Kentucky Trial Court Review
October 2013
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Auto Negligence - A women's basketball player at U of L (a starter with European professional prospects) was struck in a crosswalk on campus by a parking enforcement worker – the player suffered a career-ending knee injury

Wright v. U of L Parking Enforcement, 10-4572
Plaintiff: Scott T. Abell, Louisville
Defense: Amy D. Cubbage and Chris J. Gadansky, *McBrayer McGinnis Leslie & Kirkland*, Louisville
Verdict: $488,767 for plaintiff
Court: **Jefferson**, J. Stevens, 8-9-13

Chauntise Wright, now age 25, had just completed her junior year at the University of Louisville. A member of the women's basketball team, she had enjoyed a good year. She had started every game and was a key player for Coach Jeff Walz. Her basketball future beyond Louisville was bright – she was considered to be a likely professional player in Europe.

Against that backdrop Wright walked on campus on 7-16-08. As she crossed the street in a crosswalk near the university's student center, she was struck by Matthew Thompson. Thompson, a university employee in parking enforcement, was driving a small truck. Wright clearly had the right of way – Thompson was just inattentive. Fault would be conceded.

Thompson's truck struck Wright in the leg and knocked her to the pavement. She would recall lying in the hot sun for a short time before she was taken to the ER at U of L Hospital. The collision left her with a torn ACL. It was surgically repaired.

Wright was diligent in her rehabilitation and prepared to rejoin the basketball team that fall. Her dreams were dashed in October when she reinjured her knee in practice. That second injury was devastating, Wright undergoing an ACL reconstruction. She missed the entire 2008-2009 season – while she returned a year later, Wright was a shell of her former basketball self, appearing in a limited role for the Lady Cards. As Coach Walz testified at trial, her formerly promising professional basketball aspirations had come to an end. She did graduate from the university with a degree in exercise science.

In this lawsuit Wright alleged negligence by Thompson and the University of Louisville regarding this incident. The university prevailed by summary judgment, the court finding the school was immune from suit. The case proceeded against Thompson only in his individual capacity.

Wright's case developed that Thompson's negligence caused not just the initial injury, but also set the stage for the more complex ACL tear she suffered a few months later in practice. The combination of these injuries, her proof developed, shut the door on a professional basketball career. Her proof in this regard came from Dr. Mark Smith, Orthopedics, Louisville (also the team doctor) and Coach Walz himself.

Wright's vocational expert, Sara Ford, Louisville, valued her economic loss at $651,014. The medical bills were $73,767, Wright seeking $50,000 more for in the future. Her pain and suffering was capped in the instructions at $750,000.

Thompson defended the case and minimized the claimed injury. Notably he focused that while the collision did result in the initial knee injury, the second disabling ACL tear that was sustained in practice was a separate and distinct event unrelated to his negligence. This countered the plaintiff's reinjury theory.

This case was tried for four days on damages only. Wright took her medicals as claimed plus $30,000 more for future care. Her impairment was valued at $200,000. She took $185,000 more for pain and suffering. The verdict totaled $488,767. It has been satisfied.

Dental Negligence - During a denture repair procedure, the defendant dentist dropped a dental tool into the plaintiff's mouth – the plaintiff swallowed it – the dentist then sent the plaintiff to a chiropractor friend to have an x-ray to be sure the tool wasn't lodged in her throat – while the tool wasn't in her throat, it did become stuck in her digestive tract and had to be surgically removed

David v. Galbreath, 12-1975
Plaintiff: Edwin H. Clark, *Clark Law Office*, Lexington
Defense: Daniel E. Murner and Lacey Fiorella, *Landrum & Shouse*, Lexington
Verdict: Defense verdict on liability
Court: **Fayette**, J. Goodwine, 7-25-13

Lena David, then age 71, visited a dentist, Dr. W.B. Galbreath, on 5-26-11 for a cleaning. To accomplish the cleaning, Galbreath removed her implants utilizing a dental tool known as a hex driver. It is a small screwdriver. As Galbreath did his work, he dropped the hex driver into David's mouth and she swallowed it.

Galbreath was immediately concerned that the tool might be lodged in her throat or esophagus. Thinking quickly the dentist sent David to another doctor for an x-ray. This doctor was a nearby chiropractor friend. The chiropractor conducted the x-ray and concluded the tool had safely passed into David's stomach. Galbreath suggested to his patient that she simply wait for the tool to pass naturally.

The hex driver had other plans. David continued to report abdominal pain in the weeks after this dental snafu. The tool had not passed and was lodged in her digestive tract. It was surgically removed at St. Joseph's Hospital on 6-23-11. David

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Trial Judge _____ Date Verdict _____

Verdict _____

For plaintiff _____ (Name, City, Firm)

For defense _____ (Name, City, Firm)

Fact Summary _____

_____

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clear – the x-ray the next day showed the needle. If Nolan prevailed at trial, she sought medicals of $10,461 and $30,500 more for pain and suffering.

The hospital defended the case that the needle stick could not have happened as Nolan remembered. First the nurses draw blood with a retractable needle, the system essentially being needle-less. It was also noted that the type of needle that was removed from Nolan's arm was not a 20-gauge needle that was utilized to draw the IV.

The hospital also explained it couldn't have been a phlebotomist because no blood was ordered at the hospital. The defense also implicated the plaintiff's own care and conduct. An IME for St. Elizabeth Hospital, Dr. Timothy Allen, Psychiatry, Lexington diagnosed Nolan as suffering from Munchausen's Syndrome – the suggestion then was that the plaintiff injured herself.

As the jury deliberated the case, it had a question for Judge Stine: Can we get a magnifying glass? The record does not reflect the court's answer.

The jury answered by an 11-1 count for the hospital that its nursing staff and phlebotomists had not violated the standard of care. That ended the deliberations and Nolan took nothing. A defense judgment was entered. While the court record indicates Nolan has since moved for a new trial, that motion is not actually a part of the file.

vehicle. Progressive, as Teel's UIM carrier, piggybacked on this argument – that is, if it was an illegal joyride, there was no UIM coverage.

Teel countered the dealership's version (as advanced by Owners Insurance) that it was a joy ride. Her best proof was as follows: (1) Teel left behind her car and her keys during the test drive, (2) she had previously arranged with her mechanic for the car to be checked, and most importantly, (3) Bryant provided her a dealer tag to utilize. It was also noted that while Bryant testified the plaintiffs took off in his vehicle unlawfully, he didn't make any report to the cops about this until *after* he learned of the crash.

The court bifurcated all questions except the coverage dispute. The case was tried over two days. The verdict after 20 minutes of deliberation was for the plaintiff on the coverage issue. No jury trial has since been set on the underlying damage issues.

Auto Negligence - A right of way collision left the plaintiff with a C6-7 injury that was later repaired in a fusion surgery

Thomas v. Mills, 12-2478
Plaintiff: Hal D. Friedman, *Friedman & Cooper*, Louisville
Defense: James P. Dilbeck, Jr., *Dilbeck Myers & Harris*, Louisville
Verdict: $56,285 for plaintiff
Court: **Jefferson**, J. Cunningham, 8-21-13

There was a right of way collision in Louisville on 6-6-10. It occurred on Blankenbaker Parkway, Maegan Mills pulling from a Wal-Mart parking lot into the path of the oncoming Jerry Thomas. Thomas, in his 60's, is a retired Ford worker.

The collision was significant. It caused Thomas to run off the road and down an embankment – his vehicle stopped when it struck a pole. Mills conceded fault for the wreck.

Thomas was in pain at the scene and admitted himself to the ER at Jewish Hospital later that day. He initially treated for radiating pain for a period of two months – that included a course of physical therapy.

Thomas did not improve and he was referred to Dr. Joseph Werner, Orthopedics, Louisville. Werner later performed a C6-7 fusion. The plaintiff's proof linked the injury to the aggravation of degenerative conditions.

In this lawsuit Thomas sought damages from Mills. His medical bills were $95,774 and he sought $250,000 more for his pain and suffering. Beyond Mills the plaintiff also targeted his UIM carrier, State Auto. The UIM carrier, on the hook for an award above $100,000, did not participate at trial.

Mills defended the case and suggested that Thomas had only sustained a soft-tissue strain that resolved in three months or so. The defense linked the C6-7 disc injury to pre-existing arthritis, the fusion surgery being unrelated to the crash.

This case was tried for two days on damages only. Thomas took $21,285 of his medical and $35,000 more for pain and suffering. The verdict totaled $56,285. A consistent judgment less PIP was entered – the silent UIM carrier was also exonerated.

Nuisance - The plaintiff blamed water run-off damage on his property on his neighbor's pond

Whitson v. Cross, 08-4086
Plaintiff: W. Henry Graddy, IV and Randal A. Strobo, *Graddy & Associates*, Midway
Defense: Walter L. Porter, *Barnett Porter & Dunn*, Louisville and Jonathan Billings, *Billings Law Firm*, Lexington
Verdict: Defense verdict on liability
Court: **Fayette**, J. Scorsone, 8-14-13

Donnie and Helen Cross installed a 30-foot goldfish pond on their Swigart Avenue property in 2007. Their neighbor, Jerome Whitson, alleged that the construction of the pond changed the natural flow of water to his adjoining property. The result of the changed water flow (and pond leakage) caused Whitson's driveway to become wet and muddy – this made it difficult to transport trucks and other vehicles to his horse barn.

In this nuisance lawsuit filed by Whitson against the Crosses, it was alleged the gold fish pond had damaged his property – the plaintiff noted the pond was designed by Cross without any professional help. His expert was James Black, Engineer. If Whitson prevailed at trial, he could be awarded sums for the diminished use and value of his property.

The Crosses defended with testing from its experts that indicated the amount of run-off from the pond was too insignificant to have damaged Whitson's property. Their experts were Craig Lee, Engineer and Tom Hatfield, Surveyor.

The jury's verdict was mixed. While it found that the Cross pond unreasonably changed the natural flow of water, it further found this conduct had not substantially damaged the plaintiff's property. That ended the deliberations and Whitson took nothing. A defense judgment followed this three-day trial.

Premises Liability - The plaintiff (who had been drinking) tripped and fell in a Taco Bell parking lot

Wrocklage v. Taco Bell, 11-3315
Plaintiff: B. Keefe Montgomery, *Ciamar Legal Services*, Louisville
Defense: Brendan R. Daughtery, *Boehl Stopher & Graves*, Louisville
Verdict: Defense verdict on liability
Court: **Jefferson**, J. Cunningham, 9-10-13

James Wrocklage, then age 56, visited a Taco Bell restaurant in

Hikes Point on 7-30-10. Wrocklage was drinking. He would recall he had consumed three Mike's Hard Lemonade's that featured a so-called bourbon floater. Having finished a part of his meal, Wrocklage walked to the parking lot and his vehicle.

Suddenly he tripped on an area of concrete patchwork in the parking lot. He fell forward and landed on his face. Transported to the ER at Baptist East Hospital, he received stitches on the cut on the end of his nose. [His BAC at the hospital was measured at .07.]

Nearly 54 days later, Wrocklage entered a substance abuse program to treat his alcoholism. He linked his treatment to this incident – his expert, Dr. Mark Barrett, described the fall as the triggering event that sent his drinking out of control. Thus Wrocklage's incurred medicals of $25,000 mostly included his in-patient treatment.

In this lawsuit against Taco Bell, Wrocklage was critical of the rough patchwork done in the parking lot – he blamed his fall on that patchwork not being level. If Wrocklage prevailed at trial he sought his medical bills and $15,000 more for pain and suffering.

Taco Bell defended on liability that the condition of the parking lot was not unreasonable – it was simple concrete patchwork. Whatever the condition, Taco Bell thought it was open and obvious, Wrocklage even conceding he had seen it as he walked into the restaurant.

Taco Bell also contested the link between the fall and Wrocklage's treatment for alcoholism. A defense expert, Dr. Andrew Cooley, Psychiatry, Lexington, concluded there was no link between the two, noting Wrocklage drank the same before the fall as after it. Judge Cunningham agreed with Taco Bell and the damages for alcohol rehabilitation did not go to the jury – he issued a prefatory charge in his jury instructions that specifically stated there was no link between the fall and Wrocklage's hospitalization. Thus instead of the $25,000 in medicals initially claimed, the instructions limited his medical bills (representing the initial ER visit) to $1,526.

The jury's verdict was for Taco Bell (by a 10-2 count) that it had not failed in a duty to maintain its premises in a reasonably safe condition. That ended the deliberations and Wrocklage took nothing. A defense judgment was entered by the court.

A Notable Indiana Verdict

(Involving Kentucky Attorneys)

Medical Negligence - A fetal blood draw being carried out as part of a research study went wrong and necessitated an emergency c-section; the baby suffered an hypoxic event that has left her with spastic quadriplegia cerebral palsy

Bobbitt v. Turnquist-Wells, et al., 82C01-0508-CT-667

Plaintiff: Terry Noffsinger, *NoffsingerLAW, P.C.*, Evansville; and Evy McElmeel, *Law Offices of Evy McElmeel*, Seattle, WA

Defense: R. Thomas Bodkin and Chad M. Smith, *Bamberger Foreman Oswald & Hahn, LLP.*, Evansville, for Turnquist-Wells and St. Mary's Medical Center; David S. Strite and Mark E. Hammond, *O'Bryan Brown & Toner, PLLC.*, Louisville, KY for Malchioni

Verdict: $15,000,000 for plaintiffs (allocated $10,000,000 to Juliann Bobbitt and $5,000,000 to Jamie and Crystal Bobbitt) against Turnquist-Wells and St. Mary's Medical Center; Defense verdict for Malchioni

County: **Vanderburgh**, Circuit Court: J. Heldt, 8-23-13

On 11-18-01, 27 year-old Crystal Bobbitt gave birth to a son, Ethan Bobbitt. Sadly, Ethan was born with a severe case of thrombocytopenia. This is a condition in which the blood has an abnormally low platelet count. People with this condition have difficulty forming blood clots, and so it is possible for them to bleed to death if cut.

In the wake of this discovery, Crystal underwent a round of genetic testing. The results indicated that any subsequent pregnancies she might have would be at extremely high risk of developing neonatal alloimmune thrombocytopenia (NAT). A little over a year later, on 2-15-03, Crystal had a positive pregnancy test.

When this new pregnancy was confirmed, Crystal's ob-gyn referred her to Dr. Mureena Turnquist-Wells, an employee of St. Mary's Medical Center of Evansville, Inc. The reason for the referral was that Dr. Wells was at that time participating in a research study on NAT that was being conducted at New York Presbyterian Hospital and the Weill Cornell Medical Center.

Crystal consulted with Dr. Wells on 4-8-03 and learned that the study would require regular fetal blood sampling by means of a needle inserted into the umbilical vein. Under normal conditions, this procedure carries only a 1% risk of fetal injury or death. Crystal agreed to this plan and signed the consent form to enroll in the study three days later on 4-11-03.

Following her enrollment in the study, Crystal made monthly visits to Dr. Wells for the blood draws. On 9-2-03, when she was just over 33 weeks pregnant, Crystal once again was admitted to the hospital to prepare for the routine blood draw.

In accordance with the standard procedure, she was taken to the operating room the following day and sedated prior to the procedure. Anesthesia was provided by Dr. Michael Malchioni. As the procedure got underway, Dr. Wells had to make several attempts to insert the needle into the proper

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