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Employment Fraud - The manager of a mobile home sales dealership shot and killed a thief who broke into the on-the-lot model home – the manager was promptly fired – the manager then successfully sued the mobile home company, alleging he was fraudulently lured to the manager position with a promise that he'd be the manager-for-life

Kirk v. LUV Homes, 05-0512
Plaintiff: C. Phillip Wheeler, Jr. and John W. Kirk, *Kirk Law Firm*, Paintsville and Bobby Rowe, *Rowe Law Office*, Prestonsburg
Defense: Debra H. Dawahare and Leila G. O'Carra, *Wyatt Tarrant & Combs*, Lexington and C.V. Reynolds, *Reynolds Law Office*, Prestonsburg
Verdict: $725,000 for plaintiff
Circuit: **Floyd**, J. Caudill-1, 12-10-07

Michael Kirk started working in 1992 in sales for LUV Homes. The company sells mobile homes. Kirk was good at his job and working out of the Harold location, he became a top-seller. To the first key event in this case, Kirk was lured in 1999 to become the manager at the company's struggling location in Ivel.

Kirk recalled a promise that if he took the Harold job (considered a dog in the industry and representing a potential pay cut), he would have a job for life and that the company would stand behind him. Relying on this promise Kirk made the move. Quickly he was a success and he was earning $250,000 a year by 2005.

The second significant event occurred in March of that year. The lot (where the mobile homes are maintained) had been subject to frequent burglaries and damage to company property. Kirk was determined to stop it.

On 3-22-05, Kirk waited in the darkened model mobile home. He was armed with a gun. An intruder did come, Ronald Dillon, and Kirk apprehended him. While waiting for the police to come, there was a struggle and Kirk shot Dillon twice. Dillon was killed. [Kirk was never charged.]

Thereafter LUV Homes began an investigation and two weeks later, Kirk was summoned to company headquarters in Tennessee. He believed he was coming for a pow-wow of big-wigs to sort out a litigation response.

Instead LUV Homes fired him for violating company policy in several regards, (1) having a gun on company property, and (2) using it to kill an intruder. From the perspective of LUV Homes, while it had good reason to fire Kirk, he was terminable-at-will in any event.

Thereafter Kirk pursued this employment lawsuit against LUV Homes and while a myriad of torts were alleged, by the time of trial, it was down to just two theories, (1) breach of contract in that he was promised a job for life, and (2) fraud in that he was lured to take the struggling Harold manager position with the false promise of a job for life. He also sought quantum meruit damages for sales made before the firing and still pending but unpaid. The heart of plaintiff's case was that he was a loyal

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The KTCR 2006 Year in Review

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Another year has passed and the one-of-a-kind text Kentucky litigators have relied upon since 1998 is back with its tenth edition. At more than 600 pages, the KTCR 2007 Year in Review includes the complete verdict summary from every reported case in 2007, statewide from Paducah to Pikeville, Covington to London and all points in between. Beyond the full text of the 300 verdict summaries, the Year in Review has all the reports that makes the individual cases useful – even better for this year, all the reports bring together a remarkable **ten** years of data in an encyclopedic format.

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employee, who worked hard to make money for the company and was even willing to defend it with the use of deadly force, yet when he did just that, LUV Homes abandoned him.

LUV Homes defended that there was no contract and that the fraud count was just a rehash of the contract claim. That is as noted above, Kirk was terminable-at-will and he had been properly fired. Even if there had been a contract of sorts, LUV Homes alternatively pointed out that the shooting of Dillon was an intervening event that relieved the company of its promise.

The result was mixed at trial, the jury rejecting the contract count. Kirk did prevail on fraud and took lost wages of $250,000 and $150,000 more for in the future. His emotional distress was valued at $250,000. The jury added $75,000 more on the quantum meruit count, the verdict totaling $725,000. A judgment in that sum followed.

Kirk has moved for a new trial on punitives only, arguing that this element of damages should have gone to the jury. LUV Homes too has sought JNOV relief, repeating trial arguments on the merits, but also discussing the conduct of Kirk's co-counsel, Bobby Rowe. It alleged that he prejudiced the jury with his remarks, in and out of court, including notably what he said at security. LUV Homes attributed to Rowe that he told the security guard, that he always carried his Bible with him and he was worried if the metal detector would harm the holy text. The thrust of the motion was that Rowe said the remark for the benefit of the jury, hoping to sway their passions with his piety. LUV Homes also cited Kirk's invocation at trial of his Fifth Amendment rights regarding the shooting. All motions are pending.

Ed. Note - This trial result reminds us of *Williams v. Wal-Mart*, Case No. 1411 from 2000, a $539,237 Barren County verdict for a plaintiff who alleged age discrimination when fired from Wal-Mart. The gravamen of the case was that the woman, a long-time loyal employee, was fired for the very minor offense of stealing a fifty-eight cent bottle of water. She morphed the outrage of the firing and squeezed it into an age discrimination case. There was lots of proof of bad conduct by Wal-Mart, but almost none of age discrimination. It was of little consequence and Wal-Mart, a bad actor in that case, was hit hard in the verdict.

But the victory was pyrrhic. It was reversed on appeal as quite clearly, it wasn't a case about age discrimination.

This case seems to have been prosecuted in much the same way. The real alleged tort in this case, firing a loyal employee who was protecting sacred company property by shooting a thief, is unfortunately, not a cognizable employment tort in Kentucky. But by squeezing that the body of that fake tort into a fraud shirt, the plaintiff survived and prevailed at trial.

That result seems very unlikely to stand up on appeal. At either the Court of Appeals or the Supreme Court, the canard of this tort-stuffing will be exposed.

Medical Negligence - **The plaintiff linked a fatal bacterial infection to a hysterectomy – while there was no error in the technical performance of the hysterectomy, the estate was critical of the doctor for performing it in the first place and thus exposing the plaintiff to the bacteria**

Copley v. Edens, 03-0062
Plaintiff: Jeffrey Hinkle, *Hinkle & Keenan*, Inez
Defense: Kenneth Williams, *Williams Hall & Latherow*, Ashland
Verdict: Defense verdict on liability
Circuit: **Lawrence**, J. Preston, 11-13-07

Martha Copley, then age 40, treated in early 2002 with her Ob-Gyn, Dr. Curt Edens, for heavy vaginal bleeding. Edens recommended and Copley consented to a total hysterectomy. It was performed on 4-22-02 at Three Rivers Medical Center in Louisa.

Over the next month Copley returned to Edens with complaints of abdominal pain and nausea. Testing in May linked her symptoms to a bacterium, described specifically as clostridium difficile. That bacterium, which is hospital-based, caused sepsis which in turn led to a necrotic bowel and small intestine.

Despite aggressive intervention at a number of different hospitals, including at the Cleveland Clinic, Copley could not be salvaged. She died on 9-26-02. She was survived by a daughter, Kelley, then age 13.

In this lawsuit, Copley's estate alleged negligence by Edens, not in his performance of the hysterectomy, but rather for undertaking it in the first place. Plaintiff's expert, Dr. Lazlo Sogor, Ob-Gyn, Cleveland, OH, explained that Copley's bleeding was related to a polyp, something that could have been removed in a much less invasive procedure.

Thus by undertaking a surgery that wasn't necessary, Copley was exposed to the bacterium and the fatal complications followed. If prevailing, the estate sought medicals of $629,429, plus $582,125 for destruction (described in the instructions as lost wages). The estate's vocational expert was William Weikel, Cape Coral, FL – Copley had worked as a gas station cashier.

Beyond the funeral expense of $6,170, the jury could also award $5,000,000 for Copley's suffering. The consortium interest of Kelley (limited specifically to 43 months in the instructions) was capped at $1,000,000.

Edens defended the case that based on Copley's presentation, the hysterectomy was both properly undertaken and performed, the doctor noting importantly that the hysterectomy was a success. [The estate thought it was less of a success and in any event, that question was moot, as it shouldn't have been performed in the first place.]

The defense further developed that the bacterium was unrelated to the hysterectomy, it developing later. This was developed by an immunology expert from Tulane, Ronald Nichols.

The verdict on liability was for Edens by a 9-3 count and the estate took nothing. A defense judgment was entered.

Breach of Settlement Agreement - **As a jury was deliberating a products liability case (in August of 1998) involving a minor injured by a lawnmower, the parties may or may not have reached a $500,000 settlement – minutes later when a defense verdict was returned, the defendant thought the settlement was actually just a discussion – nearly ten years post-verdict, a mini-trial was conducted on the single question of whether there had been a settlement**

Markesberry v. The Roper Corporation, 89-0860
Plaintiff: Mark G. Arnzen and Beverly R. Storm, *Arnzen Wentz Molloy Laber & Storm*, Covington
Defense: Gerald F. Dusing and Mary Ann Stewart, *Adams Brooking Stepner Woltermann & Dusing*, Covington
Verdict: For plaintiff
Circuit: **Boone**, J. Frohlich, 11-8-07

Brandon Markesberry was just six

years old when he was run over in 1987 by a riding lawnmower operated by his Uncle. As Brandon threw grass at his Uncle, the Uncle left the mower to chase the boy. In the accident, Brandon suffered a partial amputation of one foot, as well as serious lacerations to both legs. His medicals totaled $39,000.

In this lawsuit Markesberry alleged the lawnmower, manufactured by the Roper Corporation (part of Sears) was defective in that it had a "deadman switch" to turn it off when there was no operator. Sears defended that such switches were not required, nor were they reliable in 1987.

The case advanced to trial and proof was introduced over two weeks in August of 1998. The boy was represented by Richard Lawrence and Marcus Carey. Roper's lawyers were Harry Rankin and Mark Hayden. As the jury deliberated, the parties began to discuss a settlement.

Working with their trial consultant, Mark Modlin, the plaintiff proposed a $1.5 million-$200,000 Hi-Lo. Roper rejected the Hi-Lo and instead countered with $500,000, communicating that offer to Modlin. Lawrence thought the number was too low, but that was not communicated to Roper.

At the same time, the jury came back with a question for the then-presiding Judge Bamberger. It asked the court for a definition of "unreasonable" in the context of "unreasonably dangerous." Ten minutes later, the jury had a verdict. It was for Roper. As this was happening, the plaintiff had decided to accept the offer.

Within moments of it being announced that there was a verdict (but not yet knowing what it was), Carey explained to Hayden that the $500,000 offer would be accepted. Roper thought the offer had been rejected, the plaintiff's mother having failed to immediately accept it. There would be fact disputes about what was happening as there was apparently quite a commotion in the courtroom, concerning not just the jury question, but also including phone calls going back and forth to adjustors and other interested parties.

Following the verdict, the positions solidified. Roper explained there had been an offer, but that Markesberry rejected it by asking if it could be held open a few minutes while the boy's mother made a phone call to his father. Then before it was accepted, the circumstances materially changed in the form of the jury question and thus the offer expired. The boy then, Roper thought, was owed nothing.

Markesberry countered that the offer was still open (it hadn't been modified or rescinded) and Carey's acceptance of it after the verdict closed the deal. From the plaintiff's position, it was a matter of simple contract law.

This case was tried to an advisory jury in Florence. The jury answered that the parties did reach an agreement to settle the underlying case for $500,000. A judgment for the plaintiff was entered in that sum with simple interest of 8% from the date of the settlement (from August of 1998), with interest of 12% compounded thereafter.

Medical Negligence - An avascular necrosis and subsequent hip replacement were blamed on a pain management doctor's overuse of steroid injections

Lockridge v. James, 03-1117
Plaintiff: Charles A. Taylor and Jonathan D. Whitaker, Lexington
Defense: Clayton L. Robinson and Benny Epling, II, *Jenkins Pisacano & Robinson*, Lexington
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Goodwine, 11-1-07

Daniel Lockridge was working in 1996 for UPS when he sustained an on-the-job back injury. Thereafter he treated with a pain management doctor, Oliver James. Over the course of two years, James administered some 17 steroid injections in Lockridge's spine. At the time, Lockridge thought nothing more of it.

Then in March of 2002, he was diagnosed with an avascular necrosis condition in his hips. It required a hip replacement. At this time, he also learned that this condition was related to the steroid injections.

In this medical lawsuit, Lockridge alleged the negligent and excessive use of injections by James and that they had caused the necrosis. Plaintiff's experts were Dr. Thomas Mitro, Gulph Mills, PA and Dr. John Herbert, New York, NY, both anesthesiologists. If Lockridge, now age 47 prevailed, he sought lost wages, plus impairment and suffering. [An insurer had intervened for a portion of the lost wages it had paid as a part of the worker's compensation claim.]

James defended on two fronts: (1) his administration of the injections was properly done and consistent with the standard of care, and (2) the avascular necrosis wasn't related to the injections in any event. The doctor thought it was more likely linked to Lockridge's history of alcohol and drug use. There was proof that Lockridge drank a case of beer a day and had been to rehab. Further buttressing this argument, subsequent to these events, Lockridge was convicted of cocaine possession and sentenced to five years in prison. Experts for James were Dr. Richard Rauck, Anesthesia, Winston-Salem, NC and Dr. Mark Gladstein, Orthopedics, Louisville.

Following three days of proof, the court's instructions asked if James violated the reasonably competent anesthesiologist standard in administering the steroid injections. Unanimously the answer was for the doctor and Lockridge took nothing. A defense judgment was entered.

Lockridge has sought post-trial relief on a very narrow question, arguing it was improper to exclude a learned treatise discussed by expert, Herbert, particularly, an article from the *Journal of the Korean Pain Society*. James countered it was no error as it wasn't a complete article, but rather an abstract, the body of the article being written in Korean. The court agreed and the motion was denied.

Auto Negligence - The plaintiff sued her husband and sought damages after he crashed into another driver (since settled) on a narrow one-lane road in and out of the hollow

Workman v. Workman, 06-0028
Plaintiff: Brian Cumbo, Inez
Defense: Michael E. Jacobs, *McGowan & Jacobs*, Hamilton, OH
Verdict: $17,204 for plaintiff less 20% comparative fault
Circuit: **Martin**, J. Preston, 9-5-07

Myra Workman, then age 26, was a passenger on 10-14-05 with her husband, Langley. They traveled in Lovely on a one-lane road that served as the entrance in and out of the holler. In a curve there was a crash with the oncoming (no relation) Michael Workman.

Langley recalled that Michael was on his side of the road. Michael countered that he saw Langley coming and came almost to a stop at the moment of

impact. However it happened there was a crash and Myra was hurt.

She has since treated for a broken foot, incurring medicals of $5,195. Employed as a gas station cashier, she also sought lost wages and suffering. She sued Michael and her husband – Michael settled before trial, leaving the jury only to consider this intra-family dispute. Langley defended as well as a husband can and blamed the non-party Workman for the crash.

The verdict was mixed on fault. It was assessed 20% to the non-party defendant, the remainder to husband. Then to damages, wife took $4,596 of her medicals, plus $2,618 for lost wages. Suffering was $10,000, the verdict totaling $17,204 less comparative fault. A consistent judgment was entered with no PIP set-off.

Medical Negligence - A psychiatrist was blamed for a twelve-year prescribed course of lithium which led to renal complications

Smith v. Aktar, 04-1046
Plaintiff: Michael A. Frye, *Frye Law Office*, Russell and Robert R. Waters, *Waters Law Office*, Huntington, WV
Defense: Kenneth Williams, Jr. and David F. Latherow, *Williams Hall & Latherow*, Ashland
Verdict: $500,000 for plaintiff less 30% comparative fault
Circuit: **Boyd**, J. Hagerman, 12-7-07

Carroll Smith had a long history of bipolar disorder. He began treating in 1991 with a psychiatrist, Dr. Muhammad Aktar, who prescribed lithium to manage the mental illness. The lithium was effective and controlled the condition.

However by 2003, Smith had developed kidney failure which is a known and very serious complication of lithium. It is likely that in the next two to ten years Smith will need a kidney replacement. Consistent with that procedure, Smith faces a myriad of other complications, including diabetes.

Smith sued Aktar and alleged negligence by his psychiatrist in failing to regularly test for lithium toxicity. It was plaintiff's theory that Aktar should have tested three to four times a year, that failure leading to the chronic kidney disease. Plaintiff's experts were Dr. Zeid Khitan, Nephrology, Huntington, WV and Dr. James Jefferson, Psychiatry, Madison, WI.

If Smith prevailed, he sought $4,510,010 for future care, plus $7,000,000 for suffering. Another category, described as "increased risk of harm" was capped at $200,000. His wife sought $750,000 more for her consortium interest.

Aktar defended that Smith was a difficult patient in several regards, including Smith's non-compliance. That is, Smith pressured Aktar and explained that he couldn't afford to pay for the diagnostic tests to check for liver damage.

Aktar had to balance that knowledge (the need to test) with the very real and potentially catastrophic risk of lithium toxicity. There was evidence that had he discontinued the lithium (a drug that managed Smith's bipolar disorder very well), there was very serious withdrawal risks. Aktar's expert, Dr. Lawson Bernstein, Psychiatry, Pittsburgh, PA, believed that in facing this very hard case, Aktar had done well and complied with the standard of care.

The verdict on liability was for Smith that Aktar had violated the standard of care – fault was also found with the plaintiff. It was then apportioned 75% to the doctor, the remainder to Smith. Moving to damages, Smith took $100,000 for future care, plus $400,000 for suffering. The increased risk of harm category was rejected as was consortium. The raw verdict totaled $500,000 less 30% comparative fault.

Whistleblower Retaliation - A clerical worker in Lexington alleged she was fired after having blown the whistle on her boss, the whistle-blowing being a grievance filed by the worker about how her boss treated her poorly

Powers v. LFUCG, 04-3346
Plaintiff: Debra Doss and William L. Davis, Lexington
Defense: Leslie Patterson Vose, *Landrum & Shouse*, Lexington and Carolyn Zerga, *LFUCG Dept. of Law*, Lexington
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Goodwine, 12-3-07

Donna Powers started working in 2000 for the Home Network Program, a division of the Lexington-Fayette County Urban Government (LFUCG). In February of 2004 after receiving a poor evaluation, Powers filed a grievance and alleged that her boss had mistreated her.

By May of 2004, Powers was out of work. She was first told that she was canned because of her poor reaction to the negative review. Then in a second letter, sent days later, she was told it wasn't about performance, but instead because "she was no longer needed."

Thereafter Powers filed a whistleblower action against LFUCG, arguing that she blew the whistle (complaining about her boss) and that in retaliation, she was fired. If prevailing, she sought compensatory damages as well as the imposition of punitives.

LFUCG defended that the firing was all about performance, suggesting that the grievance was filed by Powers in an attempt to create her own whistleblower lottery. The government further noted in any event that this wasn't a whistleblower case at all, that is, complaining that your boss isn't nice to you is not waste, fraud or abuse.

The jury first found for Powers that she had divulged waste, fraud or abuse and that she did so in good faith. However LFUCG prevailed on an exculpatory instruction that it had proved by clear and convincing evidence that the whistleblowing was not a motivating factor in the termination. That ended the deliberations and Powers took nothing.

Powers has since moved for JNOV relief arguing the verdict was internally inconsistent, that is, her whistleblowing contributed to the firing, but then that it wasn't a motivating factor. LFUCG responded that the verdict wasn't inconsistent and that in any event, Powers waived any objection by not raising the issue while the jury was still seated. The motion is pending.

Auto Negligence - A rear-ended plaintiff linked a disc injury to the crash – this jury awarded medicals, but nothing for suffering

Skaggs v. Watts et al, 05-0016
Plaintiff: Norman E. McNally, Louisville
Defense: Donald K. Brown and Chad Elliott Kirk, *Krauser & Brown*, Louisville
Verdict: $1,185 for plaintiff
Circuit: **Jefferson**, J. Montano, 5-31-07

It was 2-20-04 and Michelle Skaggs, then age 31 and a switchman at CSX, was stopped on Knoop Avenue at Grade Lane. At that location, she was rear-ended by James Watt, who was then driving a vehicle for Sang Tree Service.

The crash resulted in moderate damage – fault was no issue.

Skaggs treated that day at the ER for apparent soft-tissue symptoms. They did not improve and after a course of chiropractic care, Skaggs underwent a disc surgery. It was performed by a neurosurgeon, Dr. John Harpring, Louisville.

Skaggs incurred medicals of $69,030 and her lost wages were $5,016. She sought $250,000 each for both suffering and impairment. Watts, who was driving a box truck, defended the case and minimized the claimed injury. In that regard, he relied on an IME, Dr. Thomas Loeb, Orthopedics, Louisville – Loeb concluded the wreck resulted in just whiplash, the surgery being unrelated to the wreck.

While fault was no issue, the jury first navigated two prefatory instructions, (1) had the wreck caused an injury?, and (2) had Skaggs exceeded the $1,000 threshold? On both questions, the answer was yes.

Then to damages, Skaggs took $1,185 of her medicals, but nothing for every other claimed element. Less PIP, a defense judgment was entered.

Skaggs moved for a new trial and cited improper argument for the defendant in several regards, including noting that, (1) the result would be heard, it being reported in the verdict reporter, and (2) that the defendant was sweating bullets worrying about the result. Skaggs also called the award of damages inadequate. The motion was denied.

Medical Negligence - Following a cardiac catheterization, the plaintiff presented with a femoral pseudoaneurysm – it ruptured the next day and the plaintiff died

Bellamy v. Shotwell, 04-0239
Plaintiff: John F. Estill, *Fox Wood Wood & Estill*, Maysville
Defense: Mark A. MacDonald, *Freund Freeze & Arnold*, Cincinnati, OH
Verdict: Defense verdict on liability
Circuit: **Mason**, J. Maginnis, 10-12-07

Donald Bellamy, age 49, underwent a cardiac catheterization on 9-17-03. It was performed by Dr. Matthew Shotwell, Cardiology. Five days later Bellamy presented to Shotwell with bruising and pain in his groin. Shotwell performed several tests and identified a femoral pseudoaneurysm.

Shotwell made a decision to observe the pseudoaneurysm for a time, making an appointment for Bellamy to return the next day. Bellamy never made it. The next day as he was preparing to return to Shotwell's office, he suddenly collapsed. The aneurysm had ruptured. Taken to the ER, while Shotwell attempted to salvage Bellamy, the rupture proved fatal.

Bellamy's estate then sued Shotwell and alleged negligence by him in responding initially to the aneurysm. It was argued that he should have referred Bellamy to a vascular surgery or at least, he should have been admitted to the hospital. There was also a criticism of the response at the ER. Plaintiff's expert was Dr. Jay Schapira, Cardiology, Los Angeles, CA.

If the estate prevailed against Shotwell, it sought $975,398 for destruction – Bellamy had worked as a mechanic. His medicals were $12,442 and the funeral bill totaled $8,442. In uncapped sums, the estate sought his suffering as well as his wife's consortium interest.

Shotwell defended the case that he properly diagnosed the aneurysm and that the standard of care, for this sort of aneurysm, did not require hospitalization. [Plaintiff had countered that its size required just the opposite.]

It was Shotwell's additional theory that observation of the aneurysm was reasonable as the condition usually resolves on its own, rupture being very rare. The standard of care proof came from Dr. Gary Ansel, Cardiology, Columbus, OH. A pathologist, Dr. Gregory Balko, Fort Thomas, complicated causation, explaining it was just as likely that Bellamy suffered a sudden cardiac event unrelated to the aneurysm.

Shotwell prevailed at trial by a 9-3 count, this jury in Maysville concluding he had not violated the reasonably competent cardiologist standard. A defense judgment closed the case.

Auto Negligence - Following a wreck on the interstate, the plaintiff didn't treat until two months later – a Burlington jury returned a threshold verdict

Lemming v. Norton, 05-0326
Plaintiff: James R. Garvin, *Brown & Lippert*, Cincinnati, OH
Defense: Douglas B. Schloemer, *Poston Seifried & Schloemer*, Fort. Mitchell
Verdict: Threshold verdict
Circuit: **Boone**, J. Schrand, 12-7-07

On the evening of 7-31-98, Matthew Lemming, then age 39, traveled on I-275 near Hebron. He alleged that Kenneth Norton, traveling at high speed, crashed into his car and knocked him into a guardrail. Lemming was shaken, but didn't think he was hurt.

While stiff and sore the next day, Lemming didn't treat until two months later. He has continued to treat with a chiropractor, Dennis Mulcahy, Fairfield, OH for soft-tissue shoulder and neck pain. His medicals (not sought) were approximately $11,000. He did seek pain and suffering of $15,000.

Norton defended the case on damages (fault was no issue) and focused on the treatment delay. He also relied on proof from a treating doctor, Stephen Wunder, Physical Medicine, Cincinnati, OH. Wunder who saw Lemming just a few times in 1998, concluded that his patient had a temporary soft-tissue injury (quickly resolved) and that the chiropractic care was unnecessary.

The jury never got to an award of damages, rejecting the case on both threshold questions – it found that Lemming had not incurred $1,000 of reasonably necessary medicals nor had he sustained a permanent injury. The court has entered a consistent judgment.

Underinsured Motorist - Soft-tissue pain was valued at $5,000 by a Lexington jury

Morgan v. State Farm, 06-1864
Plaintiff: M. Austin Mehr, *Mehr Law Offices*, Lexington
Defense: E. Douglas Stephan, *Sturgill Turner Barker & Moloney*, Lexington
Verdict: $30,000 for plaintiff
Circuit: **Fayette**, J. Bunnell, 12-18-07

David Morgan, then age 59, had a green light to permit him to pass through Clays Mill Road from Keithshire Way. In the intersection, he was struck by a teen driver, Joshua Keramand. This moderate impact spun Morgan's minivan around. Fault was no issue.

Morgan was shaken at the scene, but because the van was driveable and he lived nearby, he first drove home to get another vehicle. He then drove himself to the ER.

Morgan has since treated with a chiropractor, Julie Martin, Lexington, for soft-tissue symptoms – Morgan saw Martin nearly 150 times. His injury was also confirmed by Dr. Alexander

Tikhtman, Neurology, Lexington.

Plaintiff's incurred medicals were $48,680 (only the unpaid portion of $18,860 was sought), Morgan additionally seeking future care, lost wages, impairment and suffering. Morgan moved first against Keramand and took his $25,000 policy limits.

Above that sum he sought UIM coverage from his carrier, State Farm – the UIM limits were $100,000. State Farm defended the case and minimized the claimed injury.

Tried on damages only, Morgan took $15,000 of his medicals, plus $10,000 for future care. Lost wages and impairment were rejected. The suffering award was $5,000, the raw verdict totaling $30,000. The judgment for Morgan was for $3,000, representing the underlying limits and a $2,000 pre-payment by State Farm. The judgment has been satisfied.

Morgan subsequently moved for a new trial, arguing the award was inadequate. The motion was denied. Pending is a separate count for bad faith.

Breach of Fiduciary Duty - A bank was blamed for cashing checks drawn on an elderly woman's account by a drug-addicted felon – the bank prevailed that the presenter, whatever his status, had a valid power of attorney that permitted the withdrawals

Caudill v. Salyersville National Bank, 95-0226
Plaintiff: Jerry Anderson, Lexington and Justin R. Morgan, *Morgan Law Firm*, Lexington
Defense: John T. Hamilton and Ellie Blackey, *Gess Mattingly & Atchison*, Lexington and P. Franklin Heaberlin, Prestonsburg
Verdict: Directed verdict
Circuit: **Magoffin**, J. Childers, 11-27-07

Gertrude Arnett was an elderly widow living in Salyersville in 1995. Her sister, Dovie, came to live with her, as did Dovie's son, Jack Scriber. Scriber had a difficult history, which included drug addiction and criminal behavior.

Scriber became close to Arnett and in 1995 when she was diagnosed with cancer and confined to a hospital in Lexington, he agreed to assist her with her financial affairs. A power of attorney was executed to accomplish this.

Immediately Scriber presented to the Salyersville National Bank and provided the Power of Attorney. In the course of several transactions, he took $414,000 from Arnett and transferred it to his own benefit. The bank, was a bit suspicious of the transactions and took a close look at the Power of Attorney. It was in order and the money was gone.

Arnett soon died and Scriber wasn't far behind – he passed in 1997. In this lawsuit, filed by Arnett's estate, it sought to recover from the bank, the $414,000 that Scriber had liberated. The theory alleged that Power of Attorney or not, the bank still had a fiduciary duty to the elderly Arnett to not let Scriber deplete her accounts.

The bank's defense was not complex. It explained that whether Scriber was a crook or not, it wasn't sure, the Power of Attorney was duly constituted and permitted Scriber to make the withdrawals. The bank went even further and took a close look at the document before permitting Scriber to raid the accounts. Plaintiff countered that the accounts should have been flagged and an attorney called – had they done so, they would have learned that Arnett only gave Scriber permission to pay a few bills and not liquidate her assets.

The case advanced to trial and was terminated by directed verdict. Judge Childers ruled that no reasonable juror could conclude that Scriber was not authorized to withdraw funds from the bank. The estate has since taken an appeal.

Medical Negligence - Following a hysterectomy, the plaintiff developed a vesico-vaginal fistula – the plaintiff blamed the injury on her surgeon's technique

Smith v. Edens, 02-0067
Plaintiff: Jeffrey Hinkle, *Hinkle & Keenan*, Inez
Defense: W. Gregory King, *Stoll Keenon Ogdon*, Louisville
Verdict: Defense verdict on liability
Circuit: **Lawrence**, J. Preston, 12-6-07

Diane Smith, then age 36 and in ad sales for a local newspaper, *The Mountain Eagle*, underwent a hysterectomy on 3-26-01 at Three Rivers Medical Center in Louisa. It was performed by an Ob-Gyn, Dr. Curt Edens.

In the six weeks following the procedure, Smith developed a vesico-vaginal fistula – despite aggressive intervention, she continues to suffer significant complications. In this negligence lawsuit, she linked the injury to the technical performance of the hysterectomy.

Particularly she believed that Edens erred in using a blunt dissection technique, thereby leading to the perforation. This was so because of her prior c-section which made her more susceptible to injury. Plaintiff's expert was Dr. Jeffrey Kotzen, Ob-Gyn, West Palm Beach, FL.

A second expert, Dr. Robert Granacher, Neuropsychiatry, Lexington, identified a Class III psychiatric injury secondary to the vaginal condition. If Smith prevailed, she sought medicals of $15,000, plus $2,000,000 for suffering. Her husband sought $1,000,000 for his own consortium interest.

Edens defended the case on several fronts. First the hysterectomy itself, the doctor described it was reasonable to use blunt dissection. Expanding on that theory, Edens further postured that it couldn't be said that the fistula developed because of the hysterectomy – alternatively, even if it did, the fistula represented a surgical complication, not negligence. Defense experts were Dr. William Monnig, Urology, Edgewood, Dr. James Holtman, Ob-Gyn, Louisville and Dr. Byram Ratliff, Ob-Gyn, Mt. Sterling.

The jury's verdict was unanimous and it was for Edens that he had not violated the reasonably competent Ob-Gyn standard. That ended the deliberations and there was no award of damages.

Breach of Contract - A medical records company spent $215,000 to develop a speciality software – despite the payment to the developer, the software didn't work

IPM Solutions v. Sigma Systems, 5:06-81
Plaintiff: James A. Sigler, *Whitlow Roberts Houston & Straub*, Paducah
Defense: Pro se
Verdict: $215,000 for plaintiff
Federal: **Paducah**, J. Russell, 12-5-07

IPM Solutions entered a contract in February of 2005 to have speciality software developed by Sigma Systems. The company is operated from Dubai by its principal, Chakradhar Pydikondala. The deal provided that IPM would make payments to Sigma Systems as the software was developed. The software

in question was designed to provide medical records support for pain management physicians.

Pursuant to the agreement, IPM paid Sigma Systems $215,000 to have the software developed. Despite the payments, Sigma Systems was unable to deliver a working product. Ultimately IPM balked and walked away from the deal.

It then sued Sigma Systems and sought to recover the $215,000 – quite simply, IPM postured that Sigma Systems didn't deliver the software. Sigma Systems countered that the software was on schedule and IPM stopped paying too soon. Pydikondala explained that the project was still in the first of four phases. IPM countered that enough had been paid and that the software was woefully inadequate. [Sigma Systems was defended pro se by Pydikondala.]

IPM prevailed at trial on the contract count and took the $215,000 as claimed. A consistent judgment was entered.

Garbage Truck Negligence - **Husband and wife plaintiffs alleged they suffered serious injuries in a low-speed crash where a garbage truck backed into their parked SUV**

Bloomfield v. Waste Management, 05-0610
Plaintiff: John C. Collins, *Collins & Allen*, Salyersville
Defense: Rebecca F. Schupbach and Sarah Osborn Hill, *Wyatt Tarrant & Combs*, Louisville
Verdict: $9,000 for Vickie and $590 for Albert
Circuit: **Floyd**, J. Caudill-1, 10-3-07

On 4-22-05, Ernie Carter, an employee of Waste Management, was operating a garbage truck in David in a driveway. At the same time, Albert and Vickie Bloomfield were parked in the driveway in their SUV. Carter didn't see the SUV and backed into it. It was an unusual wreck, the rear of the garbage truck striking the rear of the SUV. The impact resulted in minor damage. Fault was no issue.

Both Bloomfields have since treated for assorted soft-tissue injuries. Albert's medicals were $18,124 and he sought $50,000 for suffering. Vickie's medicals were $26,768 and she also claimed lost wages and suffering.

Waste Management defended this case that the wreck was too minor and at too low a speed (5 to 8 mph) to cause injury. Two biomechanical engineers, Jeffrey Ball, Centennial, Co and Gary Yamaguchi, Phoenix, AZ discussed the physics of the wreck.

Damages were also diminished by the garbage company with a tag-team of IMEs. Dr. Jerald Friesen, Orthopedics, Lexington, discussed Albert, while Dr. Russell Travis, Orthopedics, Lexington, diminished Vickie's claimed injury.

Vickie took $7,500 of her medicals and $1,500 in lost wages. She took nothing for suffering. A judgment was entered for her with no PIP set-off. Her husband didn't fare as well, taking just $590 for his medicals, but nothing for suffering. As his medicals didn't exceed the $1,000 threshold, a defense judgment was entered.

Medical Outrage - **During a procedure to test for back pain, a medical student, volunteering at a family clinic, purportedly inserted his finger in the plaintiff's vagina**

Glasson v. Rizwan et al, 06-0850
Plaintiff: Robert F. Croskery and Melinda E. Knisley, *Croskery Law Offices*, Cincinnati, OH
Defense: Scott P. Whonsetler and Craig Piekarski, *Whonsetler & Johnson*, Louisville
Verdict: Defense verdict on liability
Circuit: **Campbell**, J. Stine, 11-29-07

Misty Glasson, then age 27, had complained of persistent back pain. Her treating physician, Dr. Haj-Hammed, arranged for a selective tissue conductance test to be administered at his clinic, Tri-State Urgent Care. On the date of the test, 3-22-06, Haj-Hammed wasn't in and a second doctor, Muhammad Rizwan, performed it.

Rizwan, a native of Pakistan, was a medical student at UC who was volunteering at the clinic to gain experience. As the test was being conducted with Glasson in a gown and her panties, (with a nurse present), Glasson alleged that Rizwan suddenly pulled down her panties.

Glasson quickly pulled them up. A moment later, he took the probe and began to massage her butt. Then in the shock of shocks, according to Glasson, he inserted his bare finger into her vagina. Glasson recalled shouting out, "He shouldn't be in me." The nurse replied that "He's done in here." Rizwan quickly left the room.

That was one version of the test. Rizwan denied the panty raid or the vaginal insertion. The nurse for her part also denied any knowledge of what had happened.

Glasson was adamant about the medical assault and pursued this lawsuit against Rizwan and the clinic. Regarding Rizwan, she alleged assault and outrage. She could be awarded compensatory damages of $95,000, plus an uncapped sum for punitives. The plaintiff described that she was embarrassed and felt emotionally paralyzed by these events.

Glasson also pursued a derivative claim against the clinic for negligent supervision. Rizwan as noted above denied the assault and as there was no assault, by the reckoning of the defense, there then was no negligent supervision.

As the case went to the jury, on the two assault counts, the court asked if Rizwan intended to touch Glasson without consent by inserting his finger in her vagina and secondly by pulling down her panties. The jury said no to both, also rejecting an outrage count. Having so found, the negligent supervision count was made moot. A defense judgment was entered.

Car Repair Negligence - **The day after repairs were made to plaintiff's car, one of the front wheels simply fell off as she proceeded on the AA Highway – while finding fault and awarding special damages, this Maysville jury rejected pain and suffering**

Massie v. Henderson Body Shop, 04-0212
Plaintiff: Charlton H. Young, Maysville
Defense: Debra S. Rigg, Maysville
Verdict: $20,000 for plaintiff less 25% comparative fault
Circuit: **Mason**, J. Wood, 10-15-07

Sharon Massie, then age 29, took her 1997 Ford Aspire in for a repair on 11-14-03 to Henderson's Body Shop in Aberdeen, OH. It is operated by Tom Henderson. Two weeks later, Massie picked up her car and was on her way.

The very next day she was traveling at 55 mph on the AA Highway in Bracken County. Suddenly one of the front wheels came off the Aspire. Massie lost control and the car went down an embankment and rolled over on its roof.

Massie has since treated for soft-tissue neck and shoulder pain. In this lawsuit, Massie alleged negligence by Henderson in making repairs to the Aspire – quite simply, the front wheel

should not have fallen off.

Henderson defended his repair that he simply replaced a fender and didn't have anything to do with the wheel or the lugnuts. He also implicated Massie's own care in that she noted the vehicle began to vibrate "real bad" for some time prior to the crash – despite that vibration, she kept on driving.

The jury first found fault with Henderson regarding the repair – it also found negligence by the plaintiff. This fault was then apportioned 75% to Henderson, the remainder to Massie.

Turning to damages, Massie took medicals of $13,000, plus $5,000 for future care. Suffering was rejected, Massie taking $2,000 more for property. The verdict was $20,000 less 25% comparative fault. No judgment was entered in the case, nor were there any post-trial motions.

Breach of Contract (Promise to Marry) - The plaintiff spent $17,500 on his fiancé for a ring and her moving expenses – when the love soured, the plaintiff wanted his money back

Hernandez v. Simmons, 05-1102
Plaintiff: Jerome R. Baker, Jr., Lexington
Defense: Farrah W. Ingram, *White Peck Carrington*, Mt. Sterling
Verdict: $8,500 for plaintiff
Circuit: **Fayette**, J. Ishmael, 12-4-07

Joseph Hernandez met the love of his life, Pamela Simmons, and asked her to marry him in January of 2002. She agreed. Thereafter Hernandez provided Simmons $17,700, in the form of three payments, $10,000, $5,000 and $2,500. In anticipation of the marriage, Hernandez postured, he gave Simmons the money so that she could buy herself an engagement ring and pay for moving expenses.

True love soured and Simmons called things off. She kept the money. Hernandez wanted it back and filed this lawsuit, alleging a breach of contract, among other counts, including conversion. But it would only be contract that survived, Hernandez presenting a claim that he gave the money to Simmons, not as a gift, but for the specific purposes of buying a ring and moving to live with him.

As she never really loved him (so he thought), her whole course of conduct represented a greedy scheme. If prevailing, Hernandez wanted all of the $17,500 back. Simmons defense was elegant and simple. She postured that the money was a gift. Period. From her perspective, that was all there was to it and the claim was baseless.

The verdict in Lexington was mixed. Hernandez prevailed on one contract count and took $8,500. He lost on two other contract counts. A consistent judgment was entered.

Simmons has since moved for JNOV relief, arguing that this case was really about a contract in anticipation of marriage and was thus barred by the statute of frauds. The motion was pending.

Kentucky Supreme Court Tort Opinions

At the December rendition date, the Supreme Court issued a single tort opinion that concerned expert witness practice in a medical negligence case presented in the form of a Writ of Prohibition.

Medical Negligence - An expert witness who consulted with the plaintiffs and opined that there was no standard of care violation and then was later hired by the defendant doctor should be excluded from the testifying, the Court of Appeals erring in failing to grant a Writ of Prohibition

Sowders v. Lewis et al,
2005-SC-1456-OA
On Appeal from the Court of Appeals
Rendered: December 20, 2007
Petitioner's Counsel: Larry F. Sword, *Sword & Broyles*, Somerset
Respondent's Counsel: Joe L. Travis, *Travis Pruitt Powers & Yeast*, Somerset

The parents of Michael Sowders pursued a medical negligence claim against a doctor, Charles Catron (unnamed in the Supreme Court opinion) regarding the failure to diagnose and treat a septic hip. Plaintiff's counsel, Lee Turner, along with his co-counsel, Paul Casi, consulted with an expert witness, Frank Bonnarens. Bonnarens told Casi there was no standard of care violation. Thereafter Bonnarens consulted with counsel for the defendant doctor and agreed to serve as an expert witness.

The plaintiff sought to disqualify Bonnarens from testifying. The trial court disagreed. Plaintiff sought a writ of prohibition which was denied at the Court of Appeals.

Holding: *Justice Scott* wrote for a 6-1 court (joined by Abramson, Lambert, Minton, Noble & Schroder), reversed the Court of Appeals and focused on the intrusion to the attorney-client privilege. The court adopted a bright line rule, without any fact-based inquiry about what the expert reviewed and whether it infringed the attorney-client relationship. The rule as adopted (at page 6 of the slip opinion) is that a simple finding that the expert "did review the case for the opposing party and gave an opinion is sufficient." While reversing on this question, the court affirmed that as there was no evidence that defense counsel was privy to any privileged information, it was not necessary to disqualify him.
Justice Cunningham Dissent - He wrote that the privileges are greatly disfavored and in this case, he didn't believe that the "heavy burden" of proof had been met. The justice also believed that there was an adequate remedy by appeal in that the plaintiff could cross-examine Bonnarens if he was called at trial.
Ed. Note - Cunningham's dissent seems confused about a remedy on appeal for the plaintiff. What remedy is it for the plaintiff to cross-examine Bonnarens at trial? Bonnarens would simply testify that I reviewed the case for you and concluded there was no case. What kind of relief is that for an intrusion into the attorney-client privilege?

Discretionary Review at the Kentucky Supreme Court

At the November date, review was granted in ten cases and denied in 29 others. One grant of review concerned a tort case.

Sovereign Immunity - Are state actors entitled to up-the-ladder immunity?

Davis et al v. Swartz et al, 2007-SC-0066
Review Granted: 12-21-07
Summary: Richard Swartz was working as an employee of a road contracting firm when he was struck by a trucker. The trucker's wheels had slipped off the road due to a slight drop-off. The estate of Swartz received worker's compensation benefits.

The estate then sued several state actors regarding the road construction plan. They were granted summary

judgment by the trial judge (Judge Billingsley) pursuant to up-the-ladder immunity. The estate appealed.

The Court of Appeals reversed that up-the-ladder immunity only applies to "persons" and state actors are not persons within the meaning of the relevant statute (KRS 342.610). Had the legislature intended this protection for state actors, it could have done so in the statute, but as Judge Miller wrote at the Court of Appeals, it didn't and there is no immunity.

The state actors sought discretionary review and it was granted. It seems likely this case will be decided without Minton as he joined the opinion at the Court of Appeals.

Kentucky Court of Appeals *To Be Published* Tort Opinion Summaries

A summary of published opinions from the Kentucky Court of Appeals involving tort related issues.

Medical Negligence - Summary judgment is improper in a case where the plaintiff has failed to produce a medical expert until the trial judge has first made a finding that an expert is necessary and provided the plaintiff a reasonable time to secure an expert
Collier v. Caritas et al,
2006-CA-1612-MR
Appeal from Jefferson Circuit Court
Judge Judith McDonald-Burkman
Rendered: November 9, 2007
Appellant's Counsel: Karl Price, Louisville
Appellee's Counsel: Rebecca L. Didat and James E. Smith, Louisville

Horace Collier had an appendectomy performed on 2-17-04 at Caritas Hospital. Thereafter he alleged negligence regarding the timing of his treatment. The trial judge entered an order setting forth strict limits on the identification of expert witnesses.

Collier didn't comply with the order and the medical defendants moved for summary judgment based on the failure to identify an expert. The motion was granted. Collier appealed.

Holding: *Judge Moore* joined by Thompson and Graves, explained the general rule from *Baptist Healthcare Systems v. Miller*, 177 S.W.3d 676 (Ky. 2005), that summary judgment is an inappropriate mechanism for relief when an expert has not been named in a timely fashion. In this case, the trial judge had not first made a finding that an expert was needed in this case and until such a finding had been made, summary judgment is improper. When such a finding is made, the trial court must also provide the plaintiff a reasonable time to secure an expert.

The court additionally noted that while sanctions would be "strongly urged" in this circumstances, summary judgment is inappropriate. The case was reversed for consistent proceedings.

Verdicts Revisited

Each month, we summarize appellate review of previously reported verdict results. The summaries include the reference to the verdict report in its respective Year in Review volume. Unless otherwise noted, the opinions in this section were designated "Not To Be Published."

Auto Negligence - It is reversible error to inject insurance into a proceeding by referring to a "pot of money from which people are paid"
Walls et al v. Robinson
Appeal from Pike Circuit Court
Trial Judge: Steven D. Combs
KTCR Cite: Case No. 3471, 2006 YIR
Date of Trial: 6-12-06
Appeal Decided: 12-14-07
Lee A. Smith, Prestonsburg for Appellant
Ronald G. Polly, Whitesburg for Appellee

Thomas Robinson was injured in a right of way crash and sustained a soft-tissue injury. In closing argument at trial, his attorney referred to "in these car wreck cases there is a pot of money from which people are paid." He also made reference that the opposing attorneys had been sent to prevent a recovery. The defendant objected and it was overruled.

Plaintiff prevailed and took an award of $94,462 that included $30,000 for suffering. Defendant appealed that the injection of insurance represented reversible error.

Holding: Judge Vanmeter writing

Joined by Dixon and Wine, the court explained the general rule that the mention of insurance, even indirectly, is prohibited. Vanmeter held that the remarks mentioned above had the effect of "indirectly" injecting insurance.

Moreover, it made no difference whether the remarks prejudiced the defendant or not – the error was reversible.

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