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VIOLATION OF A MUNICIPAL ORDINANCE AS NEGLIGENCE PER SE IN KENTUCKY

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While in a number of jurisdictions an infraction of a statute or ordinance is considered to be only evidence of negligence,[1] the prevailing rule is that an unexcused violation is negligence as a matter of law The cases in Kentucky are in accord with the latter holding and are in substantial agreement with the rule approved by the American Law Institute.[2] Under this view a violation of a statute or ordinance is negligence *per se* if the enactment is designed to protect members of a class from a par ticular hazard,[3] if the person injured belongs to the class protected, and the injury is the type that the statute is designed to protect.[4] The violation complained of must be the proximate cause of the injury,[5] and the injured party is required to be free of contributory negligence.[6]

A failure to properly determine the above limitations frequently leads to fruitless litigation, aptly demonstrated in the case of *L. & N Ry. Co.* v *Sloan.*[7] In an action against the railroad, the plaintiff, alleging that he was injured when a cinder from a locomotive blew into his eye, claimed that the defendant was guilty of negligence *per se* in not having a spark arrester on its engine as required by statute. Affirming a judgment for the defendant, the Court of Appeals noted that the purpose of the legislature in enacting the statute in question was to eliminate the hazard of fire to adjoining property caused by large cinders escaping from smokestacks of engines. The court reasoned that if the spark arrester had been functioning the chance of harm

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[1] PROSSER, TORTS 275 (1941).

Restatement, Torts sec. 286 (1934)

[3] Wigginton & Sweeney v. Bruce, 174 Ky 691, 192 S.W 850 (1917) Sutton's Adm'r v. Wood, 120 Ky. 23, 85 S.W 201 (1905).

[4] Hackney v Fordson Coal Co., 230 Ky 362, 19 S.W 2d 989 (1929).

Brown Hotel v. Levitt, 306 Ky. 804, 209 S.W 2d 70 (1948), Phillips v. Scott, 254 Ky. 340, 71 S.W 2d 662 (1934), Conway v L. & N. Ry. Co., 135 Ky 229, 119 S.W 206 (1909)

[6] Murphy v Homans, 286 Ky 191, 150 S.W 2d 14 (1940).

[7] 287 Ky 663, 155 S.W 2d 231 (1941).

to the plaintiff would have been increased rather than diminished, since the arrester breaks large cinders into particles small enough to enter the eye. The court concluded that the violation of the statute was not the proximate cause of the injury It may be observed that the plaintiff was not a member of the protected class, nor was the injury of the type the statute was designed to prevent.

While it has been urged that there was no basis in the Common Law for giving civil remedies to private persons for injuries sustained through another's violation of a public statute,[8] no such uncertainty exists in Kentucky, for the doctrine of negligence *per se* has been given legislative approval. The appropriate section of the Revised Statutes reads as follows, "A person injured by the violation of any statute may recover from the offender such damage as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."[9]

Construing the foregoing section, the Court of Appeals in *Hackney* v *Fordson Coal Co.*,[10] declared "Section 466 of the statutes was passed to remove any doubt that might arise as to the right of a person for whose protection a statute was passed, to recover for a violation of that statute, where the statute was penal in nature, or where by its terms the statute did not prescribe the remedy for its enforcement."[11]

The legislature in enacting safety and welfare measures frequently establishes a standard of conduct in addition to that imposed by the Common Law, and a breach of the legislative standard will be a violation to the rights of those it was intended to protect. On the other hand the statutory duty is not exclusive, in that the actor must also exercise due care as defined by the Common Law [12] One injured by another's infraction of a statute may recover damages, although the statute itself imposed no penalty for the violation.[13]

It must be remembered that many statutes are passed for

[8] PROSSER, *op. cit. supra* note 1 at 265.
[9] KY. R. S. sec. 446.070 (1948)
[10] 230 Ky. 362, 19 S.W 2d 989 (1929)
[11] Andricus Adm'r v Pineville Coal Co., 121 Ky 724, 90 S.W 233 (1906).
[12] Prichard v Collins, 228 Ky. 635, 15 S.W 2d 497 (1929)
[13] L. & N. Ry Co. v. Cooper, 164 Ky 489, 175 S.W 1034 (1915)

the benefit of the public generally rather than for the protection of a particular class, and the infraction of such legislation does not give rise to a statutory cause of action in favor of those injured. Representative statutes of this type are those requiring drivers of automobiles to have licenses,[14] legislation prohibiting specified activities on Sunday,[15] ordinances requiring property owners to clear sidewalks abutting their property,[16] and enactments forbidding parking in specified areas.[17] Numerically speaking, the majority of infractions of municipal laws result only in the creation of a public nuisance, since as a rule, ordinances regulate objectionable conduct primarily for the protection of all the public.

Although the recent cases decided by the Court of Appeals make no distinction between statutes and ordinances,[18] the idea is prevalent among some practicing lawyers, that a violation of an ordinance is never negligence as a matter of law. Probably the cause primarily responsible for this misconception, is a failure to distinguish between ordinances enacted for the benefit of the municipality and all its inhabitants, such as were described in the preceding paragraph, and those designed to protect specified groups. Another source of misunderstanding is to be found in misinterpreting the cases[19] that have held that a violation of a city ordinance does not give the party injured a right of action under section 446.070 of the Revised Statutes. A careful reading of these cases reveals that they hold only that section 446.070 does not apply to ordinances, and they do not purport to decide the question of whether or not an ordinance, independent of the

[14] PROSSER, *op. cit. supra* note 1 at 266.

[15] RESTATEMENT, TORTS sec. 287, illustration 2. (1934).

[16] RESTATEMENT, TORTS sec. 288, comment *a.* (1934)

[17] One of the members of the Louisville Bar advises that a trial judge gave peremptory instructions for the defendant, another motorist, in a suit for injuries to the plaintiff's car, on the theory that plaintiff was contributorily negligent as a matter of law in parking too near a fire plug. The local bar for some time referred to the unfortunate attorney who, because of the amount involved had not appealed, as "Fireplug ————— "

[18] Greyhound Terminal of Louisville v. Thomas, 307 Ky. 44, 209 S.W 2d 478 (1948), Brown Hotel Co. v. Levitt, 306 Ky. 804, 209 S.W 2d 70 (1948).

[19] Equitable Life Assurance Society v McClellan, 286 Ky 17, 149 S.W 2d 730 (1941) Baker v White, 251 Ky 691, 65 S.W 2d 1022 (1933).

statute, creates a duty to private citizens, giving rise to a cause of action if the duty is breached.

The third factor that may be responsible for the erroneous idea relating to fixed standards of conduct established by municipal legislative bodies, may be reliance on a line of cases beginning in 1876, which has never been expressly overruled, and which held that a violation of a city ordinance was neither negligence nor evidence of negligence. The initial case, *Dolfinger* v *Fishback*[20] arose from an infraction of an ordinance making it unlawful for the driver of any vehicle to be more than ten feet from his horse or other animal while it was harnessed to a vehicle in the street. The defendant driver while delivering parcels for his employer, was faced with the dilemma of disobeying the ordinance above stated, or breaking an ordinance which prohibited the hitching of horses to shade trees. Choosing the former course, the driver left the horse in the street unattended, however, taking the precaution of detaching one trace from the single tree. For some unknown reason dobbin took fright, ran away, and collided with the plaintiff's wagon, injuring the plaintiff's person and property During the trial the plaintiff read in evidence the ordinance violated by the defendant. The Court of Appeals found this to be a prejudicial error and reversed a judgment entered for the plaintiff. The court declared.

> "The general council of the city has no general power of legislation. It no doubt had power to pass the ordinance and enforce it as a mere police regulation, but further than that it had no power. It may be dangerous for a driver to leave his team upon the street and the city council no doubt has authority to prohibit such an act; but the simple fact that they did prohibit it does not tend to prove that the appellant's driver was guilty of such negligence as render them liable for an injury resulting from their team having been left standing upon the streets in violation of the ordinance."[21]

The Dolfinger litigation was followed by a series of suits involving injuries inflicted on railroad crossings by trains operated in excess of a speed limit imposed by a municipality [22] In each of these cases the court rejected the plaintiff's contention that

[20] 75 Bush (Ky.) 475 (1876)

[21] *Id.* at 480.

[22] Ward's Adm'r v. I. C. C. Ry. Co., 22 Ky. L. Rep: 191, 56 S.W 807 (1900); L. & N. Ry. Co. v. Dalton, 102 Ky 290, 43 S.W 431 (1897), E. L. & B. S. Ry. v Beam, 10 Ky. L. Rep. 682, 11 S.W 6 (1888)

violation of the ordinance by the defendant railroad was negligence *per se*. Typical language is found in *Louisville & Nashville R. R. Co.* v *Redmon's Admx.*, in which the court stated. "While there is a conflict of authority as to the effect of municipal ordinances in cases of this character the rule is well settled in this state that such ordinances are not admissible, and that running in violation of them is not negligence."[23]

The last of the so-called railroad cases, *Ford's Admr* v. *Paducah City Railroad*,[24] decided in 1907, involved a street railway This litigation ensued as a result of a street car running into a pedestrian. The accident occurred while the defendant company was operating their car in the business district in the city of Paducah at a rate exceeding the maximum lawful speed in that area. Appealing from a judgment entered against him, the plaintiff asserted that the trial court committed prejudicial error in refusing to admit the ordinance in evidence. The appellate court, observing that the appellant had cited cases from other jurisdictions in support of his contention, noted that the brief cited no Kentucky authorities in support of his position. The court declared. "On the contrary it has been repeatedly held that the violation of a city ordinance in this respect is of itself, no evidence of negligence. The violation of a city ordinance is no more evidence of negligence than obedience to its provisions would be evidence of due care."[25]

While *Dolfinger* v *Fishback* and the railroad cases were never expressly overruled, they have been overruled by implication. This was not accomplished in a single case but by a number of cases which, step by step, established a principle of law contrary to that approved in the earlier cases. The first step in this process came about as a result of cases in which the plaintiff's injuries arose from the defendant's simultaneous violation of both a statute and an ordinance containing similar but not identical regulations. The leading case was *Mullins* v *Nordlaw*,[26] which reached the Court of Appeals in 1916. The plaintiff had recovered a judgment for injuries sustained in a fire in the defendant's tenement house. While the plaintiff alleged negligence

[23] 122 Ky. 385, 91 S.W 722 (1906).
[24] 124 Ky 488, 30 Ky L. Rep. 644, 99 S.W 355 (1907)
[25] *Ibid.*
[26] 170 Ky. 169, 185 S.W 825 (1916)

per se both in the defendant's violation of the Tenement House Act of 1910, and in the infraction of an ordinance requiring fire escapes on certain types of buildings in the City of Louisville, the trial court decided the case on the theory that the defendant's liability should rest upon the violation of the ordinance rather than the statute. The trial court's theory was adopted and the judgment affirmed by the reviewing court in a well considered opinion.

Two years later the Court of Appeals in *Louisville Trust Co.* v *Morgan's Admr.*,[27] affirmed a judgment for the plaintiff in litigation arising from similar circumstances. The plaintiff's testate lost his life in the disastrous Seventh Avenue Hotel fire of 1915. The hotel did not have either the fire extinguishers and hose required of such buildings by the statutes, or the outside fire escapes by an ordinance of the City of Louisville. The defendant after unsuccessfully challenging the validity of the statute and ordinance upon which the plaintiff had based his case, claimed that the violation of the ordinance and the statute was not the proximate cause of the death, for the fire had spread so rapidly that the plaintiff's testate could not have used the safety equipment had it been available. Answering the argument the Court declared.

> "Proceeding now with the argument a little further, the effect of it is that if guests in a hotel are put in a room from which escape in case of fire, would be extremely difficult if not wholly impractical, there should be no recovery on account of the want of safety equipment because if the equipment had been supplied the guests could not avail themselves of its protection. To so construe the statute and ordinance would be to destroy the very purpose of their enactment, and to give them a meaning that would enable owners and lessees of fire traps, like the Seventh Avenue Hotel, to escape liability upon the grounds that the rooms and the halls were so located and situated so that guests could not avail themselves of fire escapes and other safety equipment if they had been provided. Of course, we cannot agree that the useful provisions of the statute and ordinance should be made worthless by such a construction."[28]

It was, however, the *Mullins* case that has paved the way for the result reached in *Adams Brothers* v *Clark*,[29] which was decided in 1920. This suit arose from a violation of an ordinance

[27] 180 Ky. 609, 203 S.W 555 (1918).
[28] *Id.* at 623
[29] 189 Ky. 279, 224 S.W 1046 (1920).

prohibiting fowls from running at large within the corporate limits of the town of Smithland, the ordinance providing that violators were to be fined not less than one dollar nor more than five dollars for each offense. The defendant's chickens, kept within the corporate limits, had discriminately invaded the premises occupied by the plaintiff feed dealer, and had destroyed approximately $500 worth of feed. A judgment entered for the defendant by the trial court was reversed on appeal. The Court of Appeals observed

> "It is the contention of appellants that since by the ordinance quoted above it is unlawful for appellee to allow her chickens to run at large it was negligence *per se* to allow them to range on appellant's lot and eat the food in their barn. This court has held in cases where an ordinance was violated no recovery in damages would be had merely for the violation of the city law, if there was in fact no negligence. These cases arose out of ordinances fixing the rate of speed for trains at street crossings and upon public thoroughfares."[30]

Among the "railroad" cases cited, but not discussed by the court were *Dolfinger* v. *Fishback* and *Ford's Admr* v. *Paducah City Railway*. The *Dolfinger* case, as was pointed out in a prior paragraph, actually involved an ordinance similar in many respects to the one involved in the case under consideration, and had no relation to railroads, while in the *Ford* case the ordinance in question was undoubtedly passed as a safety measure to protect pedestrians and vehicular traffic from the hazard of injury from speeding street cars. Through inadvertence the court did not discuss the two decisions that were squarely opposed to the decision reached in the case at bar. The other railroad cases were distinguishable in that the ordinances involved in those cases were enacted for the benefit of the public generally Steam engines pulling trains through towns and villages at excessive speeds frightened animals, increased the amount of smoke emitting from puffing engines, accelerated the vibration of structures adjacent to the tracks, and were as undesirable as the increased chance of harm to parties using public crossings. All were evils to be remedied by the ordinances regulating the speed of trains. The *Adams Brothers* case, it is to be noted, was the first case in which a violation of a city ordinance was held to be negligence

[30] 189 Ky 279, 285, 224 S.W 1046, 1049 (1920)

per se, where the defendant had not also violated a statute prohibiting the conduct causing the injury

In *Home Laundry* v *Cook*[31] the Court of Appeals held that a reverse turn made by a motorist on a boulevard in violation of a city ordinance was negligence *per se,* the jury having found that the defendant's violation of the ordinance was the proximate cause of the plaintiff's injuries. This was followed by *Murphy* v *Homans*[32] which involved the defendant's violation of a statute regulating the rate of speed for automobiles in specified areas, and the plaintiff's violation of an ordinance forbidding jaywalking. The Appellate Court sent the case back for a new trial instructing the trial court to charge the jury that if the plaintiff's violation of the ordinance prohibiting pedestrians from crossing streets except at specified places, was the proximate cause of the injury their verdict should be for the defendant.

Durham v. *Maralta*[33] arose from an injury sustained by the plaintiff, a tenant in defendant's apartment house, while descending unlighted stairs. It was alleged that the defendant violated both a statute and an ordinance, each of which required the defendant landlord to keep the light burning in the hallway at the time the injury in question occurred. Citing Ruling Case Law,[34] the court declared "If the injury complained of is one which was intended to be prevented by the statute and ordinance, *supra,* the violation of their provisions must be considered as the proximate cause of the injury "[35] The court concluded "There can be no question that the Statute and the Ordinances above quoted were intended to prevent a person using the steps in an apartment house from falling in the darkness."[36] Judgment for the plaintiff was affirmed.

In *Brown Hotel* v *Levitt,*[37] decided in 1948, the Court of Appeals recognized the principle that violation of an ordinance may be negligence *per se* but denied recovery on the ground that the infraction of the ordinance was not the proximate cause of the injury The litigation arose as a result of an injury

[31] 277 Ky. 8, 125 S.W 2d 763 (1939).
[32] 286 Ky. 191, 150 S.W 2d 14 (1940)
[33] 302 Ky. 633, 195 S.W 2d 277 (1946).
[34] 20 R. C. L. 43.
[35] 302 Ky 633, 635, 195 S.W. 2d 277, 279 (1946)
[36] *Ibid.*
[37] 306 Ky. 804, 209 S.W 2d 70 (1948).

suffered by a guest in a fall that occurred while descending the stairway of the defendant hotel, when struck from behind by an unidentified man. The stairway, although eleven feet wide, did not have an intermediate handrail, required by an ordinance of the City of Louisville, on such stairways of more than seven feet in width. The plaintiff, asserting that the violation of the ordinance was negligence as a matter of law, recovered a judgment in the trial court. While the Court of Appeals agreed that the violation of the ordinance was negligence *per se,* they reversed the trial court and held that the defendant was entitled to a peremptory instruction. The Court declared

> "But we can agree with appellant in that the particular thing that happened here was most likely not within the zone of apprehension of the ordinance. In the light of the evidence can it reasonably be inferred that even though railings had been placed as provided by the ordinance, the plaintiff below could have averted or avoided the injury She and her husband were descending the steps side by side and about one foot apart. She said that she grabbed at something and if there had been a railing there she could have taken hold of it. The fact is she didn't even take hold of the arm of her husband so sudden and unexpected was the fall of the man behind her To permit a recovery herein would be allowing recovery almost, if not quite entirely upon speculation."[38]

It is submitted that the court erred in ruling as a matter of law that the failure of the hotel to maintain a guard rail was not the proximate cause of the injury Was not the plaintiff, a business guest of the hotel, a member of the class of persons the ordinance was designed to protect against injury? Was not the danger apprehended by the city legislative body in enacting the ordinance, the risk of falling on the stairs? Did not the injury occur as a result of a member of the protected class, an invitee, falling on the stairs? Is it more unlikely or foreign to human experience that a person will be pushed while descending stairs than he will fall?

It may be noted that if the handrail had been erected as required by the ordinance, three plausible possibilities come to mind. The first of these is that the plaintiff might have held the rail while descending the stairs. If the stairs had appeared dangerous, the plaintiff would have been contributorily negligent as a matter of law if she had failed to have held the handrail.[39]

[38] 306 Ky 804, 807, 209 S.W 2d 70, 72 (1948).
[39] Seelbach, Inc. v Mellman, 293 Ky. 790, 170 S.W 2d 18 (1943).

The second possibility is that the plaintiff might have been able to have grabbed the handrail had it been there, thus breaking her fall. The fact that she was unable to grasp her husband is not at all conclusive, for the rails would have been stationary while her husband was moving, and there would have been rails on each side while she could grasp her husband only if she fell in that direction. The third possibility is that the rail might have prevented the falling stranger from striking the plaintiff.

If the purpose of the ordinance was to prevent risk of injury to guests, caused by their falling through pushing, slipping or tripping on unguarded stairs, should not the jury determine if harm occurred to the plaintiff because the defendant did not provide the safeguards which the city legislative body believed to be necessary? The court apparently confused this case with those where the harm is caused by an unexpected source such as an object falling on the plaintiff from above, and the injury sustained has no relation to the violation of safety legislation.

Although it is suggested that *Brown Hotel* v *Levitt* was incorrectly decided, the error was only in the application of accepted principles. The case did not purport to make any changes in the law The court repeated the correct formula but arrived at a questionable answer. A few weeks later a decision was handed down in Greyhound Bus Terminal of Louisville v Thomas[40] which involved a violation of the same ordinance. The plaintiff while descending the defendant's stairs caught her heel in some unexplained manner and fell to the floor. The case was tried on the theory that the defendant was guilty of negligence *per se*, and the plaintiff recovered a judgment in the lower court. In affirming the trial court, the Court of Appeals declared "There can be no doubt that the purpose of the ordinance is to prevent persons descending or ascending a stairway from falling thereon.[41] In this instance the violation of the ordinance was held to be the proximate cause of the injury, the reviewing court accepting without question the plaintiff's testimony that she grabbed for a nonexistent handrail to break her fall. Since counsel for the appellant had probably submitted briefs prior to the decision in the *Levitt* case, the Court was not called upon to distinguish the two cases, and did not do so. The construc-

[40] 307 Ky. 44, 209 S.W 2d 478 (1948).
[41] 307 Ky. 44, 46, 209 S.W 2d 478, 479 (1948)

tion of the ordinance in the *Greyhound Bus Terminal Case* is more consistent with the policy of the Court with regard to the interpretation of safety legislation, announced in former cases.[42] The *Levitt* case also treats the question of proximate cause in a more satisfactory manner. It is submitted that if the injury complained of occurred to a member of the protected class, in a manner and by a means that the ordinance was designed to eliminate, the violation is necessarily the proximate cause.[43]

CONCLUSION

A line of cases decided by the Court of Appeals in the latter part of the nineteenth century and the early part of the twentieth held that a violation of a city ordinance was neither negligence nor evidence of negligence. However, the earlier cases have been impliedly, although not expressly, overruled, and it is the settled law in this jurisdiction that in a proper case violation of a city ordinance is negligence *per se*. The injured party must be a member of a class for whose benefit the ordinance was enacted, the injury must be of the type the statute was designed to prevent, and the violation of the ordinance must be the proximate cause of the injury Contributory negligence is a bar to the plaintiff's action. In conclusion it is to be observed that if the ordinance is enacted for the benefit of the public generally, its infraction is not negligence *per se*.[44]

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[42] See note 27 *supra*.

[43] See note 35 *supra*.

[44] The Kentucky Courts apparently have not considered the question of whether or not the defendant's violation of an ordinance may be excused. For the law generally regarding this question see, PROSSER, TORTS 271 (1941) *Restatement, Torts* sec. 286 Comment c (1934).