COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION--CIVIL BRANCH

NO. 94-CI-2671
(CONSOLIDATED WITH NO. 94-CI-3380)

STEVE PERKINS, et al PLAINTIFFS

vs. **PLAINTIFFS' MEMORANDUM *CONTRA* DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**

SERV-AIR, INC., et al DEFENDANTS

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STATEMENT OF POINTS AND AUTHORITIES

Introduction

The law of this Commonwealth holds that the knowing exposure of another to asbestos is outrageous conduct utterly intolerable in a civilized society. Defendants took this outrageous and intentional course of conduct based on their determination that their liability potentially arising therefrom would be limited to workers' compensation benefits.

The plaintiffs have brought before this Court tort of outrage claims arising from defendants' intentional and outrageous conduct. These claims are ripe under Kentucky law under the case of *Capital Holding Corp. v. Bailey*, Ky., 873 S.W.2d 187 (1994). Furthermore, plaintiffs are not limited only to relief under workers' compensation, because of the intentional mendacity of defendants' conduct and the nature of plaintiffs' present injuries. For these and the reasons that follow, defendants' renewed motion for summary judgment should be **OVERRULED**.

COUNTERSTATEMENT OF THE CASE

The evidence in this case demonstrates that defendants' made a studied, knowing and intentional decision to unlawfully expose plaintiffs for many years to asbestos. It also shows that defendants were well aware of the dangers the exposure presented, the legal requirements that such exposure be controlled, and that, after considering these factors, defendants chose to ignore their legal and moral duties because they foresaw plaintiffs' remedies for the injuries they would incur to be limited to worker's compensation.

The Defendants' Managing Agents In Charge of Occupational Safety Issues

The principals in this case are defendants' agent-employees Peter Galskis, defendant Irving Monclova, Dennis Witajewski, Robert Wittkower, and Roy Smith.

Galskis became employed as manager of safety, security and training at defendants' worksite in Lexington in July 1985. *Galskis I at 12*.[1] This position was responsible for all safety matters on site. *Galskis I at 13*. Galskis had responsibility for assuring compliance with work safety rules, explaining "[i]f something was necessary or required to be done, I was expected to ensure that it was done[.]" *Galskis I at 19*. Galskis would discuss "[i]n an informal sense" safety issues with Dennis Witajewski, who was and remains defendants' personnel/human resources manager in Lexington. *Galskis I at 20*.

Dennis Witajewski testified that he maintained "indirect" responsibility for occupational safety issues with Galskis for the time period early 1986 through late 1989, when there was a reshuffling of personnel. *Witajewski deposition at 7-8, 11*.[2]

Robert Wittkower was defendants' corporate safety director, whose scope of responsibility included occupational safety issues at defendants' Lexington and other work-sites. *Galskis II at 10*. Wittkower, in the scope and course of his employment by

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[1] Galskis' deposition was transcribed in three nonconsecutively paginated volumes. The transcript of Galskis' testimony taken on October 25, 1995, is cited herein as "Galskis I," that taken on November 15, 1995, cited as "Galskis II," and that taken on December 19, 1995, as "Galskis III." These deposition volumes have been filed in the record.

[2] Copies of the pages and exhibits from Witajewski's deposition cited herein are attached at Tab 1.

defendants, established occupational safety policy and procedures at defendants' Lexington site.

Defendant Irving Monclova became facility director of defendants' operations at Lexington Bluegrass Army Depot in March 1987. He testified that Galskis, Witajewski and another employee, Andy Provost, the production manager, were responsible for establishing and implementing on-site occupational safety policies and procedures. *Monclova deposition at 15-16, 40-42, 69-70.*[3] Monclova noted that shortly after he had assumed his position that Wittkower and the others had gone through in detail defendants' occupational safety policies and that he relied upon Wittkower's representations of their soundness. *Monclova deposition at 40.*

Roy Smith has been employed as defendants' facility engineer for its Lexington worksite since July 1985. *Smith deposition at 6.*[4] Smith was responsible for coordinating asbestos testing done by a third-party lab of samples removed from vehicles on which defendants' employees were working. *Id. at 25.* The third-party lab testing began in 1986. *Id. at 85-86.* Smith reported the test results to Galskis, as safety manager, and to the head of production, Provost. *Id. at 29, 33, 68.*[5]

The Nature of the Work Done By Defendants' Employees

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[3] Copies of the pages of Monclova's deposition cited herein are attached at Tab 2.

[4] Copies of the pages of Smith's deposition cited herein are attached at Tab 3.

[5] Galskis testified that "such testing was not routinely done because we were not aware of any. ... As soon as I was aware that anything had a potential for asbestos in it, I put the wheels in motion to make sure that such testing was accomplished." *Galskis II at 34.*

Defendants won in 1985 a contract from the Department of the Army to do renovation and refurbishment work on, among other things, military vehicles. In large part defendants' employees simply replaced the government service employees who had previously done the work. Monclova explained that defendants' employees were supposed to follow the same procedures regarding removal of asbestos-containing materials as had the government. *Monclova deposition at 19*. Defendants' contracts, Monclova further explained, required them to "do whatever work the government asked us to do. ... We did the work on the equipment the Army brought to us." *Id. at 43*. If removal of asbestos-containing materials was part of that work, Monclova acknowledged that proper safety procedures were supposed to be followed. *Id. at 43-44*.

Two of defendants' primary tasks were renovation and refurbishment of military vehicles known as 189/190 vans and TSQ-43 and 122/142 shelters. *Witajewski deposition at 12; Monclova deposition at 18*. Witajewski explained that the interiors of these vehicles were basically "gutted" and rebuilt; the "gutting" process entailed removal of asbestos-containing materials, a fact Monclova confirmed. *Witajewski deposition at 12, 36; Monclova deposition at 19*. The procedures used rendered the asbestos-containing materials "friable." *Smith deposition at 101*. Witajewski also explained that defendants' employees began working on the vans "in late '85, early '86, time frame" and that the vans "probably would have been one of the larger pieces of equipment in terms of numbers of pieces and dollar value, I would

imagine[.]" *Witajewski deposition at 14*. From the time that work on the vans began in late '85 or early '86 it was continuos through late '89, when Witajewski's occupational safety responsibilities ended. *Id. at 14-16*. This would have included several vans or other vehicles in each of defendants' five large work bays. *Id. at 15*.

Evidence Regarding Defendants' Willful, Knowing and Intentional Exposure of their Employees to Asbestos

Defendants were aware that their employees were being exposed to asbestos in the course of their work on the vans and shelters prior to May 1986. Witajewski authored a memo dated May 13, 1986, recounting a Communication Council meeting, a group composed of management and employee representatives, at which an employee "brought up the subject of asbestos in the vans and shelters." *Witajewski deposition at 34-35, exhibit 2*. Witajewski reported in his memorandum that "[t]he safety items provided and recommended for employees in these work areas should take care of any type condition that may exist." *Id.* Galskis, as safety manager, in conjunction with others was responsible for seeing that the necessary safety items were issued and provided. *Id. at 35*.

In accordance with his May 1986 memorandum, Witajewski acknowledged that he became aware that defendants' employees were being exposed to asbestos in the course of their work on the vans and other vehicles. *Witajewski deposition at 18*. He could not recall whether this knowledge was gained from the Department of the Army or by other testing. *Id.* Defendants were, Witajewski explained, subject to the Army's scrutiny. *Id.*

Galskis testified that he first became aware that the work being done by defendants' employees exposed them to asbestos in "summertime of 1986." *Galskis I at 18*. Wittkower informed Galskis that brake work being done on some of the vehicles entailed exposure to asbestos. *Id*.

In and prior to July 1986, defendants hired an industrial hygienist, Kenneth Troutman, and he had conducted some asbestos analysis of a sample removed from one of the vans on which defendants' employees had been or were to gut and refurbish. By letter to Witajewski dated July 19, 1986, Troutman reported that the sample was positive for the presence of chrysotile asbestos and reminded that "the OSHA regulations must be followed for any demolition." *Witajewski deposition, exhibit 3*. Witajewski testified that he would have discussed Troutman's reporting with Galskis, stating "I'm sure we would have had communications about it, yes." *Witajewski deposition at 41*. The responsibility for doing something about the presence of asbestos would have fallen to Galskis, the "production manager, probably first line supervisors, the facility director and very possibly the folks that would have been in the general or corporate office safety function," along with government personnel. *Witajewski deposition at 41-42*. Galskis, for his part, did not recall having any discussion with Witajewski regarding Troutman's report. *Galskis I at 26*.

Galskis testified that Troutman submitted a proposal to provide defendants' with continuing industrial hygiene services. *Galskis I at 25*. Troutman's proposal was not accepted because

the price was deemed too high. *Id.* Defendants continued to rely on Wittkower, their corporate safety director, to provide these services and continue to assert his control over occupational safety issues at defendants' Lexington worksite. *Id.*

Shortly after Troutman's report to Witajewski, the Department of Army sent defendants a memo and directive dated July 25, 1986, regarding "asbestos removal." *Galskis deposition, exhibit 2.* This document included reference to a meeting on May 22, 1986, in which Galskis had been reminded or informed of the necessary procedures for asbestos removal. *Id.* Despite the concerns raised to Witajewski about asbestos in vans and shelters at the Communication Council meeting and Galskis' responsibility to follow-up on those concerns, despite Galskis' presence at a meeting with Army personnel on May 22, 1986, at which asbestos removal procedures were discussed, despite Troutman's report to Witajewski regarding the presence of asbestos in the van's floor tile matting and despite the testing done by a third-party lab, which Smith reported to him, Galskis maintained that the only asbestos-related work defendants' employees were doing in July 1986 was brake jobs. *Galskis I at 29-30.*

The Army's July 1986 directive advised defendants in detail of the necessary protective measures, including training, monitoring, containment and disposal, and further referred them to reference materials. *Galskis deposition, exhibit 2.* Galskis testified that defendants did not implement any of the necessary procedures until late 1989 or early 1990, because, according to Galskis, defendants' employees were not doing any work with

asbestos containing materials prior to this time. *Galskis I at 31-32*. Witajewski, of course, testified that throughout this interim period defendants' employees were actively engaged in gutting vehicles' interiors and removing asbestos-containing materials therefrom. *Witajewski deposition at 14-16*.

Defendants failed utterly to take any appropriate action and in September 1986 the Army was becoming alarmed at defendants' continuing failure to adopt and follow basic industrial hygiene and occupational safety measures pertaining to asbestos and issued defendants, including Galskis, Witajewski and Provost, a directive on "Industrial Hygiene Asbestos Workers Protective Measures." *Witajewski deposition, exhibit 1*. Witajewski confirmed that defendants' employees were in September 1986 doing renovation and refurbishment work on the van and shelter interiors which entailed removal of asbestos-containing materials. *Witajewski deposition at 25*. The Department of Army directive set out 11 specific items that defendants needed to implement to attain compliance. *Witajewski deposition at 26-27, exhibit 1*. Galskis shared responsibility to attain compliance on these issues with Provost and others. *Witajewski deposition at 27-32*. Galskis, for his part, acknowledged that he received the directive but had no idea why it had been distributed. *Galskis I at 53-54*. Galskis added that he was relying upon Wittkower's advice during this time that nothing needed to be done. *Galskis II at 51-52*.

In late December 1986, defendants had a significant environmental and occupational safety incident and again

contracted with Troutman to monitor their cleanup. Troutman's relationship with defendants, however, was short-lived and in early January 1987 he withdrew his offer to provide industrial hygiene services to defendants "[d]ue to professional, legal and personal concerns." *Witajewski deposition, exhibit 5*.[6]

In a letter addressed to Dr. James Templin, who was serving as the Army's medical officer and defendants' occupational physician, dated January 14, 1987, Troutman detailed his findings at defendants' workplace, the reasons for the withdrawal of his offer to provide services, and defendants' determination that they would not follow the law because they believed their liability exposure limited to workers' compensation. *Witajewski deposition, exhibit 6 at 4*; *Affidavit of Kenneth R. Troutman ¶ 4, exhibit B at 4*.[7]

Troutman encountered at defendants' worksite a number of occupational safety and environmental issues. One was uncontrolled exposure to excessive amounts of lead and silica due to the sanding of the vans for painting purposes. *Witajewski deposition, exhibit 6 at 1*; *Affidavit of Kenneth R. Troutman ¶ 4, exhibit B at 1*. The other was the presence of asbestos being removed from both the vehicles' interiors and their brake drums. *Id*. Troutman and Templin examined these problems and conducted testing for several days in late December 1986. *Id*.

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[6] At about the same time by letter dated January 13, 1987, defendants' industrial nurse, Mary Susan Peak, resigned her employment, noting that her strenuous requests of "management to monitor and control lead and asbestos" had been ignored and compelled her to resign. *Witajewski deposition, exhibit 4*. Witajewski could not recall any efforts he or defendants made to assess the validity of Peak's allegations. *Witajewski deposition at 46-47*.

[7] Troutman's affidavit is attached hereto at Tab 5.

Troutman reported his findings to Wittkower. *Id.* Troutman reported to Wittkower that "numerous violations of lead and asbestos standards" existed in defendants' work practices. *Id.*

Wittkower, who spoke for defendants' as their corporate safety director, responded to Troutman's findings with criticism that he was being hasty and overzealous in attempting to find contamination and violations. *Id.* Wittkower further observed that any injuries or illnesses to defendants' employees caused by deficient occupational safety would be limited to recovery under workers' compensation. *Id.*

Monclova was briefed regarding the dispute with Troutman by Wittkower, Galskis, Provost and Witajewski when he assumed his position a few months later. *Monclova deposition at 35-36.* Galskis participated fully in these discussions and briefings which regarded and included asbestos issues. *Monclova deposition at 37.* After extended discussions with these employees, Monclova adopted Wittkower's rejection of Troutman's advice and determination that subjecting defendants' employees unlawfully to friable asbestos was appropriate in that defendants' possible liability therefor was limited to worker's compensation. *Monclova deposition at 36-38, 99-100.*

The Department of Army was less than assured by Wittkower's conclusions and issued to defendants a directive regarding "Potential Asbestos Contamination." *Galskis deposition, exhibit 14.* This directive again raised Troutman's concerns and noted a meeting on February 6, 1987, at which Galskis was present. *Id.* The directive requested continued testing and inspection and

development of procedures for removal of asbestos from the vehicles. *Id.* Galskis testified that testing was thereafter done under direction of Roy Smith. *Galskis II at 60.* Galskis, however and although he testified that testing for asbestos was a special concern for him, could not recall whether the test results were reported to him by Smith. *Id. at 34, 66.* Nonetheless, despite his faulty memory, Galskis did confirm that defendants took no measures to protect their employees from exposure to friable asbestos until November 1989. *Id. at 66.*

In May 1987, Dr. James W. Templin issued to defendants and specifically to Galskis, Witajewski, Provost and Monclova, a directive regarding "Respiratory Protection in Asbestos and Other Potentially Hazardous Environments." *Galskis deposition, exhibit 16.* Galskis was expected to take appropriate action in his capacity as defendants' safety officer. *Galskis II at 72.* However, Galskis did nothing because he claimed that none of defendants' employees were then doing any work exposing them to asbestos. *Galskis II at 80-81.*

Defendants' employees, including plaintiffs employed by them, went on about their refurbishment and renovation work through the remainder of 1987 and all of 1988. Throughout this period, as Witajewski testified, defendants' employees continued to be unlawfully exposed to asbestos in the course of this work. However, as Galskis testified and despite the Army directives and opinions from industrial hygienists, defendants took absolutely no protective measures.

In June 1989, following up on an anonymous complaint by one of defendants' employees, an OSHA inspection was conducted regarding, among other things, employees' exposure to asbestos and the absence of monitoring and training. *Galskis deposition, exhibit 18*. The inspector was informed by Galskis and Witajewski that the only work that defendants' employees were doing which exposed them to asbestos was brake work. *Galskis II at 91*. Galskis claimed that he did not know at the time that defendants' employees work on the vans and shelters involved removal of asbestos-containing materials. *Id.*

Although Galskis claimed ignorance of the employees' work in June 1989 in the vans and shelters and asbestos therein, test results received by Smith show otherwise.[8] On June 20, 1989, Smith received a test result regarding asbestos-containing materials removed from one of the TSQ-43 shelters. *Smith deposition, exhibit A*. In addition, Galskis and Witajewski were directed in July 1989 by Andy Provost to review and devise procedures for the removal of asbestos-containing materials from vans and shelters. *Witajewski deposition, exhibit 10; Galskis deposition, exhibit 19*.

Finally, in November 1989, defendants, after about four years began to address the employees' uncontrolled exposure to asbestos in the course of their work. In a memo written November 10, 1989, Galskis exposes the utter falseness of all his claims

[8] The representation by Galskis and Witajewski to the OSHA inspector that the only work defendants' employees were going involving exposure to asbestos would appear to constitute a violation of 18 U.S.C. § 1001, which criminalizes as a felony this type of false statement.

that he did not know defendants' employees had been working with asbestos in the vans and shelters, he wrote:

> Two years ago, the question was raised about the insulating material in the heater ducts in the TSQ-43. Part of the regular reworking of these shelters had the insulation removed and replaced. Because of our concern, samples of the material was tested and found it to contain asbestos.

Galskis deposition, exhibit 23.

Galskis continued on in his memo to propose implementation of a comprehensive asbestos program. *Id*. An environmental audit dated November 20, 1989, authored by Phil Schull, Wittkower's successor as defendants' corporate safety director, reported the need to formalize, implement and maintain an asbestos program. *Galskis deposition, exhibit 24*. Thus, about four years after the need to do so arose defendants, after many, many Army directives and explicit warnings from Troutman and others, began steps to comply with the law and reverse the deliberate and mendacious policies instituted at Wittkower's direction.

Plaintiffs' Claims

Plaintiffs allege cause of actions arising from defendants' intentional and outrageous conduct in causing their prolonged uncontrolled and unlawful exposure to asbestos. *Second Amended Complaint ¶¶ 10, 11, 14, 16, 17, 19*. Plaintiffs seek recovery of damages for severe emotional distress caused by defendants, damages for the increased likelihood of future complications arising from same, medical monitoring damages and punitive

damages. *Second Amended Complaint ¶¶ 24, 26, 28, 30*. Plaintiffs do not allege a cause of action sounding in negligence.[9]

ARGUMENT

POINT I

THE DECISION OF THE KENTUCKY SUPREME COURT IN *CAPITAL HOLDING CORP. v. BAILEY* PROVIDES THE BASIS FOR PLAINTIFFS' CAUSES OF ACTION ARISING FROM DEFENDANTS' INTENTIONAL AND OUTRAGEOUS CONDUCT AND *BAILEY* MAKES PLAIN THAT PLAINTIFFS' TORT OF OUTRAGE CLAIMS DO NOT REQUIRE PRESENT EXISTENCE OF PHYSICAL INJURY.

The Kentucky Supreme Court in *Capital Holding Corp. v. Bailey*, Ky., 873 S.W.2d 187 (1994), held that failing to warn another of their exposure to asbestos could give rise to a cause of action for the tort of outrage. The Court reiterated and made plain that such claim could be pursued regardless of the absence of any manifested physical injury to the plaintiff. Accordingly, the present absence of any physical injury to plaintiffs from their prolonged exposure to asbestos caused by defendants does not preclude their claims. Defendants' argument to the contrary is meritless.

Bailey controls here and squarely supports plaintiffs' claims for the tort of outrage. The *Bailey* plaintiffs were husband and wife, the husband being employed by his wife's construction company. The husband worked for about five months at removing pipes and ducts from the basement of a building owned by defendant. Although defendant knew that asbestos, some in friable form, was present in the basement, it did not warn the husband. As a result, he took no action to protect himself from

[9] Contrary to defendants' erroneous representation that plaintiffs never responded to defendants' requests for admissions attached hereto at Tab 6 is a copy of plaintiffs' timely responses.

the asbestos exposure and for that five month period "went home each day covered with asbestos dust, ..., bringing his wife, ..., into direct contact with the asbestos dust, and further contaminating their home with asbestos." 873 S.W.2d at 189.

After learning of his exposure to asbestos, the husband was examined by a pulmonary specialist. The physician determined that the husband had no "present abnormality or manifestation of disease" and that the husband had "a slightly increased risk of developing asbestosis (a type of pneumoconiosis), and a significantly increased risk of developing mesothelioma (a painful and deadly form of cancer of the membranes surrounding the lungs)"; the physician could not quantify the husband's enhanced risk of contracting mesothelioma. 873 S.W.2d at 189.

The *Bailey* plaintiffs, based on their exposure to asbestos, alleged causes of action for negligence predicated on a failure to warn theory and for outrageous conduct causing severe emotional distress. The Court affirmed dismissal of plaintiffs' negligence claims holding that they did not accrue until plaintiffs could demonstrate a physically harmful result from the exposure. 873 S.W.2d at 195. Thus, *Bailey* holds that a physical injury must exist before a cause of action for negligence arising from exposure for asbestos can accrue; given that plaintiffs have alleged causes of action for intentional conduct on a tort of outrage theory, this holdings have no relevance to this case.

Bailey also held -- in what has application to this case -- that the plaintiffs could assert a cause of action for outrageous conduct causing severe emotional distress. The Court first

addressed the nature of this tort, "an intentional tort, and the physical contact rule has no application:

> 'The basis of the cause of action is intentional interference with the plaintiff's rights causing emotional distress, with or without personal injury in the traditional sense. If there has been physical injury with paid to the body or mind, it is incidental to the emotional distress rather than essential to the cause of action. ... The plaintiff may have a cause of action for emotional distress from the intentional and unlawful interference with her rights, regardless of whether she suffers any bodily injury from such interference.'"

873 S.W.2d at 196, *quoting Craft v. Rice*, 671 S.W.2d 247, 249 (1984).

The Court then addressed whether the defendants' asserted conduct was sufficiently outrageous, as a matter of law, to trigger its liability. For this assessment the Court assumed that "for a period of about five months, more or less, Bailey was knowingly and recklessly exposed to asbestos dust and fibers, a potentially cancer producing risk." 873 S.W.2d at 196. The Court then adopted the Court of Appeals' assessment of this evidence:

> The known effects of exposure to this substance are such that we regard it as 'utterly intolerable in a civilized community,' *Restatement(Second) of Torts* § 46, comment d at p. 73 (1965), that one having a duty to warn of its presence would deliberately fail to do so.

873 S.W.2d at 196.

Bailey thus informs on two points material here: First, the tort of outrage does not require a physical injury. Second, failing to warn someone of their exposure to asbestos for a period of five months is outrageous conduct "utterly intolerable in a civilized community" as a matter of law. As applied here,

Bailey informs that defendants' argument concerning plaintiffs' absence of present physical injury from asbestos exposure is meritless.

Bailey also informs that the defendants' conduct at issue here is outrageous as a matter of law; defendants' conduct pales in comparison to that at issue in *Bailey*.[10] The conduct found outrageous in *Bailey* was limited to the building owner's failure to inform the plaintiffs of the presence of asbestos among the materials the husband was to remove. Here, however, defendants had duties imposed by statute and regulation not only to warn plaintiffs regarding the asbestos exposure but also to undertake specific ameliorative and protective measures. Defendants were aware of their legal duties and were reminded of them repeatedly by Department of Army personnel, Troutman and their own employees. Moreover, defendants willingly chose to ignore and breach the legal duties owed plaintiffs because defendants determined that their liability for their misconduct would be limited to paying workers' compensation benefits. Furthermore, defendants committed federal crimes to cover-up their violations. This is a course of conduct utterly, utterly intolerable in a civilized society with any respect for law.

Defendants' discussion of *Metro-North Commuter Railroad Co. v. Buckley*, Case No. 96-320 (U.S. Supreme Court, June 23, 1997), is materially flawed because defendants' never acknowledge and

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[10] At this stage the facts must be viewed in a light most favorable to plaintiffs, any doubts resolved in plaintiffs' favor, and all reasonable inferences supporting plaintiffs drawn. *Steelvest, Inc. v. Scansteel Service Center*, Ky., 807 S.W.2d 476 (1991); *Paintsville Hosp. Co. v. Rose*, Ky., 683 S.W.2d 255 (1985).

therefore never come to grips with what was the issue therein: "whether a railroad worker negligently exposed to a carcinogen (here, asbestos) but without symptoms of any disease can recover under the Federal Employers' Liability Act (FELA), ..., for negligently inflicted emotional distress." Slip opinion at iii. *Buckley*, in short, deals with a cause of action for negligent infliction of emotional distress and on that issue comes out the same as the Kentucky Supreme Court did in *Bailey*. However, *Buckley* says nothing about a cause of action for intentional and outrageous conduct causing severe emotional distress, which is the claim in the case at hand. *Bailey* controls that issue and under *Bailey* plaintiffs' claims are ripe. Defendants' contention that allowing plaintiffs' claims to go forward would open the floodgates to trivial suits is foreclosed by *Bailey*, *Craft v. Rice,* Ky., 671 S.W.2d 247 (1985), and their jurisprudential wellspring, section 46 of the Restatement of Torts(Second). The commentary on section 46 puts to close defendants' contention that claims such as plaintiffs' might yield an uncontrollable cause of action:

> Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. ... In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the nature of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.

Restatement (Second) of Torts § 46 Comments j and k.

Bailey and *Craft* accordingly would recognize that defendants' years-long course of willful and criminal conduct of poisoning

plaintiffs with asbestos is sufficiently outrageous to assure the genuineness of their claims. Accordingly, defendants' contrary argument is meritless.

POINT II

PLAINTIFFS ARE NOT LIMITED TO REMEDIES UNDER THE WORKERS' COMPENSATION LAW BECAUSE DEFENDANTS KNOWINGLY, INTENTIONALLY AND WILLFULLY FOLLOWED AN OUTRAGEOUS COURSE OF CONDUCT EXPOSING PLAINTIFFS TO ASBESTOS FOR MANY YEARS AND INJURING THEM AND, IN ANY EVENT, THE HARMS FOR WHICH PLAINTIFFS SEEK DAMAGES ARE NOT AN "INJURY" WITHIN THE SCOPE OF THE WORKERS' COMPENSATION LAW.

No Kentucky case has ever held that an employer who knowingly, intentionally and willfully follows for many years a course of conduct utterly intolerable in a civilized society that injures its employees and their families may attain the limited liability shelter of the workers' compensation law. Because of the intentional and utterly mendacious nature of defendants' conduct, this case falls within the "deliberate intention" exception to the worker's compensation exclusivity doctrine. Furthermore, even if defendants' outrageous conduct did not lift this case out of the workers' compensation arena, the harm for which plaintiffs seek damages in this case is not an "injury" within the meaning of KRS Chapter 342. Accordingly, both because the facts here show that defendants acted with deliberate intent and that each plaintiff's injury is not within the scope of the worker's compensation law, defendants' motion should be overruled.

Defendants' discussion of the "deliberate intention" issue is unpersuasive, mostly because it ignores the very disturbing and outrageous facts in this case. The Kentucky cases that

defendants' discuss *Fryman v. Electric Steam Radiator Corp.*, Ky., 277 S.W.2d 25 (1955), and *McCray v. Davis H. Elliott Co.*, Ky., 419 S.W.2d 542 (1967), are materially distinguishable. First, in neither case was there evidence that the employer knew that their conduct would result in injury to the injured employee; here by contrast defendants knew that plaintiffs would be unlawfully exposed to asbestos, knew they had specific statutory and regulatory duties to preclude such exposure and deliberately chose not to. Second, in neither *Fryman* nor *McCray* was there evidence that the employer followed their course of conduct because they intended their liability to be limited to workers' compensation. Third, in neither *Fryman* nor *McCray* was the employers' conduct utterly intolerable in a civilized society giving rise to a tort of outrage claim. Accordingly, defendants' may not gain the shelter of limited worker's compensation liability when that was the intentional premise of many years of unlawful and criminal conduct. Therefore, defendants motion should be overruled.

Even if defendants conduct did not trigger the "deliberate intent" exception to the workers' compensation law, plaintiffs are not limited to workers' compensation, because their severe emotional distress is not an "injury" within the worker's compensation law.

KRS 342.0011(1) defines the type of "injury" subject to the workers' compensation law and provides, in pertinent part, as follows:

> "Injury" when used generally, unless the context indicates otherwise, shall include an occupational

> disease, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

Since plaintiffs have suffered psychological injuries, which, as defendants repeatedly urge, they do not claim arise from a physical injury, the foregoing definition of "injury" renders KRS Chapter 342 inapplicable to this actin. Plaintiffs' injuries simply do not fall within the scope of the workers' compensation law, which, as a consequence, neither erects a bar to nor proves a remedy for their claims. Accordingly, neither the exclusive liability provision of KRS 342.690 or the limited "deliberate intention" exception provided by KRS 342.610 have any application to this case. Therefore, defendants' motion should be overruled.

POINT III

***BAILEY* ESTABLISHES THAT PLAINTIFFS MAY NOW GO FORWARD WITH THEIR TORT OF OUTRAGE CLAIMS AND THE DEVELOPED EVIDENCE IS SURELY SUFFICIENT TO ESTABLISH DEFENDANTS' LIABILITY FOR INTENTIONAL AND OUTRAGEOUS CONDUCT.**

Defendants' argument that the plaintiffs' may pursue other claims and are thus barred from pursuing their tort of outrage claims is meritless. First, if, as defendants argue, see defendants' memo at 9, plaintiffs develop a physical injury, they may or may not be able to pursue other claims but the same was true of *Bailey*; if *Bailey* could, as the Supreme Court held, pursue a claim for negligent infliction of emotional distress when he developed a physical injury and could also pursue a claim for the tort of outrage, then so may these plaintiffs. Accordingly, defendants' argument to the contrary lacks merit.

Defendants' discussion of the interplay of *Rigazio v. Archdiocese of Louisville*, Ky. App., 853 S.W.2d 295 (1993), *Michals v. Watkins Memorial United Methodist Church*, Ky. App., 873 S.W.2d 216 (1994), and *Bailey* is erroneous. First, *Rigazio* holds that assault and battery are the abused child's appropriate cause of action, not the tort of outrage. 853 S.W.2d at 299. Second, *Michals* is distinguishable from this case because it contains no evidence that the defendant church intentionally exposed the children to asbestos, after being advised of and knowing the proper protective measures to take and then choosing to ignore them because of a belief that liability would be acceptably limited by workers' compensation laws. Third, even if defendants are correct that this trio of cases establish that merely exposing someone to asbestos is insufficient to trigger

liability under the tort of outrage, they surely establish that a cause of action for same will lie where that exposure lasts for several years, occurs despite many informed and explicit warnings and advice of legal duties and occurs as a result of a deliberate, knowing and intentional decision to ignore the law because its remedies were deemed too limited to warrant compliance. Defendants' studied conduct and intentional disregard for plaintiffs' humanity is as outrageous as it comes. Accordingly, defendants' motion should be overruled.

CONCLUSION

For all the foregoing reasons, defendants' renewed motion for summary judgment should be **OVERRULED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been hand-delivered this _____ day of September 1997, to the following:

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