FEATURE: TORTS

EMOTIONAL DISTRESS CLAIMS IN A POST-IMPACT WORLD: By: Chris Jackson and Lucas Humble

INTRODUCTION.

For years, the "impact" rule has limited claims for negligent infliction of emotional distress throughout the Commonwealth. Under this well-known rule, an action for negligent infliction of emotional distress would "not lie for fright, shock or mental anguish which [was] unaccompanied by physical contact or injury."¹ Stated simply, no physical "impact" resulted in no recovery for the plaintiff. While the rule had its critics, it served a useful purpose to defendants who could rely on the impact rule as a defense and dispose of emotional distress claims, which lacked physical impact, early in litigation.

On Dec. 20, 2012, the Kentucky Supreme Court issued a groundbreaking opinion in *Osborne v. Keeney*² and eliminated the impact rule. In its place, the Court set forth a new test requiring a plaintiff seeking emotional damages to prove that he or she suffered a "serious" or "severe" emotional injury by presenting expert medical or scientific proof.

As soon as the opinion was handed down, a debate arose among Kentucky lawyers as to the scope of its application. Does it apply only in "non impact" cases or does it apply to all cases involving claims for emotional distress, even if these claims arise from actual physical injury caused by "impact."

Nearly two years have passed since *Osborne* and some of the initial questions left unanswered have been addressed. Nevertheless, questions remain.

While courts and attorneys may have some trepidations in applying and interpreting the new rule, several recent opinions provide some insight into this key decision and offer litigants a compass – if not a road map – for emotional distress claims moving forward. These cases underscore that attorneys in Kentucky must take note of *Osborne* and integrate it into their tort practice.

THE OLD "PHYSICAL IMPACT" TEST – A "BRIGHT LINE" RULE THAT WAS OFTEN NOT SO BRIGHT.

For decades prior to *Osborne*, Kentucky courts applied the "physical impact" rule to claims for negligent infliction of emotional distress. In the 1942 case, *Morgan v. Hightower's* Adm'r.,³ the Kentucky Court of Appeals discussed the purpose of the rule and showed the court's suspicions toward emotional distress claims, explaining that they "are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured." While the standard was, at least arguably, arbitrary, it nevertheless represented a bright-line rule that courts could presumably follow.

Yet, as courts applied the rule in subsequent decades, it became increasingly apparent that the rule led to inconsistent – and often inequitable – results. A striking example of this is the 1988 case, *Wilhoite v. Cobb.*⁴ In *Wilhoite*, a truck driver hit and killed a minor child. The truck driver settled the wrongful death claims with the child's estate. The child's mother, who witnessed the horrific accident and her child's death, sued the truck driver for negligent infliction of emotional distress.

At first glance, these facts seem to be a benchmark example of when a negligent infliction of emotional distress claim might be viable. Yet, the Kentucky Court of Appeals, affirming the trial court, held that the mother's claim was barred. The Court explained, "the thing which causes the injury to a victim must also come in contact with the witness for that witness to recover for mental distress. We are bound by this precedent."⁵

Thus, since "Mrs. Wilhoite did not herself receive any physical contact or injury from the appellee; therefore, we conclude that the court did not err in dismissing her claim insofar as it was based upon the tort of negligence."⁶

Perhaps the most controversial aspect of the Wilhoite decision was the Court's rejection of the plaintiff's argument that light rays physically impacted her eyes, thus satisfying the impact rule. In hindsight, this argument appears to be a stretch. But just eight years earlier, the Kentucky Supreme Court, in Deutsch v. Shein, ruled that a plaintiff could satisfy the physical impact rule by providing evidence that he was contacted by x-rays, holding that "[w]e 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 xrays."7 Indeed, courts had effectively watered down the physical impact rule to the point that contact, which was "minimal" or "slight, trifling, or trivial," was sufficient.⁸ Despite these inconsistent results, courts continued to apply the impact rule for over 20 years after the Wilhoite decision. During this time, attorneys were stuck interpreting an ambiguous rule while, at the same time, questioning whether it would be abolished. That time came in 2012.

THE KENTUCKY SUPREME COURT ISSUES OSBORNE V. KEENEY – AND RAISES MORE QUESTIONS.

After decades of confusion, the Kentucky Supreme Court eliminated the physical impact rule in *Osborne v. Keeney.*⁹ In *Osborne*, an individual sued after a pilot negligently crashed an airplane into her house. The plaintiff alleged, among other things, that she suffered emotional distress due to the crash. However, she was not physically contacted or injured.

The defendant attempted to rely on the impact rule, arguing that because the plaintiff had not been physically contacted she could not sue for mental damages. Surprisingly, the Court rejected the defense and, in doing so, eliminated the long-established impact rule. The Court explained that:

[T]he supposed beauty of the impact rule is that it draws a bright line for determining when a plaintiff is entitled to recover for emotional injuries. At first blush, this may make sense and seem to counterbalance the feared possibility of subjectivity in finding emotional injury. But, in practice, what constitutes a sufficient impact for purposes of liability is not an easy determination for courts.¹⁰

GAUGING THE IMPACT OF OSBORNE V. KEENEY

Comparing the arbitrary distinctions between Wilhoite and Deutsch, the Court noted that "[i]n reality, the bright line of impact establishing liability is not so bright."11

In its place, the Court established a new standard. The Court first reiterated that a plaintiff asserting a claim for negligent infliction of emotional distress "must present evidence of the recognized elements of a common law negligence claim: (1) the defendant owed

a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury."12

Recognizing "that emotional tranquility is rarely attained and that some degree of emotional harm is an unfortunate reality of living in a modern society," the Court stated "that recovery should be provided only for 'severe' or 'serious' emotional injury."¹³ Addressing what was required to satisfy this standard, the Court explained that "[a] 'serious' or 'severe' emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case."¹⁴ Suggesting a floor for what constitutes severe emotional distress, the Court continued, "[d]istress that does not significantly affect the plaintiff's everyday life or require significant treatment will not suffice."15

Arguably, however, the most important, and controversial, aspect of the Court's decision was its holding that "a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment," explaining that this rule was appropriate "in light of societal advancements in mental health treatment and education."¹⁶

The Court wasted no time in applying its new standard, holding that "the new rules espoused today governing claims involving emotional distress . . . 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."17 Therefore, Osborne applies to all cases pending as of Dec. 20, 2012, the date the Court issued the opinion.

WHERE ARE WE NOW - CLARIFYING OSBORNE.

While the Court's derogation of the old rule included its lack of a bright line standard, Osborne also raised several new questions. For example, is expert testimony required in situations where physical impact unquestionably occurred, or was it a test intended to apply only in the absence of physical contact? The opinion, likewise, left open the question of whether the new standard applies to all claims for emotional distress, including those for intentional infliction of emotional distress, an entirely separate tort. Yet another unanswered question: does Osborne provide grounds for dismissal of emotional distress claims that fail to satisfy its requirements? More generally, attorneys and scholars were left to wonder about the import of this drastically different rule and how it would affect the future of Kentucky tort litigation. In the two years since Osborne came down, Kentucky courts have provided some guidance.

Is expert proof required for all emotional distress claims based on negligence?

It is well settled in Kentucky that, unless the subject matter is within the common knowledge of a layman and does not involve any technical matters, expert testimony is required.¹⁸ Recognizing the complex subject matter in certain areas of the law, courts have held that expert evidence is required in cases such as product liability claims for failure to warn¹⁹ or medical malpractice cases.²⁰ Does Osborne present a comparable rule and require expert evidence in all

negligence cases seeking emotional distress damages?

Relying on the general rule above, one could argue that expert evidence is not required in all negligence cases claiming emotional distress. Surely a jury is equipped to determine whether emotional distress occurred in cases involving catastrophic accidents, such as a car or plane crash, or horrific injury, such as amputation or disfigurement. Perhaps, then, Osborne only applies to negligence claims where there is no physical impact and, thus, a more enigmatic emotional injury.

The language in Osborne seems to mandate a sweeping rule, reguiring expert evidence in all negligence cases seeking damages for emotional distress. Indeed, the court specifically directed its new rule at "emotional-distress plaintiffs," without limitation.²¹ Likewise, the court plainly and broadly stated that "a plaintiff will not be allowed to recover without showing, by expert or scientific proof, that the claimed emotional injury is severe or serious"22 and "a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment."²³ Apparently, the Osborne Court did not equivocate.

The question regarding the scope of Osborne's application in negligence cases was considered by the federal court in Sergent v. ICG Knott County, LLC.²⁴ Sergent involved a mineworker who suffered a "serious injury" when the mine in which he was working collapsed, ultimately requiring amputation of his leg.²⁵ Plaintiff sued, alleging negligence in the maintenance of the mine and seeking damages, including emotional distress.²⁶ In granting the defendant's motion for summary judgment as to the emotional distress claims, the court turned to the clear language of Osborne and stated, "[r]ead plainly, Osborne announced a generally applicable rule that applies to all claims for emotional damages."27 The court soundly rejected plaintiff's argument that Osborne only required expert evidence in cases where there was no physical impact.²⁸ Indeed, such an interpretation of Osborne would require application of the impact rule to determine whether expert evidence was required - frustrating the Court's abrogation of the old rule.²⁹ Relying on Osborne, the court held that expert evidence was required for all negligence claims seeking emotional distress. Impact or no impact, expert evidence is required.

• Does Osborne apply to all claims for emotional distress damages no matter the tort?

The facts and context of Osborne seem to limit its application to negligence claims. Osborne, after all, was a negligence case. Moreover, the Court abrogated the physical impact rule, a rule traditionally limited to negligence claims and not applicable to other torts.³⁰ Likewise, the Court repeatedly framed its holding within the context of a prima facie negligence case, requiring plaintiffs to first show duty, breach, and causation, and then severe emotional distress supported by expert evidence.³¹ Nonetheless, does Osborne require expert evidence of severe emotional distress for every tort seeking damages for emotional distress, such as intentional infliction of emotional distress ("IIED") claims?

In Keaton v. G.C. Williams Funeral Home, Inc., ³² plaintiff sued a funeral home for negligence, and IIED, alleging mishandling of a family member's remains.³³ The Court of Appeals affirmed the trial court's grant of summary judgment to the defendant on the negligence claim because, under Osborne, the plaintiffs failed to present affirmative evidence that they suffered severe emotional distress.³⁴ Likewise, the court affirmed summary judgment for the funeral home on the IIED claim. The court held, "as previously stated, the [plaintiff] failed to present sufficient affirmative evidence con-

FEATURE: TORTS

cerning any 'severe emotional distress' its members had experienced or were suffering. As this failure was fatal to their negligence claim, it is likewise fatal to their IIED claim."35

The implication of Keaton is far from clear. Perhaps the Keaton court was merely applying the elements of an IIED claim, which, itself requires evidence of severe emotional distress.³⁶ It could be arqued, however, that the court applied Osborne's requirement of severe emotional distress to both the negligence and the IIED claims. If the latter is true, attorneys and courts may begin extending Osborne, including its expert evidence requirement, to intentional torts, such as IIED. However, focusing solely on the context and language of Osborne, it seems the more reasoned conclusion is that the rule is limited to negligence claims.

• Does Osborne provide a means of summarily dismissing claims for emotional distress?

Readers beware - Osborne has teeth! Indeed, one need not look far for an abundance of cases where courts have granted defendants' dispositive motions on emotional distress claims based upon plaintiff's running a foul of the holding in Osborne. Relying on Osborne, Kentucky courts have granted summary judgment based upon plaintiff's failure to provide evidence of emotional distress rising to the level of "severe."37

Kentucky courts have also granted summary judgment based upon plaintiff's failure to provide expert evidence in support of their emotional distress claims.³⁸

Osborne has even been the basis for aranting motions to dismiss.39

Gildringer	SBORNE V. KEENEY		
	PORNEV. RELIT		Or
1.0	SBORT		tr
Google c			LI LI
Gueo	About 14 results (0.03 sec) Osborne V. Keeney 395 SN 30.1 - Kry: Supreme Court, 2012 - Google We granted Osborne's and Keeney's separate p we granted Osborne's and Keeney's separate p by Kentry precedent remains the proper methy by Kentry b How cited. Related articles AL2	ansider three	
	A results (0.00	raview to contra approved	· · ·
	About 14 results V Osborne V. Keeney 999 SW 361 - Ky: Supreme Court, 2012 - Google 999 SW 361 - Ky: Supreme Court, 2012 - Google We granted Deborne S and Keeney'se, final, whe We drante supresented in this case, final, whe high Analysis of the second second second Cited by 16 How cited Related articles All 2 Cited by 16 How cited Related All	scholar accretionary procedure as	
Scholar	Google	titions for discrithin-a-suit protice under	
Schola	Keeney Court, 2012 marate P	suit the suit-win analpian	
	Osborne V. Keeney 395 SN 301 - Kry Supreme Court, 2012 - Google We granted Osborne's and Keeney's segarate p We granted Osborne's and Keeney's segarate important issues presented in this case; first, when yor Kenthody presedent remains the proper mathi- ty Kenthody presedent remains the proper math- ty Kenthody presedent remains the proper math- grad by 16 How cited Related articles Al2 Cited by 16 How cited Related articles and a remain of the property of t	in for litigating save	
	Osbow 3d 1 - Ny me's and this case meth	od to: Cite	
	399 Stranted Osburresented in as the proper All 2	Verbio	
Articles	We grant issues prodent remained articles	Insurance	
1 and	importantucky precoverited Relation	una Casualty Insulation	
Case law	by Kerny 15 How on	Carolina Carolina Cash Keeney	
Federal courts	Cited by 16 From Cosborne Keeney V. Osborne Court of Appeals, 2010 - Google Scholar Court of Appeals, 2010 - With Managers, If	OSBURNINGS, and the y. Steven	
Feublin	aney - cals - unit Victoria in	num	
Kentucky courts	Keener of Appendix Appellant, Managers	Inc., Cross	
Select courts	399 SW 350 Calormov Section 14 III.00 Calormov Section 14 III.00 Calormov Section 14 III.00 Calormov Section 14 III.00 Calormov Section 14 Calormov Section	OBBORNE: Carolino Casualty Insurance ne., Appellees, and Carolina Casualty Insurance ne., Cross-Appellans, v. Steven H. Keeney: RAL HOME, INC. Information of the Supreme Court of Kenucky rendered Information of the Information of the Information of the Information of Kenucky Rendered Information of the Information of Kenucky Rendered Information of the Information of	
Select courte	Steven and Monitor Liabing	ME INC.	
	Company; and Monitor Liauric Company; and Monitor Ciauric Company; and Cite Save Related articles Cite Save	RAL HOW one Court of the be in a sated	
My library			
	Related Sch WILL AW Google Sch	on appeal, 2012), holding	
	Company, Williams Cite Related articles Cite Keaton V. GC WILLIAMS FUNE Keaton V. GC WILLIAMS FUNE Ky. Court of Appeals, 2013 - Google Sch Ky. Court of Appeals, 2013 - Google Sch Ky. Court of Appeals, 2013 - Keeney, 393 However, while this matter was peak However, while this matter was full change by	owad 1 (Ky. de" as other to	
Any time	Keatourt of Appearties matter may, 399	"impact rule	
	Ky: Coursever, while worne v. Keeinging to t	THE REVIEW AND A REVIEW	
	How in Ostorions still care		
Since 201	0 its opinion in Unisdictions still cards ange minority of jurisdictions Cite Save Related articles Cite Save	NC V. MIDDa	
Since 20 Custom	ange minority articles	involar stive damages suit. Osborn 2013)	
Custon	Related CAMPGRO Google	Scribed lost pulmu malpractice June 201	
	I AGE CAmals, 2013 mently	declosed in a legal not review derive	
	relevance VILLAGE Over a 2013 vidate Ky: Court of Appeals, 2013 Ky: Court of Appeals, 2013 Ky: Court of Appeals, 2013 Ky: Court of Appeals, 2013	attomic discretionary	
Sort			
Sort by	". Usin are not recur WL 6634125	More impact fulls More impact fulls More impact fulls More impact fulls More impact for an underlying cause of Scholar Sc	
	Com. v. Bell C	NG. v. MIDDLETON & RECU Sochair Soch	
1			
4.	Relator	Court, whout a cross 926 (Ky	
	Create alert Com. V. Bell Com. V. Bell Com. V. Bell Ky: Supreme	Court, 2013 a cross-frage (Ky2007) Gourt without a cross-frage (Ky2007) Gourt without 24 SW3d 920, 920 (Ky2072) Keeney. 399 SW3d 1 (Ky2072) Keeney. 399 SW3d 1 (Ky2072) Keeney. 399 SW3d 1 (Ky2072) A - Google Scholar A - Google Scholar Google Scholar (Strong * (1) the defendant owed a duty of ce (1) the defendant owed a duty owed (1) the defendant owed (1) the defend	
	Create alert Com. V. Berrary Suprementation of the raised before this 400 SW 3d 278 - Ky: Suprementation of the raised before this and the raised before this suprementation of the raised before the raised before this suprementation of the raised before the raised before the raised before this suprementation of the raised before the raised before this suprementation of the raised before t	Anglion, 224 Bry Kid 1 (KY) Keeney, 399 Sykid 1 (KY) Keeney, 399 Sykid 1 (KY) Keeney, 399 Sykid 1 (KY) Angli Sykid Sykid Sykid Sykid Sykid Sykid Sykid Sykid Sykid Angli Sykid	
	AUV connot be raises Inc. V. Cu	Keeney, All 2 version	are to the
	Technology Osborne	Keenery ated articles All 2 vol- ated articles All 2 vol- tated articles All 2 vol- ated articles All 2 vol- All 2 vol- All 2 vol- All 2 vol- All 2 vol-	n the
	Steer grounds by cited Her	refendant owestion betwee	, 2012)
	other ground How ofted 14 Cited by 1 How ofted 14 Davidson V. King Ky: Court of Appeals, 2014 Ky: Court of Appeals, 2014	echolar (1) the delot legal causar 1, 18 (h)	67 - C
	Davidson V. King Davidson V. King	A - Google uf must prove wintiff, and aney, 399 Svit	
	navidson voneals, 201	inin a plaintin to the planne v. Keene	
	Court of Apr Kentucky	duty (3) Injury Osbor	
	hy action under ach of the	the plaintin's inter	abandoned uning
	Buttin (2) breach and plaintif (2) breach and defendant's breach and Related articles ctate F	Iaw, a planingry to the planingry to the planingry to the planingry. Osborne V , Net Planingry, Osborne V , Net Save Olice V , McCray Osborne V , Net Supreme Court of Appeals, 2013. Google Subreme Court estimation of tright, shock, or mental anguing of supreme court of the planingry	ab now allowing
	plainth, to steach during defendant's breach during Related articles Cite Kentucky State F Kentucky State F	Satural Cray cooole Schulare Court spatal angu	
	oplated articles	NICE V. Michaele 2013 - 421 OUR Suprehock, or menoe	
	Keiner State F	court of Appealor (Ky. 2012) for fright, sindical evidence	
	Kentucky 103-Ky:	399 SWoo in an action if sound most	
	415 SW 30 Ker	aney impact rule injury	
	In Osborne photos	ysical matic entre Save	u- of
	long-establishe evere	Police McCraV Google Summer Coursemer Coursements Court of Appeals, 2013 Google Summer Coursemer Coursemers Google Summer Coursemer Coursemers Court of Appeals, 2013 Google Summer Coursemers Google Summer Coursemers System Impact rule in an action for fright, shock, or mental anguars Google Summer Coursemers System Impact rule in an action for fright, shock, or mental anguars Google Summer Coursemers System Impact rule in an action for the Summary of the S	1 Otries
	recovery for sides /	All 2 Versen a), abrogan DG, 2	1012
	palated anticles	http://www.communication.com/second/participants/participant	
	Cadle V. Corr	1ett 0013 - Google and) of Toris, No. 2010-04	
	Cadle (ADP	jeals, 20, 2013).	
	Ky: Court of this	Restauxeeney	
	1980) (quo	borne (20, 2012) (miles	No. wh
	arounds by op (Ky. Dec. cave	Appelles dorf, Joseph
	160 6634 March	Citto Morris on	Ned Pillersus
	will article	for trainform Cite Server All 2 versions Cite Server tett 2013 - Google Scholar gRestatement (Second) of Torts, § 433, cmt. a), abrogated or gRestatement (Second) of Torts, § 433, cmt. a), abrogated or gRestatement (Second) of Torts, § 433, cmt. a), borner V, 0, 2013 (finality on June 20, 2013), borner V, 0, 2012 (finality on June 20, 2013), borner V, 0, 2012 (finality on June 20, 2013), Ky Dec. Save as Cite Save as Cite Save as Cite Save	
	No.	e V. RICE Court of Appearon RIDGE, March 10, M	
	Related anos Shortridg	194 - Ky arbara Shu of Kentuchy for Append	
	500 SW 20	Bon Boo, 20, 20 VII. Re Cite Save e V. RICE e V. RICE 194 - KY: Court of Appeals, 1996 - Google Scholar 194 - KY: Court of Appeals, RIDGE, Appealsnt, V. Morris RICE 194 - KY: Court of Appeals (Kentucky, March 16, 1986, 1957) 194 - Kitely Barbara Sparset, Presidentsburg, for Appealant 	
	ma SW2d	to Resize Keeney. (finality on Junit by Dec. 20, 2012) (finality on Junit ee Cite Save ee Cite Save e V. RICE 194. Ky: Count of Appeals, 1996 - Google Scholaf 194. Ky: Count of Appeals, 1996 - Google Scholaf 194. Ky: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1996, 1957 1952 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Appeals of Kentucky, March 16, 1956 1957 MR: Count of Kentucky, March 16, 1956 1957 MR: Count of Kentucky, March 16, 1957 1957 MR: Count of	v. Davidson, Ky., 339 SW2d The employe's claim was
B&B • 9.	4 04-CA-00	redorf, Derosa Related arm	navidson, Ky
	Lane, Pill	the How cited Rein Company Google Scholar Derause	, o employe's un
	cited by	AD ALIDING COLLY 1965 TO Mining Colly 1988	Die

Clearly, attorneys who ignore Osborne do so at great risk to their clients.

INTEGRATING OSBORNE INTO YOUR CASE.

The careful advocate on both sides of the "v" will certainly wonder how to use Osborne, and avoid its pitfalls, as they develop and practice their current and future tort cases. Hopefully, Osborne's game-changing impact on the landscape of Kentucky law has become evident. At a minimum, then, given the consequences of ignoring Osborne, attorneys must be aware of Osborne and attentive to its sweeping effects. However, more can be done to further vour client's interests.

The following presents some basic, and non-exclusive, ways Osborne should be employed in your next tort case.

For the Plaintiff's bar:

- Figure Osborne into the value of your cases, both when screening potential clients and negotiating settlement - can you prove severe emotional distress and does the value of the case warrant expert costs?
- Remember, physical impact is no longer required claims for negligent infliction of emotional distress may be viable where, in the past, they would not.
- Be conscious of Osborne when drafting your complaint so as to not invite a motion to dismiss by inartful pleading.
- Draft discovery responses and prepare your clients for depositions with Osborne in mind – use these opportunities to evidence the severity of any emotional distress by focusing on its impact on plaintiff's daily lives and the extent of treatment they have received.
 - Secure expert proof, through either a retained expert or a qualified treatment provider, to support your client's emotional distress claim and properly and timely disclose experts to avoid motions for summary judgment.

For the Defense bar:

- Draft written discovery requests and depose plaintiffs with an eye toward dismissal of emotional distress claims by focusing on the lack of severity of the plaintiffs' emotional distress.
 - Get a scheduling order in place with a clear expert disclosure deadline.
 - Depose the plaintiff's expert with a focus on Osborne. Think beyond Daubert and get concessions on how the emotional distress interferes with the plaintiff's life and the extent of treatment.
 - Move for dismissal if plaintiff cannot present evidence of severe emotional distress or has failed to timely obtain an expert witness to support emotional distress claims.
 - Consider whether a rebuttal expert to contradict plaintiff's expert is necessary for trial.
 - Figure Osborne into the price you are willing to pay to settle plaintiff's claims, in terms of increased costs to both plaintiff and defendant.

CONCLUSION.

Nearly two years after the Kentucky Supreme Court issued its opinion in Osborne, questions linger. Some answers have emerged, but the opinion's full ramifications will become clearer only as parties continue to litigate and courts continue to interpret and apply the new rule.

What does appear certain, however, is that Osborne is a landmark opinion that will continue to impact tort litigation for years to come. Whether you represent a plaintiff, arguing that the rule opens the door for a litany of new claims, or a defendant, treating the rule as a shield to bar damages for emotional distress, litigants must be aware of Osborne and recognize its impact on Kentucky law. 🔜



Chris Jackson is an associate at Dinsmore and Shohl, LLP. Jackson focuses his practice primarily on tort litigation, defending clients in product liability, premises liability, and trucking matters across a variety

of industries. He is a graduate of the University of Kentucky and obtained his Juris Doctor from the University of Kentucky College of Law. In addition to maintaining a busy practice, Jackson enjoys serving as a board of director for the University of Kentucky College of Law, Law Alumni Association. Contact him at (859) 425-1000 or christopher.jackson@dinsmore.com.



Lucas Humble is an attorney with the Bowling Green law firm Bell, Orr, Ayers & Moore, P.S.C. He has extensive experience in both litigation and transactional practice, with his primary areas of practice being in

civil litigation, insurance defense, and corporate law. Humble is a graduate of Western Kentucky University and received his Juris Doctor from University of Kentucky College of Law. In his spare time, Humble serves on the board of directors for the Boys & Girls Club of Bowling Green and is active in the Bowling Green Noon Rotary Club. He can be reached at humble@boamlaw.com or (270) 781-8111.

- Morgan v. Hightower's Adm'r, 163 S.W.2d 21, 22
 (Ky. 1942) (overruled by Osborne v. Keeney, 399

 S.W.3d 1 (Ky. 2012)).

 399 S.W.3d 1 (Ky. 2012).

 163 S.W.2d 21, 22 (Ky. 1942) (overruled by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012)).

 V.4 O.W.2 (V.1 (Ky. 2002)).

- 761 S.W.2d 625 (Ky. 1988) (overruled by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012)).
- *Id.*at 626
- 6 ld.

- Deutsch v. Shein, 597 S.W.2d 141, 146 (Ky. 1980) (overruled by *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012)). 8
- Id 9 399 S.W.3d 1 (Ky. 2012).
- 10 *Id.* at 15.
- ¹¹ *Id.* at 16.
- ¹² *Id.* at 17.
- ¹³ Id.
- ¹⁴ Id.
- ¹⁵ Id.
- ¹⁶ *Id.* at 17-18. 17
- Id. at 24.
- Keel v. St. Elizabeth Med. Ctr., 842 SW2d 860 (Ky. 1992). 18
- 19
- 1992). West v. KKI, LLC, 300 S.W.3d 184 (Ky. App. 2008). Love v. Walker, 423 S.W.3d 751 (Ky. 2014)("Under Kentucky law, a plaintiff alleging medical malprac-tice is generally required to put forth expert testi-mony to show that the defendant medical provider failed to conform to the standard of care.") But, 20 even in these cases, expert evidence may not be re-quired if "'the jury may reasonably infer both negli-gence and causation from the mere occurrence of the event and the defendant's relation to it," [or] in cases where the defendant physician makes certain admissions that make his negligence apparent." Id.
- 21 399 S.W.3d 1, 6 (Ky. 2012).
- 22 Id.
- ²³ Id. at 17-18.
 ²⁴ 2013 U.S. Dist. LEXIS 173102 (E.D. Ky. 2013).
- ²⁵ *Id.* at *1-2.
- ²⁶ *Id.* at *2. 27
- *Id.* at *17
- ²⁸ *Id.* at *15-21
- *Id.* at *18-21.
- See Childers v. Geile, 367 S.W.3d 576 (Ky. 2012)("By adopting the tort of intentional infliction of emotional distress, this Court recognized that ³¹ 399 S.W.3d 1, 6, 18, 23 (Ky. 2012).
 ³² 2013 Ky. App. LEXIS 153 (Ky. App. 2013).
 ³³ Id, at *1-3.

- ³⁴ Id. at *10-11.
- ³⁵ *Id.* at *14.
- 36
- Id. at *11-12 (citing Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781 (Ky. 2004)). See e.g. Keaton v. G.C. Williams Funeral Home, Inc., 2013 Ky. App. LEXIS 153 (Ky. App. 2013)(Af-firming trial court's grant of defendant's motion for firming trial court's grant of defendant's motion for summary judgment as plaintiff had not provided the requisite proof of "some affirmative evidence of se-vere emotional distress to support the claim"); *Pow-ell v. Tosh*, 2013 U.S. Dist. LEXIS 63567 (W.D. Ky. 2013)(Granting defendant's motion for summary judgment as plaintiff failed to provide evidence of severe emotional distress as "[i]t follows that a gen-uine emotional distress injury is one that necessarily requires significant treatment. Here, no Plaintiff has courbt circuificant treatment. in fact no Plaintiff has sought significant treatment—in fact, no Plaintiff has sought any treatment").
- sought any treatment"). See e.g. Farmer v. Dixon Elec. Sys. & Contr., Inc., 120 Fair Empl. Prac. Cas. (BNA) 1525 (E.D. Ky. 2013) (Granting defendant's motion for summary judgment as plaintiff failed to present expert evi-dence of severe emotional distress); Sergent v. ICG Knott County, LLC, 2013 U.S. Dist. LEXIS 173102 (E.D. Ky. 2013)(Granting defendant's motion for summary judgment as plaintiff could not present the requisite expert evidence as the plaintiff failed to identify any experts before the expert deadline): to identify any experts before the expert deadline); Hengel v. Buffalo Wild Wings, Inc., 2013 U.S. Dist. LEXIS 107202 (E.D. Ky. 2013) (Granting defendant's motion for summary judgment as plaintiff failed to present expert evidence of severe emotional dis-tress).
- See e.g. Taylor v. JPMorgan Chase Bank, N.A., 2014 U.S. Dist. LEXIS 1931 (E.D. Ky 2014)(Granting de-fendant's motion to dismiss as the "facts alleged in [plaintiff's] complaint certainly could not be said to 39 qualify as serious or severe under the definition in Osborne"); Odom v. Cranor, 2013 U.S. Dist. LEXIS 87503 (W.D. Ky. 2013)(Granting defendant's motion to dismiss as "Plaintiff's complaint does not ade-watch date allocation concerting metal distance quately state allegations regarding mental distress he suffered to avoid dismissal of these claims"); Odom v. Hiland, 2013 U.S. Dist. LEXIS 73687 (W.D. Ky. 2013) (same).

In an effort to add value for the membership, the KBA is continuing its efforts to make the **B&B-Bench & Bar** magazine a more well-rounded resource for the growing legal community in Kentucky.

Be a part of it - ADVERTISE.

2014-15

November 2014

January 2015

March 2015 Young Lawyers Issue

May 2015 **Cyber Security Issues**

July 2015

Comparison of the Kentucky the Federal Rules of Civil

September 2015 Lawyer Wellness

NOTE: Themes are tentatively scheduled. Changes in the law may occur that may nullify or cause rescheduling to any or all of these topics

Reserve Your Space Today!

Contact By Design at 859-233-0664, or

your advertising/marketing firm.