Landrum & Shouse LLP

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The Chronicle

A Newsletter by Landrum & Shouse LLP

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Special Points of Interest

- Offices in Lexington and Louisville
- Statewide coverage
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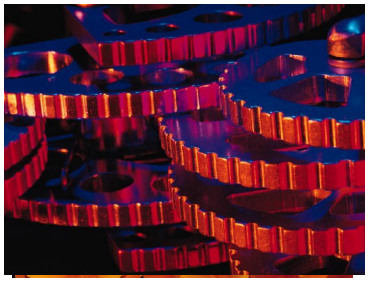
The Kentucky Supreme Court has Confirmed the "Economic Loss Rule" Applies to Product Liability Cases Seeking Damages to the Product Itself

By: Larry C. Deener

On June 16, 2011 the Supreme Court of Kentucky clarified an area of tort law that has been in a state of uncertainty for many years. Through its decision in *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, ___ S.W.3d ___, 2011 WL 2436154 (Ky. 2011), the Court confirmed that the "Economic Loss Rule" applies to negligence and strict liability claims. Simply put, the Court followed the lead of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), stating clearly that tort law does not provide a remedy for the owner's economic loss sustained when a product damages or destroys itself. Rather, the parties are directed to contract law and the bargain they made at the time of sale.

Industrial Risk Insurers prosecuted its subrogation interests arising out of the self-destruction of a large lathe and metal cutting machine used in the manufacturing processes of an Ingersoll Rand factory. The failure of the product required some $2.8 million to repair and return to service. Industrial Risk Insurers brought the action asserting both tort and contract claims, but the contract claims were barred by limitation of action. The tort claims were asserted under theories including negligence, strict liability in tort, negligent misrepresentation, and fraud by omission.



"The Court made clear the "Economic Loss Rule" applies in Kentucky to negligence and strict liability claims arising from the malfunction of commercial products."

The Court made clear the "Economic Loss Rule" applies in Kentucky to negligence and strict liability claims arising from the malfunction of commercial products. The Court removed the confusion in this area of law created by *Real Estate Marketing v. Frantz*, 885 S.W.2d 921, 926 (Ky.1994) and validated the Court of Appeals decision in *Falcon Coal Company v. Clark Equipment Company*, 802 S.W.2d 947 (Ky. App. 1990). Thus, in Kentucky, economic damage to the product itself, as opposed to damage to the other property or to the person of the plaintiff user, is not recoverable in a product liability tort action. The owner's remedy is under contract law, not tort.

The Court did not expressly decide that the "Economic Loss Rule" applied to consumer products, such as a car, boat, kitchen appliance, or the like. The United States Court of Appeals for the Sixth Circuit had predicted in *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 849 (6th Cir. 2002) that the Kentucky Supreme Court would limit the "economic damages" rule to commercial products where the parties had relative bargaining power and that Kentucky would not apply the rule in consumer product cases. Since this issue was not before the Court, it deferred this ruling. But the Supreme Court hinted it would apply the rule to consumer products as well, noting that the "Restatement (Third) of Torts: Products Liability makes no distinction between products produced for commercial customers and those produced for consumers." While the precise issue is saved for another day, the reference to the Restatement Third does not indicate the Court is inclined to make the distinction.

Technology and the practice of law change every day.

"Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy."

Public Privacy: Social Networking in Litigation

By: Elizabeth J. Winchell

The amount of personal information being placed in the public domain has exploded with the creation of social networking sites such as Facebook and MySpace, as well as with the growing popularity of blogs and Twitter. In evaluating a personal injury case, a Plaintiff's ability to engage in certain activities can significantly affect claims for impairment and pain and suffering. Surveillance of a Plaintiff's public activities can be used as an effective tool for impeachment, but a Plaintiff's online accounts of his or her activities can provide even more candid information about that person's true capabilities. Courts are now being asked to evaluate how much of that information is discoverable, with varying results.

The simplest case involves a Plaintiff who has not placed stringent privacy settings on her profile, leaving it generally available to anyone with a Facebook account. We recently impeached a Plaintiff at trial using family photographs and text postings from her Facebook account. The Plaintiff, who was involved in a car accident, claimed that she was unable to work at a computer, unable to clean her account revealed Plaintiff's thriving online crafts business, photographs of the Plaintiff swinging her children around by the arms, and Plaintiff's open invitation to her friends to attend a party at her home (for which she had been cooking and cleaning all day). We obtained a favorable result in that trial, as much of the liability argument rested upon the credibility of the parties. The Plaintiff was shocked that we had accessed her profile and had so much information about her daily life, despite the fact that her information was readily available.

The issues become much more complicated when a Plaintiff utilizes available privacy settings which restrict access to information. Those cases are being brought to the attention of trial courts around the country as defense attorneys file motions to compel Plaintiffs to disclose photographs and messages posted to social networking sites. Some courts have found that Plaintiffs create a reasonable expectation of privacy by limiting access to their profile. However, other courts have found that information placed on a social networking site is, by its very nature, intended to be public. The New York Supreme Court compelled a personal injury Plaintiff to disclose photographs and posts from Facebook, with the following explanation:

"Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy."

Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). The expectation of privacy is the determining factor in whether such information is discoverable, but judges have interpreted that expectation based upon the content of the materials, potential relevance, the specific nature of the request, and their own feelings on the topic. Kentucky courts have not yet weighed in on the propriety of compelling such information, although authenticated evidence gathered from public Facebook accounts has routinely been deemed admissible in trials.

This is an issue to be watched as it evolves. Attorneys are rarely pushing this issue at the present time because of the expense in fighting the objections. There is also the possibility that a judge or jury will find such requests distasteful, feeling that the defense is "fishing" too far into the private lives of Plaintiffs. There are also questions about how to reliably obtain the information once it is ordered to be disclosed. What is clear, however, is that courts are struggling to apply old laws to new technology, and that the results are difficult to predict.

Who is liable for a guest's injuries on leased premises?

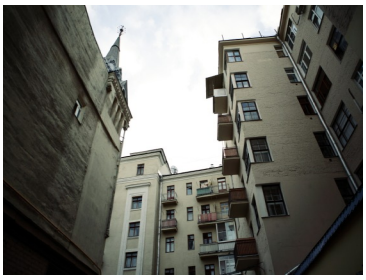
By: Hilary M. Worne

The most important detail in landlord vs. tenant premises liability is control over the premises. It is well-settled that when a tenant's invitee is injured due to a defective condition in a "common area," which is controlled and maintained by the landlord, the landlord is liable. See Dixon v. Wootton, 210 S.W.2d 967 (Ky. 1948). However, this article will focus on areas in which the tenant has full and complete control over the premises on which the injury occurred, not common areas.

The general rule in Kentucky is that a tenant, not the landlord, is liable for injuries to the tenant's guests caused by defects in the premises under the control of the tenant. In *Starns v. Lancaster*, the Court held that "a tenant in full and complete control of premises which he occupies…is prima facie liable for damages proximately caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by him, irrespective of whose duty it was, as between the landlord and tenant, to make such repairs". 553 S.W.2d 696, 697 (Ky. App. 1977). The Court held that "invitees, when seeking redress for injuries…must seek such redress from the tenant and not from the landlord." Id. at 697; see also *Bailey v. Fraley*, 2004 WL 2366182, *1 (Ky. App. 2004).

Generally, a covenant to repair in a lease agreement does not change the rule that a tenant is liable for injuries to invitees. The Starns Court made it clear that even if the landlord had a duty to make repairs to the premises, the tenant is still prima facie liable. 553 S.W.2d at 697. Additionally, in *Pinkston v. Audubon Area Community Services, Inc*., the Court held that [A] landlord is not liable for injuries caused by breach of a covenant to make repairs to a leased premises. Rather, the remedy for breach of an agreement to repair is the cost of repair. 210 S.W.3d 188, 190 (Ky. App. 2006). The Court explained that, just as with any contract, damages will not extend beyond those contemplated in the agreement.

In *Pinkston*, the individual claiming injuries was the tenant, rather than a tenant's invitee. However, the Court in *Clary v. Hayes* held that the duties of a landlord owed to a tenant's invitee are the same as those owed to the tenant; therefore, "[w]here the tenant has no redress against the landlord, those on the premises in the tenant's right are likewise barred." 190 S.W.2d 657, 659 (Ky. 1945). The Court explained that this rule applies even where the property is leased for a business purpose and the lease contemplates an invitation to the public. Id. at 659-660



An important consideration in cases involving a covenant to repair is the issue of notice. In *Schneder v. Erdman*, 752 S.W.2d 789 (Ky. App. 1988), the Court held that even if there is a covenant to repair in the lease, the plaintiff must also show that the landlord had notice of the defect that caused the injury. Id. at 790. Without notice of the defect, the landlord is not liable, despite a covenant to repair.

The Court's decision in *Schneder* left open the possibility that a landlord may be liable if there is a covenant to repair and notice of the defect. Therefore, a landlord may face liability to a tenant's invitee where the landlord has a duty to repair under the lease agreement and had prior notice of the defect that caused the injury.

"The most important detail in landlord vs. tenant premises liability is control over the premises."

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Let us ring the bell for your success.

Welcome to The Chronicle, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

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Origin of "Let us ring the bell for your success"

One of our founding partners, Charles Landrum, Jr., served for many years as a trial attorney and later District Attorney for the Louisville & Nashville Railroad Company, a predecessor railroad of CSX Transportation, Inc. In so doing, he carried on a tradition of railroad service begun by his father, Charles Landrum Sr., who had been the General Solicitor of the L&N. When Charlie announced his retirement from the active practice of law in 1986, his friends and colleagues held a retirement dinner in his honor. The event was attended by friends, attorneys, judges and railroaders from all across the Commonwealth of Kentucky.

At the banquet, the L&N executives presented Charlie with an engine bell that had seen service on an old L&N steam locomotive. The bell was mounted on a beautiful wood frame with a placard honoring Mr. Landrum's long service with the railroad.

L&S "Victory Bell"

A few years after his retirement, Mr. Landrum donated the bell to the Landrum & Shouse, LLP offices as a token of his affection for the firm. It is kept in a public place of honor in memory of Charles Landrum, Jr.'s service to his legal craft.

The bell now is known as the "Victory Bell." When rung, the bell has a strikingly loud, some say spine shivering, peal that can be heard throughout the floors of our offices. When one of our attorneys wins a jury trial, it has become custom to ring the bell (having won one for Charlie). Folks then gather in the hallway near the "Victory Bell," and the story of the trial victory is told and shared.