STATE OF KENTUCKY
RETAIL COMPENDIUM OF LAW

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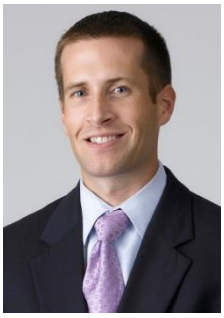
Retail, Restaurant, and Hospitality Guide to Kentucky Premises Liability

Introduction

In today's society, retail stores, restaurants, hotels, and shopping centers are the principal gathering places of most communities. As a result, it is critical for the owners, occupants, or other persons or entities in control of those properties to understand the common legal issues confronting them so that they can minimize their exposure to premises-related claims. With that in mind, a brief overview of the Kentucky legal system, with a focus on premises liability, is set forth below. We hope it provides an easy-to-use reference guide to these issues and provides practical tips to help those in the retail-related industries prevent or defend against premises liability claims.

If you have any questions about the material covered in this guide, please contact the authors listed below or another member of Bingham Greenebaum Doll LLP.



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A. The Kentucky State Court System.

1. Judicial Selection.

Judges in Kentucky are elected by districts in non-partisan elections. Kentucky is divided into seven appellate districts, each of which elects one justice to the Supreme Court and two judges to the Court of Appeals, who each serve eight year terms. Circuit and District Court districts vary in size depending upon population and caseload. Some districts encompass several counties and have only one judge, while others include only one county and have several judges. Circuit Court judges also serve eight year terms. District Court judges serve for four years.[1]

2. Kentucky's Four-Tiered Structure.

a. District Court.

The District Court is a trial court of limited jurisdiction. Juvenile matters, city and county ordinances, misdemeanors, traffic offenses, probate of wills, arraignments, felony probable cause hearings, small claims involving $2,000 or less, and civil cases involving $5,000 or less are all District Court matters, as well as voluntary and involuntary mental commitments and cases relating to domestic violence and abuse. Appeals from District Court are made to Circuit Court.[2]

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[1] KY. CONST. §§ 109-13, 115-17, 119; *see also* Kentucky Court of Justice, http://courts.ky.gov/courts.

[2] KY. REV. STAT. ANN. § 24A.010, *et seq*; *see also* Kentucky Court of Justice, http://courts.ky.gov/courts/Pages/DistrictCourt.aspx.

b. Circuit Court.

The Circuit Court is the trial court of general jurisdiction and has authority to try all cases for which jurisdiction has not been expressly vested in a different court. The Circuit Court presides over cases involving capital offenses, felonies, land disputes, contested probates of wills, and general civil litigation in disputes involving more than $5,000. Circuit Courts have the power to issue injunctions, writs of prohibition, writs of mandamus and hear appeals from district courts and administrative agencies.[3]

The Family Court is a division of Circuit Court which retains primary jurisdiction in domestic matters. Family Court shares jurisdiction with District Court over proceedings involving domestic violence and abuse; the Uniform Act on Paternity and the Uniform Interstate Family Support Act; dependency, neglect, and abuse; and juvenile status offenses.[4]

c. Court of Appeals.

The Court of Appeals hears cases on appeal from a lower court and may review directly decisions of administrative agencies of the Commonwealth.[5] Original proceedings (*i.e.*, writs of prohibition or mandamus) against a judge or agency whose decisions may be reviewed as a matter of right may also be prosecuted at the Court of Appeals.[6]

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[3] KY. REV. STAT. ANN. § 23A.010, *et seq; see also*, Kentucky Court of Justice, http://courts.ky.gov/courts/Pages/CircuitCourt.aspx.

[4] *Id*.

[5] KY. CONST. § 111 (2).

[6] KY. R. CIV. P. 76.36.

d. Supreme Court.

The Kentucky Supreme Court is comprised of a Chief Justice and six Justices.[7] It is the Commonwealth's court of last resort and the final interpreter of state law. The Supreme Court normally assumes appellate jurisdiction only by grant of discretionary review, except for cases involving the death penalty, life imprisonment, imprisonment for twenty years, and select other cases which are heard as a matter of right.[8]

3. Alternative Dispute Resolution ("ADR").

Kentucky does not have a comprehensive state-wide statute for ADR. However, KY. R. CIV. P. 16 (1)(f) provides that, at the pretrial conference, the court may require the parties to "consider … such other matters as may aid in the disposition of the action." This includes ordering the parties to engage in mediation.[9] The court may require that each party have an agent present with the full authority to settle the action. Even though the court can require that the parties engage in mediation, it cannot require the parties to actually settle.[10] Many counties have adopted the Model Mediation Rules, Kentucky Rules of Court (State) (2008) 379-80. Other counties have their own rules and some have no rules at all. Kentucky has also adopted the Uniform Arbitration Act.[11] Kentucky will enforce arbitration provisions in written agreements, except in some cases involving agreements between employers and employees, and insurance contracts.[12]

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[7] KY. CONST. § 110.
[8] KY. CONST. § 109; *see also* Kentucky Court of Justice, http://courts.ky.gov/courts/.
[9] *See Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 459 (Ky. 2004).
[10] *See id.*
[11] KY REV. STAT. ANN. §§ 417.045-240.
[12] KY. REV. STAT. ANN. § 417.050.

4. Kentucky's Rules of Civil Procedure.

Kentucky's Rules of Civil Procedure are based upon the Federal Rules and Kentucky courts often look to federal court decisions in interpreting and applying these rules.[13]

5. Local Rules.

In Kentucky, the vast majority of judicial circuits have adopted Local Rules of Court which should be consulted when practicing in those areas. The Local Rules for each county may be found at: http://apps.kycourts.net/localrules/localrules.aspx.

B. The Kentucky Federal Court System.

In Kentucky's federal court system, there are two judicial districts based on geographical regions – the Eastern District of Kentucky and the Western District of Kentucky. Each district encompasses the counties within that region and has several divisions. Specifically, the Western District of Kentucky has divisions in Louisville, Bowling Green, Owensboro and Paducah, and the Eastern District of Kentucky has divisions in Lexington, Ashland, Covington, Frankfort, London and Pikeville. An appeal from Kentucky's federal district courts goes to the Sixth Circuit Court of Appeals. Kentucky's federal courts are governed by the Federal Rules of Civil Procedure.

Negligence

A. General Negligence Principles.

Negligence is described in Kentucky as the failure to exercise "ordinary care" or "such care as the jury would expect an ordinarily prudent person to exercise under similar

[13] *West v. Goldstein*, 830 S.W.2d 379, 384 (Ky. 1992); *Hoffman v. Dow Chem. Co*., 413 S.W.2d 332, 333 (Ky. 1967).

circumstances.[14] In order to prevail on a negligence claim under Kentucky common law, "there must be a duty on the defendant's part, a breach of that duty, and consequent injury."[15]

Kentucky courts determine the duty owed by a property owner to a visitor of the property based on his or classification as an invitee, a licensee or a trespasser. These three categories are defined as follows: "[a] trespasser is one who comes upon the land without any legal right to do so, a licensee is one who comes upon land with the consent of the possessor of the land and an invitee is generally defined as one who comes upon the land in some capacity connected with the business of the possessor."[16]

For an invitee, landowners have a duty "to discover unreasonably dangerous conditions on the land and either correct them or warn of them."[17] While landowners "are not required to ensure the safety of individuals invited onto their land," they are "required to maintain the premises in a reasonably safe condition."[18] Such a duty involves the responsibility to "discover unreasonably dangerous conditions on the land and either correct them or warn of them."[19]

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[14] 2-14 PALMORE & CETRULO, KENTUCKY INSTRUCTIONS TO JURIES, CIVIL § 14.01 (5th ed.).

[15] *T&M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006). *See also Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003); *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436-37 (Ky. App. 2001); *Helton v. Montgomery*, 595 S.W.2d 257, 258 (Ky. App. 1980).

[16] *Hardin v. Harris*, 507 S.W.2d 172, 174 (Ky. 1974). *See also Shelton v. Ky. Easter Seals Soc'y Inc.*, 413 S.W.3d 901, 909 (Ky. 2013) ("an invitee is generally defined as one who "enters upon the premises at the express or implied invitation of the owner or occupant on behalf of mutual interest to them both, or in connection with the business of the owner or occupant"); *Collins v. Rocky Knob Assocs.*, 911 S.W.2d 608, 612 (Ky. App. 1995) ("A licensee is one whose presence upon land is solely for his own purpose, in which the possessor has no interest, either business or social, and to whom the privilege of entering the premises is extended as mere favor by express consent or by general or local custom.")

[17] *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891, 897 (Ky. 2013).

[18] *Id.*

[19] *Id.*

For a licensee, landowners have "the duty of refraining from willfully or wantonly causing him injury or from committing active negligence resulting in his injury, and, if the harm caused to the gratuitous licensee is the result of a natural or artificial condition of the property, known to the possessor of the property and which he should realize involves an unreasonable risk to the licensee and has reason to believe that the licensee will not discover the condition or realize the risk, the possessor owes the licensee the duty to make the condition reasonably safe or to warn him of the condition and the risk involved therein."[20]

For a trespasser, "[t]he owner of real estate shall not be liable to any trespasser for injuries sustained by the trespasser on the real estate of the owner, except for injuries which are intentionally inflicted by the owner or someone acting for the owner."[21] For purposes of KRS 381.232, the phrase "intentionally inflicted" means "inflicted by willful, wanton, or reckless conduct."[22]

B. Gross Negligence: Willful and Wanton Conduct.

In Kentucky, willful or wanton conduct is a form of gross negligence. The term "willful," is somewhat misleading, because willful conduct need not be intentional. Instead, the legal analysis hinges on the outrageousness of the conduct, not the state of mind of the actor.[23] It is not necessary to show ill will toward the person injured, but merely an indifference to the consequences of one's actions.[24]

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[20] *Collins*, 911 S.W.2d at 612.
[21] KY. REV. STAT. ANN. § 381.232.
[22] *Kirschner v. Louisville Gas & Elec., Co.*, 743 S.W.2d 840, 842 (Ky. 1988).
[23] *Louisville & N.R. Co. v. George*, 129 S.W.2d 986, 989 (Ky. App. 1939).
[24] *Id*.

In negligence cases, willful, wanton, or reckless conduct is treated as a heightened degree of negligence that authorizes the imposition of punitive damages. Courts have noted that "negligence when gross has the same character of outrage justifying punitive damages as does willful and malicious misconduct."[25] To justify punitive damages, "there must first be a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others."[26]

C. Burden-Shifting Approach.

In certain premises liability cases involving business invitees, the Kentucky Supreme Court has adopted a burden-shifting approach that is generally considered to benefit the plaintiff. Under this approach:

> the invitee retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing an accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. Such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, and shifts the burden of proving the absence of negligence, i.e., the exercise of reasonable care, to the party who invited the injured customer to its business premises. [27]

It should be noted that subsequent cases have limited this burden-shifting approach to situations involving slip and falls on a foreign substance.[28]

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[25] *Horton v. Union Light, Heat & Power Co*., 690 S.W.2d 382, 389 (Ky. 1985).

[26] *Id*. at 389-90.

[27] *Bartley v. Educ. Training Sys*., 134 S.W.3d 612, 616 (Ky. 2004) (citing *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003)).

[28] *See e.g., McNay v. Shell's Seafood Rests., Inc*., No. 2003-CA-001958-MR, 2005 Ky. App. Unpub. LEXIS 54, *7-8 (Ky. App. Feb. 18, 2005) (in a matter involving a plaintiff tripping over a sidewalk curb in defendant's parking lot, the court opined "[w]e do not believe that Lanier imposed any greater duty on [defendant than was imposed on it prior to Lanier and] the burden of proof is not shifted in this case to

D. Attractive Nuisance.

In Kentucky, courts recognize the "attractive nuisance" doctrine in which "a possessor of land is liable for any created or maintained artificial condition which the possessor realizes, or should realize, creates an unreasonable risk of bodily harm to children who would not be able to comprehend the risk or danger involved."[29] When applying this doctrine, Kentucky courts generally consider the following five (5) factors found in the Restatement (Second) of Torts § 339 when:

> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.[30]

Notably, under this doctrine, "whether children are classified as trespassers, licensees or invitees is not a controlling consideration."[31] Thus, the reason for the child's presence on the property is irrelevant to this analysis.

[defendant] to prove the exercise of reasonable care. The application of Lanier is limited to slip and fall cases brought by business invitees who have been injured as a result of slipping on a foreign substance.").

[29] *Mason v. City of Mt. Sterling*, 122 S.W.3d 500, 506 (Ky. 2003).
[30] *Id.*
[31] *Id*. at 508.

E. Off Premises Liability.

A landowner may be held responsible for damages caused by a tree that falls from his or her property, but only if that landowner has actual knowledge of the dangerous condition of the tree.[32] A landowner does not have a duty to inspect trees for dangerous conditions created by the natural decay process, particularly when the tree is in a densely wooded forest next to a lightly-used road in a sparsely settled area.[33] It appears as if this potential liability is focused on land adjacent to a public roadway and may not exist between two adjacent private landowners.[34]

F. Defenses.

In addition to not being able to satisfy the standards set forth above for the three (3) categories of individuals discussed above, there are other defenses and principles that can either wholly bar a negligence claim or reduce the amount of damages that can be recovered.

1. Statute of Limitation.

Actions for personal injury resulting from alleged negligence are generally subject to a one (1) year statute of limitations in Kentucky.[35] This means that claims filed more than one (1) years after they "accrue" will be barred as a matter of law. In Kentucky,

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[32] *Lemon v. Edwards*, 344 S.W.2d 822, 823 (Ky. 1961).

[33] *Id.*; *see also Shrader v. Commonwealth*, 218 S.W.2d 406, 409-10 (Ky. 1949) (holding that the Department of Highways did not have the duty, even along a four-lane main highway near a large city, to make such a close inspection of cliffsides along the highway as would discover that a boulder had become loosened so as to be liable to fall on the highway).

[34] *Commonwealth v. Sexton*, 256 S.W.3d 29, 36 n.14 (Ky. 2008) (declining to address the traditional rule that a landowner has "no duty to remedy purely natural conditions on his land, even if they are dangerous to his neighbors" and further noting that a fact pattern involving public roadways "may implicate different duties or concerns than that in the present case dealing with damage to nearby private property").

[35] KY. REV. STAT. ANN. § 413.140(1)(a).

such a claim begins to "accrue" on the date of the injury even if the extent of the injury is not discovered until a later date.[36]

2. Comparative Fault.

a. Pure Comparative Fault.

Kentucky is a pure comparative fault state. In all tort actions involving fault of more than one party, including the plaintiff, third-party defendants, and persons who have settled, the jury is instructed to allocate fault among the parties.[37] In apportioning fault, the jury is first instructed to determine damages without regard to fault and then to allocate fault considering both the nature of the conduct and the extent of the causal connection between each parties' conduct and the damages claimed.[38] In Kentucky, a plaintiff can recover regardless of his own percentage of fault.[39]

b. <u>Apportionment.</u>

Only those parties who were either a party to an action, formerly a party to an action, or previously released from liability can be apportioned fault.[40] Courts have refused to extend apportionment of fault to non-settling non-parties or so called "empty chairs."[41] A settlement of a workers' compensation claim between an employer and employee constitutes a settlement for apportionment purposes. Therefore, so long as

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[36] *Caudill v. Arnett*, 44 S.W.2d 668, 669 (Ky. 1972) ("The fact that appellant did not discover the extent of his injuries for several months cannot avail him. The cause of action occurred the day the injury was inflicted, and from that day the statute commenced to run.").

[37] KY. REV. STAT. ANN. § 411.182(1) (2012).
[38] KY. REV. STAT. ANN. § 411.182(1)(a), (2) (2012).
[39] *Hilen v. Hays*, 673 S.W.2d 713, 719 (Ky. 1984).
[40] *Bass v. Williams*, 839 S.W.2d 559, 563-64 (Ky. App. 1992), overruled in part on other grounds by *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004).

[41] *Baker v Ruth Webb*, 883 S.W.2d 898, 899 (Ky. App. 1994); *Bass*, 839 S.W.2d at 863-64.

there is evidence to support it, fault may be apportioned to a settling employer.[42] However, being named as a party does not automatically entitle apportionment to that person. For fault to be assigned to a tortfeasor, there must be sufficient evidence that a defendant's conduct legally caused the plaintiff's injury.

3. Assumption of Risk.

Kentucky courts no longer recognize assumption of risk as a bar to recovery but instead rely on the comparative fault principles discussed below when considering whether a plaintiff has any responsibility for injuries he or she has incurred.[43]

4. Open-and-Obvious Doctrine.

In Kentucky, the open-and-obvious doctrine historically stated that landowners were not liable when visitors were injured due to open-and-obvious conditions (i.e., potholes on a sidewalk, rain puddles on a rainy day, loose gravel on a parking lot, ice patches on a snowy day) on the premises. In the past, this defense served as an imposing legal obstacle for plaintiffs pursuing a slip and fall claim and often resulted in summary judgment being granted in favor of defendants. However, the Kentucky Supreme Court first cast doubt on the viability of the open-and-obvious doctrine as a complete bar to a premises liability claim in 2010 with its decision in *Kentucky River Medical Center v. McIntosh*.[44]

The *McIntosh* court affirmed a denial of a judgment notwithstanding the verdict based on a number of findings, including that "[e]ven where the condition is open and

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[42] *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 481 (Ky. 2001).
[43] *Parker v. Redden*, 421 S.W.2d 586, 591-92 (Ky. 1967); s*ee also Hilen*, 673 S.W.2d at 720 (deciding that negligence on the part of the plaintiff should not be a complete bar to recovery under a contributory negligence theory and instead should be considered under a pure comparative fault theory).
[44] 319 S.W.3d 385 (Ky. 2010).

obvious, a landowner's duty to maintain property in a reasonably safe condition is not obviated; it merely negates the requirement to warn of such a condition."[45] The court further found that "[t]he most important factor in determining whether a duty exists is foreseeability" and that "[t]here can be no doubt in this case that the injury was foreseeable."[46] In making these findings, the Kentucky Supreme Court adopted Restatement (Second) of Torts § 343A. [47]

Many argued that *McIntosh* effectively eviscerated the open-and-obvious doctrine while others felt *McIntosh* merely changed the analysis from one of duty to one of foreseeability. This debate was addressed and put to rest by recent decisions from the Kentucky Supreme Court in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013) and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). In *Shelton*, the plaintiff tripped and fell over wires running from her husband's hospital bed to adjacent monitoring equipment. The trial court granted summary judgment on the grounds that the wires were open-and-obvious conditions and the Court of Appeals affirmed.[48] On discretionary review, the Supreme Court reversed and held that the open-and-obvious doctrine is a question of breach, not a question of duty, opining as follows:

> [a]ccordingly, an open-and-obvious condition does not eliminate a landowner's duty. Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required. The obviousness of the condition is a "circumstance" to be factored under the standard of care. No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances. So a more precise statement of the law would be that a

[45] *Id*. at 393.
[46] *Id*.
[47] *Id*. at 392.
[48] *Id*. at 904 -05.

> landowner's duty to exercise reasonable care or warn of or eliminate unreasonable dangers is not breached.[49]

The *Shelton* court further found that "the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis."[50] Writing for the dissent, Justice Will T. Scott expressed concern that summary judgment would ever be possible under the majority's decision and bluntly characterized his dissent as "more akin to a eulogy for the former doctrine of 'open-and-obvious' dangers."[51]

In sum, the current state of the law in Kentucky appears to be that the open-and-obvious doctrine can no longer be relied upon as a complete legal bar to a premises liability claim. Instead, evidence regarding the obvious nature of an alleged dangerous condition will generally be a factual issue for the jury to consider under comparative fault principles.

Examples of Negligence Claims

There are various types of conditions which can form the basis for a traditional negligence claim. Below are some examples of common negligence claims in the premises liability context.

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[49] *Id*. at 911.
[50] *Id*. at 914.
[51] *Id.* at 920; s*ee also Webb*, 413 S.W.3d at 899 (affirming the Court of Appeals reversal of the trial court's granting of summary judgment in a premises liability case involving a fall on wet tile on a rainy day and finding, inter alia, that the premises owner "had an affirmative duty to maintain the premises in a reasonably safe condition" and that "it was foreseeable that a customer may not be able to detect whether the tile was wet or not upon a cursory inspection").

A. "Slip & Fall" Type Cases.

1. Snow & Ice.

One typical category of negligence claims in the premises liability context is "slip and fall" cases where an individual alleges that he or she fell and was injured on a landowner's property as a result of slipping on snowy or icy conditions.

In 2000, the Kentucky Supreme Court issued a decision in *Green v. PNC Bank* which addressed the state of the law in Kentucky relating to natural outdoor hazards such as snow and ice.[52] Specifically, the *Green* court confirmed that in Kentucky, "natural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landlord has a duty to remove or warn against."[53] With regard to a premises owner's efforts to remove or otherwise treat snow or ice on his or her property, the *Green* court recognized "the well-known rule that a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore."[54] However, the court further opined that "with regard to outdoor natural hazards, we perceive a distinction where a business owner undertakes reasonably prudent measures to increase the safety of the premises, such as was done in this case, and a business owner who undertakes measures which, in fact, heighten or conceal the nature of the dangerous condition."[55]

It should be noted that since the time of *Green* opinion, the open and obvious doctrine has undergone a significant transformation in Kentucky and is now generally

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[52] 30 S.W.3d 185 (Ky. 2000).
[53] *Id*. at 186.
[54] *Id*. at 187.
[55] *Id.*

considered to be a question of fact for the jury rather than a complete legal defense. Thus, it remains to be seen how the principles set forth in Green will be impacted by these decisions. The current state of the open and obvious doctrine in Kentucky is fully discussed above.

2. Black Ice.

"Black ice" is a thin layer of ice that forms on pavement or sidewalks and blends into the color of the surface. It is a well-known condition in cold weather regions. Because courts recognize that black ice can be very difficult to see, they have on occasion found that the landowner should bear no fault for any injury resulting from a black ice-related fall.[56] It is unclear what impact the recent Kentucky Supreme Court decisions addressing the open and obvious doctrine referenced and discussed above may have on the analysis of future "black ice" slip and falls.

[56] *See e.g., Bryan v. O'Charley's, Inc.*, No. 2002-CA-001503-MR, 2002 Ky. App. Unpub. LEXIS 254, *11 (Ky. App. Aug. 15, 2003) ("It is unreasonable to expect O'Charley's to divert resources to inspect its parking lot for black ice when the outside temperature was significantly above the freezing point. Furthermore, under such weather conditions, it is impossible to say that O'Charley's knew of, or could have discovered, the black ice, so as to trigger its duty to warn or remedy the hazardous situation.").

3. Slippery Surfaces – Cleaner, Polish, and Wax.

Another commonly asserted basis for a slip and fall claim is that the plaintiff fell due to the nature of the floor and/or the application of cleaner, polish, or wax on the walking surface. In Kentucky, "it is not of itself negligence to wax a floor or to have a polished or waxed floor."[57] Indeed, "a mere showing that the floor was waxed and polished and the plaintiff thereafter fell on that floor is insufficient" because "[w]axing of floors is a necessary and customary practice."[58] A plaintiff "must go further and establish by competent proof some act of negligence, either in the initial waxing or in the method of cleaning."[59]

4. Liability of Third Party Contractor.

In situations where a landowner has contracted with a third party for the performance of various tasks such as snow removal or janitorial services, there is a question as to what the liability of both the third party contractor and the landowner is if an individual is injured due to negligence of the contractor. Generally, "one who employs an independent contractor is not liable for the torts or negligence of the independent contractor."[60]

One well-recognized exception to this general rule, however, is when an independent contractor is employed to "do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is

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[57] *Jenkins Clinic Hosp., Inc. v. Hollon*, 454 S.W.2d 357, 359 (Ky. 1970).
[58] *Id*. at 359-360.
[59] *Id*. at 360.
[60] *Hazard Mun. Hous. Comm. v. Hinch*, 411 S.W.2d 686, 688 (Ky. 1967).

subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."[61] But "no liability can attach to the employer unless the injury was foreseeable as a probable result of the activity."[62]

B. Liability for Criminal Conduct.

1. General Principles.

Kentucky law recognizes that a business owner can be held liable for criminal acts of others depending on the circumstances. In particular, "Kentucky has adopted Restatement (Second) § 302(b) which states: '[a]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.'" Stated another way, "[e]ven an intervening criminal act does not relieve one for his liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act."[63] But, it should also be noted that "a business owner is not an absolute insurer of its patron's safety" and "neither a single incident nor sporadic incidents are sufficient to establish foreseeability."[64]

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[61] *Id*.

[62] *Miles Farm Supply v. Ellis*, 878 S.W.2 803, 805 (Ky. App. 1994).

[63] *Grisham v. Wal-Mart Stores*, 929 F. Supp. 1054, 1057 (E.D. Ky. 1995) (citing *Waldon v. Housing Auth. of Paducah*, 854 S.W.2d 777, 779 (Ky. App. 1991)); s*ee also Britton v. Wooten*, 817 S.W.2d 443, 451 (Ky. 1991) ("So far as scope of duty (or, as some courts put it, the relation of proximate cause) is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal. Even criminal conduct by others is often reasonably to be anticipated.").

[64] *Id.* at 1058-59 (citations omitted).

C. Claims Arising from Wrongful Prevention of Thefts.

One common problem in the retail industry is "inventory shrinkage," or the loss of inventory due to theft by employees and non-employees alike. In addition to the financial impact of this problem, a secondary effect of it is potential liability for a retailer's efforts to prevent or thwart it.

1. False Arrest and Imprisonment.

False imprisonment "is the intentional confinement or instigation of confinement of a plaintiff of which confinement the plaintiff is aware at the time."[65] False arrest is a species of false imprisonment when it is committed by an officer of the law or one who claims the power to make an arrest.[66] Kentucky courts frequently intermix the terms, but the wrong to be remedied in an action for false arrest is the arrest and imprisonment without reasonable grounds, while a false imprisonment claim is brought to remedy the confinement.[67] Recoverable damages include reasonable attorney's fees and costs that the wrongfully-arrested individual incurred in defending himself from wrongful charges.[68] An action for false imprisonment or arrest must be brought within one year of the date on which the alleged false imprisonment ends.[69]

A store owner who detains an individual with probable cause for suspected theft is protected by Kentucky statute.[70] This statute allows a "peace officer, security agent of

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[65] *Dunn v. Felty*, 226 S.W.3d 68, 71 (Ky. 2007) (citing DAN B. DOBBS, THE LAW OF TORTS § 36, p.67 (2000)).
[66] *Id; Lexington-Fayette Urban Co. Gov't v. Middleton*, 555 S.W.2d 613, 619 (Ky. App. 1977) ("False imprisonment is always the result of a false arrest, since the individual is placed under restraint by the false arrest and there can be no imprisonment without arrest by a peace officer.").

[67] *Lexington-Fayette Urban Co. Gov't*, 555 S.W.2d at 619.
[68] *Id.*
[69] *Dunn*, 226 S.W.3d at 72 (citing *Wallace v. Kato*, 549 U.S. 384 (2007)).
[70] KY. REV. STAT. ANN. § 433.236.

a mercantile establishment, merchant or merchant's employee who has probable cause" to believe that his goods were stolen to take the alleged thief into custody and detain him "in a reasonable manner for a reasonable length of time."[71] The suspected thief may be detained to request identification, verify identification, make reasonable inquiry into whether the person has unpurchased merchandise in his possession and to make reasonable investigation of the ownership of merchandise, recover goods taken by the person or others accompanying him, or to inform a law enforcement agency of the person's detention and surrender them into custody.[72] The shop owner will be immune from liability if the suspected thief was ultimately wrongfully detained, but the shop owner can plead and prove probable cause.[73]

2. Malicious Prosecution.

A malicious prosecution claim requires strict compliance with each element of the tort since Kentucky law generally disfavors this type of action.[74] To succeed on a claim of malicious prosecution, the plaintiff must prove: "(1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor,[75] (4) malice in the institution of such proceeding, (5)

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[71] *Id.* (The suspected thief may be detained either on the store premises or off premises, if the individual was in hot pursuit of the suspected thief).

[72] *Id.*

[73] *See Consolidated Sales Co. v. Malone*, 530 S.W.2d 680, 681 (Ky. App. 1975).

[74] *Garcia v. Whitaker*, 400 S.W.3d 270, 274 (Ky. 2013).

[75] *Raine v. Drasin*, 621 S.W.2d 895, 900 (Ky. 1981) ("The purpose of this prerequisite to a malicious prosecution suit is to show that the action against the defendant was unsuccessful…no particular form of termination in civil actions has been required.").

want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding."[76]

Kentucky courts have distinguished the claims of malicious prosecution, brought for wrongful institution of *criminal* proceedings, from wrongful use of *civil* proceedings.[77] To be liable for wrongful use of civil proceedings, the plaintiff must show that: (1) the defendant acted without probable case, (2) for a primary purpose other than that of securing proper adjudication of the claim in which the proceedings are based, and (3) the proceedings were terminated in the plaintiff's favor.[78]

An action for malicious prosecution or wrongful use of civil proceedings must be initiated by the plaintiff within one year of the date the cause of action accrued.[79] Kentucky courts have long held that the "advice of counsel" defense normally immunizes a defendant from a malicious prosecution claim brought for lack of probable cause.[80] In order for this defense to apply, however, the allegations upon which counsel advised the defendant must have been truthful and complete.[81]

A successful plaintiff in an action for malicious prosecution can recover "expenses incurred and damages sustained."[82] If the damage was to the plaintiff's reputation, the plaintiff can recover compensatory damages for humiliation, mortification

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[76] *Garcia*, 400 S.W.3d at 274.

[77] *Prewitt v. Sexton*, 777 S.W.2d 891, 893-94 (Ky. 1989); *see also Mapother & Mapother, P.S.C. v. Douglas*, 750 S.W.2d 430, 431 (Ky. 1988). It appears that there is some confusion among Kentucky courts as to whether the elements for malicious prosecution and wrongful use of a civil proceeding are identical. *See D'Angelo v. Mussler*, 290 S.W.3d 75, 79 (Ky. App. 2009). In practice, the elements appear to operate in the same way.

[78] *See id.* at 894 (citing RESTATEMENT (SECOND) OF TORTS § 674).

[79] *Smith v. Stokes*, 54 S.W.3d 565, 566 (Ky. App. 2001) (citing KY. REV. STAT. ANN. § 413.140).

[80] *See Garcia*, 400 S.W.3d at 274 (citing *Flynn v. Songer*, 399 S.W.2d 491, 495 (Ky. 1966)).

[81] *Id.* at 275.

[82] *Raine*, 621 S.W.2d at 900 (citing *Harter v. Lewis Stores, Inc.*, 240 S.W.2d 86, 88 (Ky. 1951)).

and loss of reputation.[83] If the plaintiff's reputation was not "assailed," the damages are limited to the loss of time and expenses incurred.[84] Further, if the evidence shows that the defendant acted with "malice, willfulness or wanton disregard of the rights of others," the court may award punitive damages.[85] These damages are also permitted for claims of wrongful use of civil proceedings.[86]

3. Defamation.

If a retailer accuses a customer or employee of committing a crime on its premises, a claim for defamation could result. Kentucky courts recognize both libel, which is defamation by writing or other means analogous to writing, and slander, which is defamation communicated by oral means.[87] In general, "the 'gist' of both torts is 'the injury to the reputation of a person in public esteem'" and prima facie cases for both torts require proof of: (i) defamatory language; (ii) about the plaintiff; (iii) which is published and (iv) causes injury to reputation.[88]

While the first three elements are relatively self-explanatory, the fourth element (injury to reputation) is more involved and rests largely on the characterization of the defamatory language involved.[89] In Kentucky, these two torts are divided into four types of statements – libel per se, libel per quod, slander per se and slander per quad. The distinction between "per se" and "per quad" is important to understand in this context:

> words are said to be actionable per se when there is a conclusive presumption of both malice and damage[,] and, thus, when the defamatory language at issue is determined to be libelous or slanderous per se,

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83 *Id.* (citing *Hayes v. Ketron*, 3 S.W.2d 172 (Ky. 1928)).
84 *Id.*
85 *Id.* at 902 (citing *Stamper v. McCally*, 229 S.W.2d 54, 56 (Ky. 1950)).
86 *Prewitt*, 777 S.W.2d at 895.
87 *Stringer v. Wal-Mart Stores, Inc*., 151 S.W.3d 781, 793 (Ky. 2004).
88 *Id*. (citations omitted).
89 *Id.* at 793-94.

> recovery is permitted without proof of special damages because injury to reputation is presumed and the words are 'actionable on their face -- without proof of extrinsic facts or explicatory circumstances.' Defamatory statements that are merely libelous or slanderous per quod, however, require proof of extrinsic facts or explanatory circumstances and special damages.[90]

Statements (oral or written) which impute crime, including theft, are considered slanderous or libelous per se because injury to reputation is presumed.[91] However, there are defenses to available to defamation claims. First and foremost, "truth is a complete defense."[92] Further, Kentucky courts "have recognized a series of qualified or conditional privileges, including [w]here the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice."[93] In the employment context, "Kentucky courts have recognized a qualified privilege for defamatory statements relating to the conduct of employees."[94]

Yet, it should be noted that these are merely "qualified" privileges which are not absolute.[95] Indeed, such privileges must be "exercised in a reasonable manner and for a proper purpose" and will be "forfeited if the defendant steps outside the scope of the privilege, or abuses the occasion" or if the statement contains "irrelevant defamatory

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[90] *Id*. at 794 (citations omitted).

[91] *Id*. at 795; s*ee also* 50 AM. JUR. 2D LIBEL AND SLANDER § 185 at 465 (1995).

[92] *Stringer*, 151 S.W.3d at 795-96; *see also Bell v. Courier-Journal & Louisville Times Co*., 402 S.W.2d 84, 87 (Ky. 1966).

[93] *Stringer*, 151 S.W.3d at 796.

[94] *Id.* (citing *Dossett v. New York Mining & Manufacturing Co.*, 451 S.W.2d 843, 84 (Ky. 1970) (recognizing a privilege for "discussions and communications within the company which are necessary to its proper function and the enforcement of the law") (emphasis in original)).

[95] *Stringer*, 151 S.W.3d at 797.

matter with no bearing upon the public or private interests which is entitled to protection."[96]

4. Negligent Hiring and Retention of Employees.

Individuals who contend that they have been wrongfully detained or accused of shoplifting will sometimes claim that the employee who detained or accused them was improperly hired, retained, or supervised. In order to prove a negligent hiring and retention claim in Kentucky, a plaintiff must establish: "(1) the employer knew or reasonably should have known that an employee was unfit for the job for which he was employed, and (2) the employee's placement or retention at that job created an unreasonable risk of harm to the plaintiff."[97]

Negligent hiring and retention claims should be distinguished from respondeat superior claims in that "under 'respondeat superior,' the employer is strictly liable for the act, while under the theory of negligent hiring/retention, the employer's liability may only be predicated upon its own negligence in failing to exercise reasonable care in the selection or retention of its employees."[98] Stated another way, "'respondeat superior' is based upon the employer/employee relationship and imposes strict liability, whereas claims of negligent hiring/retention focus on the direct negligence of the employer which permitted an otherwise avoidable circumstance to occur."[99]

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[96] *Id*. (quoting *Tucker v. Kilgore*, 388 S.W.3d 112, 115 (Ky. 1964)).

[97] *Carberry v. Golden Hawk Transp. Co*., 402 S.W.3d 556, 560 (Ky. App. 2013) (citing *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 733 (Ky. 2009)); *see also Ten Broeck Dupont, Inc*., 283 S.W.3d at 727 ("In order for an employer to be held liable for negligent hiring or retention the employee must have committed a tort. The underlying tort may be intentional, such as a sexual assault, or negligent, such as a breach of care.").

[98] *Ten Broeck Dupont, Inc*., 283 S.W.3d at 732.

[99] *Id*. at 734.

D. Liability for Actions of Intoxicated Persons (Dram Shop Liability).

In KY. REV. STAT. ANN. § 413.241, which is commonly referred to as the Dram Shop Act, the Kentucky legislature provided as follows with regard to liability for an intoxicated person:

> (1) The General Assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.
>
> (2) Any other law to the contrary notwithstanding, no person holding a permit under KRS Chapters 241 to 244, nor any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to that person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.
>
> (3) The intoxicated person shall be primarily liable with respect to injuries suffered by third persons.
>
> (4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.
>
> (5) This section shall not apply to civil actions filed prior to July 15, 1988.

Yet, the Kentucky Supreme Court has concluded that "liability may be imposed upon a dram shop despite the statute's express declaration that a dram shop's actions cannot, as a matter of law, be considered the proximate cause of any injury inflicted by an intoxicated person."[100]

[100] *Jackson v. Tullar*, 285 S.W.3d 290, 295 (Ky. App. 2007) (citing *DeStock # 14, Inc. v. Logsdon*, 993 S.W.2d 952, 957 (Ky. 1999)).

Under this theory, "liability is imputed to the dram shop for injuries to a third person if the dram shop's employees sold or served intoxicating beverages to a person when a reasonable person under the same or similar circumstances would know that he is already intoxicated,"[101] But, such liability is of a different nature than that of the intoxicated person. In Kentucky, "apportionment between the intoxicated tortfeasor and the dram shop is improper because the actions that give rise to liability — directly causing injury and improperly serving alcohol to someone who later causes injury, respectively — do not constitute concurrently negligent acts. Rather, they are separate and independent actions of two fundamentally different characters. The intoxicated tortfeasor's conduct proximately caused injury to the plaintiff, while the dram shop's actions did not."[102] In contrast, it should be noted that this principle does not prevent apportionment between two dram shops in situations where multiple dram shops have been sued.[103]

Indemnification and Insurance Procurement Agreements

A. Indemnification.

1. Contractual Indemnification.

Express contractual indemnity provisions are valid and generally enforceable in Kentucky. Furthermore, while agreements to indemnify against an indemnitee's own negligence are valid and not void for public policy, there is a strong presumption against such an intention.[104] Where there is doubt as to the meaning of an indemnity clause, such

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[101] *Jackson*, 285 S.W.3d at 295.
[102] *Id*. at 296.
[103] *Id*. at 297.
[104] *Fosson v. Ashland Oil & Ref. Co.*, 309 S.W.2d 176, 177 (Ky. 1958).

a clause will be construed against indemnification for one's own negligence.[105] In addition, pre-injury indemnification provisions used to defend against the indemnitee's own negligence are void against public policy "when agreed to by a party in a clearly inferior bargaining position."[106]

2. Common Law Indemnification.

Common law indemnity is a right available to parties in Kentucky who are exposed to liability due to the wrongful acts of another party with whom they are not in *pari delicto*.[107] *Pari delicto* is defined as two or more joint tortfeasors who are guilty of concurrent negligence of substantially the same character which converges to cause the plaintiff's damages.[108] Indemnification does not allow a party to recover from another concurrently negligent party. Instead, it allows a party who is secondarily or constructively liable to recover from the party who is primarily liable for a plaintiff's injuries due to negligence.[109]

The right to common law indemnity applies in two classes of cases. The first class occurs "[w]here the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held [responsible] for the tort of his servant."[110] The second class occurs "where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from

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105 *Id.*
106 *Speedway SuperAmerica, LLC v. Erwin*, 250 S.W.3d 339, 344 (Ky. App. 2008).
107 *Degener v. Hall Contr. Corp*., 27 S.W.3d 775, 780 (Ky. 2000).
108 *Id.* at 778.
109 *V.V. Cooke Chevrolet, Inc. v. Metro. Trust Co*, 451 S.W.2d 428, 430 (Ky. 1970).
110 *Degener*, 27 S.W.3d at 780 (quoting *Louisville Ry. Co. v. Louisville Taxicab & Transfer Co.*, 77 S.W.2d 36, 39 (Ky. 1934)).

whom indemnity is claimed was the primary and efficient cause of the injury."[111] The seminal Kentucky decision on common law indemnity is *Brown Hotel Co. v. Pittsburg Fuel Co.*, where a hotel company, found liable for a pedestrian's injuries due to an unsecured manhole, was determined to be entitled to indemnity from the fuel company whose employee left the manhole unsecured.[112]

The Kentucky Supreme Court has determined that the common law right to indemnity remains intact, despite the enactment of Kentucky's comparative fault statute, KY. REV. STAT. ANN. § 411.182.[113] In addition, a party seeking indemnification in Kentucky does not have to wait until after it is determined to be liable for damages. Instead, it may assert the indemnification claim in the original tort action.[114]

B. Insurance Procurement Agreements.

In order to avoid issues with indemnification provisions and ensure that there is an entity that will be financially responsible to satisfy claims, contracts and leases often contain insurance procurement provisions in which a person or entity agrees to procure insurance on behalf of another. In such a situation, the individual or entity has a duty to use reasonable care in procuring such insurance and if he neglects to do so, "he is himself to be considered as the insurer and liable as such, and entitled to credit for the premium which should have been paid."[115] However, "[a]n agent to insure will not be liable if he

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[111] *Id*.
[112] 224 S.W.2d 165 (Ky. 1949).
[113] *Degener*, 27 S.W.3d at 781.
[114] *Degener*, 27 S.W.3d at 780 (citing *Robert F. Simmons Constr. Co. v. Am. States Ins. Co.*, 426 S.W.2d 441, 443-44 (Ky. 1968)).

[115] *Am. Book Co. v. Archer*, 186 S.W. 672, 673 (Ky. 1916).

acted in good faith and with due care and diligence**,** and could not procure insurance at all, provided he notified his principal promptly of his inability to do so."[116]

C. Duty to Defend.

Insurance policies and other written agreements sometimes contain a provision setting forth a duty to defend another party. This duty is generally broader than a duty to indemnify as it will often obligate the indemnitor to pay for all costs associated with the defense to a lawsuit.

In Kentucky, "an insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage terms of the insurance policy."[117] If an insurer does not believe there is coverage under the policy, one option is to still defend the claim but preserve the issue via a reservation of rights letter so that it can challenge the coverage at a future time.[118] Another option is to decline the defense all together, although choosing that option subjects the insurer to potential liability for "'all damages naturally flowing from' the failure to provide a defense" if it is subsequently found that coverage exists.[119] The potential damages include "reimbursement of defense costs and expenses if the insured hires his own lawyer, and in some instances, the amount of a default judgment, if he does not."[120]

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116 *Id.*
117 *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 841 (Ky. 2005).
118 *Id.*
119 *Id.* (quoting *Eskridge v. Educator & Exec. Insurers, Inc*., 677 S.W.2d 887 (Ky. 1984)).
120 *Aetna Cas. & Sur. Co.*, 179 S.W.3d at 841.

Damages In Premises Liability Cases

A. Importance of Understanding Damages.

At the conclusion of a Kentucky jury trial, the jury is not only entrusted to determine whether liability exists on the part of the landowner, but if liability is found, the jury must also determine what amount of damages is justified under the circumstances. Below is a brief discussion of the various categories of damages in a personal injury lawsuit.

B. Available Damages for Personal Injury Claims.

1. Past Medical Bills.

An injured party may recover necessary and reasonable expenses for medical services.[121]

2. Future Medical Bills.

An injured party may recover future medical expenses caused by a tort, as long as the party shows some present physical injury to support a cause of action.[122]

3. Hedonic Damages.

Hedonic damages are not a unique item of damages. An injured party may only recover for loss of enjoyment of life or lifestyle to the extent such damages are subsumed within other recoverable categories.[123]

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[121] *Langnehs v. Parmelee*, 427 S.W.2d 223, 224 (Ky. 1967).
[122] *Wood v. Wyeth-Ayerst Labs*., 82 S.W.3d 849, 856 (Ky. 2002).
[123] *Adams v. Miller*, 908 S.W. 2d 112, 116 (Ky. 1995), abrogated on other grounds by *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997).

4. Increased Risk of Harm.

Damages for increased risk of future harm are not a unique item of damages. Instead, increased risk of harm is a factor that the jury should consider when calculating compensation for future physical pain and mental suffering, future impairment of earning power, and future medical expenses.[124]

5. Disfigurement.

A plaintiff may not recover for disfigurement, but a plaintiff may recover for past and future pain and suffering if the evidence warrants it.[125]

6. Disability.

A damage award may compensate a plaintiff for pain and suffering flowing from a permanent or temporary disability.[126] "For a permanent injury, the measure of damages is a sum reasonably sufficient to compensate the plaintiff for his physical and mental suffering, and the permanent reduction of the power to earn money."[127]

7. Past Pain and Suffering.

Damages should include fair compensation for any physical or mental suffering caused by the injury.[128] There is no set rule for computing damages for pain and suffering. The general rule is that the damages must be reasonable, free from sentiment and free from punishment so as not to amount to punitive damages.[129]

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124 *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 194-95 (Ky. 1994).
125 *Elmore v. Speicher*, 481 S.W.2d 673, 674 (Ky. 1972).
126 *Coe v. Adwell*, 244 S.W.2d 737, 739 (Ky. 1951).
127 *Louisville & N.R. Co. v. Minnix*, 260 S.W. 15, 16 (Ky. 1924).
128 *Kentucky Cent. Ins. Co. v. Schneider*, 15 S.W.3d 373, 374 (Ky. 1995).
129 *Noel v. Creary*, 385 S.W.2d 951, 953 (Ky. 1965).

8. Future Pain and Suffering.

The probability of future pain and suffering may be considered when calculating damages if the evidence shows that future pain and suffering may stem from the injury.[130]

9. Loss of Society or Consortium.

A tort victim's spouse may recover for loss of consortium.[131] A cause of action for loss of consortium "is limited to loss of society, companionship, conjugal affections, and physical assistance," and does not include loss of financial support.[132] Loss of consortium, however, may include the loss of household services from the spouse.[133]

10. Lost Income, Wages, And Earning Power.

An injured party may recover for the value of time lost and any permanent reduction in earning power.[134] To recover for lost future earnings, the plaintiff must prove his or her earning power has been reduced by the injury and recovery is limited to the amount by which it has been reduced.[135] A party does not need to prove lost wages or profits with absolute certainty, but only with reasonable certainty. [M]ere uncertainty as to the amount will not preclude recovery.[136]

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130 *Nussbaum v. Caskey*, 32 S.W.2d 18, 19 (Ky. 1930).
131 *Schulz v. Chadwell*, 558 S.W.2d 183, 188 (Ky. App. 1977).
132 *Kotsiris v. Ling*, 451 S.W.2d 411, 412 (Ky. 1970).
133 *Schulz*, 558 S.W.2d at 188.
134 *Schneider*, 15 S.W.3d. at 374.
135 *Jones v. Stern*, 168 S.W.3d 419, 423-24 (Ky. App. 2005).
136 *Kellerman v. Dedman*, 411 S.W.2d 315, 316 (Ky. 1967).

11. Punitive Damages.

a. Standard.

"'Punitive damages' includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future."[137] In civil actions, whether and for what amount punitive damages are to be awarded is a determination to be made by the trier of fact concurrently with all other issues presented at trial.[138] Punitive damages may be awarded only upon clear and convincing proof that the defendant acted towards the plaintiff with oppression, fraud, or conduct which amounts to gross negligence or reckless disregard for the life and safety of others.[139] Punitive damages are not recoverable on a claim of breach of contract or in an action "against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question."[140]

b. Gross Negligence.

A finding of gross negligence necessary to support punitive damages requires more than a lack of ordinary care. The defendant must have failed to exercise even slight care so that his or her conduct amounts to a wanton and reckless disregard for the rights of others.[141]

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[137] KY. REV. STAT. ANN. § 411.184(1)(f).
[138] KY. REV. STAT. ANN. § 411.186(1).
[139] KY. REV. STAT. ANN. § 411.184(1), (2); *Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 840 (Ky. App. 2004).

[140] KY. REV. STAT. ANN. § 411.184(3), (4).
[141] *Peoples Bank of N. Ky., Inc. v. Crowe Chizek*, 277 S.W.3d 255, 268 (Ky. App. 2008).

c. Nominal damages.

The absence of actual damages does not bar an award of punitive damages. Mere nominal damages can support an award of punitive damages.[142]

d. Insurance.

A party may obtain insurance against liability for punitive damages if the punitive damages result from gross negligence, rather than an intentional act. If a defendant has insurance, then the insurance company may be required to pay punitive damages when they result from the defendant's gross negligence.[143] An insurer may choose to exclude coverage for punitive damages.[144]

e. Factors for Unconstitutional Analysis.

Three factors determine whether punitive damages are unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the harm or potential harm suffered by the plaintiffs and their actual conduct, and (3) the difference between the plaintiff's remedy and the remedies imposed or authorized in other cases.[145] A punitive damages award will be upheld unless it was the product of "undue passion or prejudice on the part of the jury."[146]

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142 *Fowler v. Mantooth*, 683 S.W.2d 250, 252 (Ky. 1984).
143 *Cont'l Ins. Co. v. Hancock*, 507 S.W.2d 146, 151-52 (Ky. 1974).
144 *Hodgin v. Allstate Ins. Co.*, 935 S.W.2d 614, 615-16 (Ky. App. 1996).
145 *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 906 (Ky. 2008).
146 *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 470 (Ky. 1999).

C. Wrongful Death Damages.

Wrongful death claims are expressly permitted by the Kentucky Constitution and statutory law.[147] Kentucky statute provides that the representative of the decedent's estate may bring an action for damages when the individual's death arose from the negligence or wrongful act of another, or their agent or employee.[148] Punitive damages are recoverable if the act resulting in death was willful or grossly negligent.[149] Any damages that are recovered in a wrongful death action and which are not used for funeral expenses, administration of the estate and attorneys' fees are distributed to the decedent's survivors in the order delineated in the statute.[150] There is a one-year statute of limitation for a wrongful death claim which starts running on the date of death.[151] However, if an administrator of the estate is appointed within one year of the decedent's death, he has one year from the date of his appointment in which he may bring a wrongful death claim.[152] The statute is extended when the administrator is not appointed within one year

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147 *See* KY. CONST. § 241 ("Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."); KY. REV. STAT. ANN. § 411.130.

148 KY. REV. STAT. ANN. § 411.130(1) ("The action shall be prosecuted by the personal representative of the deceased.").

149 *Id.*

150 *Id.* at 411.130(2)(a-e) (If the deceased leaves a spouse and no children, all of the damages are to go to the spouse. If a spouse and children, half of the recovery goes to the spouse and the other half to the children. If the deceased leaves a child or children and no spouse, the whole recovery goes to the child or children. If there are no children or spouse, the recovery goes to the mother and/or father of the deceased. If the decedent passes with no spouse, children, or parents, the recovery will become part of the estate and be distributed in accordance with the statutes governing descent and distribution.).

151 *See* KY. REV. STAT. ANN. § 413.140(1)(a) ("An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant…").

152 *See* KY. REV. STAT. ANN. § 413.180; *Connor v. George W. Whitesides Co.*, 834 S.W.2d 652, 654 (Ky. 1992) ("[I]f a personal representative is appointed within one year of the date of death, he then is granted one year from the date of his appointment to file suit. If no suit is filed within that time, the action for wrongful death dies.") (citing *Drake v. B.F. Goodrich Co.*, 782 F.2d 638 (6th Cir. 1986)).

after death and effectively provides "two years from the date of death to appoint a personal representative and commence a cause of action for wrongful death."[153]

"[T]he measure of damages for a wrongful death…is 'the value of the destruction of the power of the decedent to earn money.'"[154] These damages are exclusively economic in nature; damages for loss of affection, support and companionship can be recovered by a spouse or children under a separate loss of consortium claim.[155] Damages awarded in a wrongful death action cannot be discounted based on the decedent's personal consumption and the existence or status of survivors has no bearing on their measure.[156]

D. Mitigation of Damages.

Under Kentucky law, an injured party must exercise reasonable care to mitigate his or her damages.[157] For example, an injured party must use ordinary care and reasonable diligence to secure appropriate treatment for the injury.[158] Notably, the failure to mitigate damages, however, is relevant only to the amount of damages, not to fault.[159]

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153 *Connor*, 834 S.W.2d at 655; KY. REV. STAT. ANN. § 413.160(2).
154 *Birkenshaw v. Union Light, Heat & Power Co.*, 889 S.W.2d 804, 806 (Ky. 1994).
155 *See supra*. p. 33.
156 *Id; Paducah Area Pub. Lib. v. Terry*, 655 S.W.2d 19, 23 (Ky. App. 1983) ("Since our test is one's destroyed power to earn money, matters such as marital status and personal consumption items such as debts, insurance (savings), and general living expenses have been held irrelevant.").

157 *Wimsatt v. Haydon Oil Co*., 414 S.W.2d 908, 912 (Ky. 1967).
158 *Brown Hotel Co. v. Marx*, 411 S.W.2d 911, 915 (Ky. 1967).
159 *Geyer v. Mankin*, 984 S.W.2d 104, 108 (Ky. App. 1998).

Bingham Greenebaum Doll LLP's Litigation Practice

From straightforward contract disputes to complex national class actions, clients turn to Bingham Greenebaum Doll's litigation attorneys to provide a comprehensive range of business litigation services. Our attorneys are experienced in all aspects of trial and appellate work in federal and state courts, and have substantial experience in alternative dispute resolution matters, such as arbitration, mediation and negotiation, including proceedings before the American Arbitration Association and other tribunals. We help our clients meet their business goals through a wide array of business litigation, including antitrust, class actions, construction, environmental/mass tort, product liability, securities, trade secrets, and many other types of commercial disputes.

Our attorneys have become trusted advisors to our clients by offering a combination of legal strategy, industry background and a practical understanding of business principles and objectives. We handle business disputes large and small for clients engaged in a broad range of industries. Whether our client is a Fortune 100 company, an entrepreneurial start-up, or an individual, we focus on the client's objectives.

Our services include:

Alternative Dispute Resolution

Antitrust and Securities

Appellate

Asset Protection

Beverage Alcohol

Class Action Defense

Collaborative Law

Construction Litigation

Covenant Not to Compete and Trade Secrets

Custody

Divorce

Domestic Partnership

E-Discovery

Entertainment and Sports Talent

Estate and Trust Litigation

Guardianship

Intellectual Property Litigation

Long Term Care

Matrimonial Law

Media Law

Plaintiff Personal Injury

Product Liability

Professional Liability

White Collar Criminal Defense

Bingham Greenebaum Doll LLP's litigation experience includes serving as national and regional counsel for large companies and trade associations. Our litigation attorneys are experienced in the coordination and handling of complex litigation, and we are equipped with state of the art information technology to manage cases efficiently and to share information with our clients.

Sometimes the best solution avoids a lawsuit or trial. Our attorneys help clients evaluate the costs, benefits and risks of litigation. We believe that our reputation of being prepared to present a case in court often leads to settlement. And, once settlement is on the table, our attorneys are skilled negotiators who work to achieve each client's business goals.