RENDERED: JULY 12, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001063-MR

RON CADLE,
Individually and as the
Administrator for the Estate of
JANE CADLE; and
SARAH CADLE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 07-CI-004652

WILMA CORNETT and
ALLSTATE INSURANCE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Ronald Cadle, individually and as Administrator of the Estate of Jane Cadle, and Sarah Cadle (the Cadles) appeal the Jefferson Circuit Court's order of summary judgment dismissing their negligence claims against the

appellants, *i.e.*, their uninsured motorist insurance carrier, Allstate, and Wilma Cornett. The circuit court dismissed the Cadles' claims after finding that any negligence on the part of Cornett was too remote to be a proximate cause of the Cadles' injuries in this matter, and that the Cadles' injuries were wholly due to two other events of unrelated, superseding negligence. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This action arises from injuries the Cadles sustained in an automobile accident on May 8, 2005. The Cadles' accident was the second of two accidents originating on opposite sides of Interstate 64 (I-64), *i.e.*, the eastbound and westbound lanes of traffic, which are separated by a wide, grassy median. The first accident involved a single car. Wilma Cornett was traveling westbound on I-64 in Shelbyville, Kentucky, when she lost control of her vehicle, went into the median, and struck the base of the eastbound bridge below the roadway.

The second accident occurred as the Cadles were traveling on eastbound I-64 toward Lexington. The Cadles' vehicle had come to a complete stop in a traffic jam that had arisen some time after Cornett's accident when the driver of a tractor trailer rear-ended the Cadles' vehicle. As a result, Jane Cadle was killed, and Sarah Cadle was seriously injured.

The Cadles brought this action against Cornett, alleging that her negligence was a direct and proximate result of their injuries and damages.[1] Thereafter, Cornett moved for summary judgment. Cornett argued that her own

[1] The Cadles settled their claims against the owner, employee, and operator of the tractor trailer.

accident was not the proximate cause of the Cadles' accident and pointed out that her accident occurred approximately 1.34 miles away from the site of the Cadles' accident. Cornett argued that if the stopped traffic constituted any kind of hazard, it was a hazard that was produced by the emergency personnel who first responded to her accident. Additionally, Cornett pointed out that it was the driver of the tractor trailer who had caused the accident with the Cadles and argued that the negligence of the tractor trailer driver in failing to avoid colliding with the Cadles was yet another superseding cause of the Cadles' injuries.[2]

The trial court granted Cornett's motion on the basis of each of these grounds, absolving Cornett of any liability for the Cadles' injuries and holding, in particular, that "it would appear that the act of the first responders in stopping traffic, and the negligence of the semi-driver constitute superseding causes." Citing *Donegan v. Denney*, 457 S.W.2d 953 (Ky. 1970), the trial court further held: "It is the opinion of this Court that the effect of the Cornett crash had 'spent itself.'"

The Cadles thereafter moved to vacate the summary judgment, arguing that the sole issue presented by Cornett's motion for summary judgment was whether the Cadles would be able to prove that Cornett's negligence was a

[2] Allstate Insurance Company, the Cadles' uninsured and underinsured motorist insurance provider, intervened as a defendant to this action. While Allstate reiterates the arguments proffered by Cornett, it is unnecessary to evaluate Allstate's request for relief given our determination of the issues before us.

substantial factor in causing the tractor trailer to rear-end their vehicle and further arguing that a reasonable jury could find that Cornett's negligence "set the course of events in motion" which resulted in the Cadles' accident. Nevertheless, the court denied their motion.

This appeal followed.[3] Additional facts relating to this appeal will be addressed below as they become relevant to our analysis.

II. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. It should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Nevertheless, summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*. (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). And, it is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings,

[3] The appellants also argued that the trial court erred when taking judicial notice of the time necessary for traffic to back up the distance that it had between the two accidents. However, appellants have failed to reference any portion of the record indicating that the court took judicial notice in that regard.

but must, by counter-affidavit or otherwise, show that evidence is available justifying trial of the issue involved. *Continental Casualty Co. v. Belknap Hardware & Mfg. Co*., 281 S.W.2d 914 (Ky. 1955).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*.

III. ANALYSIS

It is a fundamental rule of tort liability that for negligence to be established there must have been (1) a duty owed by a defendant to the plaintiff, (2) a breach of that duty which (3) was the proximate cause of the injuries which resulted in (4) damages. Negligence must be proven; it will never be presumed. *Helton v. Montgomery*, 595 S.W.2d 257, 258 (Ky. App. 1980). The third of these elements, causation, was the basis of the trial court's decision to grant summary judgment in favor of Cornett, and it is therefore the subject of the Cadles' appeal.

The Cadles argue that they produced evidence sufficient to demonstrate that they were injured by the ultimate result of a chain of events set in

motion and proximately caused by Cornett's negligence. The Cadles essentially allege that this chain of events consists of the following three links:

- First, traveling westbound on I-64, Wilma Cornett fell asleep at the wheel of her vehicle and swerved onto the grassy, I-64 median. Cornett's vehicle approached the eastbound I-64 lane, but remained on the median, never entered the eastbound lane, and instead headed for a ditch underneath an I-64 eastbound overpass bridge. Then, in the words of a report filed by the Shelby County EMS responders, her vehicle traveled "21-30 feet down on the ground against Bridge [sic] wall below/under I-64 E Bridge," requiring the EMS responders to go "70-80 feet down the steep hill to get to [Cornett's vehicle]."
- Second, the traffic at or near the I-64 eastbound overpass bridge immediately braked in response to Cornett's vehicle approaching and then going underneath the I-64 eastbound bridge, resulting in a traffic jam on eastbound I-64 that backed up to a distance of approximately 1.34 miles over a period of less than two minutes.
- Third, while the Cadles' vehicle was able to safely stop at the end of this traffic jam, the sudden stop in traffic nevertheless prevented the driver of a tractor trailer from braking in time to avoid colliding with the Cadles' stopped vehicle.

For the most part, the first link in this chain is undisputed. Cornett does not contest that she failed to act as a reasonable and prudent driver when she

lost control of her vehicle, swerved onto the I-64 median, and drove down into a ditch and against a wall located "21-30 feet" under the I-64 eastbound overpass bridge. Rather, the focus of our analysis is whether the Cadles produced any affirmative evidence supporting or creating any genuine issue of fact regarding the third of these links.

Generally speaking, "[t]he question of whether an undisputed act or circumstance is a superseding cause is a legal issue for the court to resolve and not a factual matter for the jury." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 394 (Ky. 2001) (citing *Fryman v. Harrison*, 896 S.W.2d 908, 911 (Ky. 1995)). Superseding causes absolve a defendant from liability only if they are "an independent force, not naturally arising out of or related to the negligently created condition." *Seelbach, Inc. v. Cadick*, 405 S.W.2d 745, 749 (Ky. 1966). The cause must be "unassociated with the original act." *Pile v. City of Brandenburg*, 215 S.W.3d 36, 42 (Ky. 2006). And, the essence of a superseding cause is that it is "extraordinary and unforeseeable." *Williams v. Ky. Dept. of Educ.*, 113 S.W.3d 145, 151 (Ky. 2003) (quoting *House v. Kellerman*, 519 S.W.2d 380, 383 (Ky. 1974)).

Here, as it relates to the third link in their alleged chain of causation, the Cadles argue that the trial court erred in finding that when the driver of the tractor trailer failed to stop in time to avoid colliding with the Cadles, his failure constituted a superseding cause of the Cadles' injuries. Essentially, the Cadles assert that the traffic jam on eastbound I-64 occurred so suddenly that it

substantially prevented the driver of the tractor trailer from braking in time to avoid colliding with the Cadles and that a disputed issue of fact therefore remained regarding whether the traffic jam itself remained a substantial factor contributing to the Cadles' injuries.

To frame its analysis of whether the tractor trailer driver's failure to stop in time to avoid the Cadles constituted an extraordinary and unforeseeable superseding cause of the Cadles' injuries, the trial court relied upon *Donegan v. Denney*, 457 S.W.2d 953 (Ky. 1970), which is a case that provides an example based upon similar facts. *Donegan* involved multiple vehicle collisions on an expressway. The question of whether one of those collisions, involving five cars and occurring some 800 to 1000 feet distant from the point of the collisions directly attributable to the defendant stopping its truck on the highway, was also the natural and probable result of the defendant stopping its truck on the highway. The *Donegan* Court cited the Restatement of Law, Torts 2d § 443, Comment b, stating that "'hindsight,' or an after-the-event' scrutiny, must be resorted to in deciding whether the act of a third person or other force is legally a superseding cause." *Id*. at 958. The Court observed, and reasoned, that there were "so many instances in which motorists had safely stopped between the site of [the defendant truck driver's] negligence and the locale of the five-car collision at bar" that "it

would appear abnormal[4] to suppose that [the defendant truck driver's] original negligence was not superseded." *Id*.

Here, similar to *Donegan*, the Cadles produced evidence of only one accident—namely, their own—that occurred within the approximately 1.34 mile-long traffic jam at issue. The Cadles themselves were able to effectively stop at the tail end of that traffic jam. Equally important, while the record reveals that the driver of the tractor trailer did fail to brake in time to avoid colliding with the Cadles, there is nothing in the record explaining *why* he failed to brake in time, much less that any condition attributable to the traffic jam prevented him from doing so. And, the Cadles point to no evidence capable of demonstrating that the traffic on eastbound I-64 backed up quickly enough to create the hazard of preventing any driver, in the exercise of reasonable care and prudence, from effectively stopping in time.[5] Thus, we find no error in the trial court's conclusion, which it based upon *Donagan* and the undisputed evidence of record, that the tractor trailer driver's failure to effectively stop was a superseding cause of the Cadles' injuries.

---

[4] *Donegan* uses the word "abnormal," rather than "extraordinary," to describe the superseding cause in that matter cited in this opinion. *Id*. at 958. However, *Donegan*'s use of the word "abnormal" derives from Restatement of Law, Torts 2d, § 443, Comment b, which, in turn, treats "abnormal" and "extraordinary" synonymously.

[5] The Cadles believe that because a standardized form used by the paramedics at Shelby County EMS (e.g., a "run report") relating to Wilma Cornett states "CALL RECEIVED 16 22," and another run report relating to Sarah Cadle states "CALL RECEIVED 16 24," the two accidents must have *occurred* two minutes apart from one another. And, for exactly the same reason, the Cadles assert these reports are capable of demonstrating that Cornett *caused* their accident. However, these reports simply note when Shelby County EMS *received calls* regarding the Cadle and Cornett accidents. They do not indicate when the respective accidents *occurred*.

IV. CONCLUSION

At best, the Cadles have demonstrated only that Cornett's conduct was a prior and remote cause that merely created a condition for an incident, namely the Cadles' accident, in which to occur. By itself, and in the context of negligence, this is not sufficient to create liability. *Peak v. Barlow Homes, Inc.*, 765 S.W.2d 577, 579 (Ky. App. 1988) (citing *Winders' Administrator v. Henry Bickel Company*, 248 Ky. 4, 57 S.W.2d 1009 (1933); *Gaines' Administratrix v. City of Bowling Green*, 235 Ky. 800, 32 S.W.2d 348 (1930)). For the reasons stated in this opinion, the judgment of the Jefferson Circuit Court is affirmed.

ACREE, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: I concur. However, I write separately, and respectfully, to address the dissent's assertion that "[o]ur Supreme Court has recognized that the adoption of, and strict adherence to, the doctrine of pure comparative fault has substantially diminished the rationale for the doctrine of superseding cause[.]" I am very doubtful that our Supreme Court intended to hail the end of superseding cause as a distinctive and important legal tool – one to be wielded only by our judges, not by our juries – despite similar language appearing, as dictum, in *Commonwealth, Transp. Cabinet, Dep't of Highways v. Babbitt*, 172

S.W.3d 786, 793 (Ky. 2005).[6] Furthermore, and while I recognize my stand may not follow any trend, I question whether the rationale for superseding cause has diminished – that is to say, been surrendered to juries in Kentucky jurisprudence – simply by the adoption of the comparative fault model some quarter century ago, and I question whether such surrender would be a good thing.

With all due respect, I believe our courts sometimes intermingle, too casually, the various negligence law concepts, while simultaneously failing to delineate the distinct boundaries between the province of the court and the province of the jury. This has led to confusion and bred the assumption, or so it seems to me, that our adoption of the comparative fault model meant that the jury simply would divide fault among any and all parties named in a negligence action, and that the court could set aside forever the legal principles impacting liability formerly associated with the contributory negligence model. As it turns out, more often than not, those same principles have found appropriate application under the comparative fault model now followed in Kentucky. *See, e.g., Bass v. Williams*, 839 S.W.2d 559, 563 (Ky. App. 1992) ("with the adoption of comparative negligence, it is error to instruct the jury on a sudden emergency theory"), *overruled by Regenstreif v. Phelps*, 142 S.W.3d 1, 3-4 (Ky. 2004) ("we find no conflict between comparative negligence and the sudden emergency

[6] In his dissent, Judge Nickell cites *Babbitt* for this similar language, then re-quotes from *Babbitt* a passage from Comment a. of the Restatement (Third) of Torts, § 34. Professor Leibson, in his treatise on Kentucky tort law, quotes both our Supreme Court's turn of this phrase in *Babbitt*, as well as the Restatement passage, then correctly labels it "dictum," and then states: "It will be interesting to see the effect this language has on future cases." David J. Leibson, 13 *Kentucky Practice: Tort Law* § 10.33 (2012). This appears to be one of those cases.

qualification"); *Jordan v. Lusby*, 81 S.W.3d 523, 525 (Ky. App. 2002) ("[T]his type of assumption of the risk [dog groomer or veterinarian being bitten by dog] is not subsumed by comparative fault and, hence is a complete defense." Citation omitted).

When the Supreme Court addressed superseding cause for the first time after *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), it did not hesitate to employ the same causation analysis developed under the contributory negligence model. *Britton v. Wooten*, 817 S.W.2d 443, 445 (Ky. 1991). In the comparative negligence case of *Britton v. Wooten*, the Supreme Court relied heavily on the contributory negligence case of *House v. Kellerman*, 519 S.W.2d 380 (Ky. 1975), declaring that the case was still

> indeed a leading case on the subject of causation . . . . In it Justice Palmore states:
>
> > . . . .
> >
> > If there is no issue as to whether the act or event actually occurred, whether it constituted an independent cause superseding and eliminating the alleged negligence of the defendant as a legal cause should be determined by the court. *Id.* at 383.

Britton, 817 S.W.2d at 448. The Supreme Court never placed in doubt the continued viability of the superseding cause doctrine under the comparative fault model.[7]

[7] It is noteworthy that in that case, *Britton v. Wooten*, 817 S.W.2d 443, 445 (Ky. 1991), neither the trial court nor the Court of Appeals reached the superseding cause argument. The appellee, Wooten, who had succeeded at trial and this Court, preserved the issue with the Supreme Court by filing a cross-petition for discretionary review. *Britton*, 817 S.W.2d at 445. If adopting the

It is the judiciary's solemn duty to be as clear as possible when guiding lawyers and their clients with its decisions. *See Regan v. New York*, 349 U.S. 58, 64, 75 S.Ct. 585, 588, 99 L.Ed.2d 883 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs"). Therefore, before making the mistake this Court previously made when we declared the "sudden emergency doctrine" dead, *Regenstreif*, 142 S.W.3d at 3-4, we must carefully examine this Commonwealth's jurisprudence, excluding any dicta, to determine the merits of each of these legal concepts as they are properly presented to us, including the concept of superseding cause as presented to us now.

I do not believe our jurisprudence requires us to conclude that adoption of the comparative fault model necessarily meant an abdication to juries of the courts' responsibility for determining superseding cause, or that superseding cause as a concept has been eroded, or that it has been rendered entirely irrelevant. On the contrary, superseding cause determinations have been, and must remain, reserved to the trial judge because, as Kentucky jurisprudence consistently reveals, it is within the negligence element of "cause" that superseding cause jurisprudence has been the tool by which policy considerations are applied by the courts to limit liability within legally appropriate bounds.

Begin by considering what the United States Supreme Court said.

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. [I]mpos[ing]

comparative fault model had swallowed up superseding cause, this was the best opportunity for the Court to have declared it. But the Court did not.

> responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.

Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266, 112 S.Ct. 1311, 1317 n. 10, 117 L.Ed.2d 532 (1992) (internal quotation marks and citations omitted). Our own Supreme Court acknowledged this understanding of causation in the "so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980) (quoting Restatement (Second) of Torts, § 431, cmt. a), *abrogated on other grounds by Osborne v. Keeney*, __ S.W.3d __, No. 2010-SC-000397-DG, 2012 WL 6634129 (Ky. Dec. 20, 2012) (finality on June 20, 2013). This eternal sequence of events, to which both *Holmes* and *Deutsch* refer, exists irrespective of a jurisdiction's decision to follow comparative fault principles. Because this concept continues to exist, even under the comparative fault model, so too does the need continue for *the law* to draw the line between causation in the philosophic sense and causation in the legal sense and, thereby, to prevent the possibility of "infinite liability [and] endless litigation." *Holmes*, 503 U.S. at 266 n. 10, 112 S.Ct. at 1317.

The authors of the most recent version of the Restatement of Torts do not question that such line drawing *must* occur even under comparative fault.

> No serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required. The difficulties arise in working out the framework for this limit, both between no-duty limitations and scope-of-

> liability limits, and in the form that scope-of-liability rules take.

Restatement (Third) of Torts § 29, cmt. a (2012). And those difficulties have plagued Kentucky jurisprudence just as they have plagued many others. Still, I believe our jurisprudence is clear enough, though admittedly not crystalline, to hold firm to the concept that superseding cause determinations must continue to be made by the court. Return first to *Deutsch*.

Deutsch illustrated how the law, applied by the trial court, applies public policy to set limits on the scope of tort liability, discussing first duty and breach, then shifting to public policy liability limitation in the context of causation.

> The breach of the required standard of care by an actor can produce a result similar to that of a snowball rolling down a hill. The initial consequence of the snowball may be slight. But as the snowball rolls down the hill its increasing size and momentum take on a character of their own which can cause injury of a magnitude far beyond the imagination of the one who set the snowball in motion. Nevertheless, the law is that between the negligent actor and the injured innocent, the innocent should recover compensation, ***unless the law cuts off the expansion of the negligent actor's liability as a matter of public policy. For instance, the law might not, as a matter of policy,*** impose liability where the snowball has roared to the foot of the hill and disintegrated sending several rocks to neighboring peaks to begin the process anew.

Deutsch, 597 S.W.2d at 143 (emphasis added). This illustration is tailor-made to sequential automobile accident cases such as the one before us now.

Deutsch explained more, but never ignored the important role of the law in applying public policy. After describing proximate cause as "a legal term

which defies precise definition, though many have valiantly tried[,]" and after referencing "ineffective test[s] for proximate cause[,]" the Court gave us this definition: "Proximate cause,[8] then, consists of a finding of causation in fact, *i.e.*, substantial cause, *and the absence of a public policy rule of law which prohibits the imposition of liability*." *Id.* at 143-44 (emphasis added).

This language implicates the clear distinction between the role of the judge and the role of the jury in negligence cases. The fault I find in this definition of proximate cause, or more appropriately "cause" as the third element of negligence,[9] is that its sentence structure opens the door to misunderstanding. Defining cause by first stating the jury's role – "finding of causation in fact" – before stating the judge's role – finding "the absence of a public policy rule of law which prohibits the imposition of liability" – reverses the sequence by which "cause" is determined in the courtroom. That is, with rare exception, legal issues are decided *before* giving the case to the jury.

There are at least two possible reasons why the Court in *Deutsch* addressed the jury's role first. The Restatement (Second) of Torts, § 431, half of which describes the substantial factor test on which the court relied, uses the same

[8] Use of the term "proximate cause" here is an illustration of what the authors of the Restatement (Third) of Torts have called "an unfortunate term to employ for . . . the combination of factual cause and scope of liability." Restatement (Third) of Torts § 29, cmt. b (2012). Perhaps a better reading of this sentence from *Deutsch* would be: "The negligence element of 'Cause,' then, consists of a finding of: (1) factual cause, *i.e.*, whether defendant's negligence was a substantial factor in bringing about the plaintiff's injuries, and (2) legal cause, *i.e.*, whether there is a public policy rule of law prohibiting imposition of liability on this defendant." *See Lewis v. B & R Corporation*, 56 S.W.3d 432, 437 (Ky. App. 2001).

[9] See footnote 3.

sequence. Second, and more significantly, the focus of the case was the jury's role in finding whether a physician's conduct was a substantial factor in bringing about the plaintiff's injury. The predicate legal determination whether public policy limited liability, that is, the second half of § 431, simply was not before the court.[10]

If it is fair to say that by inverting this sequence *Deutsch* cracked open the door to misunderstanding the separate roles of the judge and jury, it is also appropriate to note that the door was pushed open even wider by language in a case decided after Kentucky's jurisprudential shift to comparative fault – *NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993).

I believe *NKC Hospitals* unintentionally blurred the line between the judge's role to find (or not find) a particular act to be a superseding cause, and the jury's role to find (or not find) a particular act to be a substantial factor in bringing about the injury. That blurring of the line can be found in a single paragraph in the case that reads as follows:

---

[10] The substantial factor test, consisting of the first half of the definition of "legal cause" contained in the Restatement (Second) of Torts, § 431, was originally embraced in Kentucky in *Claycomb v. Howard*, 493 S.W.2d 714, 718 (Ky. 1973). As *Deutsch* notes, *Claycomb* did not address the "substantive rule of law liability limitation[,]" *i.e.*, superseding cause, and the facts of *Deutsch* itself did not provide the "occasion to decide, that basic causation itself should be treated as a matter of law, leaving the issues of negligence only to the jury." *Deutsch*, 597 S.W.2d at 144. Nevertheless, a lengthy section of dicta in *Deutsch* first quotes the Supreme Court of Wisconsin as stating, "blunt[ly]" but in conformity with § 431, that "public policy considerations are regarded as an element of legal cause, although not a part of the determinations of cause in fact, which this court refers to as 'substantial factor[,]'" then notes that various jurisdictions "couch the public policy considerations in terms of 'forseeability of injury,' 'orbit of risk,' 'zone of danger,' or [like Kentucky] 'intervening and superseding causes[,]'" before concluding, again in dictum, that "[t]he use of 'public policy' in the raw as a liability limitation is a more flexible approach." *Id.* (citations omitted). This is followed by a description of Kentucky's "collective substantive policy rules which limit responsibility for a negligent act" – which we label "superseding cause." *Id.*

> Superseding causation, as such, is never submitted to the jury, [citations omitted], except to the extent that its elements are already incorporated in the comparative fault instructions as simply negligence. Here, the trial court ruled that Dr. Hawkins' negligence was not a superseding cause. Then, the jury found that Dr. Hawkins' negligence was 65% [and NKC Hospitals' negligence was 35%] of the cause of Mrs. Anthony's death. Had the jury found 100% of the cause attributable to Dr. Hawkins, in effect, they would have said Dr. Hawkins' negligence was a superseding cause.

Id. at 569. Breaking down this paragraph illustrates my point.

The paragraph begins with a principle that remains firmly intact in our jurisprudence – "Superseding causation . . . is never submitted to the jury"; of course not, its determination remains solely the province of the trial judge. Skipping the end of that sentence momentarily, we see that *first* "the trial court ruled that Dr. Hawkins' negligence [the undisputed intervening event] was not a superseding cause. *Then*, the jury" was given the case. This, too, presents an axiom – the court must determine whether an intervening event was a superseding cause *before* the jury is given the case. This is all fine guidance, but it is the paragraph's remaining language which blurs the line between judge and jury.

That remaining language insinuates that a jury can make superseding cause determinations just like a judge. But that simply is not true. Returning to the second half of the first sentence, the Court says that sometimes superseding cause "elements are already incorporated in the comparative fault instructions . . . ." *Id.* However, such an instruction does no more than facilitate resolution of any factual dispute whether an intervening act actually occurred. It would be wrong to

interpret the statement that "elements [of superseding causation] are already incorporated in the comparative fault instructions" as delegating superseding cause determination to the jury. How these elements of superseding cause, in fact and in practice, are incorporated in the jury instructions is clearly explained in *House v. Kellerman*:

> Only when (1) an act which is claimed to have taken place would be a superseding cause as a matter of law, and (2) there is an issue of fact as to whether it happened, should there be an instruction mentioning it, and that instruction should tell the jury in substance that unless it believes from the evidence that it did not happen it shall find for the defendant, this form being essential in order to keep the burden of proof on the plaintiff.

House, 519 S.W.2d at 383. Incidentally, this explanation of the role of judge and jury, unlike the description in *Deutsch*, gets the sequence right.

But the real problem, the real invitation to say that juries can make superseding cause determinations, is in the last phrase of the paragraph, which may be correct in some sense, but is entirely misleading.

After the trial judge in *NKC Hospitals* made the determination, as a matter of law, that Dr. Hawkins' negligence did not supersede the negligence of NKC Hospitals (and consequently did not absolve NKC Hospitals of liability), the case was submitted to the jury which apportioned fault, as a matter of *fact*, between Dr. Hawkins (65%) and NKC Hospitals (35%). The Court then said, improvidently in my opinion, that

> [h]ad the jury found 100% of the cause attributable to Dr. Hawkins, *in effect*, they would have said Dr. Hawkins' negligence was a *superseding cause*.

NKC Hospitals at 569 (emphasis added). And that is where the Court invited confusion.

True, some may consider the practical *effect* of a jury's apportionment of 0% to one defendant equivalent to the judge's finding that another defendant's negligence was a superseding cause, but is it really the same thing?[11] It is not if we are intellectually honest in the application of our jurisprudence which, I believe, would compel us to read this last sentence as though it *actually* says this:

> Had the jury found 100% of the cause attributable to Dr. Hawkins they would have said NKC Hospitals' negligence was *not a substantial factor*.

Substantial factor determination is exclusively within the province of the jury; superseding cause determination is exclusively within the province of the judge. *Miller ex rel. Monticello Baking Co. v. Marymount Medical Center*, 125 S.W.3d 274, 287 (Ky. 2004) ("Whether an intervening event is a superseding cause is a legal issue[.]"). Substantial factor and superseding cause simply are not the same either in fact, or in effect, and we should not equate them in any way.

So, must our jurisprudence tip its hat to the Restatement (Third) of Torts on this point, or even its repetition in *Babbitt* that "the rationale for the doctrine of superseding cause has been substantially diminished by the adoption of

[11] It is not being hypertechnical to note that, for lawyers and parties obligated to pay them, the results are *not* the same, even in a practical sense. The defendant who has been found not liable because an undisputed intervening event was deemed a superseding cause does not have to endure a full trial. Not so for the defendant whose comparative fault is found by a jury to be 0%.

comparative negligence"? *Babbitt*, 172 S.W.3d at 793. I think not. As touched upon in footnote 6 and discussed *infra*, Professor Leibson correctly labels that statement as mere dicta which, if followed, would point Kentucky jurisprudence in a direction it has never gone.

It should be clear: Kentucky has not abandoned the traditional approach to negligence-based causes of action. As recently as 2009, our Supreme Court reaffirmed that "we remain committed to the longstanding tort principle that liability based upon negligence is premised upon the traditional prerequisites, such as proximate cause and foreseeability." *Morgan v. Scott*, 291 S.W.3d 622, 631 (Ky. 2009). Again this past September, our Supreme Court reaffirmed that Kentucky analyzes negligence claims traditionally. *Wright v. House of Imports, Inc.*, 381 S.W.3d 201, 213 (Ky. 2012) ("A common law negligence claim requires proof of (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury.").

Contrary to Kentucky's approach, "[t]he Restatement [(Second) of Torts] does not follow the traditional analysis for proximate cause." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 437 fn13 (Ky. App. 2001). To be sure, "Kentucky courts have not fully embraced the Restatement (Second) approach to causation analysis." *Id*. "In fact, the Restatement Second, Torts § 281, in stating the elements of a negligence action does not use the term 'duty,' but rather states this element in language which requires a finding that 'the interest (of the plaintiff)

invaded is protected against unintentional invasion' by the defendant." Liebson, Tort Law § 10:3 fn1.

If Professor Liebson, and this Court in *Lewis*, and the Supreme Court in *Morgan* and *Wright*, are correct, that we have yet to abandon our traditional approach to negligence for the new paradigm of the Second Restatement, why would we jump even further ahead and embrace concepts promoted, for the first time in earnest, in the Third Restatement?[12] Without clear directive from our own justices, this Court should not be inclined to make that leap. And if our Supreme Court decides to do so, the leap must be taken with that Court's eyes wide open, and then decisively and with clarity.

My concurrence with the majority is without reservation. However, the recent, factually similar opinion in *Cefalu v. Continental Western Ins. Co*., 703 N.W.2d 743 (Wis. App. 2005), is worthy of consideration by Kentucky courts handling future cases of this type.

In *Cefalu*, like our case, there were two accidents. The first accident involved a single vehicle – a truck rollover. In the second accident, the plaintiff-appellant was driving her vehicle when she was struck by a third vehicle.

[12] Authors of the Restatement (Third) of Torts have effectively acknowledged it was a mistake for the First and Second Restatements to have infected most if not all jurisdictions' jurisprudence with poorly described (at least poorly understood) concepts such as proximate cause and substantial factor. Restatement (Third) of Torts, § 29 cmt b (2012) ("the term 'proximate cause' is a poor one to describe limits on the scope of liability. It is also an unfortunate term to employ for factual cause or the combination of factual cause and scope of liability."); *id.* cmt a ("The 'substantial factor' requirement for legal cause in the Second Restatement of Torts has often been understood to address proximate cause, although that was not intended. Because the rules in this Chapter address the grounds for limiting liability with greater precision than the substantial-factor standard, this Restatement does not use that term.").

Applying the superseding cause doctrine, the trial court ruled that "the rollover accident was not a cause-in-fact of Cefalu's injuries and that public policy considerations militated against imposing liability" on the driver involved in the rollover. *Cefalu*, 703 N.W.2d at 770. I believe the Wisconsin opinion is entirely consistent with Kentucky jurisprudence, including, sadly, the confusion of the roles of judge (public policy determinations first) and jury (cause-in-fact determinations second), and much of the analysis can be applied to the case before us now.

Specifically addressing the public policy considerations inherent in a court's superseding cause determination, the Wisconsin court had this to say:

> [A] court still may deny recovery after addressing public policy considerations. The public policy considerations that a court applies to decide if it should preclude liability are: (1) the injury is too remote from the negligence, (2) the injury is too wholly out of proportion to the tortfeasor's culpability, (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm, (4) allowing recovery would place too unreasonable a burden on the tortfeasor, (5) allowing recovery would be too likely to open the way for fraudulent claims, or (6) allowing recovery would enter a field that has no sensible or just stopping point. These considerations are addressed on a case-by-case basis.
>
> . . . .
>
> Even were negligence [of the rollover vehicle driver] a cause-in-fact of the [second] accident, we would still refuse to impose liability on [the rollover vehicle driver] on grounds of public policy because Cefalu's injuries were too remote . . . and allowance of recovery would enter into a field that has no sensible or just stopping point. . . .

> While it may have been foreseeable that [the first driver's] act of overturning his truck and spilling his load of limestone would have necessitated the assistance of emergency vehicles and personnel, we cannot agree that it was a normal consequence . . . for other drivers to then become involved in an accident [elsewhere].
>
> . . . .
>
> If we accept [appellant's] position, then every tortfeasor who causes an initial accident is liable for damages resulting from a second accident even after emergency personnel respond and secure the area. This becomes apparent when we consider the [following] hypotheticals: Would a "rubbernecker" who collides with a vehicle in front of him or her while viewing the original accident have a claim against the tortfeasor who caused the original accident? Would a pedestrian who crosses the street on a "don't walk" sign because he or she is watching emergency personnel and is hit by a car have a claim against the tortfeasor who caused the original accident? As these hypotheticals demonstrate, if liability attaches in this case, we would have no clear or obvious guideposts for the cessation of liability. We would
>
> inappropriately enter a field that has no just or sensible stopping point.

Cefalu, 703 N.W.2d at 774-82.

To these hypotheticals, I would add others appropriate to ponder in this case. Must the jury decide whether Cornett would be liable if Cadle was killed when the driver who struck her was distracted by the mere radio news report of Cornett's accident? Must the jury decide whether Cornett was liable for injuries resulting from a third accident brought about by yet another driver observing the second accident? And so on indefinitely? If the dissent is correct, wouldn't each of these

hypothetical causes of action reach the jury? I am afraid that is the logical extension of the dissent's reasoning, and I cannot agree. The court, that is the judge, must retain the ability to cut off liability and I believe our established superseding-cause jurisprudence provides the means and the guidance to do so, even in the era of comparative fault.

For these reasons, I concur with the majority that the circuit court's grant of summary judgment in favor of Cornett should be affirmed.

NICKELL, JUDGE, DISSENTING: Respectfully, I dissent. In this wrongful death action, the trial court erred in granting summary judgment because genuine issues of material fact existed with respect to Cornett's liability for the death and injuries suffered by the Cadles. Clearly, Cornett deviated from the applicable standard of care when she fell asleep at the wheel while driving on an interstate highway. The question remained as to whether Cornett's deviation represented a substantial factor in, or a proximate cause of, the subsequent events that led to the death and injuries sustained by the Cadles.

In Kentucky, proximate cause is a mixed question of law and fact, consisting of the two separate, but not mutually exclusive, legal concepts of cause and effect and legal cause. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). Cause and effect requires that an act must induce an accident which otherwise would not have occurred; that is, the alleged injury would not have resulted "but for" the defendant's conduct. *Gerebenics v. Gaillard*, 338 S.W.2d 216, 219 (Ky. 1960). Legal cause or proximate cause, requires that a tortfeasor's

conduct be a "substantial factor" in bringing about the plaintiff's injury, *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497, 499 (Ky. App. 1999), and may involve consideration of additional concepts, including "foreseeability" and "intervening" and "superseding" causes, *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980). A "superseding" cause has been defined as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Donegan*, at 958. Though a superseding cause is an intervening independent force, an intervening independent force is not necessarily a superseding cause. If the resultant injury is reasonably foreseeable by the original actor, then the other factors causing to bring about the injury are not a superseding cause. *NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993). Our Supreme Court has recognized that the adoption of, and strict adherence to, the doctrine of pure comparative fault has substantially diminished the rationale for the doctrine of superseding cause, stating:

> the advent of more refined tools for apportionment of liability—comparative responsibility, comparative contribution and substantial modification of joint and several liability—also has undermined one important rationale for these rules: the use of scope of liability to prevent a modestly negligent tortfeasor from being held liable for the entirety of another's harm when the tortious acts of other, more culpable persons were also a cause of the harm.

Commonwealth, Transp. Cabinet, Dept. of Highways v. Babbitt, 172 S.W.3d 786, 793 (Ky. 2005) (internal citations omitted).

In the present case, Cornett negligently fell asleep at the wheel while driving on a heavily travelled interstate highway. As a result, she lost control of her vehicle, causing it to traverse into the median, necessitating assistance from first responders, and resulting in traffic becoming significantly backed-up on a major interstate highway. Some moments later, while Cornett's accident scene was being cleared by the first responders, a tractor trailer truck slammed into the back of the Cadles' vehicle which had stopped with the stalled traffic on the interstate highway.

My reading of recent Kentucky Supreme Court decisions compels me to conclude a jury should be given the opportunity to determine whether Cornett's antecedent conduct was not so remote as to excuse liability, if any. However, given the divergent views expressed in the majority opinion, concurring opinion, and this dissenting opinion, our Kentucky Supreme Court might wish to avail itself of this opportunity to clarify its position regarding the validity of the superseding cause doctrine in light of our adoption of pure comparative fault.

A jury, acting in its role as fact-finder, could reasonably conclude under the facts before us that Cornett's negligence, combined with the negligence of others, caused the Cadles' wreck and resulting death and injuries. A jury might also conclude that Cornett's negligence had not "spent itself" because the dangerous highway situation it initiated persisted and had spread to the site of the Cadles' collision. *Donegan*, at 957. Indeed, a jury might reasonably find that "but for" Cornett's negligence in falling asleep at the wheel, the circumstances leading

to Cadles' collision would not have been set in motion, and that the hazardous situation in which the Cadles had been placed and the ensuing wreck, death and injuries were foreseeable consequences of Cornett's negligence. If so, comparative fault would allow a jury to weigh Cornett's negligence against the negligence of others and to apportion liability, if any, only for that percentage of the total harm for which the jury might conclude Cornett to be responsible.

In the analogous case of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), the Supreme Court of Kentucky held that another long-standing substantive tort principle—the open and notorious doctrine in premises liability cases—had diminished importance and effect in the age of pure comparative fault. While not wholly overruling open and notorious principles, the Supreme Court deferred judgment on those issues to the jury in its fault calculus, stating "the incompatibility between the open and notorious doctrine as an absolute, automatic bar to recovery and comparative fault is great." *Id* at 391. The incompatibility between the superseding cause doctrine and comparative fault is no less, and courts should now recognize that reality.

The majority's reliance upon *Donegan*, which can be distinguished on its facts and was decided prior to Kentucky's adoption of comparative fault in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), and KRS 411.182, is misplaced. The principles subsequently espoused in *Babbitt* would strongly caution against judicial, rather than jury, resolution of proximate cause questions such as those presented by the facts of this case. *Babbitt*, together with *Pile*, point to the

significantly diminished importance of the superseding cause doctrine following Kentucky's adoption of pure comparative fault. The clear trend is toward jury resolution of issues involving the relative fault of parties and other extrinsic factors which contributed to the ultimate results of the parties' course of conduct in a given instance. Because genuine issues of material fact remained with respect to whether Cornett was liable for the death and injuries suffered by the Cadles, the trial court erred in holding Cornett's negligence was excused as a matter of law pursuant to the superseding cause doctrine and in granting summary judgment. Therefore, its decision should be reversed, and the matter should be remanded for disposition by a jury.

BRIEF FOR APPELLANTS:

Joseph C. Klausing
Benjamin J. Weigel
Louisville, Kentucky

BRIEF FOR APPELLEE, WILMA CORNETT:

James P. Dilbeck
Louisville, Kentucky

BRIEF FOR APPELLEE, ALLSTATE INSURANCE COMPANY:

Wm. Clifton Travis
John E. Hamlet
Louisville, Kentucky