 1 yr before
accident.
Off almost 1 yr after
accident.
Worked 2-3 months
Started back
~~Returned~~ to work

Caution – Stop lite
Sign said all roads change

Law – (Ky) required traffic advise
to be given.

Δ Ex 1.

13 Jan.
Paid Paul top union rate
12 hrs + his hr
Average 4 hr.
Now pays 14 —— now being paid some rate

#3. Danny Beckett -
Section foreman.

Paul Reffett worked under him

Electrician -
- unable to do 90% of what he was doing

Cross -
He began work 1 June 81

Knowledge is the only usable product that Paul Reffett has of value to the Company.

#4. Buell Sprekler
Denver, Co

Knows Paul Ruffatt
13 Jan 1982

working for Va Solid Energy
operating vehicle

Silver near fuel

Worked almost a year - daily
traveled on this road
He was going toward
Fuel Bldg - on left side of
Rd.
Accident occured on
left side.

driver said when he popped
around curve he knew he was
on wrong side of road.

Cross
Paul had brother-in-law
from tuggle to Fuel (coming out)
drive on right hand side - then

at spire cross (again to left)

Bonnie Reffett

Wife of Paul.

Activity before accident
Body Building
Skiing
Roller Skating.

Change after accident
difficulty in sleeping
didn't exercise
Roller Skate

Marital difficulties arose after accident.

1981 Pulled muscle & pinched nerve

Started getting into Exercise activity after this.

Paul Reffett: - working West Va. coal Energy

29 yrs of age
divorced
to 5th Grade
masonary work
Went into Coal Mines at 17.
Brakeshoeman
did this 2 months
Operated machine - (Roof bolter)
13 months.

Went to another mine Machine Operator
Learned Repairman - (electrical)
On-the-Job-Training

Going to work - 2nd Shift
on that date - ending with
Buck Spradlin.

Ep 2-3-4
2- Charged for services
3- Pharmacy bills -
4:- re-imbursement agreement.
to re-imburse union for
such benefits if later compensated
5 1981 Top returns $20,000 +
6 1982 - earned income -- 16,080.07
sick pay :-
7. 1983 - earned income. 16,320.26
1983 - Jan. March - April strained
back -

TI Ex 8 - Continuous Miner
traction motors must be changed
9 - 265 - Lee Norse Miner
Ripper drum - must be changed
10 - Clutch assembly - changed
twice a year
11 - (With drawn)
12 - S & S Scrap -
Twin, foam filled - must be changed
13 - Spud Reducer S & S Scrap
must be changed
14 - Ripper Head Shaft -
changed every 12 - 14 months
15 Conveyor belt takeup assembly.

did exercises - latter part
of 1981 after pinched nerve.

TI Ex 1. Hosp. Records
1(a)
1(b)

13 Jan. Hosp

1st period 7 days released from hosp
returned to hosp. on same date

2nd period 6 days.

Ex. 16 - Back brace.

Wore it every day for 5 weeks after getting out of hosp.

Then 2 days a week for a while —

didn't wear at job

Cross:

just school at 13-14.

1976 - back injury
Portici
pain & numbness in right hip
W/C claim - Chad Perry. atty.
Award
$20 per week since 1977.
5% permanent partial disability.

The exercise program was undertaken in June 1981 after visits to Chidgey and Angelucci.

1983 — Miners were on 3-5 days per week.
5 days before strike 83 — 3-4 days thereafter
1981 — miners on 5 day a week
1982 — doesn't know how many days per week miners were working

decrease in gross pay in 1983 may have been because of decrease in working time.

Ex - 2. - Picture of forks of Rd.

Maynard vehicle 100-125 ft away when 1st noted
both vehicles - 20-25 mph.

Maynard - 1st turn to right.

Spradlin did not go into right hand lane.

Dep of Ratliff. 32 page 7.

Depositions of Dr Roe +
Dr Chang are made a
part of the trial record

Dr. Roe

D. Chang

#1

Maynard

Randall Lee Maynard

13 Jan. 82

Tug Rivi Armstrong employee —

Truck driver — delivered rebar to Mines (by himself)

Never been to the Complex before

Stopped at Guard house.

Right headed to Control Site up hill switch back to right took left. 1st fork. - (1 way) Rd — then came back by Lowers Rd — Right side to Pad

— — —

didn't think there would be another

We assumed the Lower Rd as being 1 way

Cross :

he was worried about Condition of Rds and didn't pay attention to signs.

Couldn't say whether signs were there or not.

Coard told him Rd was switched and to be careful.

Right hand side to Guard House + Caution light —

Left hand to Fork - then 1 way - back right hand side to office - at this didn't pay attention to signs (although Guard at Guard house told him to watch road) because of snowy Condition of Rd —

Tom Sheppard

President of Rimco

TT Ex 17.
18.

Doesn't recall seeing sign stay left.

1st time recalls seeing sign was a month ago.

Doesn't recall seeing a sign not saying then wasn't a sign

personally almost had an accident 4 months before this accident at same place.

Driver Maynard admitted
to being on the wrong side
of the road but seeks to
excuse himself by way of a back
door emergency.

Because of road Conditions
he did not observe the signs
if any there were,

the Court is satisfied from
the evidence and finds there were
signs — whether or not such signs
were adequate - isn't in issue
because Maynard said because
of Conditions he wasn't looking.

An emergency applies only
to situations which arise suddenly
and unexpected —

He knew of Conditions?

Roads from time he left on his
trip until the accident. He says
was assuming Rt 1 way and not reading

of Keeg ~~out~~ a look out

for signs

the acts he performed

of the car — the vehicle —

or ~~the~~ to proper side of the rd

was as a result of an emergency

because it was sudden and

unexpected - but has negligence

been on the wrong side of the rd

caused the emerging

Rec'd 10-17-84
C.A. 82-323

LAW OFFICES
BURKE, BURKE & WILSON

FRANCIS D. BURKE
KATHRYN BURKE
CHARLES F. WILSON, JR.

310 MAIN STREET
P. O. DRAWER 511
PIKEVILLE, KENTUCKY 41501
(606) 432-0181

Francis Dale
Davis Mr. Reffett
was badly
depressed —

Dr.

October 17, 1984

Hon. G. Wix Unthank, Judge
United States District Court
Pikeville, Kentucky 41501

IN RE: REFFETT v. TUG RIVER ARMATURE & MACHINE

Dear Judge:

The attorneys in this case have concluded that neither one of us desire to take the deposition of Dr. Adkins with respect to his report.

The case may stand submitted on the memorandum and memorandums filed unless, of course, the Court desires to have further memoranda for oral argument.

Very Truly Yours,

Francis D Burke
FRANCIS D. BURKE

James B Todd
JAMES B. TODD

FDB/tc

Francis Dale
Dana Mr. Reffett
was badly
depressed —

M.

Rec'd 10-17-84
C.A. 82-323

LAW OFFICES
BURKE, BURKE & WILSON

FRANCIS D. BURKE
KATHRYN BURKE
CHARLES F. WILSON, JR.

310 MAIN STREET
P. O. DRAWER 511
PIKEVILLE, KENTUCKY 41501
(606) 432-0181

October 17, 1984

Hon. G. Wix Unthank, Judge
United States District Court
Pikeville, Kentucky 41501

IN RE: REFFETT v. TUG RIVER ARMATURE & MACHINE CO.

Dear Judge:

The attorneys in this case have concluded that neither one of us desire to take the deposition of Dr. Adkins with respect to his report.

The case may stand submitted on the memorandum and memorandums filed unless, of course, the Court desires to have further memoranda for oral argument.

Very Truly Yours,

Francis D Burke
FRANCIS D. BURKE

James B Todd
JAMES B. TODD

FDB/tc

United States District Court
FOR THE
Eastern District of Kentucky

Chambers of
G. Wix Unthank
Judge
Pikeville, Kentucky 41501

August 28, 1984

Dale Adkins, M.D.
Pikeville Medical Building
Williamson Road
Pikeville, Kentucky 41501

Re: Reffett v. Tug River, Civil Action No. 82-232

Dear Dr. Adkins:

Pursuant to our telephone conversation enclosed herewith are six questions concerning damages allegedly suffered by the plaintiff, Paul Reffett.

Also enclosed is a copy of an award entered for the plaintiff for an occupational injury suffered by the plaintiff on or about the 19th day of December, 1977, the depositions of Drs. Rolando Cheng, Robert Roe, T. R. Miller and Ralph Angelucci, the hospital records of the initial hospitalization after the injury sustained on the 13th day of January, 1982, and a recent hospital confinement.

If you agree to accept this appointment, please advise and the plaintiff, Paul Reffett, will be made available for examination.

If you accept the appointment, whether or not the plaintiff is examined, the attorneys herein, Francis Dale Burke and James Todd, will desire to take your deposition.

Thank you for your cooperation.

Very truly yours,

G. Wix Unthank
Judge

GWU:mem

Encls:

QUESTIONS

1. What was the functional impairment, if any, suffered by the plaintiff, Paul Reffett, prior to the accident of the 13th day of January, 1982?

2. What was the occupational disability, if any, existing prior to the 13th day of January, 1982 accident?

3. What was the functional impairment, if any, resulting solely from the accident of the 13th day of January, 1982?

4. What was the occupational disability, if any, resulting solely from the accident of the 13th day of January, 1982?

5. If any functional impairment or occupational disability existed prior to the accident of the 13th day of January, 1982, whether or not it was enhanced by reason of the 13th day of January, 1982 accident, and the extent of such enhancement, if any?

6. Any combination of either functional impairment or occupational disability resulting from the accident of the 13th day of January, 1982 and the enhancement of same by reason of previous impairment or disability and the extent thereof?

LAW OFFICES
BURKE, BURKE & WILSON

FRANCIS D. BURKE
KATHRYN BURKE
CHARLES F. WILSON, JR.

310 MAIN STREET
P. O. DRAWER 511
PIKEVILLE, KENTUCKY 41501
(606) 432-0181

August 21, 1984

G.Wix Unthank, Judge
United States District Court
Federal Bldg.
Pikeville, Kentucky 41501

IN RE: REFFETT v. TUG RIVER, CIVIL NO. 82-323

Dear. Judge Unthank:

I believe that Mr. Todd and I have agreed on the names of three (3) doctors whose competency we agree on.

The first doctor is O.W. Thompson, Jr., whose offices are in the Pikeville Medical Building on Williamson Road, Pikeville, Kentucky and whose office number is 432-2172.

The second doctor is James D. Evans whose offices are located in Town & Country Shopping Center, Williamson Road, Pikeville, Kentucky and his office number is 432-2533.

The third doctor is Dale Adkins, whose offices are in the Pikeville Medical Building, Williamson Road, Pikeville, Kentucky and his office number is 432-0051.

I assume the Court will submit to the physician agreeing to act under the appropriate Federal Rule the following material:

1) Exhibits "1" "1a" & "1b", the record of the initial hospitalization of the plaintiff after the injury sustained in the accident.

2) The depositions of Dr. Rolando Cheng, Dr. Robert Roe, Dr. T.R. Miller and Dr. Ralph Angelucci.

3) The hospital record of the plaintiff's recent hospital confinement.

I would request further that the physician be advised, as shown by the evidence in this case, that the plaintiff had been employed as a repairman from February the 6th, 1981 to the present, except for the hospitalization period shown by the exhibits. I submit that the physician should also be advised that the plaintiff's employer and foreman had both testified that the plaintiff could not engage in tasks involving lifting, stooping, & bending as he routinely did prior to the injury of January 13th, 1982.

There was some reference in the depositions of Drs. Miller and Angelucci to earlier evaluations by them. The matter was not pursued any further than that but I have checked with my client and find that on may the 3rd, 1982 he received an award from the Workers Compensation Board for an injury sustained on December 19th, 1977.

I attach a copy of the opinion and award of the board, which was not appealed from and is presently in effect, for the consideration of Mr. Todd and yourself as to whether it should be given to the physician acting as an independent expert.

Based on the opinion of the Sixth Circuit in the case of Duty, et al v. U.S.A., decided June 11, 1984, the independent expert should be asked to answer questions in the following areas:

1) The extent of any functional impairment suffered by the plaintiff prior to the accident of January 13th, 1982;

2) In the event the expert witness cares to express an opinion with respect to occupational disability existing prior to January 13th, 1982;

3) The extent of functional impairment resulting solely from the accident of january 13th, 1982;

4) If the expert witness chooses to do so, any estimate of occupational disability resulting solely from the accident of january 13th, 1982;

5) Whether any functional impairment existing prior to January 13th, 1982 (or, if the witness chooses to do so, any occupational disability) was enhanced into further disability by the accident of January 13th, 1982;

6) Any combination of either functional impairment or occupational disability directly resulting from the accident of January 13th, 1982 and enhancement by reason of that accident of previous impairment or disability, and the extent therof.

In this connection, it is my opinion that the Court needs to give the expert witness some guidelines with respect to the differentiation between bodily impairment and occupational disability. The most comprehensive discussion of that difference, from a legal standpoint, is found in the case of Osborne v. Johnson, Ky.,(1968) 432 S.W. 2d 800.

That case is, of course, a Workmen's Compensation case but it is a scholarly discussion of the concepts of functional impairment and occupational disability. In headnote 3 of that opinion, the Court states that occupational disability is the same as impairment of earning capacity. The question of impairment of earning capacity is, of course, one of the items of damages to which the plaintiff is entitled in this case, if such exists.

The opinion goes on to note that the mere fact that a workmen is earning the same wages after disability as before is not conclusive on the issue of impairment of earning capacity.

I make this suggestion in no spirit of argument. The ultimate determination rests with the Court as the trior of the fact, but when a physician undertakes to speak in terms of occupational disability, if he elects to do so, he must be advised that medical percentages of functional impairment are not determinative of occupational disability.

Mr. Todd may very well want precise question framed to the expert witness as to whether recent hospital confinement or mechanical locked bowles is a result of the injuries sued on.

Of Course all of this would be subject to cross-examination of the expert witness by either Mr. Todd or myself. It has been my experience that many physicians, and particular those who seldom if ever testify in personal injury cases, do not understand the difference between legal causation and medical causation, that is whether the injury is a substantial contributing factor to a condition even though it may not be the sole and only cause of the condition.

I hope that these views will be of some assistance to the Court. They are made, of course, purely as suggestion in line with the Court's request to the parties.

Perhaps an informal conference between all counsel and the Court might help.

Very Truly Yours

Francis D Burke

FRANCIS D. BURKE

FDB/tc
encl: compensation award letter

[B J Kent]

Dec.

(1) Award for 10/19/77 injury.
(2) Last Hosp. Record - ~~Hall Med~~ ~~Court attached to motion to reopen~~
8/6/84
(3) Hour Deposition ~~in chief~~ Angelucci, Miller, Cheng and Roe
(4) Ex. 1, 1(a), & 1(b),

Dr. want to examine Ruffett.

Questions to answer for Court subject to deposition by Attys

Dr. Adkins would like to examine records and see Xrays before he makes decision.

QUESTIONS

1. What was the functional impairment, if any, suffered by the plaintiff, Paul Reffett, prior tot he accident of the 13th day of January, 1982?

2. What was the occupational disability, if any, existing prior to the 13th day of January, 1982 accident?

3. What was the functional impairment, if any, resulting solely from the accident of the 13th day of January, 1982?

4. What was the occupational disability, if any, resulting solely from the accident of the 13th day of January, 1982?

5. If any functional impairment or occupational disability existed prior to the accident of the 13th day of January, 1982, whether or not it was enhanced by reason of the 13th day of January, 1982 accident, and the extent of such enhancement, if any?

6. Any combination of either functional impairment or occupational disability resulting from the accident of the 13th day of January, 1982 and the enhancement of same by reason of previous impairment or disability and the extent thereof?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-323

PAUL REFETT, ET AL PLAINTIFFS

VS: AMENDED JUDGMENT

TUG RIVER ARMATURE AND
MACHINE COMPANY, ET AL DEFENDANTS

* * * * * *

On motion of the plaintiff and for amendment to the Judgment of the Court entered November 28, 1984,

IT IS FURTHER ORDERED AND ADJUDGED:

That the plaintiff is awarded and shall recover from the defendants interest on the various items of damages awarded in items (a), (b), (c), and (d) of the judgment, subject to the subrogated claim of the intervening plaintiff, at the rate of 9.50% per annum from November 28, 1984 until paid and this action is STRICKEN from the docket.

This 20th day of December, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-323

PAUL REFFETT, et al — PLAINTIFFS,

VS:

TUG RIVER ARMATURE and MACHINE COMPANY, et al — DEFENDANTS AND THIRD-PARTY PLAINTIFFS,

VS:

BUELL E. SPRADLIN — THIRD PARTY DEFENDANT.

JUDGMENT

* * * * * * * * * * * * * *

This action came on for trial before the Court, Honorable G. Wix Unthank, District Judge, presiding, and the issues have been duly tried and a decision has been duly rendered,

IT IS ORDERED AND ADJUDGED:

That the plaintiff, Paul Reffett, recover of the defendants, Tug River Armature & Machine Company, Inc., and General Accident and Fire Assurance Corporation:

(a) the sum of Forty Thousand ($40,000) Dollars for permanent injury and impairment of power to earn money;

(b) the sum of Thirteen Thousand Three Hundred Ninety-nine and 26/100 ($13,399.26) Dollars for loss of wages;

(c) the sum of Fifteen Thousand ($15,000) Dollars for past, present and future pain and suffering;

(d) the sum of Ten Thousand Eighty-six and 08/100 ($10,086.08) Dollars for medical expenses;

(e) and his costs of action.

That the third party plaintiffs, Tug River Armature & Machine Company, Inc., and General Accident & Fire Assurance Corporation, take nothing by reason of their third-party complaint and that same be and hereby is **DISMISSED.**

The intervening plaintiff, Kentucky Farm Bureau Insurance Companies, by reason of the Kentucky Revised Statutes, made certain basic reparation benefits in the sum of Ten Thousand ($10,000) Dollars to the plaintiff, Paul Reffett.

IT IS, THEREFORE, ADJUDGED:

That the intervening plaintiff be subrogated to the claim of the plaintiff, Paul Reffett, against the defendants, Tug River Armature & Machine Company, Inc., and General Accident & Fire Assurance Corporation, in the sum of Ten Thousand ($10,000) Dollars.

That the expense of expert witness, Dr. A. Dale Adkins, in the sum of Three Hundred Fifty ($350) Dollars be taxed as costs.

This is an action between multi-parties involving multi-issues. This is a **FINAL JUDGMENT** upon all issues between said parties.

This 28th day of November, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-323

PAUL REFFETT, et al — PLAINTIFFS,

VS:

TUG RIVER ARMATURE and MACHINE COMPANY, et al — DEFENDANTS AND THIRD-PARTY PLAINTIFFS,

VS:

BUELL E. SPRADLIN — THIRD PARTY DEFENDANT.

MEMORANDUM OPINION AND ORDER

* * * * * * * * * * * * * *

The use of the term "slight" in making reference to plaintiff's impairment isn't a denigration of plaintiff's difficulty. The evidence, deposition of Dr. Cheng, pp. 9-10, q & a, 23-25; 1-12, reflects a functional disability to the body as a whole in the amount of 10 percent. While this amount may be characterized as slight, it is nevertheless substantial. While a diminished capacity may not reflect a present impairment of one's earning power it does reflect a diminished capacity to compete in the labor market. Under Kentucky law, when permanent nature of injury is shown, failure to show impairment of one's earning power is not fatal to recovery for permanent injury. Traylor v. U. S., 396 F.2d 837, 6C.A. 1968.

The plaintiff, in establishing the merits of its complaint, also established the merits of the claims of the intervening plaintiff. The plaintiff seeks reimbursement,

in whole or in part, for his costs in obtaining such proof. Notwithstanding a feeling of sympathy for plaintiff's plight, in the absence of a duty or agreement, the Court is unable to make such an allocation of costs between the parties.

Dr. A. Dale Adkins, Court appointed expert witness, deferred any opinion as to disability from the back injury to the appropriate consultant. He did opine, however, that plaintiff was temporarily disabled from abdominal distress by reason of constipation and fecal impaction in July, 1984. Moreover, such temporary disability was so related to the January, 1982 accident, as to be a result thereof.

The record reflects additional medical expense for this hospitalization between 27 July 1984 and 5 August 1984, to be in the sum of Three Thousand Six Hundred Thirteen and 83/100 ($3,613.83) Dollars. The sum of Three Hundred Fifty ($350) Dollars for the Court appointed expert, Dr. A. Dale Adkins, is deemed reasonable and to be affixed as costs herein.

The Court declines to make any further additions or diminution with regard to loss of wages, pain and suffering, and impairment of power to earn money. The Court is of the opinion that its award in the Memorandum Opinion entered in this action 23 October 1984 is adequate.

IT IS ORDERED that a judgment be entered pursuant to Civil Rule 58, Federal Rules of Civil Procedure, and in accord with the memoranda opinions herein.

This 28th day of November, 1984.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-323

PAUL REFFETT, et al — PLAINTIFFS,

VS:

TUG RIVER ARMATURE and
DEFENDANTS MACHINE COMPANY, et al — DEFENDANTS AND
THIRD-PARTY PLAINTIFFS,

VS:

BUELL E. SPRADLIN — THIRD-PARTY
DEFENDANT.

MEMORANDUM OPINION AND ORDER

* * * * * * * * * * * * * *

This action was tried by the Court without a jury. The Court heard the evidence and considering the testimony of the parties, their witnesses, exhibits and statement of counsel, therefore, makes the following findings of fact and conclusions of law:

On or about the 13th day of January, 1982, in Martin, County, Kentucky, the Eastern District of Kentucky, a motor vehicle collision occurred. This Court has jurisdiction of the subject matter and parties. This collision involved two vehicles. One vehicle was operated by the third-party defendant, Buell E. Spradlin, in which the plaintiff, Paul Reffett, was a passenger. The third party defendant, Buell E. Spradlin, at said time and place was not negligent. The plaintiff, Paul Reffett, was not contributorily negligent. The other vehicle involved in the collision and accident was a truck owned and operated by an employee of the

defendant and third-party plaintiff, Tug River Armature and Machine Company, Inc. The driver of this vehicle was an employee and acting within the scope and authority of his employment. The collision and accident, at said time and place, was brought about by reason of the sole negligence of the defendant, Tug River Armature and Machine Company, Inc.

In said accident and collision, the plaintiff, Paul Reffett, received injuries. These injuries were the direct and proximate result of the negligence of the defendant, Tug River Armature and Machine Company, Inc. The injury received by the plaintiff, Paul Reffett, was an anterior wedge compression to the Lumbar II Vertebra resulting in a significant loss of the height of said vertebra. By reason of said injury the plaintiff, Paul Reffett, incurred medical expense in the sum of Six Thousand Four Hundred Seventy-two and .25/100 Dollars ($6,472.25). By reason of said injury the plaintiff, Paul Reffett, suffered loss of wages in the sum of Thirteen Thousand Three Hundred Ninety-nine and .26/100 Dollars ($13,399.26). By reason of said injury, the plaintiff, Paul Reffett, suffered pain, past and future, in the sum of Fifteen Thousand Dollars ($15,000). By reason of said injury, the plaintiff, Paul Reffett, suffered a slight impairment of his power to earn money in the sum of Forty Thousand Dollars ($40,000).

The intervening plaintiff, Kentucky Farm Bureau Companies, has paid the sum of Ten Thousand Dollars ($10,000) in PIP benefits to the plaintiff, Paul Reffett. The defendant, General Accident and Fire Assurance Corporation, is an insurer of the defendant, Tug River Armature and Machine Company, Inc. in accordance with the terms and conditions of a contract of insurance between said defendants.

The parties may submit memoranda of points and authorities why judgment should not be entered for the plaintiff, Paul Reffett, and against the

defendant, Tug River Armature and Machine Co., Inc., pursuant to this Memorandum Opinion and Order on or before the 13th day of November, 1984.

This 23rd day of October, 1984.

G. WIX UNTHANK, JUDGE