EMOTIONAL DISTRESS CLAIMS IN A POST-IMPACT WORLD:

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GAUGING THE IMPACT OF OSBORNE V. KEENEY

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 x-rays."[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]

> 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 warn[19] 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, requiring 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-

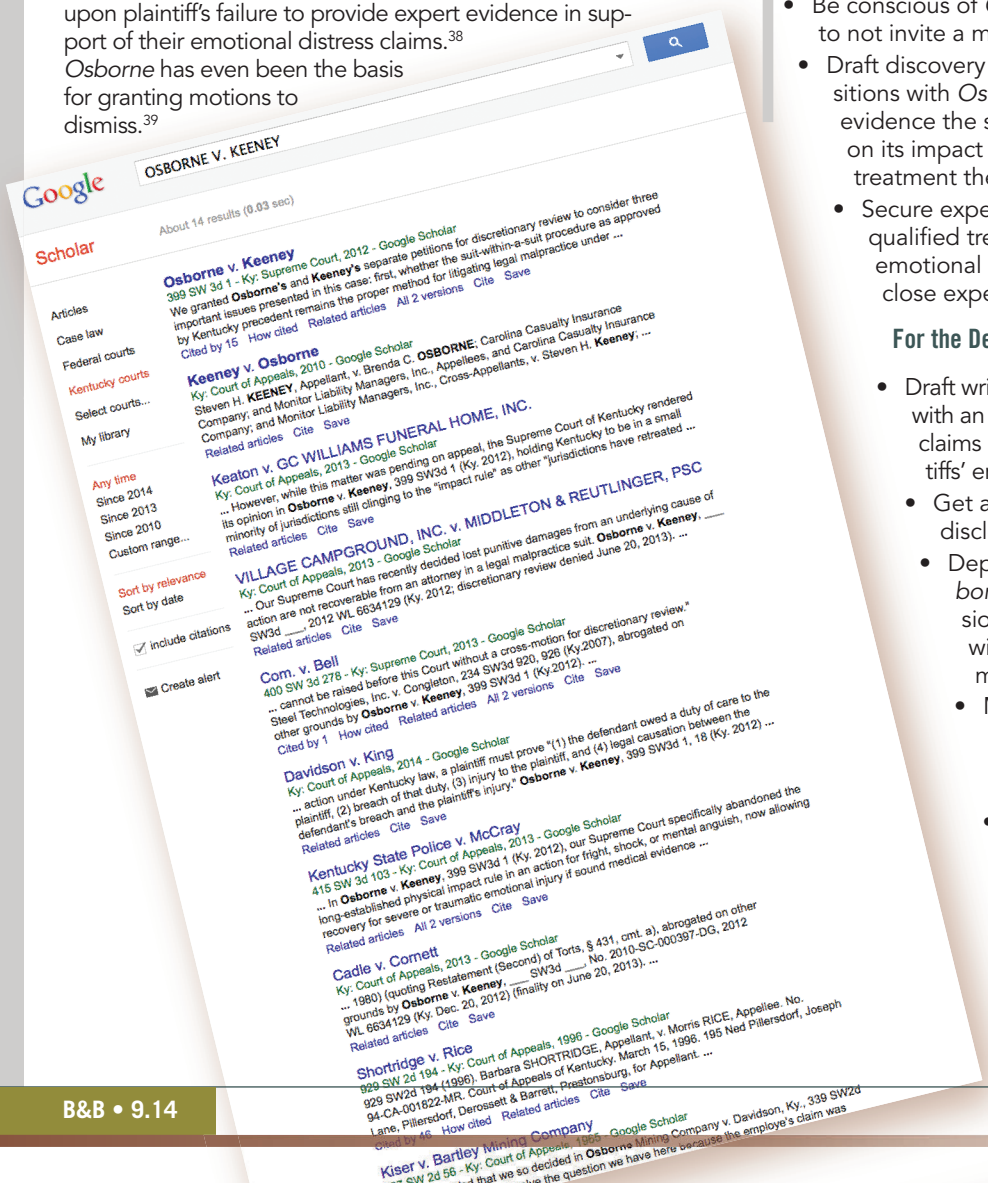
cerning any 'severe emotional distress' its members had experienced or were suffering. As this failure was fatal to their negligence claim, it is likewise fatal to their IIED claim."[35]

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 argued, 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 granting motions to dismiss.[39]



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 your 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. B&B

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1 *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)).
2 399 S.W.3d 1 (Ky. 2012).
3 163 S.W.2d 21, 22 (Ky. 1942) (overruled by *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012)).
4 761 S.W.2d 625 (Ky. 1988) (overruled by *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012)).
5 *Id.*at 626
6 *Id.*
7 *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.
18 *Keel v. St. Elizabeth Med. Ctr.*, 842 SW2d 860 (Ky. 1992).
19 *West v. KKI, LLC*, 300 S.W.3d 184 (Ky. App. 2008).
20 *Love v. Walker*, 423 S.W.3d 751 (Ky. 2014)("Under Kentucky law, a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care.") But, even in these cases, expert evidence may not be required if "'the jury may reasonably infer both negligence 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.
29 *Id.* at *18-21.
30 *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 physical impact, or personal injury, need not be present for a plaintiff to recover.")
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)).
37 *See e.g. Keaton v. G.C. Williams Funeral Home, Inc.*, 2013 Ky. App. LEXIS 153 (Ky. App. 2013)(Affirming trial court's grant of defendant's motion for summary judgment as plaintiff had not provided the requisite proof of "some affirmative evidence of severe emotional distress to support the claim"); *Powell 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 genuine emotional distress injury is one that necessarily requires significant treatment. Here, no Plaintiff has sought significant treatment—in fact, no Plaintiff has sought any treatment").
38 *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 evidence 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); *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 distress).
39 *See e.g. Taylor v. JPMorgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 1931 (E.D. Ky 2014)(Granting defendant's motion to dismiss as the "facts alleged in [plaintiff's] complaint certainly could not be said to 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 adequately 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).