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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002348-MR

RONALD EDWARDS — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 07-CI-00082

JORDAN GRUVER AND
JARRED HENSLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON AND CLAYTON, JUDGES.

ACREE, JUDGE: Ronald Edwards appeals a Meade Circuit Court jury verdict and judgment finding him liable for the injuries sustained by Jordan Gruver at the hands of recruiters for Edwards' wholly owned unincorporated association, the Imperial Klans of America (IKA). Gruver's injuries were sustained when four of Edwards' recruiters accosted Gruver and two physically assaulted him; Gruver's

assailants were Jarred Hensley, Andrew Watkins, Joshua Cowles, and Matthew Roberts. In this same case, Hensley was found liable on the claim of assault, and Edwards was found liable on alternate claims of his negligent selection and retention of unfit individuals to serve as recruiters, and his negligent supervision of his recruiters.[1] Only Edwards pursued an appeal of the judgment.[2] We affirm.

Factual background

The record reflects the following facts. In the fall of 1996, Ronald Edwards, a resident of Christian County, Kentucky, established the IKA, an unincorporated association under Edwards' sole control. Edwards' IKA handbook claims IKA "is a fraternal and patriotic movement promoting the ideals of Western, Christian Civilization[,]"[3] but it also states that "[t]he IKA hates: Muds [persons of mixed-race], spics, kikes, and niggers." According to Edwards, "[t]he IKA is the largest Klan organization in America today" with active members in thirty-eight states and five foreign countries.

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[1] This Court rendered the original opinion in this case on January 14, 2011. However, appellee Gruver petitioned the Court for rehearing on the ground that, despite our acknowledgement that Gruver was not relying on the doctrine of *respondeat superior*, our original analysis focused on that doctrine exclusively; this is demonstrated by our discussion in the original opinion of Restatement (Second) of Torts §§ 315 and 319 (1965), both of which discuss *respondeat superior* theories of liability. *See* Restatement (Second) of Torts § 317 (1965) ("Duty of Master to Control Conduct of Servant" which elaborates on § 315). Liability for negligent selection, as alleged in the complaint and argued before us previously, is not based on the doctrine of *respondeat superior*. Restatement (Second) of Agency § 213(c) (1958); *see also Patterson v. Blair*, 172 S.W.3d 361, 367 fn.2 (Ky. 2005) (citing *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438 (Ky. App. 1998)). Because we agree that we failed to properly analyze his claims, we granted rehearing.

[2] Although named as an appellee, Hensley did not participate in this appeal in any capacity.

[3] Edwards testified that in April 2006 he loosened membership restrictions to allow some non-Christians to join IKA.

Since Edwards formed IKA, he has served as its head, presiding over functions wearing a white robe with four purple stripes on the sleeves and other emblems of his status as IKA's "Imperial Wizard." His income is derived solely from IKA dues, contributions, and merchandise sales through an IKA website. Private IKA functions, including the annual Nordic Fest, are held on Edwards' property in Christian County, with guest speakers and live bands participating.

There is a notable element of secrecy in Edwards' organization. The IKA handbook says: "It's not any outsider's business to know the membership of the Klan, the objectives of the Klan, or how we intend to accomplish our goals." Since 1999, IKA has burned all membership records and other records relating to IKA activities. Even correspondence is burned the day after it is received.

Individuals desiring to be a part of this organization, whom Edwards denominates as "Ghouls," will eventually take a secret oath. First, however, they must complete a written application that requires them, among other things, to disclose any criminal background.

Three of Gruver's four assailants had criminal convictions for violent offenses prior to joining IKA. Hensley, one of the IKA recruiters who assaulted Gruver, testified that he already had been convicted of "a few assaults, aggravated menacing charge, and illegal use of a firearm" when he joined IKA in 2001. Cowles joined IKA the very month he was released from prison after serving two and a half years for wanton endangerment. Roberts, too, had a criminal record before joining IKA; he had been convicted on independent indictments for

robbery, burglary, and theft. Edwards was aware of the criminal history of each of these men when they joined. His position, however, was that, "you know, everybody deserves a second chance." Edwards even promoted Hensley from his position as an "Exalted Cyclops" to "Grand Titan" of Ohio shortly after Hensley was arrested for disorderly conduct in 2003.

The evidence showed that Edwards personally appointed each of Gruver's assailants to specific positions in the IKA. In addition to selecting Hensley as a "Grand Titan," he also selected Watkins as IKA's first "Imperial Gothi," or Odinist[4] religious leader.[5] He made Cowles an acting "Exalted Cyclops." Roberts testified that Edwards had appointed him to serve IKA as an "Exalted Cyclops" as well.

According to the handbook, "[o]nce a Klan member is approved to be an Exalted Cyclops, he is authorized to recruit and organize a Klavern"; Klaverns are the foundational units of IKA. A basic Klavern consists of four members. Most of Gruver's four assailants, if not all, belonged to the same Klavern.

According to the IKA handbook again, Klavern's are required to meet at least monthly and

> [e]very Klavern is required to conduct some sort of activity each month that will spread the Klan message

[4] Odin is a major god in Norse mythology. Odinism is an ancient religion predating Christianity and practiced primarily in Scandinavia by worshipping Odin and other Norse gods.

[5] While Watkins had no prior criminal record, Edwards testified that, in his capacity as the IKA "Imperial Gothi," he appeared at IKA functions on Edwards' property to "glorify skinhead violence against 'spics' and other minorities through music." IKA's regular religious leaders are known as "Kludds."

> and build membership. Activities may include distributing Klan literature or newspapers (door-to-door, on autos, or handing them out directly). [The IKA] **DOES NOT** hold public activities. . . . Some Klan organizations do public functions and pick up membership as a result. However, we believe that we will pick up better membership by being what we really and truly are – The Invisible Empire.

(IKA handbook; emphasis in original).

Klan literature takes a variety of forms. Relevant to this case are certain information cards Edwards authorized Cowles to have printed specifically designed with IKA information to recruit members. Cowles had a total of 2000 such cards printed; he left about half in the guard shack office at Edwards' IKA compound in Christian County. Cowles testified that Edwards expected and encouraged him to pass these cards out for purposes of recruiting. He also testified that he gave some of the cards to Hensley and some to Watkins. Roberts testified that he had retrieved some of the recruiting cards himself from the guard shack office where Cowles had left them.

There was some dispute at trial as to whether each individual IKA member was authorized to recruit. However, Edwards testified that he personally selected his recruiters, as indicated by the following exchange at trial:

> Q . . . do [members] have to call you before they can go out and recruit any members?
>
> A They are supposed to, yes.
>
> . . . .
>
> Q Do you expect every Klan member to be a recruiter?

A No. I have turned some down not to be recruiters, yes.

(Trial Transcript, pp. 244-45; testimony of Ron Edwards). In the case of Gruver's assailants, each was personally authorized by Edwards to recruit.

Edwards selected Cowles to recruit new IKA members when he designated Cowles an "Exalted Cyclops"[6] just two months after Cowles completed a three-year prison term for beating a man with a beer bottle. Edwards also selected Roberts for the position of "Exalted Cyclops," with the same authority to recruit as Cowles and his superiors in rank, "Grand Titan" Hensley and "Imperial Gothi" Watkins.

The record indicates that Gruver's four assailants considered the 2006 Meade County Fair a good opportunity to recruit new IKA members. As Roberts told it, they considered Meade County "a redneck county, bunch of hicks and rednecks, and it would be a great place to recruit for the Klan." The four of them planned a trip to the fair together for July 29, 2006.

None of Gruver's four assailants resided in Meade County. Hensley and Roberts lived in Cincinnati, Ohio; Cowles was attending school in Columbus, Ohio, and living part time with Hensley. Watkins lived in Louisville, Kentucky. Cowles, Hensley and Roberts rode together in Cowles' vehicle from Cincinnati to

[6] Edwards admitted selecting Cowles as an acting "Exalted Cyclops," or "EC," and Cowles' unchallenged testimony was that "An EC is a recruiter." The IKA handbook is consistent with that testimony.

Meade County. They met Watkins at a liquor store near the fairgrounds before going into the fair as a group.

Cowles and Roberts testified that the group meandered through the fairgrounds, each handing out the IKA information cards Cowles had had printed. Each wore summer attire revealing their many tattoos, most of which expressed racist sentiments. All wore steel-toed boots with red laces which, according to some who testified, signified that the wearers had "shed blood for their race . . . ."

Sixteen-year-old Jordan Gruver was also at the fair. He had come with his older brother. Early in the evening, he saw the four IKA members handing out the information cards they had brought. He also noticed their tattoos, particularly the swastika tattoos, and heard them call a carnival worker "nigger." Gruver tried to heed old advice to avoid such persons; for a while, he succeeded.

As midnight neared, however, Gruver became separated from his older brother and was searching for him when he was approached by Hensley (6'2", 200 pounds), Watkins (6'7", 300 pounds), Cowles (6'5", 300 pounds), and Roberts (6'7", heavy set). The four men confronted Gruver who was 5'2" and weighed 135 pounds. They called him a "spic" and a "border hopper." They believed Gruver was, to use their term, an "an illegal spic." In fact, Gruver was a native-born U.S. citizen; his father was born in Panama, but was adopted while still a young child by a Kentucky citizen, became a naturalized citizen himself, and married a native Kentuckian. Jordan Gruver is that couple's youngest child.

After Gruver told the four men he was not an illegal alien, Watkins threw whiskey in the boy's face, and Hensley knocked him to the ground. Hensley and Watkins then repeatedly kicked Gruver with their steel-toed boots while he lay in the fetal position. There was evidence that Gruver suffered a broken jaw, permanent damage to his left arm, and severe emotional trauma. After the police took Hensley and Watkins into custody, Cowles called Edwards to report their arrests. Edwards asked Cowles to keep him posted.

Hensley and Watkins were charged with public intoxication and disturbing the peace; later, after Gruver gave his statement to the police, Hensley and Watkins were charged with assault. They eventually pleaded guilty to the charge. Gruver later filed this civil action.

Procedural background and the presentation of evidence

Gruver's complaint included a count of assault against Hensley, Watkins, and Cowles and, in the same action, asserted two separate claims against Edwards and IKA. Count IV of the complaint set forth the negligent selection/retention claim as follows:

> Defendants IKA and Edwards were reckless, wanton, grossly negligent, or negligent when they selected and retained Cowles, Hensley, Watkins, and Roberts to recruit IKA members from the general public and to promote IKA activities in a public place. Defendants IKA and Edwards knew or should have known of Cowles', Hensley's, Watkins', and Roberts' propensity for violence and that allowing Cowles, Hensley, Watkins, and Roberts to occupy leadership positions within the organization and allowing Cowles, Hensley, Watkins, and Roberts to recruit for the organization and promote

> its activities created an unreasonable risk of harm to others. . . .
>
> The Plaintiff's injuries were a natural, probable, and foreseeable consequence of the reckless, wanton, grossly negligent, or negligent acts and omissions of the Defendants.

Count V alleged a separate claim for negligent supervision/instruction as follows:

> Defendants Edwards and IKA were reckless, wanton, grossly negligent, or negligent when they supervised Defendant Cowles, during the membership recruitment drive at the county fair on July 29-30, 2006. Defendant Edwards and IKA knew of or should have known of Hensley's, Watkins', Roberts', and Cowles' violent propensities, that they were going to be in contact with racial and ethnic minorities at the county fair, and that they were likely to drink alcohol, yet they failed to exercise reasonable care to prevent the foreseeable acts from occurring. . . .

Gruver settled his civil claims against Watkins and Cowles prior to trial, and he dropped IKA as a defendant once it was established that IKA had no separate legal existence apart from Edwards.[7] Gruver continued to pursue his claims against Hensley and Edwards in a jury trial held in November 2008. Hensley and Edwards represented themselves.

[7] The IKA handbook says, "The Imperial Klans [of America] is a non-profit, chartered, and completely lawful and legal organization." However, no evidence of a nonprofit or chartered organization by that or any similar name can be found in the records of the Secretary of State of the Commonwealth of Kentucky, or among the nonprofit organizations registered with the Internal Revenue Service. We may properly *sua sponte* consider such sources. *See Fox v. Grayson*, 317 S.W.3d 1, 18 fn.82 (Ky. 2010) (quoting *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004) ("A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.")).

In addition to the factual background outlined above, Gruver offered evidence that Edwards encouraged the use of violence by IKA members, which Edwards denied.

In defense, Edwards emphasized his right under the First Amendment of the U.S. Constitution to express his racist views by such means, for example, as the cards Cowles had printed and his IKA website. However, the official IKA handbook did not limit promotion of the IKA message to constitutionally protected free speech; the handbook included such statements as: "*The Klan has its emphasis on action*, and is not merely a 'publishing organization.'" (Emphasis in original).

In further defense, Edwards also elicited testimony from some of the assailants that he had a rule that they should "[s]tay within the letter of the law . . . ." That admonition was repeated in the IKA membership application which includes an affirmation that "I will conduct myself in an acceptable manner and WILL NOT commit criminal acts while a member of The IKA of the Ku Klux Klan." (Emphasis in original). There is even language in the IKA handbook to the same effect. But the handbook, again, sent a mixed message as shown by the following passages.

> **Violence** against the Aryan race shall be crushed. <u>We are not promoting violence in any way,</u> but any species that cannot fight for its survival does not deserve to exist. This is God's natural law. . . . [T]he Klan has a proven record of fighting for our people's rights and winning. . . . We must fight to secure a future for the White children in America . . . . When there is at least one of us who

> will stand up and fight, there will always be hope for victory. . . . The Knights of the Ku Klux Klan is not, nor ever will be, a *paper tiger*. We shall not be given to move imaginary armies around making a game of farce out of the life and death struggle we are engaged in. [Various emphases in original.]

Gruver presented evidence demonstrating that Edwards' pacifist rhetoric was not borne out by his actions. Substantial evidence was presented that a few months before Gruver's assault, Edwards hosted the annual Nordic Fest, showcasing racist bands with songs encouraging violence against minorities, and speakers whose messages were equally provocative of violence. Transcripts of lyrics and speeches were entered into evidence.

To prove Edwards personally encouraged his members to commit acts of violence, Gruver introduced a videotape in which Edwards said the IKA was "more militant than any Klan organization in America today. We can be very violent and we can be very deceptive and we will do whatever we have to do to survive." When Edwards testified, however, he emphatically denied personally encouraging any violence. Gruver then presented rebuttal testimony contradicting Edwards' denial.

First, Gruver called a former IKA member, Kale Kelly, to directly refute Edwards' testimony. Referring to Edwards, Kelly said, "He promotes violence and hatred among anybody who he feels threatens him: Minorities, Jews, blacks. I've lived with him. I know this." Kelly testified that while he was an IKA member, Edwards instructed him "to kill, assassinate and injure Jews, blacks, people of

mixed race, and anybody who opposed us or threatened us." He specifically referred to two separate individuals Edwards instructed Kelly to kill. One of those individuals was Morris Dees, one of Gruver's attorneys; Kelly described the plot and how it was foiled by law enforcement.

Second, Gruver elicited testimony from Cowles that Edwards "asked me to beat someone up" for wearing an unauthorized IKA tattoo. Cowles described that particular episode in some detail.

Third, Gruver called Roberts who testified that Edwards "called us to become a tough guy whenever problems happened." He also referred to Edwards' attempt to use himself and others as his "thugs."

Furthermore, Gruver elicited testimony from Edwards himself that contradicted Edwards' insistence that the chief rule (Edwards actually said "only rule") of IKA membership was to "[s]tay within the letter of the law[.]" Edwards acknowledged a second rule that actually anticipated illegal activity – "when anybody gets arrested whatsoever . . . they [are] supposed to call me." The evidence showed that after the IKA members disobeyed Edwards' first rule and were arrested for assaulting Gruver, they obeyed Edwards' second rule to call him.

Following the presentation of the respective cases, the jury was instructed on Gruver's assault-related claims against Hensley, and on Gruver's claims against Edwards of negligent selection and retention, and negligent supervision. In accordance with those instructions, the jury returned a verdict in favor of Gruver in excess of $2.5 million. Of that amount, over $1.5 million was

in compensatory damages against Hensley and Edwards, with Edwards' being found responsible for twenty percent of the amount, and $1 million in punitive damages for which Edwards was found solely responsible.

Edwards alone appealed from the final judgment. He presents three arguments: (1) it was palpable error to admit the testimony of Kale Kelly; (2) admitting the criminal histories of IKA members was also palpable error; and (3) the trial court's denial of Edwards' motion for a directed verdict was clearly erroneous. We find no merit in these arguments.

Standard of review

In reviewing alleged errors involving evidentiary rulings by the trial court, we use the abuse of discretion standard of review. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). However, Edwards acknowledges his failure to preserve either of his claims of evidentiary error. Under such circumstances, this Court will only reverse the ruling of the trial court "upon a determination that manifest injustice has resulted from the error." Kentucky Rules of Civil Procedure (CR) 61.02.

The standard for review of denial of a directed verdict motion is set forth in *Lewis v. Bledsoe Surface Mining Company*, 798 S.W.2d 459 (Ky. 1990). In determining whether the circuit court erred in denying the motion, all evidence that favors the prevailing party must be taken as true; and the reviewing court is not at

liberty to assess the credibility of witnesses or determine what weight is to be given the evidence. *Id.* at 461. As the prevailing party, Gruver is entitled to all reasonable inferences that may be drawn from the evidence. *Id.* The appellate court is limited to determining whether the verdict is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *Id.* (quoting *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988)). In sum, "[o]nce the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

Admitting Kale Kelly's testimony was not palpable error

Edwards' first argument is that it was palpable error to admit Kale Kelly's testimony that, sometime after 1998, Edwards asked him to kill Morris Dees. He contends that the testimony was inadmissible under Kentucky Rule(s) of Evidence (KRE) 404(b) as evidence of prior crimes or bad acts. Gruver, on the other hand, contends that such evidence was admissible rebuttal evidence to contradict or impeach Edwards' testimony that he did not encourage or tolerate any kind of violent or illegal behavior. We do not find palpable error here.

"Evidence of collateral criminal conduct is admissible for the purpose of rebutting a material contention of the defendant." *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005); *see also Moore v. Commonwealth*, 771 S.W.2d 34,

39 (Ky. 1988), *abrogated on other grounds by McGuire v. Commonwealth*, 885 S.W.2d 931, 935 (Ky. 1994). Edwards took the witness stand and sought to refute Gruver's negligent supervision allegation by contending that he discouraged violence by his members and recruiters, making that contention material to his defense. Thus, under the rule in *Ernst*, Edwards opened the door to rebuttal evidence. Kelly's testimony rebutting Edwards' material contention was therefore proper.

However, even though proper under the rule in *Ernst*, relevant rebuttal testimony "may be excluded if its probative value is *substantially* outweighed by the danger of undue prejudice[.]" KRE 403 (emphasis supplied). Edwards argues that the prejudice engendered in the minds of the jurors by Kelly's testimony outweighed its probative value and should have been excluded. We disagree.

We acknowledge that Kelly's testimony was prejudicial – all relevant evidence is prejudicial. That is to say, evidence tending to disprove a defendant's rendition of the facts necessarily harms his case. *See* Kentucky Revised Statutes (KRS) 401; and *Gell v. Town of Aulander*, 252 F.R.D. 297, 306 (E.D.N.C. 2008)("All relevant evidence is 'prejudicial'[.]"). For that reason, KRE 403 does not bar all prejudicial evidence; only evidence that is *unfairly* prejudicial is excludable.

More importantly, we note again that our review of this issue is for palpable error, not for abuse of the circuit court's discretion in ruling on an evidentiary objection.

> An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). A palpable error must be so serious that it would seriously affect the fairness to a party if left uncorrected. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Fundamentally, a palpable error determination turns on whether the court believes there is a "*substantial possibility*" that the result would have been different without the error. *Id*.

Hibdon v. Hibdon, 247 S.W.3d 915, 918 (Ky. App. 2007) (emphasis supplied).

In the context of all the evidence, we cannot say that there is a substantial possibility that without Kelly's testimony, the jury would have reached a different result. Nor do we believe that even if it was error to allow Kelly's testimony, that such an error would "seriously affect the fairness to [Edwards] if left uncorrected[.]" *Brewer*, 206 S.W.3d at 349. That is so because, in addition to Cowles' and Roberts' testimony that Edwards encouraged them to engage in similar, albeit less flagrant, acts of violence, there was an abundance of evidence – in the IKA handbook and website, in the speeches at Edwards' Nordic Fest, in Edwards' own recorded statements, in the music Edwards sold on compact disc, etc. – that supported the reasonable inference that Edwards encouraged IKA members to engage in violence against those groups which "[t]he IKA hates[.]"[8]

[8] We are not holding that Kelly's testimony regarding Dees was harmless error. We have "endeavor[ed] to avoid mixing the concepts of palpable error and harmless error. One is not the opposite of the other. A claim of palpable error presupposes a lack of preservation and such claims are held to the standard described herein. Harmless error, on the other hand, presupposes preservation and an erroneous trial court ruling, but nevertheless permits a reviewing court to disregard it as non-prejudicial." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

In the context of the full record, Kelly's testimony about Morris Dees, transcribed in 4 pages of a 930-page transcript, is not so consequential as to justify a finding that its admission constituted palpable error.

Admitting evidence of Gruver's assailants' criminal history was not palpable error

Edwards next argues that the trial court committed palpable error by allowing Edwards and Gruver's assailants to testify about the assailants' criminal histories. He offers three grounds for finding palpable error: (1) Gruver did not give him notice of intent to present such evidence as required by KRE 404(c); (2) under KRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible"; and (3) under KRE 403, the probative value of the evidence of Gruver's assailants' criminal histories was outweighed by its prejudicial impact on the jury. We find no merit in any of these grounds.

Edwards' first ground fails because the language of the rule itself requires notice only "[i]n a criminal case . . . ." KRE 404(c).

Edwards' second ground also fails because of the language of the rule itself. KRE 404(b) *only* prohibits "[e]vidence of other crimes, wrongs, or acts [offered] to prove the character of a person in order to show action in conformity therewith." KRE 404(b). Gruver did *not* offer this evidence to show that his assailants' acts of assault were in conformity with their violent character.[9] He offered the evidence under the *exception* to KRE 404(b), which says, "[e]vidence

[9] Because Hensley neither objected to this evidence, nor appealed the judgment, we need not apply KRE 404(b) to the evidence as it relates to establishing Hensley's liability for assault.

of other crimes, wrongs, or acts . . . may, however, be admissible: (1) If offered for some other purpose, such as proof of . . . preparation, plan, knowledge . . . or absence of mistake or accident[.]" KRE 404(b)(1). The "other purpose" for which Gruver offered the evidence included establishing that Edwards knew of the violent nature of the individuals he selected as IKA members and recruiters – one of the elements of Gruver's claim. Such evidence was not prohibited by KRE 404(b).

Edwards' third ground for finding palpable error is that, under KRE 403, the probative value of the evidence of *the assailants'* criminal history was outweighed by its prejudicial effect on the jurors' opinion of *Edwards*. In Edwards' words, "[t]he jury was presented with a litany [sic] of witnesses who had previous criminal records which served to paint Mr. Edwards in such a way that the jury disregarded the facts and decided the case on their dislike of Mr. Edwards and his beliefs." We do not find this argument persuasive.

When reviewing a challenge to evidence based on KRE 403, "the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Morgan v. Commonwealth*, 189 S.W.3d 99, 110 (Ky. 2006), *reversed on other grounds in Shane v. Commonwealth*, 243 S.W.3d 336, 343 (Ky. 2007) (internal quotation marks and citation omitted).

We find that the probative value of the evidence at issue was high because it bore directly on an element of the claim against Edwards, *i.e.*, his

knowledge of the violent propensities of the individuals he selected as IKA members and recruiters. Given the record as a whole, we also find it a remote risk that *the assailants' bad acts* caused the jurors to view Edwards prejudicially, or to "dislike" him, or to base their verdict on that prejudice. In a recent criminal case, a similar argument has been rejected despite the suggestion that "there was a guilt-by-association aspect to the introduction of" evidence of prior bad acts of the defendant's associate. *Adams v. Commonwealth*, 2010 WL 2025104, *9 (Ky. 2010)(2009-SC-000296-MR)).[10] We are convinced that the jury's finding of liability against Edwards was not because of his association with individuals who had criminal histories.

Edwards also makes a "cumulative effect" argument regarding the sum of his evidentiary objections, stating, "[t]he jury's verdict is a clear reflection of their animosity towards Mr. Edwards based upon the inadmissible and inflammatory testimony, thus the verdict is manifestly unjust." We do not agree.

We note that, while deliberating, the jury posed questions to the circuit court regarding interpretations of the jury instructions. While the court

[10] *Adams* is cited pursuant to CR 76.28(4). In *Adams*, the defendant was on trial for the manufacture of methamphetamine. He was asked by the Commonwealth whether he knew that his girlfriend's mother had been arrested for the same crime. Defendant objected that the Commonwealth's purpose was to impeach defendant's character based on his association with the woman. The circuit court allowed the question. Applying a harmless error and not a palpable error analysis, see footnote 8 *supra*, the Supreme Court determined it was error to do so. However, the error was found to be harmless because "the evidence [that she had manufactured methamphetamine] did not directly incriminate Adams [in the commission of that same crime] and, therefore, did not have a substantial influence on the verdict." *Adams*, 2010 WL 2025104 at *9. Two factors present in *Adams* are not present in the case *sub judice* and the absence of both weighs in favor of finding that any error here is harmless: (1) the case before us is a civil case, not a criminal one; and (2) Gruver is not trying to hold Edwards liable for the same conduct which was the subject of the witnesses' testimony.

properly declined to answer those questions directly, the court did respond appropriately. The nature of the questions (relating to Edwards' liability) demonstrates that the jury considered the evidence conscientiously before deciding the case.

Furthermore, before delivering the verdict, the jury foreman asked permission to address the court, as follows:

> JUROR: Your Honor, can I say something before you start reading the verdict?
> COURT: Yes.
>
> JUROR: I would just like to say this was not an easy task for us as a whole. I know by some of you are rolling your eyes and that you are thinking, yeah, that's not so. But it was very difficult. It was very emotional for some of us. We didn't agree on everything at all times, and it was challenging.
> So, we would just like to mention that on behalf of us as a whole.

Finally, we note that the jury apportioned only twenty percent of the compensatory damages to Edwards. The jury's sober comments and this verdict undermine Edwards' argument that the jury's verdict was based solely upon their passions or prejudices against him.

We have carefully considered all Edwards' arguments regarding the admission of evidence in the context of the entire record and find no palpable error.

The circuit court properly denied Edwards' directed verdict motion

If a plaintiff articulates a cognizable claim, presents substantial evidence of that claim at trial, sees that the jury is properly charged, and receives a favorable

verdict and judgment, he is entitled to have that verdict and judgment affirmed by the appellate court on review. If not, and if a claim of error is properly preserved, the appellate court must reverse the judgment and set aside the verdict.

We conclude that the verdict and judgment must be affirmed since we are not persuaded by Edwards' arguments for reversal.

Preliminarily, we find that Edwards properly preserved this claim of error. After presenting his case in defense, Edwards, a non-lawyer representing himself, asked the trial court "[t]o drop this case against me," which the trial court treated as a motion for directed verdict.

On appeal, Edwards argues in essence that Gruver did not present a cognizable claim and that the verdict was not supported by substantial evidence. We disagree.

We will first consider whether Gruver's claim for negligent selection is a cognizable claim in Kentucky. Then, we will discuss the sufficiency of the evidence supporting the verdict rendered upon that claim.

Negligent selection is a cognizable claim in Kentucky

Edwards argued to the circuit court that *N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d (1982), stands for the proposition that "an organization [like IKA] cannot be held responsible . . . unless I specifically gave them [the assailants] orders to do an illegal act." In effect, he repeats that argument on appeal, stating there was no evidence that he

"encouraged, solicited, directed, supervised or instructed anyone to attend the fair for recruiting and to assault anyone . . . ."

To begin with, Edwards did not read *Claiborne Hardware* closely enough. That case says:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed *by reason of association alone*, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Claiborne Hardware, 458 U.S. at 920, 102 S. Ct. at 3429 (emphasis supplied). Gruver did not attempt to hold Edwards liable "by reason of association alone." Rather, Gruver claimed Edwards was liable because he negligently selected unfit agents[11] to recruit new IKA members from among the general public, and that Edwards' own negligence in doing so, not his mere association with the group, resulted in the foreseeable injuries Gruver sustained. Such a cause of action is recognized in Kentucky.

By at least 1989, the legal foundation for Gruver's cause of action, negligent selection, was well laid in Kentucky. In *Smith v. Isaacs*, 777 S.W.2d 912 (Ky. 1989), our Supreme Court discussed one's independent liability for the conduct of third parties. The Court there noted that liability for selecting unfit workers "is

[11] Edwards has never asserted that Gruver's assailants were not his agents, but only that they did not act at his *specific* instruction. In any event, there was substantial evidence that an implied agency existed between Edwards and those he selected to recruit for IKA. "An implied agency is an actual agency as much as if it were created by express words, and is a fact to be shown or ascertained by inferences and deductions from other facts for which the principal is responsible . . . ." *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 259 (Ky. 1985).

covered by . . . the Restatement (Second) of Torts, Section 877." *Smith*, 777 S.W.2d at 914. That section, captioned "Directing Or Permitting Conduct Of Another," states in pertinent part:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . .
>
> > (b) conducts an activity with the aid of the other and is negligent in employing him . . . .

Restatement (Second) of Torts § 877(b) (1979). The Restatement's Comment on Clause (b) of § 877 states that this rule

> has frequent application to cases in which an employer is conducting a business and negligently employs incompetent or dangerous servants or is negligent in not giving them directions. In these cases the employer is liable not only because of the relation between the parties, but also *because of his own tortious conduct*. (*See* § 307 and Restatement, Second,[12] Agency, §§ 213

[12] *Smith* relied on Restatement (Second) of Agency § 213 (1958), and so we also refer to that version. However, Restatement (Third) of Agency § 7.05 (2006) is that section's current counterpart and is equally, or more, applicable to the facts of this case. The Reporter's Notes comparing the two sections states:

> The black-letter formulation in this section does not delineate specific conduct that constitutes negligence or recklessness. The formulation in Restatement Second, Agency § 213, likewise was "not intended to exhaust the ways in which a master or other principal may be negligent in the conduct of his business." Id., Comment *a*. The formulation in this section, as in § 213, is not limited to situations in which an actor is characterized as the agent or employee of the person who conducts an activity through the actor. The formulation is broader because the narrower formulation may imply, contrary to virtually all cases, that a person who engages the services of actors who are not agents is not subject to liability for negligent or reckless conduct in selecting or otherwise dealing with the actor. Restatement Second, Agency § 213 does not appear to have intended this consequence because Comment *a* emphasizes that "[t]he rule stated in this Section is not based upon any rule of the law of principal and agent or of master

> and 505). *The rule also applies when there is no master and servant relation*.

Restatement (Second) of Torts § 877(b) cmt. c (emphasis supplied). The Supreme Court in *Smith* went on to state, as is pertinent to this case, that

> Restatement (Second) of Agency, Section 213, specifically addresses personal liability for conducting an activity through servants or other agents . . . if he is negligent or reckless:
>
> > (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
> >
> > (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or
> >
> > (c) in the supervision of the activity . . . .[13]

Smith, 777 S.W.2d at 914 (quoting Restatement (Second) of Agency § 213 (1958)). Furthermore, the Supreme Court quoted § 213 cmt. a which explains:

> The rule stated in this Section is not based upon any rule of the law of principal and agent or of master and servant. It is a special application of the general rules

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> and servant. It is a special application of the general rules stated in the Restatement of Torts . . . ."

Restatement (Third) of Agency § 7.05 Reporter's Notes *a. Comparison with Restatement Second, Agency*.

[13] Negligent supervision is distinct from *respondeat superior* liability, though the two may co-exist. *See* Restatement (Second) of Agency § 213 cmt. h. (entitled, "*Concurrent negligence of master and servant.* In addition to [independent] liability under the rule stated in this Section [213], a master may also be subject to liability if the act occurs within the scope of employment."). Because negligent supervision under § 213 is not a form of vicarious liability, there does not need to be a finding that the tortfeasor was acting within the scope of employment. *See* § 213 cmt. a ("The rule stated in this Section is not based upon any rule of the law of principal and agent . . . ."). However, if the tort does occur in the scope of employment, the employer may also be vicariously liable in accordance with the principles set forth in Restatement (Second) of Torts § 317 (1965). As noted in footnote 1, *supra*, we previously analyzed this case only under Restatement (Second) of Torts § 317.

> stated in the Restatement of Torts and is not intended to exhaust the ways in which a master or other principal may be negligent in the conduct of his business.

Smith, 777 S.W.2d at 914-15 (quoting Restatement (Second) of Agency § 213 cmt. a).

In summary, *Smith* recognized three legal concepts relevant to Gruver's claim against Edwards for negligent selection. The first concept is that a claim of negligent selection does not require proof that the negligent-selection defendant gave specific direction that the person selected commit a tort. *Smith*, 777 S.W.2d at 914; *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 439 (Ky. App. 1998) (supervisor did not instruct employee to sexually assault tort victim). It is sufficient that the negligent-selection defendant knowingly charged an unfit person with responsibility or authority to carry out the defendant's task under circumstances that foreseeably placed others at risk of injury.

The second legal concept is that negligent selection is not based on the doctrine of *respondeat superior*, but on general negligence principles. *See Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 732 (Ky. 2009); *see also Patterson v. Blair*, 172 S.W.3d 361, 367 fn.2 (Ky. 2005). Consequently, the focus is neither on the individual selected for a task nor directly on his tortious conduct in carrying it out. Instead, the focus is on the negligent-selection defendant *himself* and *his* conduct in deciding to select an individual so unfit for the task that it placed others at risk. Therefore, the tort of negligent selection must be proved by

applying traditional common-law elements of negligence directly to the conduct of the negligent-selection defendant himself.

The third concept recognized in *Smith* is a corollary to the second – the cause of action for negligent selection does not require the existence of an employment relationship. The rule of liability for negligent selection still "applies when there is no master and servant relation." Restatement (Second) of Torts § 877(b) cmt. c; *see also Smith*, 777 S.W.2d at 914 (citing Restatement (Second) of Torts § 877, and Restatement (Second) of Agency § 213 (discussing "personal liability for conducting an activity through servants *or other agents*"; emphasis supplied). It remains true, of course, that when an employer hires an employee, the employer has "selected" that employee for purposes of a negligent-selection claim.

In 1998, this Court formally recognized the tort of negligent selection – in the specific context of a negligent hiring – in *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d at 442 (citing Restatement (Second) of Agency § 213(b)). *Flor-Shin* predictably embraced the first two legal concepts of the negligent-selection claim described above and generally referred to in *Smith*.[14] However, because in *Flor-Shin* an employment relationship did, in fact, exist between the tortfeasor who physically assaulted the plaintiff and the negligent-selection defendant, there was no need for us to point out that an employment relationship was *not* an element of the cause of action. Consequently, we framed our analysis in the facts then before us, articulating the legal issue as follows: "The crux of this appeal is whether, as a

[14] This Court did not cite *Smith* in *Flor-Shin* but relied on the same sections of the Restatements discussed in *Smith*.

matter of law, an employer can be held directly liable for injuries sustained by a third person caused by the criminal acts of its employee under the theory of negligent hiring." *Flor-Shin*, 964 S.W.2d at 439. We framed the answer in the same employment context, concluding "that the established law in this Commonwealth recognizes that an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person." *Id.* at 442.

Our choice of words in *Flor-Shin*, that was appropriate to its facts, is not cause for reading the case as though we intended to *limit* the scope of the negligent-selection cause of action in Kentucky to the employment context. *Flor-Shin*, like *Smith*, relied on Restatement (Second) of Agency § 213(b) and other Restatement authority, none of which limits the tort of negligent selection to the employment relationship, nor is there any authority in any of the Restatements that discusses negligent selection and negligent hiring as different torts. They are not. *See, e.g., Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell*, 359 S.E.2d 241 (Ga. App. 1987) (negligent-selection case finding no genuine issue of material fact that BB/BS could not have known that its volunteer would sexually molest child).

Therefore, we cannot agree with Edwards' assertion that we *should* read *Flor-Shin* as limiting the tort of negligent selection to the employment context.[15] Edwards has cited no authority for making such a distinction and we have found

[15] Edwards did not raise this argument in his brief, but in his response to Gruver's petition for rehearing, where he stated "*Oakley* [*v. Flor-Shin*] is about Employer/Employee relations. . . . The case before us has absolutely nothing to do with employer/employee relations."

none. Furthermore, requiring an employment relationship as an element of a negligent-selection claim would supplant the second legal concept embraced both in *Smith* and *Flor-Shin*, *i.e.*, that the tort is *not* based on the doctrine of *respondeat superior*, but imposes independent liability on the negligent-selection defendant based on his own negligence.

Therefore, we need merely paraphrase *Flor-Shin* to hold that the established law in this Commonwealth recognizes that an entity[16] can be held liable when its failure to exercise ordinary care in selecting or retaining persons to conduct its activity creates a foreseeable risk of harm to a third person.

Under the theory of liability discussed in Restatement (Second) of Agency § 213(b), and *Smith*, and *Flor-Shin,* Gruver sufficiently alleged in Count IV of his complaint that Edwards failed to exercise ordinary care in selecting IKA recruiters; that he selected and retained recruiters for that task whom he knew to be violent and, therefore, unfit; that the risk of harm to Gruver was foreseeable; and that

[16] Or, as in this case, an individual whose alter ego is a well-structured, yet unincorporated enterprise.

Gruver was injured thereby.[17] In this case, the commentary to § 213 is illuminating.

> *d. Agent dangerous.* The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating conduct having an undue tendency to cause harm is liable therefor.

Restatement (Second) of Agency § 213 cmt. d.

We therefore hold, again, that the cause of action for negligent selection is a cognizable claim under Kentucky law, and turn our consideration to Gruver's proof of that claim.

Substantial evidence supported each of the elements of Gruver's claim for negligent selection

Because Gruver's negligent-selection cause of action is not based on the doctrine of *respondeat superior*, he was required "to prove the traditional common-law elements of negligence, including duty, breach, foreseeability, causation, and injury in order to prevail." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 58 (Ky. 2010). We consider each in turn.

[17] Arguably, Count V of the complaint also sufficiently alleges claims based on legal concepts set out in Restatement (Second) of Agency § 213(a) and (c) because Edwards gave the IKA recruiters "improper or ambiguous orders [or] . . . fail[ed] to make proper regulations" regarding their duties to recruit, and because he negligently supervised the activity. Restatement (Second) of Agency § 213(a) cmts. c and g ("directions . . . [must] anticipate circumstances which he [the principal] should realize are likely to arise"; "One who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others."); Restatement (Second) of Agency § 213(c). Because no published Kentucky case has yet recognized either of those specific theories of liability, and because the case *sub judice* can be decided without doing so here, we will decline further consideration of those claims.

Whether the defendant owed a duty is ultimately a question of law for the court to decide. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992). "The most important factor in determining whether a duty exists is foreseeability." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (citation omitted). And, foreseeability is frequently dependent upon certain facts, as explained in *Hammons*:

> Foreseeable risks are determined in part on what the defendant knew at the time of the alleged negligence. The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have.

Hammons, 113 S.W.3d at 90 (internal emphasis and quotation marks, and citation omitted); *see also Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999)(one's duty is "to exercise ordinary care in his activities to prevent foreseeable injury"). There was abundant evidence regarding what Edwards knew at the time he committed the tort Gruver alleged.

Edwards knew better than anyone that his organization was based on hatred of certain specific groups. He knew what types of persons were attracted to his organization, and he knew their proclivities generally. He specifically knew the violent tendencies of Gruver's assailants. He knew that his selection of these assailants as recruiters would cause them to interact with the targets of the organization's hate-based mission and even with members of the law enforcement

community. Edwards' standing order to recruiters to contact him "*when*" they were arrested is certainly sufficient evidence upon which a jury could infer that Edwards did not expect recruiters to obey his other order to "stay legal." Rather, the order to call him upon being arrested raises a reasonable inference that Edwards actually anticipated just what occurred in this case. If Edwards could not foresee Gruver's assault, it was because he chose not to.

When the acknowledged mission of an organization is to hate groups and individuals based on their appearance or heritage or behavior, its leaders face a daunting but necessary task to see that individuals they select to proselytize for the organization refrain from going beyond the constitutional protections of hate speech to the implementation of violence as a means of spreading the organization's message.[18] Despite the difficult nature of that task, the risk of physical harm to others is not only obvious and foreseeable, it is also potentially great. We conclude that Edwards had a duty to take reasonable care when selecting his recruiters so as to prevent foreseeable acts from occurring. Edwards

[18] U.S. Supreme Court Associate Justice Stephen Breyer recently expressed concern that an individual or group might embrace such a tactic of engaging in non-protected violence as a means of spreading a constitutionally protected message. In his concurring opinion in *Snyder v. Phelps*, --- U.S. ----, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (involving the military-funeral protests of Westboro Baptist Church), Justice Breyer said:

> [S]uppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views [or his organization's views] on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means.

Snyder, 131 S. Ct. at 1221 (Breyer, J., concurring).

breached that duty by selecting unfit individuals to recruit members among the general public where, in a multicultural society, they were sure to interact with the individuals they hate – one of them was Gruver.

We also have no difficulty finding substantial evidence of causation. Cowles effectively testified that, but for their selection as IKA recruiters, the four of them would not have been together at the fair where Gruver was assaulted. And while Edwards is correct when he says there was evidence that the assailants were not at the Meade County fair to recruit new members, there was substantial evidence to the contrary. In fact, each of the assailants emphasized how important the recruitment of new members was to Edwards personally. For example, when Cowles was asked, "Would you say that Ron Edwards was obsessed with bringing in members and money?" he responded, "Absolutely."

Furthermore, the jury was persuaded that Edwards was responsible for the assailants' actions at the fair. In a separate jury instruction, Instruction No. 6, the jury was asked:

> Do you believe from the evidence that Ron Edwards induced or encouraged the violent actions of Jarred Hensley, Andrew Watkins, or other Klansmen, and that Ron Edwards' inducement or encouragement was a substantial factor in causing injuries and damages to Jordan Gruver?

Nine of the jurors responded affirmatively. Edwards did not challenge that instruction, and he did not appeal the jury's finding under it. Even if he had, there was substantial evidence supporting the finding.

Edwards does not challenge the sufficiency of the proof regarding Gruver's injuries. In any event, there was sufficient evidence of Gruver's injury as a consequence of Edwards' breach.

In sum, the verdict and judgment in this case was supported by substantial evidence.

Conclusion

For the foregoing reasons, we find no palpable error in the admission of the evidence to which Edwards objects, nor do we find the trial court's denial of Edwards' motion for directed verdict to be clearly erroneous. Therefore, we affirm the judgment of the Meade Circuit Court.

CLAYTON, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion except in so far as the majority's opinion (1) finds no error with the admission of the testimony of Kale Kelley which inculpates Edwards in an attempted murder plot against Morris Dees, counsel for the appellee and the plaintiff below, and (2) finds no error in the trial court's failing to grant a directed verdict on negligent selection as a viable cause of action based on the facts *sub judice*. Thereupon, I dissent.

Certainly, as established by KRE 402, all evidence of relevance has potential for admission during a trial. However, mere relevance is not the touchstone by which the evidence is admitted, because evidence, though relevant, must not be of such character that its probative value is substantially outweighed by undue prejudice, nor should it lead to confusion of the issues, mislead the jury, result in undue delay, or be a needless presentation of cumulative evidence. KRE 403.

In the trial below, the admission of the testimony of Kale Kelley concerning the plans to murder Morris Dees inculpated Edwards and, I believe, resulted in undue prejudice to Edwards. Its admission was error because the alleged victim, Morris Dees, was an attorney appearing before the jury as counsel for the plaintiff in the trial of this matter. Necessarily, Morris Dees, as counsel for a litigant, was in a position to endear himself to the jury by his dress, demeanor, mannerisms, personality, eloquence of speech, proximity to the jury, continued appearance before the jury and participation in the trial of the matter as counsel for a litigant. This "endearment," combined with the admission of the collateral facts surrounding the attempted murder plot of Dees, invited the jury to make a decision on the liability of Edwards on irrelevant grounds. It is true that evidence of collateral facts may be admissible under certain circumstances. However, its probative value must not be substantially outweighed by undue prejudice. I believe that the testimony of Kale Kelley was unduly prejudicial and that its admission was reversible error.

As a second basis for the exclusion of the testimony of Kale Kelley inculpating Edwards in the murder plot, I believe that the testimony tended to show that Edwards had a violent character and, thus, was improper evidence of other crimes, wrongs, or acts under KRE 404(b). And, while possibly admissible under the KRE 404(b) exception of "knowledge" as argued by Gruver, I believe that it should be excluded because the improper use of the evidence by the jury substantially outweighed the need for the evidence to show that Edwards had knowledge of the criminal backgrounds of his followers. This is particularly true when, *sub judice,* Edwards admitted that his followers had criminal backgrounds. Thus, I find this to be reversible error.

In addressing whether negligent selection is a viable cause of action based on the facts *sub judice*, the evidence showed that Edwards encouraged certain persons to recruit for the Klan, that the recruiting activity consisted of giving out cards, and that Edwards specifically told all members not to commit any criminal act. The majority seeks to impose liability on Edwards for negligent selection of recruiters with criminal backgrounds using the Restatement (Second) of Torts, the Restatement (Second) of Agency, and the application of *Flor-Shin, supra*; respectfully, I disagree.

In the case *sub judice,* it is apparent that the recruiters have criminal backgrounds and it is equally apparent that Edwards taught hate of all but the Aryan race. Nevertheless, there is no evidence that Edwards told the recruiters to assault anyone or that assault of third persons was condoned by Edwards as an

acceptable recruiting method. There was simply no nexus between the encouraged activity of recruiting and the commission of the criminal act by the four recruiters.

In analyzing the tort of negligent selection as applied to the facts *sub judice*, we must first consider the language of *N.A.A.C.P. vs. Claiborne Hardware.* *Claiborne Hardware* states that, for liability by reason of association alone to apply, the group must possess unlawful goals and the individual to be held liable must have the specific intent to further those goals. *Claiborne Hardware*, 458 U.S. at 920, 102 S. Ct. at 3429. The goal was to recruit individuals to become members of the IKA. This is not an unlawful goal. Further, the testimony was that Edwards always cautioned his followers not to violate the law and there is no evidence that Edwards specifically intended the assault that occurred. To impose liability on Edwards on the basis of the actions of individuals chosen to recruit, when they take it upon themselves to assault a third party, strains the application of negligent selection as a viable cause of action to the facts *sub judice*. Second, the Restatement (Second) of Torts § 877(b) states that we must look to the activity to be conducted, *i.e.*, recruitment. It is not the recruiting for which Gruver seeks to hold Edwards liable, it is an assault. Absent evidence that recruiting involved assaulting third parties, then the Restatement (Second) of Torts § 877(b) is not applicable. Third, Restatement (Second) of Torts § 877(b) states that it also applies when there is no master and servant relation and references agency. Therefore we must look to the Restatement (Second) of Agency § 213, which addresses personal liability for an activity conducted through servants or other

agents. This begs the question as to who is an agent and how an agency is established. If we accept that the four recruiters were, somehow, Edwards' agents, then the agency would be bound by the terms prescribed by Edwards and there is no evidence of such terms.

This raises the issue concerning the necessary nexus that must exist between the recruiting activity and the assault for Edwards to be liable for the assault. The majority finds the nexus in Edwards' selection of recruiters with criminal backgrounds. If the necessary nexus is found in the mere fact that the individual recruiters have criminal backgrounds, then an onerous burden will be placed on all who have anyone with a criminal tendency or background acting on their behalf, since they will suffer liability for any act committed by those so acting. I would find that, absent a substantial nexus between the activities Edwards sought to encourage, *i.e.*, recruitment, and the assault, then liability could not exist.

Fourth, the majority uses *Flor-Shin, supra* to find that negligent selection is a viable cause of action based on the facts *sub judice*. *Flor-Shin* is based on an employment relationship, and I disagree that "merely paraphrasing" the opinion makes it applicable *sub judice*. I would find that a directed verdict should have been given on the claim of negligent selection.

BRIEFS FOR APPELLANT:

Kyle A. Burden
Louisville, Kentucky

BRIEFS FOR APPELLEES:

Morris S. Dees, Jr.
J. Richard Cohen
Montgomery, Alabama

Bethany A Breetz
William F. McMurry
David A. Friedman
Mark R. Overstreet
Louisville, Kentucky