[redacted] JEFFERSON CIRCUIT COURT

[redacted]

Jack Cooper [redacted] PLAINTIFF

v. **PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Bob Cooper [redacted], et al. DEFENDANTS

* * * * * *

Plaintiff, Jack Cooper [redacted], by and through counsel, and for his response to Defendants' Motion for Summary Judgment, states as follows:

INTRODUCTION

Jack Cooper [redacted] was a great manager who was fired because he refused to allow the controlling shareholders to use corporate assets for their own improper purposes. The firing itself was just one element of a larger scheme to defraud Jack Cooper [redacted] The scheme included actual fraud, waste, and misappropriation of corporate assets and the scheme was hatched out of the desperate efforts of Bob [redacted] and Chad Cooper [redacted] to preserve their standards of living in the face of large losses in the dealerships managed by Chad Cooper [redacted] including the flagship, Bob Cooper [redacted] Auto [redacted], Inc. ("BCA [redacted]").

From June of 1984 until he was fired in January of 1998, Jack Cooper [redacted] was president and general manager of [redacted] Auto [redacted] Inc. ("DAI [redacted]"). During all times relevant to this action, Chad Cooper [redacted] was general manager of all the other dealerships owned by the Cooper [redacted] family -- which at one time included Dodge, Plymouth, Isuzu, Buick, Chevy-Geo, and Ford franchises, but which at the time of Jack [redacted] firing included only BCA [redacted] DAI [redacted] and a Kia franchise. Bob Cooper [redacted]

served as the chief executive officer of the dealerships managed by [redacted]

[redacted] consistently out-performed dealerships managed by [redacted] (by a huge margin) and consistently out-performed industry averages during [redacted] management. See, Report of Plaintiff's expert, Douglas Dean, attached as Exhibit 1.[1]

[redacted] employees thought [redacted] was a great manager. In fact, when [redacted] first began to threaten to fire [redacted] (because [redacted] would not guaranty [redacted] indebtedness or allow [redacted] to guaranty [redacted] indebtedness), the employees of [redacted] on their own initiative, circulated a petition, which every employee of the dealership signed (except [redacted] and his son, who was not asked to sign), asking [redacted] not to fire [redacted][2] See, [redacted] depo. at pp. 83-86.

[redacted] Motor Company thought [redacted] was a good manager, who achieved above average results at the dealership. See, [redacted] depo. at pp. 45, 76-77. [redacted] Motor Credit Company ([redacted]), who replaced [redacted] Bank ("[redacted] as lender to the [redacted] Group of dealerships, determined that [redacted] was a good manager and [redacted] was not. See, [redacted] depo. at pp.34, 36, 76-77.

The bankers to the [redacted] Group concluded that [redacted] was a good manager and that [redacted] was not. See, for example, [redacted] depo. at p. 38.

[redacted] won three consecutive Customer Excellence Awards from [redacted] in the late 90s for excellence in customer service. See, [redacted] depo. at pp. 57-58.

In other words, [redacted] had consistently great earnings for its shareholders and kept all of its

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[1] [redacted] Buick and [redacted] Chevrolet-Geo, also managed by [redacted] consistently lost money in the 90s. When the financial statements of those dealerships are produced by Defendants and the results of those dealerships are added to the bar charts which are part of Mr. Dean's report, the differences between the management abilities of [redacted] and [redacted] will be shown even more clearly.

[2] That petition was given to [redacted] on the day [redacted] was fired and has not been produced in this litigation.

other constituencies very well satisfied during [redacted] time as its manager. So, why was he fired?

As can be seen from the [redacted] Report (Exhibit 1), [redacted] and its subsidiaries lost money in the 90s. [redacted] Buick and [redacted] Chevrolet-Geo, also managed by [redacted] also lost money in that period. For a time, [redacted] and [redacted] continued to take large salaries and bonuses out of [redacted] were able to borrow large sums, interest free, from [redacted] and were able to pay some dividends out of [redacted] However, the combination of large losses and large distributions were bound to lead to a day of reckoning, and that day was June 23, 1997.

[redacted] operated for some period of time with severe cash shortages. See, [redacted] depo. at p. ___. Rather than put additional money into the dealership or reduce their distributions, [redacted] and [redacted] took the course of falsifying their financial statements and defrauding their bank. The ways and means of the fraud are not important at this point. Suffice it to say that the [redacted] officer in charge of the account has testified that the bank was defrauded. See, [redacted] depo. at p. 73. An auditor from [redacted] who audited the [redacted] accounts in the spring of 1997, has also testified that the [redacted] financial statements were falsified for the purpose of concealing fraud on the bank. See, [redacted] depo. at pp. 32, 75. On June 23, 1997, the bank discovered that [redacted] had sold vehicles worth more than $2MM out of its inventory without paying the bank (which had a security interest) for the vehicles. (This is known as "selling out of trust" or "SOT".)[3] The bank immediately demanded that [redacted] pay the $2MM and that he take his business elsewhere.

[redacted] to this point had provided floor plan financing for all the [redacted] dealerships, including [redacted] all of the loans were cross-collateralized and cross-defaulted, and the loans were

[3] [redacted] was not out of trust and its financial statements were not falsified. [redacted] depo. at p. 58

guarantied by [redacted] and [redacted]

The discovery by [redacted] of the [redacted] fraud set off the chain of events that resulted in the firing of [redacted] -- which was part of a pattern of breaches of the fiduciary duties owed by [redacted] and [redacted] to [redacted] and to [redacted] Those breaches of fiduciary duty were intended to allow [redacted] and [redacted] to misappropriate the assets of [redacted] to their own benefit, and those breaches of fiduciary duty did allow, after [redacted] firing, [redacted] and [redacted] to misappropriate [redacted] assets. The breaches of duty which were a part of this pattern include the following:

! <u>The fraud on [redacted]</u> [redacted] and [redacted] were guarantors of the indebtedness of the group to [redacted] and [redacted] depended on [redacted] for its financing to buy cars. The fraud on [redacted] seriously jeopardized the financial well-being of [redacted] and [redacted]

! <u>The failure to disclose the fraud on [redacted]</u> [redacted] and [redacted] were guarantors of the [redacted] indebtedness, but were never informed about the problems with the bank. See, [redacted] depo. at p. ___. [redacted] never even showed [redacted] the workout agreement with [redacted] that the dealerships, including [redacted] were required to sign; [redacted] signed the workout agreement on behalf of [redacted] Yet during the time the fraud continued, [redacted] and the other dealerships continued to borrow money from [redacted] while [redacted] was kept in the dark by his brother and father about the growing risk that [redacted] would default on its loans and that the bank would ask [redacted] and [redacted] to make good on their guaranties.

! <u>Failure to disclose poor financial condition of [redacted]</u> By the Summer of 1997, [redacted] was in very poor financial condition. See, [redacted] ([redacted] depo. at p. 22 and [redacted]

("[redacted] was an exemplary company."); [redacted] depo. at pp. 46, 76.

([redacted]) depo. at pp. 53-54. Separate and apart form the risks to the guarantors created by the fraud on the bank, DAI and Jack Cooper as guarantors of the Cooper group loans, should have been kept informed that BCA was in serious financial trouble.

! The transfer of loans from Bank to AMCC The loans at AMCC were more costly to the dealerships; the interest rates were higher. See, [redacted] depo. at p. 42. Yet the loans were transferred from Bank to AMCC without any consultation with Jack and without giving DAI an alternative. We now know that this was done because AMCC would not have made the loan without the participation (and guaranty) of DAI because DAI was the successful and prosperous dealership. [redacted] depo. at pp. 27-28.

! The requirement that DAI guaranty the AMCC indebtedness. DAI was required to guaranty not only the indebtedness of BCA to AMCC but also the indebtedness of Bob Cooper [redacted] personally. DAI obtained no benefit from signing these guaranties and incurred substantial risks in doing so. Bob Cooper executed the guaranties without Jack consent, but AMCC required additional collateral for the loans because Jack did not consent. [redacted] depo. at p. 48,88.[4]

! Insistence that DAI pay legal Bob incurred by BCA In January of 1998, Jack refused to allow DAI to pay a large legal Bob incurred by BCA Jack was fired within one or two business days after he refused to pay the Bob

! The firing of Jack Cooper [redacted] was a great manager who was fired because he refused to allow the controlling shareholders to misappropriate assets.

[4] In the beginning of the negotiations for the AMCC loans, AMCC asked for the guaranty of Jack and his wife on all the loans, but, by the time the loans were closed, AMCC had dropped that demand and Jack did not guaranty the AMCC borrowings.

! The arrest of [redacted] was given no warning of the firing and expressed his belief that he had, as a shareholder, the right to be in the dealership. Moreover, [redacted] had the reasonable concern (given the track record of [redacted] and [redacted] that documents would be removed or altered in his absence. [redacted] remained in the dealership that day and caused no disturbances. [redacted] depo. p. ___. In spite of [redacted] 13 years of excellent service, in spite of a complete lack of reason for believing that [redacted] presence in the dealership would cause any problems, [redacted] had his own son arrested and led out of the dealership in handcuffs -- because [redacted] and [redacted] wanted more than their share of the assets of [redacted] and were unwilling to wait for it.

! Defamation. At the time of the firing, [redacted] informed the [redacted] in words that were unmistakable and untrue, that [redacted] was fired because he was a poor manager.

! Cancellation of Health Insurance. After the firing, [redacted] and [redacted] caused [redacted] wife's health insurance to be canceled. [redacted] has serious health problems and [redacted] and [redacted] knew that it would be difficult for her to find replacement insurance coverage.[5] [redacted] Affidavit, Exhibit 2, at §19.

! Post-Firing Misappropriation of Assets. The motives of [redacted] and [redacted] are made clear when their actions after the firing are examined. They have taken excessive salaries and bonuses for themselves out of the dealership. They have split [redacted] salary and bonus between themselves, but they are not providing any management or effort at [redacted] in return for their salaries and bonuses. [redacted] depo. at p. 19-20, 56. They have paid only minimal dividends. They have paid insurance commissions to themselves, through

[5] The insurance was reinstated, but not before it added to the emotional trauma already created

a company called [redacted], on insurance purchased by DAI They have paid themselves commissions on extended warranties offered by [redacted] Dealer Services and sold to DAI customers. They have caused DAI to pay professional expenses incurred by Bob and Chad Cooper

! The poor post-firing performance of DAI Unfortunately for everyone involved, the management of Chad and Bob at DAI (actually the failure to manage) has followed a now familiar pattern -- the earnings of DAI are spiraling downward. 1999 was the best year for Auto sales in history, yet it now appears that 1999 earnings at DAI may be only a third of what they were in 1997 (the last year of Jack management).

There are remedies for this type of conduct and this Court should not hesitate to allow the jury to apply those remedies.

ARGUMENT

I. THE BREACH OF FIDUCIARY DUTY CLAIM

The Defendants make two arguments here: (a) that the June 19, 1984 letter (because it contains an acknowledgment that Jack was an employee at will) eliminates the fiduciary obligations of Bob and Chad Cooper to Jack and (b) that Bob Cooper had a legitimate business reason for firing Jack Cooper and, consequently, that any examination of the decision is foreclosed by the business judgment rule.

The Effect of the Bylaws.

The Defendants have failed to mention that the DAI bylaws impose an obligation which is inconsistent with the position taken by the Defendants. The letter agreement does not purport to

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by the actions of Bob and Chad

affect [redacted] rights as a shareholder. His rights as a shareholder include the right to have the operations of the corporation governed by the bylaws of the corporation. ***The bylaws of*** [redacted] ***provide that the removal of any officer must be in the best interest of the corporation.*** When questioned about the bylaws, [redacted] gave the following testimony:

Q. Okay. I'm looking off the marked copy, Exhibit No. 12. Now, you understand that bylaws are basically rules that shareholders write to govern their relations with each other, true?

A. I believe that's accurate.

Q. And I'm just asking your understanding concerning this. The bylaws will set out, for instance, how officers are elected, when annual meetings are to be held, how board of directors should be elected, true, sir? Generally.

A. Generally, I believe that's correct.

Q. All right. And this Exhibit No. 12 is for [redacted] Auto true, sir?

A. That's what it says, yes.

....

Q. Now, when Mr. Jack Cooper was fired by Bob Cooper he was an officer of the company, true, sir? He was president.

A. I believe that's correct, yes.

Q. On page 8 of the bylaws, would you turn to that paragraph, please? Do you see "Removal and Resignations," that paragraph, sir?

A. Yes.

Q. It states, "Any officer or agent elected or appointed by the Board of Directors may be removed by the Board of Directors whenever, in its judgment, the best interest of the Corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed." Do you see that, sir?

A. Yes.

Q. You don't have any debate with that sentence, do you, sir?

A. I don't believe I do.

Q. In other words, whenever an officer is removed, the reason has to be within the best interest of the corporations, right?

A. That's what it says.

The bylaw provisions are in conflict with the interpretation placed on the June 12 letter agreement by Defendants. The bylaws require a showing that Jack termination was in the

best interest of the corporation and [redacted] and [redacted] cannot make that showing.

The Obligations Imposed by Statute.

Kentucky law provides, in KRS 271B.8-300 "General Standards for directors." that:

> A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (a) In good faith;
>
> (b) On an informed basis; and
>
> (c) In a manner he honestly believes to be in the best interests of the corporation.

The law does not allow directors to modify this duty by contract and it does not provide any exceptions for decisions made about employees and managers. The decision to fire [redacted] was not made in good faith, and it was not made with the honest belief that the firing was in the best interests of the corporation.

Interpreting the June 12 Letter.

The letter agreement, in relevant part, provides only the following acknowledgment of [redacted]

> "I fully understand that I am an at will employee of the new [redacted] dealership and that I have not been promised any employment agreement or length of employment."

This one sentence says nothing about fiduciary duties and nothing about [redacted] rights as a shareholder.[6] Yet, Defendants argue that in 1984, in this one sentence, [redacted] released

[6] [redacted] has testified that he was told at the time, and he understood, that the phrase "I understand that I am an at-will employee" meant that he could be fired by [redacted] at any time and for any reason. However, Mr. [redacted] will testify at trial that, had he considered it at the time, and had be been advised by counsel, he would have understood that an employee at will can be fired for any LEGITIMATE reason. Clearly, that is the law. See, e.g., Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. 1992) ('[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy.').

Bob Cooper and Chad Cooper from liability for their own breaches of his fiduciary duties to Jack That is not what the letter said and that is not what the parties understood. Contract provisions which relieve parties from liability for future conduct "must be construed with every intendment against the party who seeks the immunity from liability" since these provisions "are not favorites of the law." Richard's 5&10, Inc. v. Brooks Harvey Realty Investors, 399 A.2d 1103, 1105 (Pa. Super. Ct. 1979); see, also, Osgood v. Medical, Inc., 415 N.W.2d 896, 902 (Minn. Ct. App. 1987); and Fitzgerald v. Newark Morning Ledger Co., 111 N.J. Super. 194, 267 A.2d 557 (1970).

The only thing that the letter did was confirm Jack status as an employee at will, it did nothing and said nothing about fiduciary duties. It cannot and should not be construed to relieve Bob and Chad from their fiduciary obligations or to change the bylaw requirement that the termination of an officer be in the best interest of the corporation. It can not be and should not be construed as altering the duties imposed by KRS 271B.8-300.

The Legal Consequences of Employee-at-Will Status.

This issue has been carefully considered recently by the Tennessee Supreme Court in Nelson v. Martin, 958 S.W.2d 643 (TN. 1997). Nelson, Martin, and Gammon were the only shareholders in B& M Printing Company. In March of 1989, Martin expressed concerns about Nelson's work, Nelson denied that his work was in any way deficient, but during the course of the argument used "highly offensive language" towards Martin. Martin, as president, immediately fired Nelson and the board of directors confirmed the firing on the vote of two of the three shareholder/directors. The trial court granted the defendants summary judgment on Nelson's breach of fiduciary duty claims, the court of appeals reversed trial court. The Tennessee Supreme Court reinstated the summary judgment in favor of the defendants, but used

an analysis which, when applied to this case, will result in the denial of Defendants' summary judgment motion.

The Tennessee Supreme Court acknowledged that Nelson's employment was terminable at will. Id. at 649. The court nonetheless found that "The question is whether the record contains material evidence that Martin and/or Gammon violated the fiduciary duty owed to Nelson in terminating his employment." The court examined cases on both sides of the issue and aligned itself with what it characterized as the modern trend to closely examine the actions of the controlling shareholders. The court also acknowledged "the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation." Id. at 649. (Quoting from the decision of the Massachusetts Supreme Court in Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 353 N.E.2d 657 (1976)). However, the court found that the requisite maneuvering room would not be compromised by examining the question of whether the controlling group can demonstrate a legitimate business purpose for its action.

> Based on these principles, Martin and Gammon, together and separately, were obligated to deal fairly and honestly with Nelson and could not act out of avarice, malice, or self-interest in violation of their fiduciary duty to him as a shareholder.

Id. Further, the court explained:

> Pursuant to the bylaws of the corporation[7], Martin, as president, had the authority to discharge employees of the corporation, including Nelson, and Martin and Gammon, as directors, had the authority to confirm the employment action taken by the president and to remove Nelson as a director. In the exercise of those powers and duties on behalf of the corporation, Martin and Gammon owed a duty of good faith and fairness to Nelson.

Id. at 649-650. (Emphasis supplied.) Finally, the court held that:

[7] Unlike the [redacted] Auto bylaws, the B&M Printing bylaws did not require that the

> In order to withstand a motion for summary judgment, allegations that the fiduciary duty has been violated must be supported by material evidence that the action was not in the perceived best interests of the corporation and further that it was motivated by malice, avarice, or self-interest.

Id. at 650-651. There was no evidence in the record before the court that Martin or Gammon were acting out of malice, avarice, or self-interest or that the action in firing Nelson was not in the best interest of the corporation and, consequently, Nelson's breach of fiduciary duty claims were dismissed. Here of course, there is more than enough evidence that [redacted] and [redacted] were acting out of malice, avarice, and self-interest to defeat the Defendants' summary judgment motion.

The decision of the Ohio Court of Appeals in Cruz v. South Dayton Urological Associates, Inc., 121 Ohio App. 3d655, 700 N. E. 2d 675 (1997), is cited by Defendants as being "directly on point." (Defendants Memorandum at 13.) What Defendants fail to point out about Cruz, however, is that most of the plaintiff's breach of fiduciary duty claims survived the defendants' motion for summary judgment in that case. Cruz was a shareholder and employee of a professional corporation organized for the practice of medicine. All of the shareholders signed a formal agreement which provided that their employment could be terminated without specification of cause and a separate agreement which provided for the repurchase of their shares in the event of termination of employment. Cruz's employment was terminated and he brought among other things a claim for age discrimination and a claim for breach of fiduciary duty. His fiduciary duty claim had three parts: (1) the claim that the firing itself was a breach of fiduciary duty, (2) the claim that the method of the firing was a breach of fiduciary duty, and (3) the claim that the reallocation of certain overhead expenses by the shareholders was improper. The

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termination of an officer be in the best interest of the corporation.

appellate court reversed the trial court and reinstated the second and third parts of Cruz's breach of fiduciary duty claims.

Other courts have held that, even where the minority shareholder had no implied contract for a definite term, his employment may be a breach of fiduciary duty. See, e.g., Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 353 N.E.2d 657 (1976); Orchard v. Covelli, 590 F. Supp. 1548 at 1556, 1558 (W. D. Pa. 1984)(rejecting a shareholder-employee's wrongful discharge claim (1) by noting that there was 'no evidence of the existence of a contract for employment, oral or written,' (2) by stating that the 'position as stockholder and officer of the corporation gave ... no position of tenured employment,' and (3) by citing the at-will doctrine, but granting oppression- based relief by concluding that the termination was part of a breach of fiduciary duty); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) (noting that a discharged shareholder-employee was subject to termination without cause pursuant to the at-will doctrine, but concluding that the termination may have nonetheless been a breach of fiduciary duty).

The Business Judgment Rule.

Defendants have also claimed that, because Bob Cooper as the sole director of DAI had the right to fire Jack Cooper and because he stated a reason for firing Jack Cooper[8] the

[8] Defendants now claim that Jack Cooper was fired because of his failure to communicate with Bob Cooper The statements made by Bob and Chad on the day of the firing and immediately thereafter tell a different story. The real reason Jack was fired is that Bob and Chad wanted to misappropriate DAI assets and Jack would not allow it. For example, Bob Cooper told the DAI employees immediately after the firing that Jack was fired because of his refusal to consent to DAI guaranty the indebtedness of BCA and Bob Cooper to AMCC See, depo. at p.___. On the day of the firing, Bob attorney, told , Jack Cooper attorney, that Jack was fired because he refused to allow DAI to pay a legal Bob owed by BCA See, depo. at p._. Bob and Chad problem with Jack was not that Jack failed to communicate, but that when Bob did communicate with Jack (which, in 1997 at least, was to ask for money or the guaranty of unrelated indebtedness), Jack said no.

business judgment rule prevents any further inquiry into the matter. *The business judgment rule dictates just the opposite outcome.* The most recent Kentucky explanation of the business judgment rule came in Allied Ready Mix Company v. Allen, Ky. App., 994 S.W.2d 4 at 8 (1998):

> The business judgment rule is a presumption that in making a business decision, not involving self-interest, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. [Citation omitted.] The party challenging the board's decision bears the burden to establish facts rebutting this presumption.

(Emphasis supplied.) The rule is merely a burden shifting rule. The rule does not prevent inquiry into a director's conduct, it merely creates a rebuttable presumption that the director's conduct is in the best interest of the corporation - except in cases, like this one, involving self interest. Not only are Bob and Chad Cooper not entitled to any presumptions of innocence here, once self dealing is proven, as it clearly will be in this case, fraud is presumed and the burden shifts to the director/controlling shareholder to prove that his conduct was in the best interest of the corporation. W & W Equipment Co. v. Mink, 568 N.E.2d 564 (In. App. 1991).

Conclusion

The termination of Jack Cooper employment cannot be examined in a vacuum. It was part of a scheme to deprive him of the benefits of stock ownership. Examined in light of all of the facts and circumstances of this case, it becomes clear that the firing of Jack Cooper was a clear breach of the fiduciary duties of Bob and Chad Cooper

II. THE BREACH OF CONTRACT CLAIM

The Defendants assert that [redacted] claims on the oral option agreement are barred by statute of frauds and because [redacted] never exercised the option

The Statute of Frauds Claim is Barred Because Not Raised as an Affirmative Defense

The Defendants have not pled the statute of frauds as an affirmative defense -- not in two prior motions to dismiss, not in three answers, not in their prior summary judgment motion in this Court. CR 8.03 provides that "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of frauds . . . ." Defendants have failed to comply with the rule and, consequently, have waived the defense. Sheffer v. Chromalloy Mining and Mineral, Ky. App., 578 S.W. 2d 594 (1979)(affirmative defense of failure of consideration waived); Young v. Tackett, Ky. App., 481 S.W.2d 661 (1972); MaCurdy v. Sikov & Love, P.A., 894 F.2d 818 (6th Cir. 1989)(affirmative defense of accord and satisfaction waived).

The Statute of Frauds Is Not Applicable in Any Event.

The statute of frauds is inapplicable because this contract concerned the sale of a "security" within the definition of Article 8 of the Kentucky Uniform Commercial Code. KRS 355.8-113 provides:

> A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one (1) year of its making. (Emphasis supplied.)

KRS 355.8-103, "Rules for Determining Whether Certain Obligations and Interests are Securities or Financial Assets," provides that "(1) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security." This is clear enough, but the Kentucky Court of Appeals has added further clarity by ruling that the stock of a

closely held corporation is a "security" within the meaning of Article 8 of the Kentucky Uniform Commercial Code, in Smith v. Baker, 715 S.W.2d 890 (Ky. App. 1986).[9]

A written contract may be modified orally.

In Kentucky "[A] written contract can be modified or abandoned by a subsequent oral agreement, [but] the proof to support such an assertion must be clear and convincing." Dalton v. Mullins, 239 S.W.2d 470, 475 (Ky. 1956), quoted in L. K. Comstock & Co. v. Becon Construction Co., 932 F. Supp. 906, 932 (E.D. Ky. 1993). However, "[T]his does not mean that it must be established beyond a reasonable doubt, but that the evidence must not be vague, ambiguous, or contradictory, and must come from a credible source. It does not have to be undisputed or uncontradicted." Wehr Constructors, Inc. v. Steel Fabricators, Inc., Ky. App., 769 S. W. 2d 51, 54 (1988).

Admission of Bob Cooper Takes This Case Out of the Statute of Frauds.

Perhaps the most interesting part of the Defendants' argument is that they do not claim that Bob Cooper never promised to sell his stock in the dealership to Jack just that the promise is unenforceable or that Jack did not act like it was enforceable. In fact, Bob Cooper has admitted, under oath, that he made that promise. Bob Cooper depo. II at p. 39. Even if the statute of frauds applies, the admission by Bob Cooper under oath and on the record, that he promised to sell the dealership to Jack Cooper takes the case out of the statute of frauds. Calloway v. Calloway, Ky. App., 707 S.W. 2d 789 (1986); Central Jersey Dodge Truck Center, Inc. v. Sightseer Corporation, 608 F.2d 1106 (6th Cir. 1079).

The Significance of the 1997-1998 Negotiations.

[9] At the time Smith, supra, was decided, KRS 355.8-319 provided that sales of securities were subject to the statute of frauds. KRS 355.8-319 has been repealed, and replaced with KRS 355.8-113, effective January 1, 1997.

Defendants claim that the course of dealing of the parties respecting the sale of the stock of [redacted] to [redacted] demonstrates that [redacted] never had an option -- because [redacted] never exercised any option and because he negotiated for the purchase of the dealership rather than insisting on enforcement of the option. However, the evidence will be that [redacted] tried to exercise the option and was rebuffed. The negotiations for the purchase of [redacted] were not inconsistent with the existence of an option; rather they were a rational attempt to settle the matter without litigation. Mr. [redacted] has testified, for example, that his approach in representing [redacted] was not to be confrontational, but instead to try and find a way to work things out if possible. See, [redacted] deposition at p. ___. However, he never denied the existence of the option.

Defendants claim, in their Memorandum at p.22, "During his deposition, Mr. [redacted] testified that [redacted] never exercised the oral option which [redacted] claims exists and which would have given [redacted] an automatic right to purchase all of the stock in [redacted] (Emphasis in the original.) No quote from the deposition is offered and no page number is referenced.[10] In fact, Mr. [redacted] testified to just the opposite:

> "But at some point in the case I remember telling [redacted] that -- again, I don't know when -- but that [redacted] said, 'I have an option to buy out the stock and I want him to sell it to me.'" [redacted] depo. at p.32.
>
> "But I know at some point in here we said that -- we informed Max [Goldsmith] that there was in fact an option and we wanted to exercise it. I mean, I remember doing that." [redacted] depo. at p. 34
>
> "My February 19 letter [to [redacted] c/o [redacted]] says that he was told he would be able to buy the majority interest." [redacted] depo. at p. 35
>
> "But as of February 19, 1996, I was telling [redacted] that we believed there was an interest. And I think -- as I say here, I think [redacted] had requested to buy the

[10] Mr. [redacted] deposition was taken the same day the Defendants' Memorandum was served, January 21, 2000.

company previously and was told by Mr. [redacted] that he wasn't interested. I do recall knowing that beforehand." [redacted] depo. at p. 36.

"I believe Mr. [redacted] tried to exercise it [the option] several times and was told [redacted] wasn't interested in signing it or that he -- and again, I'm really stretching my memory and I don't know for sure, or it could have been that Mr. [redacted] told him, 'There is no such option, we don't know what you are talking about.'" [redacted] depo. at p. 40.

The affidavit of [redacted] attached as Exhibit 2, also confirms, in paragraph 8, that [redacted] repeatedly tried to exercise the option and that [redacted] repeatedly refused to sell his stock in [redacted] to [redacted] That is why negotiations were necessary.

Defendants also claim, in their Memorandum at p. 22, that "In fact, Mr. [redacted] testified that the negotiations for [redacted] purchase of [redacted] fell through because [redacted] withdrew his offer." This was another mis-characterization of Mr. [redacted]' testimony. He testified that [redacted] terminated the negotiations:

Q. Take a look at Exhibit 21. It's also a February 5, 1998 hand_delivered letter from [redacted] to you.

A. Right. That's the letter I was talking about that I kept separate with the original agreements that had been signed that I have here.

Q. In the second paragraph, sir, it says, "If [redacted] wants to proceed with this transaction, please return two fully executed originals, along with the good faith deposit, to me on or before 4 p.m., Friday, February 6, 1998. If the agreements and check are not received by the aforesaid date and time, the [redacted] offer to sell is withdrawn. My clients do not wish to negotiate further." Did you discuss that with [redacted]

Q. Your letter of February 6, 1998, which is Exhibit 22, to [redacted] ends on the last paragraph of the last page, "While [redacted] is willing to negotiate the points raised above and in our earlier correspondence, he is unwilling to sign the documents as presented."

[redacted] did not walk away from the negotiations, he received a take it or leave it

offer from [redacted] lawyer. He did not accept the offer but he clearly indicated, through his lawyer, that he was willing to continue the negotiations.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Defendants assert that Plaintiff's claim for intentional infliction of emotion distress must fail as a matter of law because the conduct of [redacted] and [redacted] was not outrageous enough.

The elements of the cause of action were explained recently in Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61, 65 (1996):

> Our Commonwealth first adopted the tort of intentional infliction of mental distress in the case of Craft v. Rice, Ky., 671 S.W.2d 247 (1984). In Craft, we adopted Restatement (Second) of Torts, section 46, and recognized the elements of proof necessary for this new tort:
>
> 1. The wrongdoer's conduct must be intentional or reckless;
>
> 2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
>
> 3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
>
> 4. The emotional distress must be severe.

The court went on to point out that:

> Citizens in our society are expected to withstand petty insults, unkind words and minor indignities. Such irritations are a part of normal, every day life and constitute no legal cause of action. It is only outrageous and intolerable conduct which is covered by this tort.

Kroger, supra, at 65.

The conduct of [redacted] and [redacted] in this case went far beyond "petty insults, unkind words, and minor indignities." [redacted] managed [redacted] successfully from 1984 to January 1997. During the course of the work, [redacted] distributed millions of dollars in income to [redacted] and

[redacted] earned the respect of [redacted] employees, and [redacted] bankers. There is no hint that [redacted] took money out of the company improperly or otherwise engaged in any impropriety.[11] [redacted] lived modestly and, when not working, attended to his Korean born wife, Sook (who developed leukemia in 1987). [redacted] was in all ways a dutiful and respectful son, save one - he would not let his father and brother loot the corporation.

So long as the other dealerships were able to throw off enough cash to support their lavish lifestyles, [redacted] and [redacted] were relatively content to leave [redacted] alone to make money for them. However, [redacted] did developed a festering resentment for his older, much more competent, brother ([redacted] depo at p. 172) and there is evidence that [redacted] tried, even before 1997, to sabotage [redacted] efforts and referred to [redacted] on occasion, as his "bastard brother." [redacted] depo. at p. 172. However, when their own lifestyles and poor management forced them to sell the Dodge, Plymouth, Buick, Chevy, and Isuzu dealerships, and when their own lifestyles and poor management put [redacted] on the ropes, they sacrificed [redacted] Because [redacted] prevented them from misappropriating corporate assets, and only for that reason, [redacted] and [redacted] lied to [redacted] They stole from him. They caused him to be arrested and led from the dealership in handcuffs. They published outrageous falsehoods about [redacted] management ability in the newspaper with the largest circulation in the state of Kentucky. They caused his sick wife's health insurance to be terminated. <u>This was nothing less than outrageous behavior in the extreme</u>.

Some jaded people in this day and age might be of the opinion that this type of conduct from strangers or competitors is not unusual.[12] Most people, however, would conclude that this

[11] We should say there is no hint of impropriety other than the unsubstantiated and slanderous claims made by [redacted] and [redacted]

[12] Although, the undersigned submits that most people still believe that you should not steal,

type of conduct by a partner or by a father toward his son and by a brother to another brother is "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." At least, this Court cannot decide, as a matter of law, that the conduct does not offend "generally accepted standards of decency and morality."[13]

It is possible to draw some conclusions from the cases other than some conduct is bad, some conduct is not so bad. It is possible, in other words, to add at least some objectivity to the analysis. Where a defendant's conduct is merely callous or insensitive and does not form a pattern of conduct which is beyond decency, a plaintiff will not be able to make out the tort. Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1 (1990)(hospital staff insensitive to mother who lost her child in premature labor). If the conduct complained of is the result of ineptitude and indifference, and not malice, the plaintiff will not have a viable claim. Kentucky Farm Bureau Mutual Insurance Co. v. Burton, Ky. App., 922 S.W.2d 385 (1996)(wage garnishment case where defendant relied on the advice of counsel). However, where the plaintiff alleges a pattern of poor behavior which demonstrates malice or the intention to do harm on the part of the defendant, the plaintiff will be found to have a viable intentional infliction of emotional distress claim. Craft v. Rice, Ky., 671 S.W.2d 247 (1984)(former sheriff allegedly harassed plaintiff by keeping her under surveillance at work and home, threatening to put her husband in jail and driving so as to force her vehicle into an opposing lane of traffic); and Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61 (1996)(terminated employee harassed to induce him to sign a release). This case clearly involves a pattern of immoral and indecent behavior by Bob and Chad Cooper

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you should not bear false witness, and you should not covet anything that belongs to a neighbor (or a brother).

[13] The lawyers (and judge) in this case can debate about what "generally accepted standards of decency and morality" are; but, ultimately, a jury is going to have a better idea about those standards than we are.

which extended over a period of time, which was carried out with malice, which was intended to harm, and which did harm, Jack Cooper

Defendants would have this Court believe that "[a] prime example of the limited nature of the tort of intentional infliction of emotional distress is Rigazio v. Archdiocese of Louisville, Ky. App., 853 S.W.2d 295 (1993)." (Defendants' Memorandum at p. 30.) The point of the Defendants' argument is that, since sexual abuse on a minor by a Catholic priest cannot form the basis of a claim for intentional infliction of emotional distress, surely the conduct of Bob and Chad Cooper cannot be held to constitute intentional infliction of emotional distress. This argument completely misconstrues the holding in Rigazio. The court there acknowledged that the conduct was outrageous, the only question was which statute of limitations to apply -- the one year statute of limitations for assault and battery, or the five year statute for intentional infliction of emotional distress. The court found that the one year statute was the proper statute. The case has no application to Jack Cooper's claims in this case. The court of appeals there held only that, where a plaintiff may recover damages for emotional distress under several tort theories, intentional infliction of emotional distress is not the proper cause of action. In other words, the ruling in Rigazio will prevent the recovery of damages for emotional distress caused by outrageous conduct only in the odd case (like Rigazio) in which the statute of limitations has run on some, but not all claims.[14] Rigazio, supra, at 299.

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[14] The actual language from the opinion on this point is as follows:

> "[W]e believe that § 47 [of the Restatement(Second) of Torts] recognizes that where an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action. The tort of outrage was intended to supplement the existing forms of

The actions of [redacted] and [redacted] have caused [redacted] to suffer severe emotional distress. The Defendants' own psychiatrist, Dr. [redacted], after examining [redacted] reported:

> If [sic] does appear that Mr. [redacted] developed a major depression in reaction to treatment he has received, or perceived to have received, form his stepfather, [redacted] There does seem to be a direct relationship between the alteration in his mood and behavior of Mr. [redacted] directed towards [redacted]

(See, expert witness report of Dr. [redacted] dated January 10, 2000, produced by Defendants to counsel for [redacted] Moreover, during his deposition on February 3, 2000, Dr. [redacted] went even further. Dr. [redacted] within a reasonable medical probability, concluded that [redacted] perception of [redacted] treatment involving the termination on January 26, 1998, caused [redacted] to suffer a psychological condition dx as Major Depression, per DSM III. In his testimony, Dr. [redacted] made it clear that [redacted] perception of [redacted] wrongful treatment included the publication made about the termination in the [redacted] on January 27, 1998. Major depression often causes despair and hopelessness so profound that the person loses interest in life, becomes incapable of feeling pleasure and sexual arousal, and may be unable to get out of bed or eat for days at a time. But this illness may also cause other symptoms not easily recognized as depression: weight loss or gain; anxiety, irritability, or agitation; chronic indecisiveness; or sleep disturbances (insomnia or sleeping all the time). Officially, according to DSM-IV, major depression involves at least two weeks of deep despair and at least four of the following: Sleep problems. Insomnia or sleeping all the time. Appetite problems. Loss of

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recovery, not swallow them up.

appetite or major weight gain. Lack of energy. Apathy, lethargy, no interest in anything Feelings of worthlessness, hopelessness, and/or terrible guilt. Difficulty concentrating, or unusual indecisiveness. Suicidal thoughts, or suicide attempts. Dr. [redacted] recognized that Jack suffered all of the symptoms listed above at one time or another, EXPLICITLY BECAUSE, WITHIN A REASONABLE MEDICAL PROBABILITY, OF THE WRONGS Jack PERCEIVED HE SUFFERED. Moreover, Dr. [redacted] recognized that Jack suffered disabling panic attacks, due to Jack clinical depression. Beyond the misery it causes, a big risk in major depression is suicide. Within five years of suffering a major depression, an estimated 25% of sufferers try to kill themselves. Moreover, Dr. [redacted] recognized that this serious illness, if left untreated, can cause brain damage by permanently altering the chemistry in the brain. Dr. [redacted] opined that the risk of cardiovascular disease, because of Major Depression, may also increase. Those with Major Depression may have an almost fourfold increase in the risk of heart attack. And, if a heart attack is suffered by someone depressed, there may be a fourfold increased risk of dying when compared to a non-depressed population. Clearly, Major Depression is a serious disease. When Bob intentionally breached his duties as a director, shareholder and his tort duties prohibiting publication of falsehoods and malicious defamation, he committed intentional torts directly causing Jack to suffer this overwhelming illness. On this point, there is no conflict of fact. Even Dr. [redacted] Defendants' own witness, admits this. Today, Jack continued mental well being is maintained only through the use of the anti-depressant, Serzone. Jack suffered a psychological and physical wrong every bit equivalent to a broken arm, leg or a bloody face. Indeed, at trial, Counsel for Plaintiff will argue that the intentional infliction of this disease, is every bit equivalent to Bob breaking Jack leg or hitting him in the face. Given a choice between Major Depression, and a broken leg, most

rational humans would chose a quick healing break any time.

Jack Cooper has not only been severely damaged financially by the conduct of Bob and Chad Cooper he has been severely damaged mentally and emotionally. Kentucky law provides a remedy for that damage and this Court should not hesitate to apply it.

IV. DEFAMATION

To the Newspaper reporter who asked, Bob Cooper explained his firing of Jack Cooper by saying the following things (all of which were published and all of which were libel per se):

"We've just been unhappy about the way the store's been run."

"My son Jack kind of cross-ways with us now."

"The board of directors was not pleased with his duties. . ."

"[He's of a belief that an auto dealer who spends more than three or four hours (a day) in an auto dealership is stupid."

Bob Cooper further amplified this last statement by stating that he has had as many as seven dealerships at one time and "I was in one of them every day."

The classic formulation of liable per se in the business context is that false statements are actionable as libel per se when they impute "unfitness to perform the duties of an office, occupation, or employment, or having [sic] a tendency to prejudice him in his trade, calling or profession. . . ." Shields v. Booles, 238 Ky. 673, 38 S.W. 2d 677 at 680 (Ky. App. 1931)(emphasis supplied). See, also CMI, Inc. v. Intoximeters, Inc., 918 F. Supp. 1068 at 1083 (W.D. Ky. 1995)("The Court must consider 'if [the words] directly tend to the prejudice or injury of a person in his profession, trade or business." (emphasis supplied). Quoting from White v.

Hanks, 255 S.W.2d 602 (Ky. 1953).)[15]

In the business context, the test is not very high. Did the words suggest unfitness or tend to prejudice [redacted] in his trade? The answer is clearly yes. Any doubts can be erased by asking the following question: "Would I hire a manager who believed that he only needed to work three or four hours a day and who was fired because the board of directors of his employer was "not pleased with his duties."[redacted] depo at p___.

Defendants argue that "[redacted] was repeating a statement made by [redacted] about his father." Defendants' Memorandum at 34. That argument is disingenuous, to say the least, particularly in light of the clarification [redacted] offered in the very same article. Moreover, [redacted] has testified to the contrary.

> Q. Did you have a conversation with [redacted] reporters prior to the publishing of this article?

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[15] Black's Law Dictionary (Revised Fourth Edition) defines "tend" as follows: "To have a leaning; serve, contribute, or conduce in some degree or way, or have a more or less direct bearing or effect; to be directed as to any end, object or purpose; to have a tendency, conscious or unconscious, to any end, object or purpose." (Emphasis supplied.)

[16] [redacted] would not hire a manager with that philosophy. He is of the belief, or at least says he is of the belief that car dealership managers have to work hard. During his deposition given to counsel for Plaintiff, [redacted] described the problems faced by a new general manager as follows:

> Well, Mr. [redacted] worked approximate 30 days, and [redacted] was a __ was a very fine gentleman and I really thoroughly enjoyed [redacted] but [redacted] had not been used to a domestic automobile franchise, number one, and he really hadn't been used to a dealership that __ that handled the volume, had the number of sales personnel and so forth and so on. And [redacted] was __ was probably in a stage in his life where he was not looking to work extremely hard, put in a lot of hours. He had a son, I believe, and a daughter and they were __ were the primary focus in his life at the time, and so he really __ he didn't enjoy the rigors and the pressure and the time at the dealership. So after about 30 days he told Mr. [redacted] that he believed he needed to move on and...

> A. . . . . And I said, "Well, his philosophy, which he stated to his mother several times and to me once, that if a dealer had to spend more than three hours a day in a dealership, he was stupid." And so there's where he got his information there. . . .

Bob Cooper depo. at p. ___.

If the court is inclined to find that the statement is capable of more than one meaning, it must submit the question of whether the statement is libel per se to the jury. The Kentucky Supreme Court has provided the following guidance on the issue:

> Although it is usually the court's function to determine whether a crime imputed by published statements is actionable as libel per se, where the words at issue are capable of more than one meaning, as they are here, the jury should decide which of the meanings a recipient of the message would attribute to it. Deitchman v. Bowles, 166 Ky. 285, 179 S.W. 249 (1915); Beams v. Beams, 138 Ky. 818, 129 S.W. 298 (1910).
>
> > "A publication must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. If it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be heard." Gearhart v. WSAZ, Inc., 150 F.Supp. 98, (E.D.Ky.1957), aff'd 254 F.2d 242 (6th Cir.1958) (emphasis added).

Yancy v. Hamilton, Ky., 786 S.W.2d 854 at 858 (1989).

Numerous modern cases have held that statements which can reasonably be interpreted as indicating professional incompetence are libel per se. See, for example, Hopewell v. Vitullo, 701 N.E.2d 99 (Ill. App. 1998); Kelleher v. Corinthian Media, Inc., 617 N.Y.S.2d 726, 208 A.D.2d 477 (N.Y. Sup. Ct. App. Div. 1994); and Kraus v. Brandstetter, 562 N.Y.S.2d 127, 167 A.D.2d 445 (N.Y. Sup. Ct. App. Div. 1990) (statement in hospital newsletter that staff board was unanimous in vote of no confidence held libel per se).

Defendants also claim that the statement was merely an expression of opinion and, as such, is privileged. Defendants are saying two different and inconsistent things about the statement. On the one hand, they say that it is only a repetition of something Jack Cooper said about Bob Cooper On the other hand, they say that it is only a statement of opinion by Bob Cooper Which is it? It might be an expression of opinion if Bob Cooper had said "I think he's of the opinion . . ." But he did not say that. The statement is a false expression of fact about Jack Collin's business philosophy and unwillingness to work hard.

V. Chad Cooper TORTUOUS CONDUCT

The Defendants claim that Chad Cooper had nothing to do with the firing. The evidence on this point, like the evidence regarding the other breaches of fiduciary duty, shows that Chad was right in the thick of it. Chad Cooper not only participated in the breaches of fiduciary duty, he participated in the fruits of that conduct. Here is what Mr. has to say about the participation of Chad Cooper in Jack firing:

> Q. Mr. , did you talk to anybody else on January 26, 1998, about Jack Cooper
>
> A. Yes, talked to .
>
> Q. What do you recall about any conversation or conversations with Max ?
>
> A. called me and __ sort of apologetic and said that Chad Cooper had called him on Friday before and had said, "Draft the documents and get rid of Jack We're just not putting up with him not doing what we tell him." That was basically the... I don't know that those words, but that was my gist of it. The gist of what it was, was that called me and said Chad had called him and said they were tired of Jack not doing what he was asked to do and that they wanted him out and that, you know, that they just didn't feel like he could __ then went on to say that he told Chad to think about it over the weekend, not to do it on Friday but to think about it over the weekend. And he said Chad called him back Monday morning and said, "We want to do it, you know, we're

going to do it."

And I got the impression in that conversation that [redacted] and [redacted] wanted him out because [redacted] had refused to authorize Downtown [redacted] to pay a [redacted] that was really the [redacted] of [redacted] and that they felt that they could negotiate __ that they needed __ in order to negotiate the sale of everything, they needed [redacted] out of there. That was my impression of the conversation. But I very specifically remember [redacted] telling me that [redacted] had called him on both occasions and said, "We want him out. Draft the document that's needed." And then it was my vague recollection that it was they wanted him out because of the [redacted] that hadn't been paid, that he had refused to have [redacted] pay and because they felt they could only negotiate to buy this place if he were out of there.

. . . .

Q. Do you have any recollection of any additional conversations with [redacted] on January 26, 1998, other than what you've told me?

A. I remember having several conversations with him and basically in those conversations him relaying that to me. I remember that it was the first conversation where he told me about [redacted] ***calling him and saying, "Put him out."***

[redacted] depo at pp. 100-103. (Emphasis supplied.)

CONCLUSION For all these reasons, the Defendants' motion for summary judgment should be denied and this case should proceed to trial on February 15, 2000.

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[redacted]

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing pleading was hand-delivered this 4th day of February, 2000, to:

[redacted]

[redacted]

COUNSEL FOR PLAINTIFF

[redacted]