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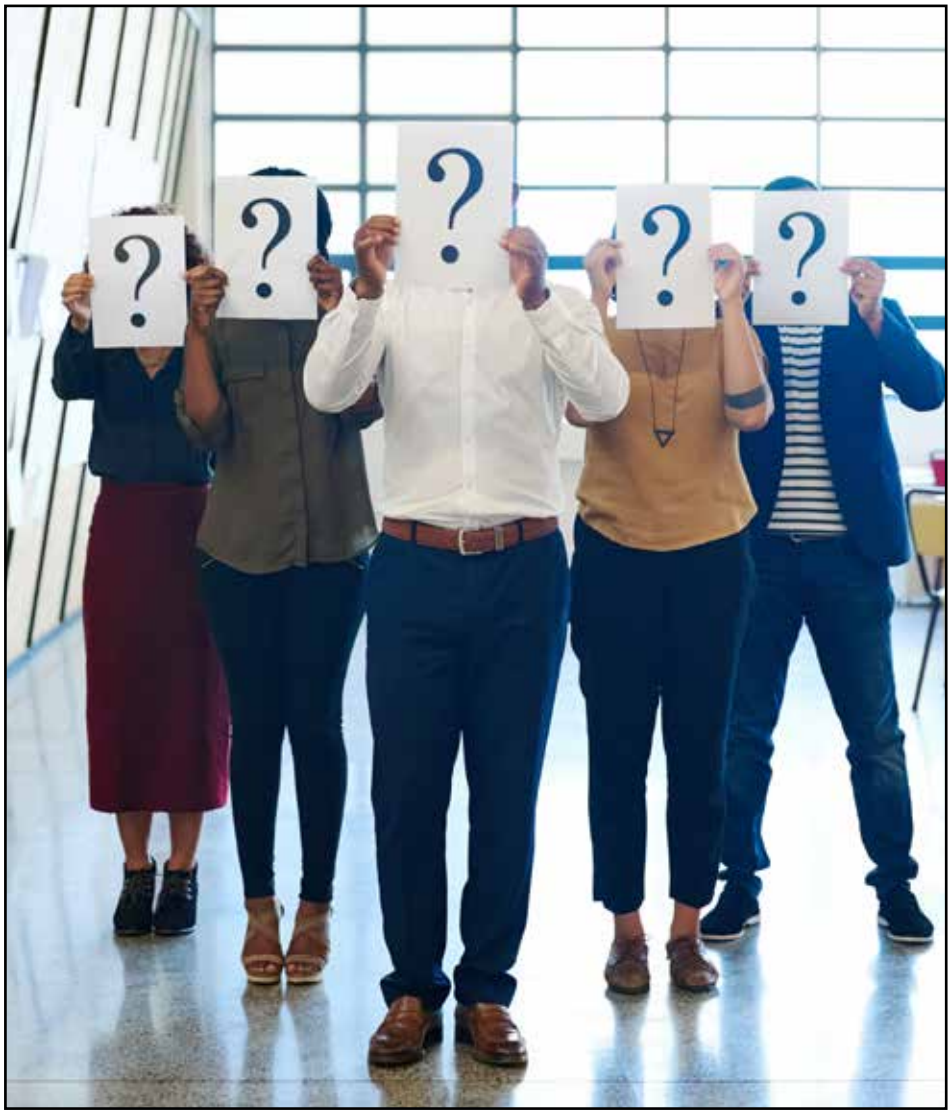
KENTUCKY AGENCY ANALYSIS – THE TIME HAS COME FOR CHANGE



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Attorneys routinely encounter Kentucky's traditional agency analysis and find it cumbersome, outdated, and inconsistent. Although the analysis involves the weighing of nine factors, there is conflicting case law regarding the primacy of any one of the factors. Consequently, the manner in which the analysis and associated case law has developed in the workers' compensation context has created difficulty and unpredictability in vicarious-liability application. It is high time for Kentucky attorneys to encourage courts to abandon the traditional multiple-factor test in favor of a more streamlined analysis like that found in the Restatement (Third) of Agency.

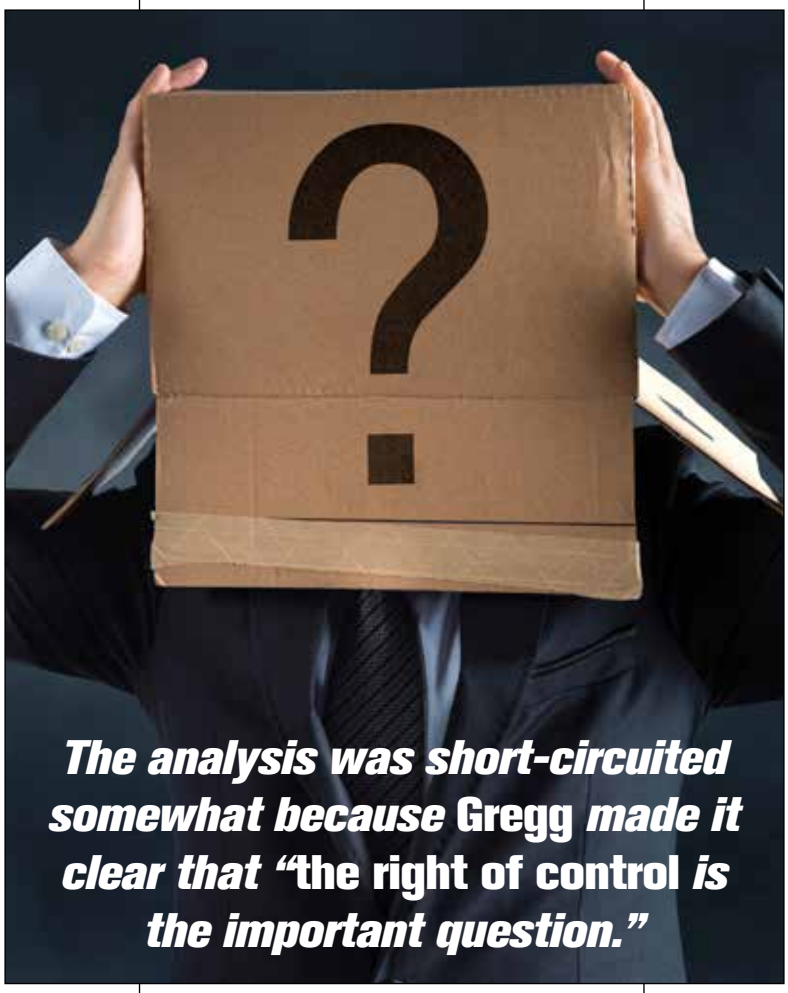
THE MISDEVELOPMENT OF KENTUCKY'S ACTUAL AGENCY ANALYSIS

Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003) (quotations and citations omitted); *see also Kindred Nursing Ctrs. L.P. v. Brown*, 411 S.W.3d 242, 249 (Ky. App. 2011); Restatement (Third) of Agency § 2.01 (2006). Under Kentucky law, a "principal is vicariously liable for damages caused by torts of commission or omission of an agent or subagent, other than an independent contractor, acting on behalf of and pursuant to the authority of the principal." *Williams v. Ky. Dep't of Educ.*, 113 S.W.3d 145, 151 (Ky. 2003) (citing *Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594, 595 (Ky. 1953)). Whether an alleged tortfeasor is an agent of a principal is a legal conclusion. *Wright v. Sullivan Payne Co.*, 839 S.W.2d 250, 253 (Ky. 1992).

Beginning with *Sam Horne Motor & Implement Co. v. Gregg*, 279 S.W.2d 755 (Ky. 1955), Kentucky courts often use a multi-factorial test derived from Restatement (First) of Agency § 220(2) (1933), to determine whether an alleged tortfeasor is an independent contractor or employee for purposes of vicarious liability.[1] These factors are: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether,

in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relationship of master and servant; and (10) whether the principal is or is not in business. *Gregg*, 279 S.W.2d at 756–57; Restatement (Second) of Agency § 220(2) (adding factor 10). The cumbersome nature of this analysis is plainly evident.

The analysis was short-circuited somewhat because *Gregg* made clear that "the r*ight of control* is the important question." *Gregg*, 279 S.W.2d at 758. In actuality, the importance of control was present in Kentucky's common law long before *Gregg*'s use of the Restatement. *See, e.g., Ballard & Ballard Co. v. Lee's Adm'r,* 115 S.W. 732, 734 (Ky. 1909); *Bowen v. Gradison Constr. Co.*, 32 S.W.2d 1014, 1019 (Ky. 1930); *Barnes v. Indian Refining Co.*, 134 S.W.2d 620, 623–24 (Ky. 1939); *Shedd Brown Mfg. Co. v. Tichenor*, 257 S.W.2d 894, 896–97 (Ky. 1953); Restatement (First) of Agency § 220 cmt. c (1933) ("Those rendering service but retaining control over the manner of doing it are not servants.") The emphasis on control has continued well after *Gregg*. *See, e.g., Nazar v. Branham*, 291 S.W.3d 599, 606-07 (Ky. 2009) (omitting the Restatement factors entirely and stating, "[a]n individual is the agent of another if the principal has the power or responsibility to control the method, manner, and details of the agent's work."); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003) ("Under Kentucky law, the right to control is considered the most critical element in determining whether an agency relationship exists."); *Brooks v. Grams, Inc.*, 289 S.W.3d 208, 212 (Ky. App. 2008). Focusing on control is logical because it would be manifestly unfair to impose liability on an alleged principal for the conduct of work that it does not control. *King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 664 (Ky. 1973) ("One reason for the development of the rule of non-liability of an employer for the negligence of his independent contractor was the unfairness of imposing liability upon an employer who had no means of imposing any control over the work.")



A direct conflict with this longstanding common law developed shortly after *Gregg*'s use of the Restatement factors, when Kentucky courts began using the factors outside the scope of vicarious liability and thus encountered different policy objectives. In 1959, just four years after *Gregg*, the Kentucky Supreme Court applied the Restatement factors in a workers' compensation case to determine whether an injured worker was an employee. *Locust Coal Co. v. Bennett*, 325 S.W.2d 322 (Ky. 1959). In doing so, the court omitted any reference to control as the primary factor and instead noted that "[n]o one of these factors is determinative." *Id.* at 324. A few years later, in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), perhaps the most cited case for the agency factors' use, the court solidified their application to workers' compensation cases.[2] The problem is that workers' compensation involves an analysis of an employer-employee relationship that is far broader than that of vicarious liability, and *Ratliff* made this clear: "[I]n determining the relationship of employer and employee under the Workmen's Compensation Act a broader and more liberal construction is used favoring employee." *Id.* at 323; *see also Abel Verdon Constr. v. Rivera*, 348 S.W.3d 749, 753 n.6 (Ky. 2011) ("*Ratliff* emphasized that the workers' compensation approach to analyzing the parties' relationship was broader and more liberal than the approach found in the law of master and servant or principal and agent.")[3] Unfortunately, *Ratliff* was a catalyst for misapplication in vicarious liability cases.

The Kentucky Supreme Court perpetuated—if not authorized—this conflict in *Ky. Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Ky., Inc.*, 91 S.W.3d 575 (Ky. 2002), when it held that *Locust Coal* was correct in finding that "not one of the aforementioned factors is determinative" and every case "needs to be resolved on its own facts." *Id.* at 580.[4] Similar to *Locust Coal, Landmark* was an unemployment insurance case, which is wholly different from vicarious liability. Yet courts have applied *Landmark* and *Locust Coal* to vicarious liability and have found that all factors should be given equal weight. *See, e.g., Am. Nat'l Univ. of Ky., Inc. v. Commonwealth ex rel. Beshear,* 2019 Ky. App. LEXIS 103, at *9, 2019 WL 2479608 (Ky. App. June 14, 2019); *Dixon v. Lake Cumberland Reg'l Hosp., LLC*, 2017 Ky. App. Unpub. LEXIS 927, at *16–18, 2017 WL 1533812 (Ky. App. Apr. 28, 2017); *Armstrong v. Martin Cadillac, Inc.*, 2016 Ky. App. Unpub. LEXIS 872, at *37, 2016 WL 7406703 (Ky. App. Dec. 22, 2016); *Curtis v. Coast to Coast Healthcare Servs.*, 2017 U.S. Dist. LEXIS 127853 (E.D. Ky. Aug. 11, 2017); *Foncannon v. Se. Emergency Physicians, LLC*, 2017 U.S. Dist. LEXIS 54870,

2017 WL 1362029 (E.D. Ky. Apr. 11, 2017). At least one other jurisdiction has properly recognized this error. In *Dent v. Exeter Hosp., Inc.*, 931 A.2d 1203 (N.H. 2007), the New Hampshire Supreme Court found that a physician was an independent contractor of a hospital and rejected the use of an eleven-factor test of actual agency rooted in workers' compensation law. It held:

> The instant case does not present a question of workers' compensation. Instead, the question before us is whether an agency relationship existed for purposes of vicarious liability. We have consistently used the three-pronged test described above to determine whether an agency relationship exists. Accordingly, we decline Dent's invitation to employ the workers' compensation test in the instant case.

Id. at 1210 (internal citations omitted).

This conflict between the primacy of control versus all factors being treated equally is routine ammunition for plaintiffs' attorneys to claim—wrongly—that a dispute over the various factors creates a factual issue, rendering summary judgment inappropriate. *See Nazar v. Branham*, 291 S.W.3d 599, 606 (Ky. 2009) ("Where the facts are in dispute and the evidence is contradictory or conflicting, the question of agency, like other questions of fact, is to be determined by a jury."). But these factors are not jury questions. A court reaching mixed conclusions on the factors does not mean that the underlying facts are in dispute, such that summary judgment is unavailable; after all, the parties could agree on all the facts and disagree on the legal effect of those underlying facts.

If the factors were indeed true factual questions, they would of course need to be presented to the jury. But a review of Kentucky's foremost treatise on jury instructions, Palmore and Cetrulo's *Kentucky Instructions to Juries*, provides no citation or mention of the factors. The form instructions relating to actual agency are extremely concise. *See* Cetrulo, *Kentucky Instructions to Juries* § 33.01 (informing the jury that it should find for the plaintiff if "D [principal] had authorized A [agent] to sell or deal in seed corn as its agent," but identifying no factors or considerations for that determination). If anything, the factors are for the court to consider in making a legal conclusion regarding agency. Despite potential mixed conclusions on the factors, regardless of the weight afforded them, there would be no fact issue requiring a jury's resolution.

In fact, the Kentucky Court of Appeals has explicitly rejected this argument. In *Brooks v. Grams, Inc.*, 289 S.W.3d 208 (Ky. App. 2008), the court reviewed the agency factors and acknowledged that "the facts of this case satisfy three of these factors" for a determination of agency. *Id.* at 212. Agency liability was inapplicable, however, because "under the circumstances of this case, the presence of three of the nine factors . . . *is not sufficient to impose liability.*" *Id.* (emphasis added). In other words, jury questions are not created simply because a small number of factors may be present supporting agency. The Brooks decision is not an isolated occurrence.[5] Plaintiffs cannot escape summary judgment in cases in where merely some factors favor agency while others favor an independent-contractor finding.

That said, there is an alternative to this inconsistent and improperly perpetuated analysis, and it is time for Kentucky defense counsel to promote its adoption.

RETURNING THE FOCUS TO CONTROL

The Restatement (Third) of Agency, published in 2006, abandoned the multi-factor approach from the first and second Restatements. Instead, the Restatement (Third) outlines a straightforward analysis: "[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." Restatement (Third) of Agency § 7.07(3)(a) (2006). This section replaces § 220 from the Restatement (Second) and the factors it outlined.[6]

In truth, control was the Restatement's focus all along, but it was simply obscured by Kentucky courts' detour into workers' compensation law and their departure from emphasizing control. The Restatement (First) of Agency defined a servant as "a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, *is subject to the other's control or right to control.*" Restatement (First) of Agency § 220(1) (emphasis added). Kentucky courts use the factors to determine whether an alleged agent is indeed subject to the principal's control. Notably, the factors are found in subsection two of the relevant Restatement sections; control, on the other hand, is listed in subsection one.

The Restatement has long been viewed by Kentucky courts as the "guiding star for courts and scholars alike on the state of the law." *Ky. Legal Sys. Corp. v. Dunn*, 205 S.W.3d 235, 237 (Ky. App. 2006). Kentucky courts have already repeatedly cited the Restatement (Third) of Agency § 7.07 with approval for its definition of scope of employment. *See, e.g., Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44, 51–52 (Ky. 2008); *Feltner v. PJ Operations, LLC*, 568 S.W.3d 1, 4 (Ky. App. 2018); *Collins v. Appalachian Research & Def. Fund of Ky., Inc.*, 409 S.W.3d 365, 369–70 (Ky. App. 2012); *O'Bannon v. Boys & Girls Club, Inc.*, 2018 Ky. App. Unpub. LEXIS 526, 2018 WL 3602784 (Ky. App. July 27, 2018). In fact, the Eastern District of Kentucky has refused to review the factors, opting instead to focus on whether the alleged principal was in control of the alleged agent's conduct. *See Dilts v. Maxim Crane Works, L.P.*, 2009 U.S. Dist. LEXIS 23924, 2009 WL 803699 (E.D. Ky. Mar. 25, 2009).[7] Returning to an analysis with an emphasis on control would harmonize Kentucky law and promote the underlying policies of vicarious liability.[8]

CONCLUSION

There are at least two main takeaways from Kentucky's flawed actual agency analysis. First, defense attorneys should be prepared to rebut plaintiffs' attempts to cite case law from workers' compensation, unemployment insurance, or other legal areas to assert that a question of fact exists regarding an agency relationship. The factors, while factually based, are resolved by legal conclusion and are not jury questions. Second, defense attorneys should push for the law's development and clarification by promoting an approach focusing on control, which is the historical heart of agency's analysis. The Kentucky Supreme Court has acknowledged its duty is not to "maintai[n] the watch as the law ossifies," and so it is for attorneys. *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012). We cannot expect the law surrounding agency to evolve without initiative. Advocating for the return to a focus on the principal's control or, in the alternative, the adoption of the Restatement (Third) of Agency § 7.07 is consistent with Kentucky case law, eliminates present case law inconsistencies, and offers a simpler analytical framework for judges and litigants. The time is now.

Joey Wright is an associate at Thompson, Miller & Simpson in Louisville, Kentucky. Prior to joining TMS, Joey was law clerk for Chief Justice John D. Minton, Jr. of the Kentucky Supreme Court. Joey's practice is focused on defending healthcare providers in complex litigation involving negligence, credentialing, and novel vicarious-liability theories; defending major manufacturers against claims of product liability; and defending healthcare professionals before licensing agencies, all with a particular emphasis on appellate matters. Joey is a member of KDC and has drafted multiple Supreme Court amicus briefs on KDC's behalf . He also serves as a current member of Kentucky's eCourts Project Management Committee, has served on the Kentucky Bar Association Young Lawyers Division Executive Committee, and served as Vice-Chair of the Louisville Bar Association's Appellate Law Section. In addition, Joey has been very involved in the Louisville community, serving on various charitable boards and participating in Leadership Kentucky's Elevate Kentucky program. In his spare time, Joey enjoys fly fishing, tying flies, woodworking, and spending time with his wife and four dogs.

[1] Of note, there is an arguable distinction between an employee or servant and an agent for purposes of vicarious liability. "The crucial line between servant and non-servant agents can perhaps be best illustrated by the traveling salesman. In all cases he is an agent seeking to advance his master's interest; but he may or may not be a servant." Restatement (Second) of Agency, Title B, Scope. Also, the relationship between an attorney and client is one of agency but not servitude, and therefore vicarious liability would not apply. See Ronald C. Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 31, 39 (1979). Resolving or otherwise explaining this distinction is, however, outside this article's scope.

[2] Ironically, *Ratliff* did not cite the Restatement as the source of the factors, but instead a workers' compensation treatise: Larson's *Workmen's Compensation Law*, Vol. 1 (1952).

[3] *See also Purchase Transp. Servs. v. Estate of Wilson,* 39 S.W.3d 816, 818 (Ky. 2001) ("In *Ratliff v. Redmon, supra*, the Court emphasized that the purpose of Chapter 342 favored a different concept of the term 'employee' from that which was applied at common law. In stating its approval of the trend to find employee status in instances where such protection was appropriate, the Court noted that Kentucky was not alone in limiting the scope of independent contractor status with regard to workers' compensation claims.") (emphasis added); *Brewer v. Millich,* 276 S.W.2d 12, 15 (Ky. 1955) ("In answering this question [whether workers' compensation coverage is applicable], the approach to be used is that of determining the relation of employer-employee under the Workmen's Compensation Act *rather than of master and servant or principal and agent in tort actions.*") (emphasis added).

[4] Adding to the confusion, a set of cases developed in which four factors were emphasized as "predominant." *Uninsured Employers' Fund v. Garland,* 805 S.W.2d 116, 118–19 (Ky. 1991) (citing as predominant, "(1) the nature of the work as related to the business generally carried on by the alleged employer; (2) the extent of control exercised by the alleged employer; (3) the professional skill of the alleged employee; and (4) the true intent of the parties"); *Husman Snack Foods Co. v. Dillon,* 591 S.W.2d 701 (Ky. App. 1979); *Chambers v. Wooten's IGA Foodliner,* 436 S.W.2d 265 (Ky. 1969). This line of cases also arose in the workers' compensation context; the confusion it wrought, however, has not been contained to that area of law.

[5] *See, e.g., Powers v. Keeneland Ass'n, Inc.,* 2017 Ky. App. Unpub. LEXIS 931, 2017 WL 1193174 (Ky. App. Mar. 31, 2017) (summary judgment affirmed despite four factors weighing in favor of agency); *Armstrong v. Martin Cadillac, Inc.,* 2016 Ky. App. Unpub. LEXIS 872, at *44, 2016 WL 7406703 (Ky. App. Dec. 22, 2016) ("Though there are some factors that indicate an employee-employer relationship, the majority of factors indicate an independent contractor relationship."); *Niles v. Owensboro Med. Health Sys., Inc.,* 2011 U.S. Dist. LEXIS 8642, *7–8, 2011 WL 321725 (W.D. Ky. Jan. 28, 2011) (mixed review of factors, but granted summary judgment); *Zetter v. Griffith Aviation, Inc.*, 2006 U.S. Dist. LEXIS 23192, 2006 WL 1117678 (E.D. Ky. Apr. 25, 2006) (summary judgment granted despite mixed conclusion on factors); *Johnston v. Sisters of Charity of Nazareth Health Sys., Inc.,* 2003 Ky. App. Unpub. LEXIS 3, 2003 WL 22681562 (Ky. App. Nov. 14, 2003) (mixed conclusion on factors but court found control to be the most important factor and affirmed summary judgment because there was no disputed issue of fact).

[6] Restatement (Third) of Agency § 7.07, Reporter Note a ("This section is a consolidated treatment of topics covered in several separate sections of Restatement Second, Agency, including §§ 219, 220, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, and 267.")

[7] Of note, the court stated that the factors all related to control. *Dilts*, 2009 U.S. Dist. LEXIS 23924 at *18, 2009 WL 803699 at *6. This is consistent with the Restatement's holistic structure as well as Kentucky case law.

[8] For a lengthy discussion of those policies, see *Patterson v. Blair,* 172 S.W.3d 361 (Ky. 2005).