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Torts--Negligence-Violation of an Administrative Regulation as Negligence Per Se

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applicant should not be entitled to relief.[25] Admission into labor unions is virtually the only area where courts have uniformly forbidden discrimination in membership.[26] In most other situations, particularly social and fraternal societies, there has been absolute discretion in choice of members.[27] A distinction has been made between voluntary and involuntary associations,[28] and in some cases involving the latter, courts have compelled admission and full membership.[29] But a social fraternity must be categorized as a voluntary organization, and thus it escapes the prohibitions on free selection of members.[30]

For all practical purposes, *Sigma Chi* is of no value except as a forerunner of future similar cases. The court, by skirting the major issues, established no authoritative precedent. Until the questions raised by the freedom of association claims are satisfied, the problem of fraternity discrimination remains.

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[25] See Note, 14 W. RES. L. REV. 346, 357 (1963).

[26] Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1944); Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629, 320 P.2d 494 (1958); International Bhd. of Elec. Workers v. Commission on Civil Rights, 140 Conn. 537, 102 A.2d 366 (1953).

[27] Note, 14 W. RES. L. REV. 346, 360 (1963).

[28] An example of an involuntary society is one which is necessary for economic survival, such as a medical association.

[29] Typical of these cases is Falcone v. Middlesex County Medical Soc'y, 62 N.J. Super. 184, 162 A.2d 324 (1960) where the court said that if the exclusion resulted in substantial injury to the plaintiff, "the court will grant relief." 62 N.J. Super. 184, 197, 162 A.2d 324, 331.

[30] In a discussion of the right of association, Associate Justice William O. Douglas said: "In my view, government can neither legislate with respect to nor probe the intimacies of political, spiritual, or intellectual relationships in the myriad of lawful societies and groups, whether popular or unpopular, that exist in this country." Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1375 (1963). In the same article, Justice Douglas quoted the noted historian, Alexis de Toqueville:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

63 COLUM. L. REV. 1361, 1363.

TORTS-NEGLIGENCE-VIOLATION OF AN ADMINISTRATIVE REGULATION AS NEGLIGENCE PER SE.—After removing tile from the floor of a room in his service station, Calvin Stipes, the manager, and three employees proceeded, in direct violation of the Standards

of Safety of the Kentucky Department of Insurance,[1] to pour gasoline on the floor in order to remove the leftover glue. As the employees were cleaning the floor, Stipes stepped into an adjoining room to turn on a fan to remove some of the fumes. At that moment an explosion filled the room with flames. In the ensuing fire two of the employees died and Stipes was uninjured. Home Insurance Company, the insurer of the owner of the station, brought a diversity action against Hamilton, the lessee of the station, and employer of Stipes. *Held*: partial summary judgment[2] granted for plaintiff. The violation of the safety regulation was negligence per se and the violation was the proximate cause of the injuries. *Home Ins. Co. v. Hamilton,* 253 F. Supp. 752 (E.D. Ky. 1966).

For many years Kentucky has held that violation of a statute or municipal ordinance is negligence per se,[3] but only if certain conditions are satisfied. Before a violation will constitute negligence per se, the statute or municipal ordinance must be enacted for safety purposes, the injury must be one the statute or municipal ordinance was enacted to prevent, the injury must be to one of the group protected, and the violation must be the proximate cause of the injury.[4] The question of proximate cause is ordinarily a jury question and not a proper subject of summary judgment. However, it has been held that where the uncontradicted evidence is such that only one conclusion can be drawn by fair-minded men there is no issue of fact for the jury, and the court must determine the case as a matter of law.[5] From the facts of *Hamilton* the only

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[1] Department of Insurance Standards of Safety §§ 1400 (2)(f), 1412 (1)(e) (1955) (superseded March, 1963). § 1400 (2) (f) classifies gasoline as a Class I liquid; 1412 (1)(e) states: "No Class I flammable liquids shall be stored or handled within any service station building except packaged items." The Standards of Safety had been promulgated by the Commissioner of Insurance under the authority of KY. REV. STAT. 227.300. Section 1 of the statute gives the commissioner broad powers to promulgate rules and regulations for a reasonable degree of safety for human life against fire and panic. Section 2 specifically grants power to regulate handling of flammable liquids.

[2] In order to find defendant Hamilton liable in damages, an agency relationship must exist between Hamilton and Stipes. The plaintiff's motion for summary judgment on the issue of agency relation was denied by the court.

[3] Louisville Taxicab and Transfer Co. v. Holsclaw Transfer Co., 344 S.W.2d 828 (Ky. 1961); Blackwell's Adm'r v. Union Light, Heat and Power Co., 265 S.W.2d 462 (Ky. 1953); Pryor's Adm'r v. Otter, 268 Ky. 602, 105 S.W.2d 564 (1937); National Casket Co. v. Powar, 137 Ky. 156, 125 S.W. 279 (1910).

[4] 253 F. Supp. 752, 755. Numerous cases hold for each of the propositions. However, the cases cited in *Hamilton* present a fair cross section of the various holdings.

[5] Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955).

conclusion which can be drawn is that the violation of the regulation was the proximate cause of the injuries. Therefore, the granting of summary judgment on the issue of proximate cause was entirely proper.

Kentucky is joined by a great majority of the states in holding the violation of a statute to constitute negligence per se.[6] However, many of these states will not go so far as to extend the negligence per se doctrine to municipal ordinances or administrative regulations. Instead of being negligence per se, a violation of an administrative regulation in the great majority of states is merely evidence of negligence.[7] In fact, only five states have held violation of an administrative regulation to be negligence per se.[8] Such inconsistency by the states is difficult to understand. Perhaps the only reason for a state to hold violation of a statute to be negligence per se and at the same time hold violation of an administrative regulation as mere evidence of negligence is the widespread distrust of many administrators and the accompanying delegation of power by the legislatures. Whatever the reason for such a position, it appears that the minority position is the more rational approach. Frequently, a legislature does not feel competent to pass specific statutes to cover a certain field. Thus, the power of regulation is delegated to an administrator who has more working knowledge of the intricacies of his chosen profession.[9] In those jurisdictions where violation of an administrative regulation is merely evidence of negligence, the jury is permitted to substitute its uninformed opinion for that of the administrator, who is usually an unbiased expert in his field.[10] As a result of such a policy many violators of safety regulations go free without even an excuse for the violation.[11]

In spite of the large number of states taking the opposite stand, Kentucky has taken the rational and consistent approach to the

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[6] PROSSER, TORTS 202 (3d. ed. 1964); 28 AM. JUR. *Negligence* § 169 (1941).

[7] *Ibid.*

[8] See Lanagazo v. San Joaquin Light & Power Corp., 32 Cal. App. 2d 678, 90 P.2d 825 (1939); Hyde v. Connecticut Co., 122 Conn. 236, 188 Atl. 266 (1936); Maner v. Dykes, 55 Ga. App. 436, 190 S.E. 189 (1937); Pennsylvania R. Co. v. Moses, 42 Ohio App. 220, 182 N.E. 40 (1931); Rhinehart v. Woodford Flying Service, 122 W.Va. 392, 9 S.E.2d 521 (1940).

[9] Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEXAS L. REV. 143, 144 (1949).

[10] *Id.* at 148.

[11] An example is *Town of Kirkland v. Everman*, 217 Ind. 683, 29 N.E.2d 206 (1940), where a jury found that defendant used due care in spite of his violation of a safety regulation concerning underground gasoline tanks.

negligence per se doctrine. As noted by the *Hamilton* court,[12] the Court of Appeals has held that administrative regulations have the force and effect of laws.[13] The Federal District Court for the Eastern District of Kentucky has extended this rule by holding that compliance with state regulations is prima facie evidence of absence of negligence.[14] The Court of Appeals has also assumed for the purpose of argument that violation of a regulation *could* constitute negligence per se.[15] As a result of the prior holdings, the court in *Hamilton* felt the logical conclusion would be to hold that violation of an administrative regulation constituted negligence per se.

The *Hamilton* court found no prior Kentucky decision which held violation of an administrative regulation to be negligence per se. The court frankly declared that, "The Court of Appeals has assumed for the purpose of argument that violation of such a regulation could constitute negligence *per se. . . . but it has never so held. . . .*"[16] (Emphasis added.) The statement is not in accord with at least two authorities.[17] Those two authorities have interpreted *Phoenix Amusement Co. v. White,*[18] decided by the Court of Appeals in 1948, as holding the violation of a safety regulation to be negligence per se.[19] The *Phoenix* case involved a woman who had fallen through theater emergency doors which opened directly upon a flight of steps in violation of a Standards of Safety requirement that the doors open upon a landing. *Hamilton* cited *Phoenix,*[20] but not in connection with the holding concerning negligence per se. The *Hamilton* court may have overlooked the *Phoenix* case, but it more likely concluded that *Phoenix* merely assumed that violation of a safety regulation is negligence per se, as was the case in *McKinley v. Danville Motors, Inc.*[21] *Phoenix* stated: "But appellant was negligent in having

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[12] 253 F. Supp. at 755.

[13] Gering v. Brown Hotel Corp., 396 S.W.2d 332 (Ky. 1965); Linkous v. Darch, 323 S.W.2d 850 (Ky. 1959); Union Light, Heat, & Power Co. v. Public Serv. Comm'n, 271 S.W.2d 361 (Ky. 1954).

[14] Isbell v. Union Light, Heat & Power Co., 162 F. Supp. 471 (E.D. Ky. 1958). See also Vaught's Adm'x v. Kentucky Util. Co., 296 S.W.2d 459 (Ky. 1956).

[15] McKinley v. Danville Motors, Inc., 374 S.W.2d 366 (Ky. 1964).

[16] 253 F. Supp. at 755.

[17] Morris, *supra* note 9, at 145; PROSSER, *op. cit. supra* note 6, at 203.

[18] 306 Ky. 361, 208 S.W.2d 64 (1948).

[19] Morris, supra note 9, at 145; PROSSER, *op. cit. supra* note 6, at 203.

[20] 253 F. Supp. at 755.

[21] 374 S.W.2d 366 (Ky. 1964).

these exit doors open directly onto a flight of stairs instead of a landing as provided in the Safety Regulations mentioned above. . . ."[22] In this statement the *Phoenix* Court appears to assume that everyone knows a violation of a regulation is negligence, which is not the case. No decision prior to *Phoenix* had mentioned such a proposition. Indeed, the *Phoenix* Court was more concerned with proximate cause than negligence per se. Furthermore, the defendant in *Phoenix* was not held to be negligent, and the Court of Appeals ordered a new trial because of a faulty jury instruction.[23] Thus, apparently the court in *Hamilton* correctly stated that no prior decision had held a violation of a regulation to be negligence per se.

The basic reason given by the *Hamilton* court for its decision is that the violation of a statute or municipal ordinance is negligence per se and it can see no difference between a valid regulation and such ordinances and statutes. Therefore, violation of a regulation should be negligence per se.[24] Despite the lack of reasoning for such a statement, the decision is undoubtedly correct. As stated before, there is little reason not to apply negligence per se to administrative regulations. The administrator's power is delegated by the legislature and is subject to judicial review. Absent an attack on the administrator himself, no reason can be seen to refrain from holding violation as constituting negligence per se. Of course, the same limitations should be placed on administrative regulations as have been listed above as resting on statutes and ordinances.[25] In addition, any objection to the reasonableness of an administrative regulation should be considered by the court. If any of these conditions are not satisfied, then the regulation should not serve as a criterion to measure negligence in a civil action. No such conditions are referred to in the *Hamilton* decision. However, since the court could find no difference in a regulation and a statute or municipal ordinance, the natural assumption is that the conditions ordinarily placed on the negligence per se doctrine with respect to statutes and municipal ordinances would equally apply to administrative regulations.

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[22] 306 Ky. 361, 364, 208 S.W.2d 64, 66 (1948).
[23] *Id.* at 366, 208 S.W.2d at 68.
[24] 253 F. Supp. at 755.
[25] See text at note 4 *supra.*