Imagine a scenario where a cleaning company hires a man to work as a nighttime janitor at your local big box store. Sometime later, the newly hired janitor assaults and kills the only big box store employee who was working inside the store at the same time. After this tragedy occurs, the cleaning company learns the janitor it recently hired had a long history of violence-related convictions. The victim’s family then comes to you, seeking legal advice. What civil options are available to the victim’s family and estate?

The above facts are premised on those in Oakley v. FlorShin, the first Kentucky case recognizing the tort of negligent hiring. Negligent hiring, training, supervision or retention claims differ from vicarious liability/respondeat superior claims; in negligent hiring cases, the focus is on whether the employer’s failure to use reasonable care in selecting an employee placed a third party at risk, whereas in vicarious liability/respondeat superior cases, the plaintiff (again, a third party) is attempting to hold the employer liable for torts committed within the course and scope of the employee’s employment.

The Employer’s Duty to Exercise Reasonable Care

“Kentucky courts recognize a ‘universal duty’ of care under which ‘every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.’” In other words, every person must use ordinary care to ensure his or her conduct does not injure other people.

It is long-standing Kentucky law that business owners must exercise ordinary care to protect their customers from injury. That means employers have a duty to use ordinary care when hiring or retaining employees. In negligent hiring/retention claims, an employer can only be held liable if it failed to exercise reasonable care when selecting or retaining employees. Moreover, an employer can only be held liable for negligent hiring/retention for an employee’s intentional torts if (1) the employer knew or reasonably should have known that the employee was unfit for the job for which he or she was employed, and (2) the employee’s placement or retention at that job created an unreasonable risk of harm.

Generally, “An actor whose conduct has not created a risk of harm has no duty to control the conduct of a third person to prevent him from causing harm to another.” A duty can, however, arise to exercise reasonable care where “(a) a special relation exists between the actor and the third person, which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.”

In Grand Aerie Fraternal Order of Eagles v. Carneyhan, the Kentucky Supreme Court explained: [A] defendant’s ability to control the person who caused the harm must be real and not fictional and, if exercised, would meaningfully reduce the risk of the harm that actually occurred. Special relationships involving entities in charge of a person with dangerous propensities are illustrative of what is necessary for a special relationship: courts of other jurisdictions have required a substantial degree of control. See, Div. of Corr. v. Neakok, 721 P.2d at 1126 (parolee remained subject to state control where state could impose special conditions of parole tailored to prevent foreseeable harm and enforce such conditions with threat of parole revocation); Taggart v. State, 118 Wash.2d 195, 822 P.2d 243, 255 (1992) (same conclusion where parole officers could supervise parolees to ensure compliance with terms of parole, and where parole could be revoked upon noncompliance . . .

Judicially imposed limitations on special relationships between employers and employees are highly illuminating as to the degree of ability to control sufficient to give rise to a duty of reasonable care in the exercise of control. The Second Restatement provides that a special relationship exists between master and servant only if the servant is using an
instrumentality of the employment relationship to cause harm, i.e., either the master’s chattel or premises entered by virtue of the employment relationship. Restatement (Second) of Torts § 317 (1965). The proposed Third Restatement puts this requirement more succinctly: “Special relationships giving rise to the duty provided in [§ 41(a)] include: ... (3) an employer with employees when the employment facilitates the employee’s causing harm to third parties.” Restatement (Third) of Torts: Liability for Physical Harm § 41(b)(3) (Proposed Final Draft No. 1, 2005) (emphasis added). See, also, Marusa v. Dist. of Columbia, 484 F.2d 828, 831 (D.C. Cir. 1973) (city had duty of reasonable care in training and supervision of police officer who caused off-duty injury with service revolver); Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 (Minn. 1983) (apartment owner had duty to exercise reasonable care in hiring employee who later used passkey issued by apartment owner to rape tenant); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419, 422 (1947) (city had duty of reasonable care in retention of police officer who, while off-duty, shot and killed plaintiff’s decedent with service revolver); Hutchison ex rel. Hutchison v. Luddy, 560 Pa. 51, 742 A.2d 1052, 1060 (1999) (evidence sufficient to support negligent supervision and retention claim against employer where employee used his status as such to enter minor’s motel room where sexual abuse occurred). Again, the common thread through the above-described employment relationships is that the employer has a real means of control over the employee, which, if exercised, would meaningfully reduce the risk of harm. See, Weaver v. African Methodist Episcopal Church, Inc., 54 S.W.3d 575, 582–83 (Mo. Ct. App. 2001) (“Such limitations serve to restrict the master’s liability for a servant’s

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purely personal conduct which has no relationship to the servant’s employment and the master’s ability to control the servant’s conduct or prevent harm.”).10

In Carberry v. Golden Hawk Transp. Co., Inc., the Court of Appeals held there is no common law duty imposed upon employers requiring them to perform criminal background checks of all people they intend to hire.11 The Carberry court further stated employers have no common law duty to further investigate candidates’ backgrounds where there are no “red flags,” which should cause employers to question what otherwise appear to be complete job applications.12 That is because “a potential employer must have a modicum of faith and trust in a job applicant.” The Carberry decision does not address employers’ contractual obligations to perform criminal background checks on prospective employers, or what an employer should do when “red flags” appear on a person’s application.

In Kendall v. Godfrey, the Court of Appeals modified the above rule, and concluded that common carriers had a duty to perform background checks on their employees. In reaching its holding, the Court of Appeals noted that common carriers, including taxis, are required to use the “highest degree of care for the safety of its passengers.”13 Moreover, Kentucky courts interpreted “highest degree of care” to “‘mean[ ] the utmost care exercised by prudent and skillful persons in the operation of the conveyance.’”14 Note however, although common carriers have higher standards of care when hiring or retaining employees, they are not strictly liable for torts committed by their employees. “Although a carrier must exercise the highest degree of care for its passengers, it is not an insurer of their safety.”15 On the other hand:

It is the rule in this state, and the almost universal rule, that a carrier is liable for assaults committed on passengers by its employees whether the assault is in the supposed interest and discharge of a supposed duty to the carrier or was merely that of an individual motivated by conceptions of personal wrong and entirely disconnected with the performance of a duty.16

Breach and Foreseeability

In Ten Broeck Dupont, Inc. v. Brooks, the Kentucky Supreme Court stated, “[i] any case in which [an employer] faces liability for the criminal actions of a third party, the focus must necessarily be on whether the criminal activity was foreseeable.”17 Therefore, “absent foreseeability, no duty, the breach of which entails liability, could arise.”18

In Pathways, Inc. v. Hammons,19 the Kentucky Supreme Court stated, “As a concept, foreseeability defies easy definition.” The Pathways court, however, explained:

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.” Restatement (Second) of Torts § 289(a) (emphasis added); see, also, Mitchell v. Hadl, Ky., 816 S.W.2d 183, 186 (1991). (Holding that liability for negligence is based on what the defendant was aware of at the time of the alleged negligent act and not on what the defendant should have known in hindsight.) The term “knowledge of pertinent matters” is explained by Restatement (Second) of Torts § 290, which states:

For the purpose of determining whether the actor should recognize that his conduct involves a risk, he is required to know (a) the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community; and (b) the common law, legislative enactments, and general customs in so far as they are likely to affect the conduct of the other or third persons.20

In Shelton v. Ky. Easter Seals Soc., Inc.,21 the Kentucky Supreme Court held, “[T]he foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis. In doing so, the foreseeability of harm becomes a factor to determine what was required by the defendant in fulfilling the applicable standard of care.” The Shelton court further explained, “[T] he question of foreseeability and its relation to the unreasonable nature of the risk of harm is properly categorized as a
factual one, rather than a legal one. This correctly 'examines the defendant’s conduct, not in terms of whether it had a 'duty' to take particular actions, but instead in terms of whether its conduct breached its duty to exercise reasonable care.'

Several applicable Kentucky cases discuss whether a negligent hiring plaintiff’s injuries were foreseeable. In Z.A., a minor by his Next Friend, S.A. v. City of Louisville, the plaintiff, a minor, sued the City of Louisville for negligent hiring and supervision after a part-time library employee sexually molested him at the Iroquois Branch of the Louisville Free Public Library. The plaintiff claimed the employee’s actions were foreseeable because, a few weeks earlier, the employee had been caught projecting graphic material from his computer through the computer lab’s overhead projector. At the close of discovery, the City moved for Summary Judgment, arguing the employee’s sexual assault was unforeseeable. The trial court denied the City’s motion, stating, “The picture of the obese lady’s naked bottom in the pool does, albeit to a minimal degree, tend [sic] to be sexual in nature and could be seen as a reasonably foreseeable beginning of a future sexual assault by [the employee]. Thus, the Court [did] not believe Summary Judgment [was] appropriate…” The case then proceeded to trial, and at the close of the plaintiff’s case, the City moved for a Directed Verdict. The trial court granted the City’s motion, deciding, “that Z.A. failed to establish the notice, or foreseeability, issue, so that he also failed in his negligent supervision and retention claim.” Z.A. subsequently appealed.

In affirming the trial court’s granting of the Directed Verdict, the Court of Appeals stated:

In order to establish that the City owed him a duty, Z.A. must prove that Donovan’s sexual assault was foreseeable. We must hold that it was not.

Z.A. rests his argument that the sexual assault was foreseeable on the report of Donovan showing inappropriate pictures in the lab three weeks before the assault took place. Z.A. argues that the picture of the woman in the pool provided the necessary basis for foreseeability. The trial court wrestled with the foreseeability element during the summary judgment stage and during trial, ultimately determining that Z.A. had failed to establish this element. The question of duty, as we have discussed, is a question of law, subject to de novo review. We are constrained to agree with the trial court, as well as the City, that there is just not enough of a connection between the showing of the picture, as inappropriate as it was, and the later sexual assault to establish this element of foreseeability. The staff at the Library could not have reasonably known that Donovan would sexually assault Z.A. based upon the showing of the inappropriate picture. Z.A.’s general premises liability claim must also fail because the City could not have reasonably known that Donovan would later sexually assault a visitor to the Library. Because Z.A. cannot establish that the City owed him a duty of care, his negligence claims must fail, and the circuit court properly granted a directed verdict in the City's favor.

In 2015, the Court of Appeals decided Hall v. Goss Ave. Antiques and Interiors. There, a custodian who worked at a local antique mall attacked the plaintiff, who was a customer. The antique mall moved for Summary Judgment on the plaintiff’s negligent hiring claim, arguing (1) the custodian was an independent contractor, and not its employee; (2) the custodian’s attack was unforeseeable; and (3) the work the custodian was performing at the antique mall did not place other employees or members of the general public at risk. The case proceeded to trial because the court determined a genuine issue of material fact existed as to whether the custodian’s attack was foreseeable. At the close of trial, the jury determined the antique mall was not the custodian’s employer, and thus, the antique mall could not be held liable for negligent hiring. After the verdict, the parties filed cross-appeals. The antique mall argued the trial court erred by failing to grant its Summary Judgment motion on the plaintiff’s negligent hiring and retention claim. The antique mall also argued the trial court’s jury instructions regarding whether the custodian was the mall’s “employee,” “agent” or “instrumentality” were erroneous.

In rejecting the mall’s argument that the trial court erred when denying the Summary Judgment motion, the Court of Appeals stated, “[T]he trial court was correct in denying the motion for summary judgment. Whether [the custodian] was an employee of [the antique mall] was disputed as well as whether the altercation was foreseeable.” In reaching that determination, the Court of Appeals cited Shelton, supra, for the proposition that juries should decide whether a plaintiff’s injuries are foreseeable in order to

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determine what actions the defendant needs to take to comport with the applicable standard of care.31

Do I Need An Expert? What Kind of Expert?

In virtually all negligent hiring cases, the plaintiff needs to introduce testimony from a hiring expert to establish the applicable standard(s) of care and explain how the defendant employer’s actions violated them. There are many sources to locate hiring experts. I personally prefer to retain a negligent hiring expert who is a member of professional organizations, and who has written extensively about appropriate measures to take when investigating prospective employees’ backgrounds. For example, ASIS International,32 a worldwide association of safety and security professionals, published a “Preemployment Background Screening Guideline” in 2009. That guideline’s purpose is to aid employers in understanding and implementing the fundamental concepts, methodologies and related legal issues associated with the preemployment screening of job applicants.” The first several pages of ASIS’ Preemployment Background Screening Guideline provide the names of the dozens of security professionals who helped draft and revise it. The people listed on those pages are a good place to start. Similarly, searching “background check” on Amazon.com reveals that several books exist about the appropriate way to investigate job applicants’ backgrounds. Contacting those books’ authors is another way to locate a potential hiring expert.

Now that you started searching for a hiring standard of care expert, do you need a causation expert? In Pathways, supra, the Kentucky Supreme Court stated, “[L]egal causation . . . presents a mixed question of law and fact.”33 In Stathers v. Garrard County Bd. of Education,34 our Court of Appeals stated that plaintiffs in virtually all negligence cases, save medical negligence cases, need not introduce expert testimony to establish causation. Moreover, in Deutsch v. Shein,35 the Kentucky Supreme Court adopted the “substantial factor test” for causation, as set forth in § 431 of the Restatement (Second) of Torts, entitled “What Constitutes Legal Cause.” Comment (a) to § 431 explains what is meant by a “substantial factor”:

In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff’s harm. The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

In other words, a “danger is foreseeable if its general character might be reasonably anticipated, if not its precise manner.”36

Based upon the above, in negligent hiring cases where an employee’s criminal conduct injures an innocent third, I recommend retaining a criminologist to address whether the criminal conduct causing the plaintiff’s injuries was foreseeable. Criminologists are social scientists who study the nature, extent, management, causes, control and prevention of criminal behavior. Criminologists look at relevant information, including but not limited to, the results of any criminal background checks performed as to the actor and the court files from the actor’s criminal convictions. As discussed above, plaintiffs are not required to introduce expert testimony regarding causation; it, however, would be prudent for anyone handling a negligent hiring case involving criminal conduct to consult with, if not disclose, a criminology expert. A criminologist has the requisite education, training and experience to determine and opine to a jury whether it was reasonably foreseeable the actor would commit a crime while in the defendant’s employ.

Can an Employee’s Criminal Conduct be a Superseding Cause?

Although no Kentucky state or federal appellate has addressed this specific issue, it is reasonable to believe Kentucky will follow the majority rule—an actor’s criminal conduct will not relieve a negligent employer from liability for an innocent third party’s injuries and damages.

In Britton v. Wooten,37 our Supreme Court stated the premise that a third party’s criminal acts prevents the originally negligent party from being held liable is “archaic” and “has been rejected everywhere.” Subsequently, in NKC Hospitals, Inc. v. Anthony, the
Supreme Court explained:
A superseding cause is an intervening independent force; however, an intervening cause is not necessarily a superseding cause. We say that, if the resultant injury is reasonably foreseeable from the view of the original actor, then the other factors causing to bring about the injury are not a superseding cause. Such train of thought is in keeping with Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980). Deutsch established: “Liability for a negligent act follows a finding of proximate or legal cause,” which is conduct based on a substantial factor in bringing about the harm. Deutsch relied on The Restatement of Torts, Second, § 431.38

The Anthony court held a superseding cause, which absolves the original negligent actor from liability, possesses the following attributes:
1. An act or event that intervenes between the original act and the injury
2. The intervening act or event must be of independent origin, unassociated with the original act
3. The intervening act or event must, itself, be capable of bringing about the injury
4. The intervening act or event must not have been reasonably foreseeable by the original actor
5. The intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or the second party plaintiff] or the intervention of a natural force
6. The original act must, in itself, be a substantial factor in causing the injury, not a remote cause.

As stated above, no Kentucky court has addressed whether an actor's criminal conduct is a superseding cause, thereby absolving the originally negligent party from liability. Many other jurisdictions, however, tackled this very issue. For example, in Potticas, supra, the Minnesota Supreme Court expressly stated, “The inherent nature of a negligent hiring cause of action precludes the application of superseding intervening cause.”40 That is because “in negligent hiring cases, the alleged intervening cause [i.e., the actor's criminal conduct] was created by the [defendant employer's] original negligence.”41 In other words, an employee/actor's criminal conduct, which causes harm to the innocent third party plaintiff, is not independent from the defendant employer's previous negligent actions in hiring and placing the unreasonably dangerous employee/actor.

The final consideration when examining a potential negligent hiring suit is whether to name as a defendant the bad actor whose conduct injured the innocent third party plaintiff. Note that in cases where the bad actor’s actions are criminal in nature, namely either assault or battery, you need not name the actor. In Brooks, supra, the Kentucky Supreme Court held that negligence and assault and battery claims are mutually exclusive.42 On the other hand, if the bad actor’s actions were negligent in nature, you may want to consider adding him or her as a defendant if the actor has assets or an insurance policy covering the negligent actions or behaviors.
able to push my spouse out of the way” or “I should have kept my eye on my spouse.” Mental health professionals tell you that thoughts about the ability to control life and death are much more PTSD-focused than grief-focused. Another major difference between grief and PTSD is the emotional focus. In grief, you can still feel love for everyone, so if your mother dies, you can still love your spouse and children, despite grieving horrifically for the loss of your mother. In PTSD, there is a restricted affect where the person has an inability to connect with others and a lack a desire to see or share with other people.

In jurisdictions where a consortium claim is derivative of the bodily injury claim or wrongful death, a claim for NIED is a separate and distinct cause of action. Make sure to obtain a copy of the liability and underinsured/uninsured motorist policies to see if you can make an argument that separate coverage should be afforded by NIED.

What Can We Do?

When your clients experience a significant injury, witness a serious injury, witness a death or learn about the death of someone close, take time to ask some questions and get more information. Follow up with them 30 days after experiencing the trauma and ask the same questions to see if their problems or symptoms persist. Recommend they talk to their family doctor about getting a referral to a mental health professional for evaluation and possible counseling. Recommend that your clients see a psychologist or psychiatrist. Have your clients evaluated by a mental health expert for potential PTSD and if your client is diagnosed with this condition, the mental health expert will either agree to treat your client or refer him or her to someone who can offer evidenced-based treatment or cognitive processing therapy.

The most important thing you can do is recognize the emotional and mental pain your client is experiencing and try to get him or her help under the care of a qualified mental health professional.

— Jay R. Vaughn, Contributing Club practice with Schachter, Hendy & Johnson, P.S.C. He focuses his practice on personal injury, automobile and large truck collisions, wrongful death and nursing home neglect cases.

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26 Id. at *3.
27 Id. at 4 (emphasis added).
29 Id. at *1.
30 Id.
31 Id. at *8 (citing Shelton, supra, 413 S.W.3d at 914).
33 113 S.W.3d at 89 (citing Deutsch v. Shein, 597 S.W.2d 141, 145 (1980)).
35 597 S.W.2d 141, 143-44 (Ky. 1980).
36 Barton v. Whataburger, Inc., 276 S.W.3d 456, 461 (Tex. App. 2008) (citing Travis v. City of Mesquite, 830 S.W.2d 94, 98 (Tex. 1992); Nixon v. Mr. Prop. Mgmt. Co., Inc., 690 S.W.2d 546, 551 (Tex. 1985)). See, also, Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 915 (Minn. 1983) “For negligence to be the proximate cause of an injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.”
37 817 S.W.2d 443, 449 (Ky. 1991).
38 849 S.W.2d 564, 568 (Ky. 1993).
39 Id.
40 331 N.W.2d at 915.
41 Id. at 916. See, also, McLean v. Kirby Co., a Div. of Scott Fetzer Co., 490 N.W.2d 229, 242-43 (N.D. 1992); Cf., Wood v. Safeway, Inc., 121 Nev. 724, 739-41 (2005), where the Nevada Supreme Court held the actor’s criminal conduct was a superseding cause, as it was unforeseeable. There, the defendant employer required proof of identification and checked employment references before hiring the bad actor, the actor had no past criminal record, and the employer had never received any complaints about the actor’s conduct.
42 283 S.W.3d at 732-33.