Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

July 2007 **Published in Louisville, Kentucky** **11 K.T.C.R. 7**

Comprehensive Statewide Jury Verdict Coverage

Civil Jury Verdicts

Complete and timely coverage of civil jury verdicts including circuit, division, presiding judge, parties, case number, attorneys and results.

Premises Liability - A bank customer tripped in the parking lot in a pot hole and broke both of her legs

Hatfield v. First National Bank of Manchester, 03-0354

Plaintiff: Annette Morgan, *Morgan & White*, Manchester

Defense: Ronald L. Green, *Boehl Stopher & Graves*, Lexington and Clint J. Harris, Manchester

Verdict: $557,405 for plaintiff less 10% comparative fault

Circuit: **Clay**, Special Judge Thomas Lewis, 11-17-06

Betty Hatfield visited the First National Bank of Manchester on 7-14-02 to cash a money order. As Hatfield left the bank, she tripped in a jagged pothole that adjoined the sidewalk. She fell hard and in the process, she broke both her left and right fibulas. Treated at the ER, Hatfield incurred medicals of $7,405.

In this premises liability lawsuit, she sought damages from the bank, alleging negligence regarding the pothole. That it was a hard-to-detect hazard, she noted that a bank manager later fell in the same pothole and broke a foot. Besides the medicals, Hatfield sought pain and suffering in an uncapped category. The bank defended the case and postured that this large and dangerous pothole was visible to all comers – the plaintiff simply walked blindly into this open and obvious hazard.

The verdict was mixed on fault. It was assessed 90% to the bank, the remainder to Hatfield. Then to damages, she took her medicals plus $550,000 for pain and suffering. The raw verdict totaled $557,405.

The trial judge later reduced the suffering award to $500,000 (then subject to the 10% reduction in comparative fault) to comport with plaintiff's last CR 8.01(2) interrogatory answer. The final judgment then was for $456,665.

The bank sought a new trial and argued that (1) the condition was open and obvious, Hatfield admitting she'd seen it, and (2) the suffering award was excessive. The motion was denied and the bank has since satisfied the court's judgment.

Medical Negligence - A local family doctor was blamed for mismanaging a pre-eclamptic pregnancy after the baby was delivered stillborn

Hillman v. Woolum, 03-0391

Plaintiff: Stephen M. O'Brien, *Garmer & O'Brien*, Lexington

Defense: Richard P. Schiller and Kimberly S. Naber, *Schiller Osbourn Barnes & Maloney*, Louisville and J.P. Cline, III, *Cline Law Office*, Middlesboro

Verdict: $500,600 for plaintiff

Circuit: **Bell**, J. Bowling, 7-20-07

Lisa Hillman was pregnant in the fall of 2002 – the father was her husband, Aaron Hillman. Her delivering doctor was Jerry Woolum, Pineville (family doctor and surgeon and former UK football quarterback). A little girl, Caitlynn, was delivered stillborn on 9-30-02, the umbilical cord constricting her body.

Caitlynn's estate alleged negligence by Woolum in mismanaging the pregnancy. The theory went that Woolum should have recognized that Lisa's hypertension and pre-eclampsia made this a high risk delivery. She then should have been closely monitored and referred to a perinatologist. With this intervention, the theory went, Caitlynn would have been delivered healthy.

Plaintiff's expert was Dr. Richard Fields, Ob-Gyn, Sarasota. If the estate prevailed, it sought $600 for the funeral bill, plus $1,330,848 for impairment. This was quantified by Ralph Crystal, Vocational Expert, Lexington. Each parent sought $500,000 for their consortium interest.

Woolum defended the case on two fronts, (1) that he properly managed the pregnancy, and (2) little Caitlynn suffered from a genetic defect (the placenta was too small) that gave her a very small likelihood of viability. Defense experts were Dr. Harvey Kliman, Placental Pathology, Yale and Dr. Lawrence Butcher, Ob-Gyn, Pineville.

The verdict was for the plaintiff on liability and then to damages, the estate took the funeral expense as claimed. Each parent was awarded $250,000 for their consortium interest, the verdict against Woolum totaling $500,600. A judgment in that sum followed.

Plaintiff moved for a new trial arguing the verdict was inadequate in that it failed to value the decedent's destruction. Woolum countered that the verdict was consistent, there being proof in any regard that the birth was not survivable. Judge Bowling granted the motion and set the matter for trial.

At this juncture Woolum appealed the new trial order and sought a writ of prohibition. The writ was denied. Then as the second trial on damages approached, the parties entered a settlement. Woolum would be permitted to appeal and pay $475,000 more for the destruction interest on the condition that Woolum wouldn't pay if the matter was reversed.

Woolum's appeal has cited several issues, but notably the injection of insurance. This occurred, the plaintiff introducing proof that Butcher (a defense expert) and Woolum had a common malpractice insurer. The plaintiff had argued that the proof of insurance was properly admitted to show the common interest reflected bias.

Kentucky Trial Court Review
July 2007
Table of Contents

Verdicts

Jefferson County

Auto Negligence - *A pedestrian was struck in a restaurant parking lot* - Zero p. 3

Breach of Fiduciary Duty - *A shareholder of a medical services firm believed certain corporate loans were improper* - $176,300 p. 4

Premises Liability - *The plaintiff fell over scaffolding and was injured by broken glass at a grocery* - Zero p. 6

Clay County

Premises Liability - *Plaintiff broke both her legs when she tripped in a pothole at a bank* - $557,405 p. 1

Bell County

Medical Negligence - *A family doctor was blamed for failing to monitor a high-risk pregnancy, the infant girl being born stillborn* - $500,600 p. 1

Madison County

Auto Negligence - *Headaches and memory loss followed a right of way crash* - $360,600 p. 3

Fayette County

Premises Liability - *The plaintiff fell and broke her hip at a thrift store – pain and suffering was rejected* - $9,444 p. 3

Perry County

UIM - *Suffering from an emotional injury (in a case where the plaintiff relied on Granacher) at zero* - $19,387 p. 4

Premises Liability - *The plaintiff slipped on wet pavement (from a leaky water main) and broke her ankle* - $3,500 p. 5

FELA - *A cumulative trauma injury was linked to mounting and dismounting moving trains* - $250,000 p. 7

Warren County

Dental Negligence - *The wrong tooth was removed* - Zero p. 4

Kenton County

Auto Negligence - *Medicals/No Suffering* - $4,284 p. 5

Gallatin County

Assault/Negligent Punching - *After a minor crash at a gas station, there was a brief scuffle* - Zero p. 6

Rockcastle County

Auto Negligence - *Threshold verdict returned in the case of a minor rear-ender* - Threshold p. 6

Hardin County

Real Estate Fraud - *The parcel was smaller than believed, the sellers making a post-contract sale of a portion of it* - $8,350 p. 7

Knox County

Breach of Fiduciary Duty - *In this intra-family squabble, heirs were not happy when their aunt's estate was plundered* - Zero p. 7

Supreme Court Tort Opinions p. 8

Pre-Impact Fright - Kentucky's high court unanimously rejected damages for pre-impact fright p. 8

Trespass - In a certification of law to the Sixth Circuit, the Supreme Court answered that proof of actual harm is not required to state a claim for trespass p. 8

False Imprisonment - The statute of limitations in a false imprisonment or false arrest case begins to run at the date of the arrest and not at the time of an acquittal or dismissal of criminal charges p. 9

Discretionary Review at the Supreme Court p. 9

Court of Appeals Published Tort Opinions

Premises Liability - A company that buys a commercial facility and begins to renovate it through a third-party contractor is not liable to an employee of another sub-contractor that is injured because of purported safety violations p. 9

Insurance Contract - Intent may be inferred in the case of a shooting when the shooter lacks the mental capacity to form intent p. 10

Premises Liability - When a plaintiff stumbles on steps that are clearly "crumbly and fragile," a claim for personal injury is precluded as the condition is open and obvious p. 10

Verdicts Revisited

Auto Negligence - While a felon may be impeached pursuant to KRE 609(A), it is improper to characterize a felon as a persistent felon and thus a hardened criminal p. 10

Products Liability - A $5.9 million verdict was set aside, the trial court erring in denying a CR 14 motion to present a third-party claim p. 11

Defamation - In a defamation claim brought by a contract physician when allegations were made to her employer that she had falsified timecard records, summary judgment should have been granted as the hospital enjoyed a qualified privilege in reporting the results of its timecard investigation p. 11

Auto Negligence - While walking in the parking lot of the Olive Garden restaurant, the plaintiff's foot was run over by the defendant

Hardison v. Josey, 04-0895
Plaintiff: Mat A. Slechter, *Sampson & Slechter*, Louisville
Defense: Robert J. Rosing, *Ewen Kinney & Rosing*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Perry, 5-30-07

This case started in the parking lot of the Olive Garden restaurant in Louisville. The plaintiff, Mayme Hardison was walking when she was struck by Anthony Josey. He ran over her foot – Josey immediately stopped when Hardison's daughter yelled at him about what happened. For his part, Josey always denied having run over plaintiff's foot.

Whether he did or not, Hardison went to the ER where she was treated for a bruise. Her treating orthopedist, Dr. George Gossman, later identified a Morton's Neuroma nerve injury – the neuroma was surgically removed, but Hardison has still complained of numbness. Plaintiff's medicals were $4,839 and she sought $30,000 for suffering.

As noted above, Josey denied striking Hardison. He also diminished the claimed injury with an IME, Dr. Martin Goldman, Orthopedics, Louisville. The expert believed Hardison was well-healed. The foot injury was linked not to a car wreck, but instead to a common condition related to wearing shoes which are too tight.

The defense also received a spoliation instruction. This was based on evidence that Hardison had testified that the tire left a mark on her sandal. The sandal was never produced and at some point, Hardison wasn't sure, she threw the sandal away.

The verdict on liability at trial was for Josey and Hardison took nothing. A defense judgment was entered.

Hardison moved for a new trial and argued the verdict was against the weight of the evidence, both she and her daughter remembering her foot was struck and that immediately, she had an injury. The defendant's contra-memory was called self-serving by the plaintiff. That Hardison didn't receive a fair trial, she also noted the jury only deliberated twenty minutes. Josey responded to the motion that the case came down to credibility and disputed versions of the incident, the jury resolving the matter for the defendant. The motion was denied.

Auto Negligence - The plaintiff suffered headaches, memory loss and PTSD after a right of way crash – the defense expert (Shraberg) thought the plaintiff suffered from pseudo-dementia

Helton v. The Allen Company, 04-0093
Plaintiff: Roger M. Oliver, *Oliver & Oliver*, Berea
Defense: Tammy S. Meade and Justin M. Schaefer, *Sturgill Turner Barker & Moloney*, Lexington
Verdict: $360,600 for plaintiff
Circuit: **Madison**, J. Jennings, 4-16-07

There was a right of way crash on 12-3-01 on Paint Lick Road near I-75. The defendant, Glenn Mullins of the Allen Company, eased out in heavy traffic and into the path of the oncoming Nancy Helton. A moderate collision resulted. The Allen Company did not contest fault.

Helton's airbag deployed and she was briefly knocked unconscious. That day she was treated and released at the ER in Berea. She has since complained of headaches, memory loss, PTSD as well as radiating back pain. Appropriate medical proof of her injury was introduced, including from Dr. William Brooks, Neurology, Lexington. Helton, then age 49 and an LPN, has sought medicals, future medicals, suffering and impairment damages.

The Allen Company defended on damages and relied on a psychiatric IME, Dr. David Shraberg, Lexington. He concluded that Helton's complaints had a significant "characterological component" and moreover he could not document any loss of consciousness beyond her own self-serving recollection. The expert also described having identified pseudo-dementia.

On cross-examination, the following was gleaned from Shraberg, (1) his IMEs cost $600, (2) he has performed more than 1,000 of them, and (3) they are aligned 90% for defendants, 10% for plaintiffs by his count.

Tried on damages, Helton took medicals of $6,560 plus $150,000 more for future care. Impairment was $104,040, the jury awarding $100,000 for suffering. The verdict totaled $360,600 and a judgment less PIP was entered on Helton's behalf. [The verdict is gleaned from the judgment as it was not made a part of the court record.]

Premises Liability - The plaintiff fell at a thrift store and broke her hip – the jury awarded her medical bills, but nothing for pain and suffering

Toomey v. Salvation Army Thrift Store, 06-1369
Plaintiff: Edwin H. Clark, *Clark Law Office*, Lexington
Defense: Jay R. Langenbahn, *Lindhorst & Dreidame*, Cincinnati, OH
Verdict: $9,444 for plaintiff less 75% comparative fault
Circuit: **Fayette**, J. Crittenden, 6-6-07

Dorothy Toomey exited the Salvation Army thrift store in Lexington on 5-27-05. Toomey, age 79, fell from a handicap ramp onto the sidewalk. In the fall, she sustained a broken hip. Her medical bills were $9,444 and she sought $30,000 for pain and suffering.

It was Toomey's theory that the design of the ramp and the slope violated KRS 198B.130. In developing proof of injury, it was learned that Toomey's hip was surgically repaired. Hospitalized four days, she advanced to a walker and then a cane. While on her feet again, Toomey describes ongoing pain.

The Salvation Arm defended that there was no statutory violation and in any event, Toomey was not within the class of persons the statute was designed to protect. [The designed to protect issue would be a fact issue at trial.] Then to plaintiff's care, the defense postured at the scene that Toomey postured that she was sorry for having been so stupid to have stepped off the ramp.

In this unusual case, the court directed a verdict on liability. While the Salvation Army was at fault as a matter of law, plaintiff's duties remained in issue. Fault was then assessed 75% to her, the remainder to the defendant.

Then to damages, she took all of her medicals, but nothing for pain and suffering. As the jury deliberated, it asked the court: Can we find out what she paid out of pocket and how much was paid by med-a-care? The court replied tersely, "No."