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CLIENT MATTERS

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COMPENSATION LAW SEMINAR

On October 14 and 15, 2010, the University of Kentucky college of Law hosted the 18th Biennial Workers' Compensation Law Institute. Billed by the University as "The Authoritative Program on Kentucky Workers' Compensation Law" for 36 years, the seminar tends to draw more experienced practitioners as attendees, and over 60% of the program's 2010 participants reported having practiced workers' compensation law in excess of 20 years. This year three of our Ward, Hocker & Thornton attorneys were asked to speak to this group of judges, lawyers and insurance representatives. Steve Goodrum co-presented the Kentucky Case Law Update: A Review of

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NEW RULING ON "OPEN AND OBVIOUS" DOCTRINE

On August 26, 2010, the Kentucky Supreme Court ruled the "Open and Obvious" Doctrine an issue of fact to be determined by the jury rather than an issue of duty imposed by law. *Ky. River Med. Ctr. v. McIntosh*, 2010 Ky. LEXIS 215 (Ky. Aug. 26, 2010)

In the past, the court has expressed the importance of distinguishing between duty by law and a matter of fact. "If duty is not excused by a known or obvious danger, the injured invitee might recover, albeit in a diminished amount, [by virtue of his own comparative fault]. In contrast, if the invitee's voluntary encounter with a known or obvious danger were deemed to excuse the land owner's duty, then there would be no negligence to compare—and, therefore, no recovery." *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321, 1325 (Idaho 1989) This was the exact distinction the Kentucky Supreme Court was asked to make in *Ky. River Med. Ctr. v. McIntosh*. The modern trend of courts across the country was to follow the Second



New offices of WHT in Louisville, KY.

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THINGS THAT WORK: TEXTER

Texter is an application that saves you countless keystrokes by replacing abbreviations with commonly used phrases you define. Texter runs in the Windows system tray and works in any application that requires information to be entered. Texter is free. Texter can be used for many things: signatures, addresses, and commonly used abbreviations can be effortlessly expanded from small user-defined abbreviations. Texter's other advantage is that it works in any type of document whether it's a brief in Word, an email, an on-line form, or any other application that requires

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- Insurance Defense
- Large Loss Subrogation
- Products Liability Defense
- Premises Liability
- Surety & Fidelity Law
- Trucking & Transportation Litigation
- Workers' Compensation

WHO WE ARE, HOW WE CAME TO BE, AND WHERE WE ARE HEADED...

WHT is a full-service litigation firm serving clients and carriers in Kentucky, Indiana, Ohio and Tennessee. We are led by AV attorneys with pre-eminent distinction in their field. We currently have offices in Lexington and Louisville, KY. In the past, as a show of our willingness to meet the clients' needs, we have also had offices in Nashville, TN and Cincinnati, OH.

Since our inception, WHT has specialized in defending worker's compensation claims and insurance defense matters. The founding partners created the firm in an era when they felt that the clients' and carriers' needs could be better served with a new approach to legal service. Put into motion, the approach tailors each relationship by blending the legal expertise needed with the expectations and guidelines set by our individual clients, corporate clients, and carriers. As a result, WHT provides targeted litigation support to achieve results with recognized focus on balancing legal costs of efficient and quality representation.


Moving forward, WHT is expanding our practice areas to meet the growing needs and requests of our clients. We added healthcare professional liability, surety and fidelity, financial institution law, and trucking and transportation litigation to our umbrella of legal services. If you have a question about any area of our practice, a Member in either office is ready to assist.

*I think there is no sense in forming an opinion
when there is no evidence to form it on.
If you build a person without bones in him,
he may look fair enough to the eye,
but he will be limber and cannot stand up; and
I consider that evidence is the bones of an opinion.*
— Mark Twain


Things that Work: TEXTER ...CONT FROM PG 1

repetitive information to be typed in. It is particularly effective for entering information in computerized logs or diaries, timesheets or forms. For example in my personal Texter database I use the following abbreviations among dozens others:

- msj: Motion for Summary Judgment
- fdct: Federal District Court
- rn: review and revise
- rpd: request for production of documents
- itg: interrogatories

The only concern with naming abbreviations is not to use a sequence of letters that commonly appears while typing. Texter can be downloaded from a number of sources. **Simply Google "texter" to find the free download.** 

Compensation Law Seminar ...CONT FROM PG 1

the Key Cases in the Biennium. Steve presented the new cases from a defense perspective while attorney, Bradley Slutskin, offered the Plaintiff's perspective. Don Walton co-presented a discussion of Current Problems with Average Weekly Wage Calculation along with Plaintiff attorney, Greg Schabell. (This addressed the complexities of pinpointing the true wage using KRS 342.140(1); the components of a "wage;" seasonal, concurrent and "consistently intermittent" employment; and concerns about the AWW of minors based upon the 2010 decision of Dairy Queen v. Surrutt). And Walter Ward presented on the issues of Reimbursement of Patient Out-of-Pocket Expenses in a Workers' Comp Case. 

New Ruling on "Open and Obvious" Doctrine ...CONT FROM PG 1

Restatement of Torts which said:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.* Restatement (Second) of Torts § 343A(1) (1965) (emphasis added).

The Kentucky Court said the modern approach is consistent with Kentucky's focus on foreseeability in its analysis of whether or not a defendant has a duty. This Court has previously stated that "[t]he most important factor in determining whether a duty exists is foreseeability." *Pathways v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) And went on to conclude the modern approach was also consistent with Kentucky's Comparative Fault structure and the most recent case law in this matter. The Court said: "The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable. Thus, this Court rejects the minority position, which absolves, *ipso facto*, land possessors from liability when a court labels the danger open and obvious. However, this view also alters the position of the person injured by an open and obvious danger to the extent that only under extremely rare circumstances could a plaintiff avoid some

**Thus, this Court
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share of the fault under comparative negligence. While "open and obvious danger" is no longer a complete defense under the Restatement, it is nonetheless a heightened type of danger which places a higher duty on the plaintiff to look out for his own safety. Such a condition, being open and obvious, should usually be noticed by a plaintiff who is paying reasonable attention. Yet the plaintiff is not completely without a defense to this: there could be foreseeable distraction, or the intervention of a third party pushing the plaintiff into the danger, for example. Even in

such situations, a jury could still reasonably find some degree of fault by the plaintiff, depending on the facts." *Ky. River Med. Ctr. v. McIntosh*, 2010 Ky. LEXIS 215, 16-17 (Ky. Aug. 26, 2010). 