Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

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Comprehensive Statewide Jury Verdict Coverage

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Address Change

Please note that effective with this issue, the address and phone number for the Kentucky Trial Court Review have changed. The address is 9462 Brownsboro Road, No. 133, Louisville, Kentucky 40241. The new phone number is 502-326-9794, and the toll-free number is 1-877-313-1944.

Civil Jury Verdicts

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

Medical Negligence -

Circumcision gone bad results in a defense verdict

Pack v. Witten, 98 CI 3197
Plaintiff: Jeffrey Stamper, *Connelly Kaercher & Stamper*, Louisville
Defense: Scott Whonsetler & James Burd, *Whonsetler & Associates*, Louisville
Verdict: Zero Verdict
Circuit: **Jefferson** (15), J. Conliffe, 12-20-99

On 6-14-97, John Pack, age 58, underwent a circumcision procedure to deal with persistent inflammation and general penis hygiene. It was conducted by Dr. Frederick Witten, Urology, Louisville. Thereafter, Pack has complained of a panoply of complaints which he has attributed to the procedure.

Particularly, he alleged that too much foreskin was removed, and as a result, Pack has suffered from (1) painful and altered erection, (2) sexual dysfunction, and (3) a condition whereby his penis retracts internally when sitting. Besides the physical maladies, he has also reported post-traumatic stress and depression as noted by Shannon Voor, Psychologist, Louisville.

His liability expert was Dr. Thomas Kasper, Urology, Rockville, MD, who criticized Witten's technique that resulted in too much skin being removed, all causally linked to Pack's complaints. Also for Pack was Dr. Gerald Jordan, Urology, Norfolk, VA, who discussed treatment options to correct the condition. Plaintiff sought his medicals of $2,294, plus $9,065 for future care. A separate category was for future psychiatric care, capped at $1,950. Suffering was limited to $2,000,000,

while the consortium claim of his wife, Karen, was limited to $1,000,000.

Witten denied negligence or that anything improper was done. He explained that he performed what is known as a "sleeve" circumcision, which is very precise. Accordingly, there has been no physical injury, nor any reason why Pack suffers from a sexual dysfunction. The retraction when sitting was called unrelated to the surgery, but instead a normal condition in light of Pack's pubic fat pad. Liability experts included Dr. John Mulcahy, Urology, Indianapolis and Dr. David Paulson, Urology, Duke. Contesting the emotional damage was Dr. Andrew Cooley, Psychiatrist, and his assisting psychologist, Kathleen Chard, both of Lexington, who found (1) no PTSD, (2) that Pack was malingering and (3) that while there was mild depression, it was related to the litigation.

Whonsetler delivered his summation for Witten and summarized that his client acted reasonably, while conversely, the criticism of him was not. He then turned to plaintiff's expert, Kasper, and called his opinions based on faulty assumptions about how Witten performed the procedure. This was contrasted with the preeminent defense experts, who testified there was no error and no correlation between the procedure and the claimed injury. He concluded asking for a defense verdict that was unclouded by emotion.

Stamper, in his closing remarks, defended Kasper's opinions and the medical records which indicate that too much skin was removed. It was no surprise that the national colleagues appeared to defend Witten, Stamper explained, as it happens in every malpractice suit. He quantified the damages for the jury, explaining Pack had "lost his manhood," then asking the panel to use common sense and to compensate the plaintiff.

The jury found that Witten had not violated the reasonably competent urologist standard and awarded plaintiff no damages. Judgment for Witten has since been entered.

Sexual Harassment - Non-sexual gender based hostile working environment alleged

Clifton v. Osram Sylvania, 98 CV 356
Plaintiff: Larry Roberts, *Roberts & Smith*, Lexington & John Roach, *Ransdell Roach & Wier*, Lexington
Defense: Larry Sykes & Kymberly Wellons, *Stoll Keenon & Park*, Lexington
Verdict: $100,000 for plaintiff
USDC: **Lexington**, J. Forester, 10-14-99

In January of 1985, Debra Clifton, age 46, was first hired to work as an electrician for the Sylvania plant in Versailles that manufactures lamps. While still employed, and despite receiving promotions over the years, she filed this sexual harassment lawsuit. In a twist on the typical claim, Clifton's was that Sylvania's conduct had cumulatively created a non-sexual gender based hostile work environment.

More particularly, she alleged, among other things, (1) that men were hired and promoted differently, (2) that she was treated differently as to lunch breaks, and (3) that her supervisor, besides constantly belittling and deriding her work product, also improperly discussed personal matters with her. There was also an incident where she was suspended three days for calling her supervisor an "asshole." She criticized the suspension in that cursing was prevalent in the work environment, and that she alone was singled out.

What her claim did not include was any allegation of improper sexual contact. Instead she pointed to instances of the aforesaid conduct as creating a severe and pervasive hostile working environment because of her sex. At trial, she sought compensatory and punitive damages. Clifton also presented two derivative claims, (1) that she was passed over for promotion to equipment design because of her sex, and (2) that she was retaliated against for filing an EEOC complaint.

Sylvania called Clifton's lawsuit a "dressed up" attempt to masquerade as discrimination, when nothing more was present than her disdain for the supervisor. She had not been treated differently because of her sex, the company argued, nor was her failure to be promoted so related. Sylvania introduced proof Clifton was not hired for the equipment design position because she lacked appropriate qualifications.

The first jury instruction concerned the hostile environment claim, and required Clifton to prove, (1) that the hostile environment existed and (2) that Sylvania had not exercised ordinary care to promptly correct it. The panel found for Clifton under the aforesaid, but rejected her other two claims, (1) the promotion issue and (2) retaliation. Having prevailed on one count, the jury went to damages, awarding Clifton $85,000 for compensatory damages. She took another $15,000 for punitives, the verdict totaling $100,000.

Auto Negligence - Two injured in a taxicab car wreck

Sweeney & Weyrauch v. Yellow Cab, 96 CI 5119
Plaintiff: Timothy McCarthy, *Nutt Mayer & Stein*, Louisville for Sweeney
Jack Ruck, *Ruck Wilson & Helline*, Louisville for Weyrauch
Defense: Armer Mahan, *Lynch Cox Gilman & Mahan*, Louisville
Verdict: $123,775 for Weyrauch; $33,589 for Sweeney
Circuit: **Jefferson** (11), J. McDonald-Burkman, 11-19-99

Debra Weyrauch, age 44, was in a 1969 Buick at Southern Parkway and Evelyn, when a Yellow Cab driven by Thomas Martin pulled into her path. As a result, Weyrauch broadsided the cab in a moderate collision. Besides injuring Weyrauch, this collision also caused injury to Martin's passenger, Patrick Sweeney, age 37. Thus at this trial, there were two plaintiffs, Weyrauch and Sweeney, seeking damages from Martin and Yellow Cab. Liability for the wreck was not a jury issue.

Weyrauch was hurt more seriously, sustaining a (1) flap tear of her meniscus (knee), and (2) a disc injury in her neck. She sustained two surgeries to repair her knee, one performed by Dr. William Moss, Orthopedics, Louisville. Dr. Lawrence Peters, Pain Management, Louisville, treated her neck injury with injections. Her medical bills were $28,000 and she sought another $171,031 for future care. Her suffering claim was limited to $250,000.

Yellow Cab contested her injuries with an IME, Dr. Martyn Goldman, Orthopedics, Louisville, who reviewed her records. He noted a history of medical problems, pointing to pre-existing conditions as the cause of the knee and neck injury. The defense also looked to Weyrauch's prior car wrecks, (1) the first in 1986, and (2) another just six days before this crash.

Turning to Sweeney, because of this wreck, he was knocked out at the scene, then complaining of soft-tissue pain and

headaches. While the soft-tissue complaints have mostly resolved, headaches have continued. His medical bills were $9,839 and he sought another $30,000 for suffering. Medical proof came from Dr. Michael Peveler, Family, Louisville. Yellow Cab relied heavily on notes from Peveler that indicated the injury had resolved by June of 1996.

Mahan went first in his summation to the suffering claim of Sweeney, noting (1) Peveler's opinion that he was healed within six weeks, and (2) significant gaps in treatment. Similarly, he discounted Weyrauch's neck injury, noting she waited five months after the wreck to seek treatment. Mahan then traced proof that the neck and knee injury were both pre-existing, suggesting plaintiff only be compensated for the aggravation of those conditions. More generally, counsel explained that attorneys request damages, but it is juries that award them, asking the panel to not check common sense at the door.

Ruck spoke next for Weyrauch and conversely traced the proof which he contended linked the knee and neck injuries to this crash. Finishing, Ruck described how the injury affected his client, then challenging the jury to return a verdict about which they can be proud.

McCarthy went last and told the jury all that remained was for the jury to compensate the parties for their injuries. He then discussed how Sweeney has continued to live with the effects of this wreck for four years, asking for a reasonable suffering award.

The jury only considered the damage claims of the plaintiffs, liability having already been decided. Sweeney took his medical bills as claimed, plus $23,750 for suffering. His verdict totaled $33,589. Weyrauch took $12,625 of his medicals, plus $33,850 for those in the future. Her suffering was valued at $77,800, leaving her with a total verdict of $123,775.

Auto Negligence - **Interstate driver blacked out and rear-ended a disabled vehicle, leaving the occupant with (1) diminished smell & taste and (2) a comminuted shoulder fracture**

Works v. Genuine Parts, 99 CV 001
Plaintiff: Michael Hatzell, *Hatzell & Groves,* Louisville
Defense: Thomas Hectus, *Tilford Dobbins Alexander Buckaway & Black*, Louisville
Verdict: $137,000 for plaintiff
USDC: **Louisville**, J. Heyburn, 12-8-99

Patricia Works, age 54, was stopped in the emergency lane on southbound I-65 near the horse barns on 9-18-97 with a flat tire. She had summoned help from Triple A and was waiting inside her car for it to arrive. At the same time on I-65, Donald Keith was driving a car for his employer, Genuine Parts.

Keith either blacked out or fell asleep, his car drifting into the emergency lane at 55 mph. At that speed, and in what was a significant crash, he rear-ended Works. The collision left her with a comminuted shoulder fracture, post-concussive injuries including memory loss and concentration, plus other assorted soft-tissue symptoms. Works has also reported a diminished sense of smell and taste.

Her medical bills, not sought, were $29,138. Through an ENT, Ted Steffen, Louisville, she developed proof of the smell and taste injury. Dr. David Petruska, Neurology, Louisville, discussed the post-concussive injuries. At trial, she sought lost wages of $40,000 from her job as a salesclerk at Lazarus, plus pain and suffering.

There was another underlying current to this jury trial. At the time of the wreck, Works was returning home from treatment for cancer. By the time of trial, her condition had become terminal, leaving her with just three to four months to live. On the eve of trial, the defense moved for a continuance, in part because their IME neuropsychiatry expert, Robert Granacher, had suffered a heart attack and was unavailable for trial. As a continuance would leave Works with a limited remedy while she was alive, she elected to limit her proof of the brain injury, excising portions of Petruska's proof, and instead focusing on the (1) shoulder injury and (2) the smell and taste problem.

Thus at trial, the only jury issues turned on damages, as the court resolved liability in favor of Works, rejecting a black-out defense. Similarly, the court disallowed plaintiff's claim for punitive damages, based on the Keith's having blacked out. The matter was submitted to a federal jury, which awarded works $12,000 for her lost wages. Another $125,000 was given for suffering, leaving plaintiff with a total verdict of $137,000. Judgment has been entered for Works - the defense has since appealed.

Premises Liability - **Fault no issue in case where a ladder fell on the arm of a elderly woman resulting in a comminuted wrist fracture**

Daniels v. Wal-Mart, 99 CV 063
Plaintiff: Jesse Riley, Russellville
Defense: Michael Farmer, *Farmer Kelley Brown & Williams*, London
Verdict: $155,456 for plaintiff
USDC: **Bowling Green**, J. Russell, 1-10-00

Mary Daniels, age 67 and of Tennessee, was shopping at the Russellville Wal-Mart, having come to town to see relatives. As she walked down an aisle, a store employee on a ladder, James Allen, had just placed boxes of potato chips on the shelves. He began to fold his ladder, but he lost control and it fell upon Daniels. She was knocked to the ground, and the impact resulted in (1) a comminuted fracture to her wrist and forearm, and (2) a nasty bruise to her hip.

She was treated by Dr. Kirk Fee, Orthopedics, Bowling Green, who performed two surgeries on her wrist. Because of the painful injury, the plaintiff who used to work as a private housekeeper, has been unable to continue. She has also reported depression from this injury, as evidenced by Dr. John Chauvin, Internal Medicine, Hermitage, TN. Her medical bills were $20,146, and she also sought future care, lost wages, impairment and suffering.

In the rarest of rare case, Wal-Mart admitted that it was solely to blame for the incident, leaving damages as the only jury issue. The panel awarded her medicals as claimed, plus $5,700 for those in the future. Lost wages were $13,360, and she took another $25,000 for impairment. The federal jury in Bowling Green valued her suffering at $91,250, and the verdict totaled $155,456. Judgment in that sum has been entered for Daniels.

The KTCR 1999 Year in Review has just been published. Included here is a quick look at *the Table of Contents*. The 1999 volume is 394 pp. bound and includes everything that made the 1998 edition useful, plus much more. Answered questions include: *Which judges tried the most cases? Which judges had the lowest average verdicts? Who tried the most cases in 1999? Who tried the most in 1998 & 1999?*

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The Kentucky Trial Court Review
1999 Year in Review
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Premises Liability - Fall precipitated by a rail defect leaves plaintiff with a broken leg and ankle

Barker v. Shaffer, 98 CI 0812
Plaintiff: Garis Pruitt, Catlettsburg
Defense: Ralph McDermott, Ashland
Verdict: $201,659 for plaintiff
Circuit: **Boyd** (2), J. Hagerman, 12-1-99

On the night of 1-23-98, Linda Barker, age 55, visited her daughter, Deana, who rented a second-story apartment from Ronald Shaffer. It was dark and the area unlit as Barker descended the stairs later that evening. There was a portion of the handrail that was defective, such that nails protruded freely.

Halfway down the stairs, Barker's coat became entangled on the nail, causing her to fall forward the rest of the way. As a result, she suffered serious injuries, including (1) a broken left leg near the knee, and (2) a fracture of her right ankle. She was treated by Dr. Michael Goodwin, Orthopedics, Ashland, who performed surgery on the ankle, which was the more serious injury. Thereafter, for a period of time, Barker moved through a wheelchair, walker and crutches, before walking again. Medical expenses totaled $23,289, and the future care was limited to $5,522.

She still reports significant discomfort, all of which has impaired her vocation as a banquet server at a local hotel. She sought lost wages of $4,000, plus impairment of $89,837. There was an additional claim of $157,871 for household services. The instructions placed no cap on suffering damages.

In this action, she sued Shaffer for negligence, criticizing the (1) the defect in the rail, and (2) the inadequate lighting which violated local ordinances. She employed a safety expert, Scott Jenkins, Ashland, who discussed these matters.

For his part, Shaffer denied negligence or that there was any defect in the railing. He pointed to proof that the fall was caused by Barker having taken a misstep.

The matter was submitted to a jury, which found Shaffer violated a duty to maintain his premises in a reasonably safe condition. Conversely, it found no deviation by plaintiff, then moving to damages. Barker took her medicals and future medicals as claimed, but nothing for lost wages. Impairment and household services were $42,548 and $30,000, respectively. For her last element, suffering, the jury selected the sum of $100,000. Her verdict totaled $201,659, and judgment in that sum has been entered. **See the KTCR** *1999 Year in Review*, Case No. 981, where a federal jury in Ashland awarded a female plaintiff $1,710,486 for a serious knee injury.

Premises Liability - Tobacco worker seriously injured when a tie rail in a barn collapsed

Morrow v. Lane, 97 CI 0290
Plaintiff: Kirtley Amos, *Alexander & Amos*, Lexington
Defense: Craig Reinhardt, *Fowler Measle & Bell*, Lexington
Verdict: Zero Verdict
Circuit: **Woodford** (1), J. Overstreet, 7-20-99

Robert Morrow, age 35, was hanging tobacco for Jesse Lane on 11-6-96 in a barn some five or six rails off the ground. Suddenly a rail broke and Morrow tumbled to the ground. His injuries from the fall were serious, and he remained hospitalized for two weeks. Morrow broke both arms, a leg, his jaw and his skull in the incident. The arm later became infected, and necessitated a surgery.

His medical bills totaled $132,798, and another $5,637 was sought for future care. Dr. James Templin, Pain Management, Lexington, discussed his care and treatment of Morrow. Plaintiff also sought $32,000 for lost wages, plus an uncapped sum for impairment. His last element, pain and suffering, was also uncapped.

Morrow's liability theory against Lane was that he provided an unsafe place to work in that the rails were (1) not properly inspected, (2) unstable and (3) bug infested. The defendant indicated that he had inspected the rails, and that there was no sign of a problem, nor any way for him to know there might be. Lane also pointed to Morrow's care, noting he had the same duty to inspect the rails.

The jury charge asked specifically (1) if Lane had exercised ordinary care as to the tie rail defect, (2) whether he knew of the defect or should have, and (3) causation. The answer was in favor of Lane, and the jury didn't reach Morrow's duties, apportionment or damages, awarding plaintiff nothing. Judgment has been entered for Lane.

Civil Sexual Assault - Stepfather sued for sexually assaulting his minor stepson over a period of eight years

Bollinger v. Burns, 98 CI 0482
Plaintiff: Gregory Butrum, *Radolovich Law Office*, Louisville
Defense: Pro se
Verdict: $30,520,000 for plaintiff
Circuit: **Jefferson** (5), J. Potter, 12-22-99

From 1981 until 1989, starting when he was 2 ½, Derek Bollinger, now 20, was repeatedly sexually abused by his stepfather, Dennis Burks. In 1991, Burks pled guilty to sodomy charges and was sentenced to serve twenty years in prison. Bollinger has since filed this suit for civil sexual assault against his former stepfather.

Liability was no issue at this trial. As well, Burks was unrepresented and offered no defense at trial, admitting the conduct had occurred. Plaintiff indicated that more than 1,000 acts occurred. At trial, he sought suffering and punitive damages, both uncapped.

In an unopposed closing, Butrum displayed pictures of his client as a child, then arguing Burks destroyed that by what he did. He then described the horrific conduct by the defendant, whose conduct is even worse because he acted as a father figure to the boy. Unable to keep his secret any longer, Bollinger came forward, and while the jury cannot give the years back, its verdict can tell him it wasn't all for nothing. In valuing his client's claim, Butrum asked for $5,000 per assault, plus $10,000,000 for punitive damages.

The jury only considered damages and awarded Bollinger $13,520,000 in compensatory damages, plus $17,000,000 for punitives. The verdict for the plaintiff totaled $30,520,000.

Auto Negligence - Myofascial pain results after a rear-end MVA; $20,000 awarded for suffering

Winter v. Miller, 98 CI 0252
Plaintiff: David Futscher, *Arnzen Parry & Wentz*, Covington & Kenneth Zuk, Amelia, OH
Defense: Paul Boggs, *Lange Quill & Powers*, Newport
Verdict: $36,907 for plaintiff less 20% comparative fault
Circuit: **Kenton** (3), J. Bartlett, 12-9-99

On 2-17-96, at a short merging ramp to I-275 near Ky 17 in Fort Wright, Diana Winter was rear-ended by a teenager, Steven Miller. The collision left a moderate dent to the rear bumper of Winter's station wagon. Liability

was contested by Miller, who pointed to Winter's having given inadequate warning that she would stop. Winter responded that the short merging ramp necessitated that she yield to traffic on I-275.

Whoever was to blame for the wreck, Winter, age 38, has complained of radiating low back pain. Despite neurological, orthopedic and chiropractic care, her pain symptoms have continued. Dr. Michael Swank, Orthopedics, Cincinnati, identified a non-operable disc injury linked to the crash; a Cincinnati neurologist, Clarence Lewis, recognized myofascial pain. Also for Winter was her chiropractor, Joseph Sheppard, Amelia, OH. Her medical bills totaled $17,934, and she sought another $25,000 for future care. In two uncapped categories, she also claimed past and future suffering.

The jury found both to blame for the wreck, assessing 80% to the defendant, remainder to plaintiff. As to damages, she took $16,907 of her medicals, but none for those in the future. Past suffering was valued at $20,000, but there was no award for future suffering. The verdict totaled $36,907, less the 20% comparative fault. An appropriate judgment, reflecting comparative fault and PIP offset, has since been entered. While deliberating, the jury had questions, asking (1) why didn't health insurance pay her medical bills?, and (2) who will be awarded the medicals, plaintiff or an insurance company?

Medical Negligence - Doctor's decision to recommend gallbladder surgery is criticized

Harris v. Stephens, 97 CI 1081
Plaintiff: Greg Stumbo, *Stumbo Barber & Moak*, Prestonsburg
Defense: David Trimble, *Frost & Jacobs*, Lexington
Verdict: Zero Verdict
Circuit: **Pike** (2), J. Lowe, 11-18-99

Stirl Harris, age 54 and a local magistrate, was treated for abdominal pains by Dr. Grady Stephens on 8-6-96. Stephens conducted an enzyme test which was abnormal and indicated a gall stone or gallbladder problem. On 8-16, Stephens removed Harris' gallbladder in a laparoscopic cholecystectomy. It seemed uneventful, but in the next few days, Harris had continuing pain.

He returned to seek care and it was determined that bile was leaking from the injury. Soon after, a second emergency surgery was performed by a Lexington gastroenterologist, Dr. Jerry Yon. While Harris has reported some pain symptoms and suffered a weight loss after the surgery, he is mostly recovered physically from the initial injury.

From these facts, Harris filed suit alleging medical negligence against Stephens. While he did at first criticize the gallbladder surgery technique, by trial, the criticisms were that (1) the surgery was unnecessary, and (2) Harris was not properly informed. On liability for Harris was the retired Dr. John Myers, Internist, Lexington, who contended the enzyme test was not sufficient to justify surgery - moreover, it turned out Harris had no gall stones. As to informed consent, Harris argued that he was not fully informed of other treatment options.

While Harris has recovered from his physical injuries, he has since suffered significant psychiatric symptoms. As identified by Dr. Arnold Ludwig, Psychiatry, Lexington, a significant disturbance and post-traumatic stress were noted. On impairment issues, Norman Hankins, Jonesborough, TN, valued plaintiff's loss at $165,574.

The defense responded on liability with Dr. William Cheadle, Surgeon, Louisville who noted, (1) the bile leak was a normal complication and the original surgery was proper, and (2) the enzyme test is a proper indicator for the gallbladder surgery. Rebutting Ludwig was Dr. Robert Granacher, Psychiatry, Lexington, who found a minimal psychiatric injury, but did find, (1) a general anxiety disorder that pre-existed this incident, (2) a grandiose personality disorder, and (3) symptom magnification.

The liability instruction asked if Stephens was (1) negligent in recommending the gallbladder surgery or (2) whether an informed consent deviation existed. Under either, Harris could prevail, but the jury answered no, awarding no damages. Judgment has since been entered for the defendant.

Auto Negligence - Jury awarded plaintiff $3,000 for suffering in whiplash injury case

Mahan v. Sizemore, 98 CI 0808
Plaintiff: David Smith, Corbin
Defense: John Callis, III, *Boehl Stopher & Graves*, Prestonsburg
Verdict: $14,679 for plaintiff
Circuit: **Laurel** (2), J. Messer, 12-7-99

On the evening of 10-6-97, Kristi Mahan, age 21, was a passenger with a friend, Nina Kidd, traveling on U.S. 25. Mahan and Kidd remember that a car driven by Leonard Sizemore pulled from a stop sign onto U.S. 25 coming from the opposite direction and made a wide turn. A moment later, Sizemore having crossed the line, there was a head-on impact in Kidd's lane. For his part, Sizemore contended that (1) the wreck happened in *his* lane, and (2) that Kidd's lights weren't illuminated.

However it occurred, there was a moderate collision and the airbags in Kidd's car were deployed. Kristi has since complained of radiating soft-tissue symptoms, headaches, and pain in her knees. She was treated by Dr. Greg Bargo, D.C., Corbin, who noted muscle spasms from the whiplash injury. At trial, she sought her medical bills of $10,779, $900 for lost wages, plus an uncapped sum for suffering.

Sizemore besides contesting liability, also employed an IME to defend the case. He was Dr. Richard Sheridan, Orthopedics, Lexington; the IME opined that (1) Mahan had resolved from her strain injury, (2) that the objective tests were normal, and (3) he also criticizing the chiropractic care.

The matter was submitted to a London jury which found Sizemore solely to blame for the wreck, refusing to impose liability on plaintiff's driver, Kidd. As to damages, Mahan took her medicals and lost wages as claimed, plus another $3,000 for suffering. The verdict totaled $14,679, and an appropriate judgment has since been entered on plaintiff's behalf.

Auto Negligence - Potato chip truck rear-ends plaintiff causing soft-tissue injuries

Porter v. Herr Food, 98 CI 0085
Plaintiff: Michael Fox, Olive Hill
Defense: Donald Moloney, *Sturgill Turner Barker & Moloney*, Lexington
Verdict: $41,637 for plaintiff
Circuit: **Carter**, J. Long, 11-17-99

On 2-9-98, on N. Carol Malone Boulevard in Grayson, Robert Porter, age 27, was stopped in traffic. Behind him and distracted by another vehicle was Denver Paugh, in a potato chip truck for Herr Food. At some 35 mph, Paugh rear-ended Porter, in a wreck that Paugh described as moderate to severe. In a pick-up truck, Porter's head snapped back, shattering his back window.

Briefly unconscious at the scene, Porter has since complained of soft-tissue symptoms and headaches. He was treated by Dr. Bal Bansal, Neurology, Ashland, who identified a permanent soft-tissue injury, assigning

a 10% impairment. His medical bills totaled $10,476. A Greenup police officer, he also argued the wreck impaired his run for local sheriff. The vocational expert, William Weikel, Morehead, valued the diminished work capacity range at between $149,000 and $175,000. His wife, Donella, also presented an uncapped consortium claim.

The defense contested liability, pointing to the other vehicle that distracted Paugh, also disputing damages. The IME for Herr Food was Dr. Joseph Zerga, Neurology, Lexington, who noted just a strain, but no permanent injury.

The jury resolved liability for the plaintiff in this rear-end crash, and turning to damages, it awarded Porter $10,090 of his medicals. He took $7,797 for lost wages, but nothing for future medicals or impairment. Past suffering was valued at $18,750, plus $5,000 for that in the future. The verdict totaled $41,637, and an appropriate judgment has since been entered.

Uninsured Motorist - Drunk driver pulled into the path of a car, causing soft-tissue injuries to two plaintiffs; $27,500 & $35,000 of punitives awarded to each plaintiff, respectively

Clark & Matlock v. State Farm,
95 CI 0789
Plaintiff: Robert Grant, Louisville
Defense: Robert DeGolian, *Bennett Bowman Triplett & Vittitow*, Louisville
Verdict: $65,525 for Matlock & $51,461 for Clark
Circuit: **Bullitt**, J. Waller, 10-14-99

On 11-21-93, an uninsured and drunk driver, Darrell Cothern, ran a stop sign and pulled onto Ky 61, striking a car driven by Malinda Clark, age 48. His BAC level was .175. Clark had seen Cothern coming, but expected him to stop. The minor collision knocked Clark's vehicle into the ditch.

In this action, Clark and her daughter who was a passenger, Dawn Matlock, age 26, sued the uninsured motorist carrier, State Farm. Besides seeking compensatory damages for their injuries, they also sought to impose punitive damages upon State Farm for the drunken conduct of Cothern.

Clark suffered a soft-tissue neck and back injury in the wreck, incurring medical bills of $16,461. She also sought future medicals of $63,750, plus suffering which was capped at $200,000. The daughter, Matlock, has complained of soft-tissue symptoms in her shoulder, attributable to being thrown around the vehicle as it entered the ditch. Her medical bills were $23,025, plus future medicals of $249,600. She was treated by Dr. Irene Key, Osteopath, Louisville, who noted Matlock's chronic strain and the need for continuing treatment. Her suffering claim was also limited to $200,000.

As the law was for the plaintiffs, the jury only considered damages. Clark took her medicals as claimed, nothing for those in the future, plus $7,500 for suffering. Similarly, Matlock took her medicals as claimed, nothing for future medicals and $7,500 for suffering. Turning to punitive damages, Clark took $27,500, while Matlock took $35,000. All told, Clark's verdict totaled $51,461, while Matlock's was $65,525. Post-trial, a judgment has been entered for plaintiffs for the suffering damages, plus unpaid medical bills. However, the court reserved an award of punitive damages, pending the state supreme court's consideration of punitive damages in a drunk driver/UM context.

Underinsured Motorist - Myofascial pain from rear-end wreck nets plaintiff $100,000 for suffering

Huckaby v. Farm Bureau & Webb,
94 CI 2693
Plaintiff: Alan Leibson, Louisville
Defense: Mark Sandmann, *Rawlings & Associates*, Louisville for Farm Bureau
Charles Cassis, *Goldberg & Simpson*, Louisville for Webb
Verdict: $122,166 for plaintiff
Circuit: **Jefferson** (9), J. Mershon, 12-17-99

During rush hour on 12-20-90, on I-264 near Newburg Road, Stanley Huckaby, age 52, had stopped in traffic that had backed up onto the interstate. Behind him, Pamela Webb came over a small hill and couldn't stop in time, sliding into Huckaby on the wet road. Webb offered her $50,000 policy limits, which Farm Bureau elected to advance. At trial, Webb continued to be defended by her insurer, with Farm Bureau also actively defending.

The wreck was significant, so much so, that at the scene, Webb was knocked out. More importantly, the plaintiff Huckaby complained of persistent soft-tissue symptoms for a period of several years. Treated by his friend, Dr. Stephen Aaron, Surgeon, Louisville, without relief, Huckaby went to the Mayo Clinic for analysis. He received three recommendations there, (1) to lose weight, (2) exercise, and (3) not actively seek treatment.

The search for effective care continued and he found it with Dr. Terry Davis, Pain Management, Louisville. Since 1993, he has seen Davis numerous times, enduring over 1,000 injection treatments. Davis has diagnosed a permanent injury, identifying myofascial pain. His medical bills totaled $51,264.

At the time of the wreck, Huckaby had just launched his own pharmaceutical sales company. While it has been successful this decade, plaintiff has suffered from diminished capacity. He claimed $10,221 for lost wages, plus an even $1,000,000 for impairment. Suffering was also limited to $1,000,000.

The defense contested liability for the rear-end wreck, pointing to the (1) wet road conditions, and (2) the dangerous pre-construction design of I-264 in 1990 that permitted exit traffic from Newburg Road to back up onto I-264. As to damages, the IME was Dr. Timir Banarjee, Neurology, Louisville. He contended the symptoms should have resolved in three to six months, also disputing the treatment by Davis, which has effectively turned Huckaby into a pin cushion. The defendants also relied heavily on the Mayo Clinic recommendations.

Cassis closed first on behalf of Webb and began noting the dangerous nature of I-264 in 1990, asking if her conduct amounted to negligence. As to damages, he asked a similar question, if she was to blame, did she cause all his injuries. He suggested not, tracing the opinions from the Mayo Clinic and the criticism of Davis by Banarjee. He asked for a common sense verdict and explained the panel could award the claimed sum for suffering, a lesser sum or even zero.

Sandmann was next for Farm Bureau and his close focused on an lengthy recitation of themes from a football movie, *North Dallas Forty*. Counsel compared Huckaby to the young rookie running back who takes an injection to mask injury, thereby suffering a more severe injury; similarly, the repeated injections by Davis have exposed Huckaby to reinjury. While plaintiff wasn't lying about his injuries, Sandmann argued, he was badly mistaken, noting the Mayo Clinic opinion. He finished that it was undisputed there was a whiplash injury, however, that merited a verdict of just a fraction of the claimed sum.

Leibson spoke last for the plaintiff and called him his "junkyard dog" client who won't quit or let his maladies get him down. He then wondered that Farm Bureau must be very afraid of this case and what the jury may say by their verdict. Turning to the wreck and the injuries, he called it a violent collision that has resulted, "bottom line," in a serious soft-tissue injury. As to liability, he criticized the defense for suggesting Webb didn't cause this wreck, noting all the other cars stopped in traffic, except for her. Leibson then traced proof of the "cascade" injury which is real, even though it doesn't show up on MRI testing. As a guide for suffering, he suggested 10 cents a minute for plaintiff's life expectancy, equaling a sum of over $1,000,000.

The jury found Webb to blame for the wreck, (Huckaby's care was no issue,) and then moved to damages. He took $22,166 of his medicals, but nothing for wage loss or impairment. Suffering was awarded in the sum of $100,000 and the verdict totaled $122,166. Thereafter, the court questioned the jurors, and it was learned the medicals award was reached by a poll method. Judgment has since been entered for Huckaby for $50,000, representing an offset for the already paid medicals, plus the underlying $50,000 coverage already received.

Medical Negligence - Chiropractic manipulation of a disc bulge is alleged to lead to a herniated disc injury

Terrell v. Hill, 97 CI 0186
Plaintiff: Mark Gray, *O'Koon Menefee & Gray*, Louisville
Defense: James Grohmann, *O'Bryan Brown & Toner*, Louisville
Verdict: Zero Verdict
Circuit: **Jefferson** (3), J. Abramson, 12-10-99

On 6-17-96, Kevin Terrell, age 40, was treated by a chiropractor, Terry Hill for symptoms of back stiffness. During an adjustment on his back, Terrell heard a pop, and contemporaneously, he has complained of increased symptoms. He later endured a cervical fusion surgery and in this action, sued Hill for chiropractic negligence.

Plaintiff alleged that when he presented to Hill, he suffered from a bulging disc. Due to inadequate history and testing, Hill negligently manipulated Terrell's spine, causing the bulging disc to become herniated. As a result, Terrell, a self-employed contractor, has suffered a permanent impairment. Quantifying the loss was Edward Berla, Vocational Expert, Louisville, who valued same at $248,790. Past suffering was limited to $50,000, while that in the future was capped at $165,000.

On liability for plaintiff was Dr. Brian Anseeuw, Chiropractor, Louisville, who causally linked the care and inadequate testing to the herniated disc. Also for Terrell was Dr. Lansing Cowles, Neurology, Louisville, who performed the disc surgery; however, his causal link was less certain than Anseeuw.

The defense countered with a chiropractor, Jeffrey Miller, Louisville, who found the care proper, even if there was a disc injury. Dr. William Olson, Neurology, Louisville, disputed Anseeuw, who is also his neurological resident at U of L, and contended, (1) only extreme trauma or a chronic injury can cause a herniated disc, (2) that here, the disc injury was chronic and pre-existed the manipulation, and (3) Hill's care was only a temporary aggravation. Also for Hill on these issues was Dr. George Raque, Neurology, Louisville.

Grohmann, in his summation, identified the key issue for the jury, as whether or not plaintiff had radicular pain before the adjustment. If he did, then the disc injury pre-dated his treatment with Hill. Counsel then set forth proof, including medical records which indicate the symptoms existed prior to the manipulation, also asking why plaintiff sought chiropractic care if there wasn't an injury? He concluded that plaintiff's injuries were not caused by Hill's treatment and asked the jury to return a common sense verdict.

Gray described what he called the truths of the case. They were: (1) Miller solicits attorneys to defend these cases, (2) the pain Terrell reported to Hill was not consistent with a herniated disc, and (3) prior to Hill's treatment, the symptoms were minor. Because of Hill having twisted the spine, Terrell sustained an injury, and the change in his symptoms was no coincidence. Had Hill have run the simple tests suggested by Anseeuw, instead of shuffling through his patients, greedily placing them at risk, then there would be no injury. Turning to damages, he called the past suffering the removal of two discs, while the future suffering is the pain Terrell will endure for his life expectancy. He finished telling the panel that their verdict will take a stand for patient's rights, telling doctors to spend more time with their patients.

The jury question asked if Hill had violated the reasonably competent chiropractic standard. The answer was no and the panel didn't reach damages, awarding Terrell nothing. Judgment has since been entered for the defense.

Excessive Force - 16 year-old driver claims he is pulled from his car and kicked after a police chase

Crabtree v. Towles, 98 CV 028
Plaintiff: Douglas Rouse, *Rouse Skees Wilson & Dillon*, Florence, & Anne McBee, Florence
Defense: Jeffrey Mando, *Adams Stepner Woltermann & Dusing*, Covington
Verdict: Zero Verdict
USDC: **Covington**, J. Bertelsman, 11-24-99

After 2:00 a.m. on 12-29-96, Douglas Crabtree, then age 16, was driving his mother's car in Covington with two friends. A Covington police officer noted the car driving erratically, spinning tires and disregarding a stop sign. When the officer prepared to pull the car over, Crabtree began to flee. The chase continued across the 12th Street Bridge into Newport. It soon ended on Thornton Avenue when Crabtree stalled the car. By then, a Newport officer, Terry Towles, had joined the pursuit.

Crabtree reports that he was pulled from his car through an open window and roughly taken down. Then while restrained, Towles kicked him in the groin. The teenage passengers with Crabtree confirmed this version.

Thereafter, the boy was arrested and later treated for bruising and blood in his urine at the St. Elizabeth Medical Center. His medical bills totaled $1,120. Besides suffering damages, he also sought punitive damages.

Towles had a different take, contending that Crabtree volitionally exited the car, only to be apprehended after a brief chase. Thereafter, Crabtree was properly restrained and he was not struck in the process.

The liability instruction asked if the defendant had used excessive force in the arrest? The answer was no and plaintiff took no damages. Judgment has since been entered for Towles.

Hospital Negligence - Failure to treat and detect a groin injury secondary to an angioplasty

Mattingly v. Humana Hospital, 91 CI 4676
Plaintiff: Kevin George, *George George & Hemsell*, Louisville
Defense: Frank Doheny, *Dinsmore & Shohl*, Louisville
Verdict: Zero Verdict
Circuit: **Jefferson** (15), J. Conliffe, 11-19-99

George Mattingly, was 45 in the summer of 1990, when he was transferred from a small-town hospital to Humana in Louisville for treatment of a heart condition. While at the hospital, he underwent an angioplasty to treat a 100% blockage of his right coronary artery. The procedure was initiated by passing a wire into the femoral artery in his groin.

Thereafter, he was released to go home, given a blood-thinning medicine, coumodin, to treat the heart condition, but which also had the effect of slowing the healing of the groin wound. Complications and infection set in at the wound site in the groin, and as the infection developed, plaintiff suffered a necrosis injury. He later endured two surgeries to repair the damage, but has continued to complain of disabling pain that has impaired his general store business.

In this action, he sued Humana Hospital and asserted negligence in the nurse treatment. Namely, he was (1) released too soon, (2) the risks and use of coumodin were not properly explained, (3) the nurses improperly observed, appreciated and treated the hematoma in his groin. George called it a case of giving the plaintiff "rat poison," (the coumodin), but not giving him proper instructions. On liability for Mattingly was a nurse, Barbara Wallace, Chicago, IL and Dr. Daniel Davis, Vascular Surgery, Columbia, SC. Plaintiff sought his medical bills of $170,834, plus impairment of $1,007,043. His suffering claim was capped at $3,000,000, and his wife, Cathy, also presented a consortium claim.

The hospital denied negligence and called the condition a known risk and complication of passing the line for the angioplasty. It also opined that the administration and use of the coumodin was a medical decision, and not attributable to the nurses. Jenny Beerman, Nurse Expert, Kansas City, testified that the nurse care and monitoring was proper. Also for Humana was Dr. Michael Daugherty, Surgeon, Lexington. Humana also raised the duties of the plaintiff in failing to promptly seek care.

The defense tended to minimize damages, noting that at the time of this incident, plaintiff was already disabled from a variety of conditions, including asbestos-related diseases. Plaintiff countered that the vocational award included not just what he earned, but covered his capacity to earn.

The jury instructions asked if the hospital had violated the duty of ordinary care. No was the response from the jury and the panel didn't reach Mattingly's care, apportionment or damages, awarding him nothing.

Automobile Fraud - Dispute centers on an alleged promise that the leased vehicles were "executive cars"

Kocinski v. Freedom Dodge, 98 CI 2000
Plaintiff: Don Pisacano, *Stites & Harbison*, Lexington
Defense: Scott Mattmiller & Elizabeth Hughes, *Gess Mattingly & Atchison*, Lexington
Verdict: $11,965 for plaintiff
Circuit: **Fayette** (8), J. Clark, 12-9-99

On two occasions, ten days apart in 1997, Mark and Michelle Kocinski leased vehicles from Freedom Dodge in Lexington. They were a 1996 Chrysler LHS and a 1996 Dodge Caravan. The Kocinskis assert the sales staff made certain promises, namely, (1) that the cars were "executive cars," and (2) that the Caravan had never been wrecked.

The executive car distinction had import, as the Kocinskis believed the vehicles were driven by Chrysler executives, and were not program or rental cars. All seemed well until the Kocinskis received their titles in the mail, which confirmed both vehicles had been rentals. They also soon learned that the Caravan had been wrecked.

This suit raised consumer protection and fraud counts against Freedom Dodge, both predicated on the faulty promises aforesaid. The Kocinskis sought to rescind the leases, or alternatively, for the diminution in value of the vehicles. A claim for punitive damages was also presented.

Freedom Dodge contended that (1) there was never a promise that the Caravan was not wrecked, and (2) the staff promised the cars were generic program cars purchased at a Chrysler auction, but that there was no promise they were "executive cars." In diminishing damages, the defense noted the plaintiffs have driven both cars extensively since the sale. The Kocinskis rebutted Freedom Dodge noting that the dealer knew the cars were rentals. It pointed to the titles at the Chrysler sale, signed by a Freedom Dodge employee three months before the Kocinski sale, which reflected the seller as a rental car company.

The jury found for the Kocinskis on both cars as to the Consumer Protection Act claim, but rejected the fraudulent misrepresentation counts. Turning to damages, the panel rejected recision, instead awarding plaintiffs the diminution in value. For the LHS, it was $5,470 and $6,225 for the Caravan. As punitive damages were rejected, plaintiffs took a total of $11,965. Post-trial, the court granted another $39,000 in attorney fees to the Kocinskis. **See the KTCR** *1998 Year in Review*, Case No. 271, where Freedom Dodge sustained $5,000 of punitive damages in an automobile fraud case.

Excessive Force - Pro se prisoner claims St. Matthews police beat him up during an arrest

Valenzula v. Jeffrey, 96 CV 436
Plaintiff: Pro se
Defense: Dave Whalin, *Landrum & Shouse*, Louisville
Verdict: Zero Verdict
USDC: **Louisville**, J. Heyburn, 11-23-99

On 8-19-95, Timothy Valenzula, age 47, had been drinking, and decided to call his estranged wife. Apparently things didn't go well, and she advised Valenzula that she would call the cops, as she knew there was a warrant for his arrest. Valenzula, drinking again, and just released from the hospital after a bout of alcohol intoxication, became incensed and decided to go to his wife's home. Lacking transportation, he stole a truck and off he went.

Just after leaving her home, the St. Matthews police detected the stolen truck and a chase was on. It ended shortly, with Valenzula exiting the still moving truck, and attempting to flee. He was soon flushed from a hiding spot and arrested.

Valenzula claimed that during the arrest, one of the officers, Brad Jeffrey, had roughed him up, including (1) kneeing him in the groin and (2) striking him in the head with a pistol. All of the alleged abuse occurred after he was restrained. At trial, against Jeffrey only, Valenzula sought an

uncapped sum for pain and suffering.

Jeffrey denied ever striking Valenzula, and initially thought the wound was inflicted by a police dog that was assisting in locating the plaintiff. Later, when it was learned that the dog was not involved, Jeffrey was unsure how Valenzula suffered the blow to his head, but theorized it could have occurred as he fled. For his part, Valenzula thought the story blaming the dog was a flat-out lie, offered by Jeffrey to disguise his excessive force.

Jeffrey responded that Valenzula had manufactured the entire story as a means to get back at Jeffrey who besides being involved in this arrest, was also the investigating officer in an unrelated but contemporaneous bicycle theft indictment that was returned against plaintiff. Arising from this incident, and other charges, Valenzula was imprisoned - at trial, he was a resident of a halfway-house.

However this affair occurred, and regardless of who may have been lying, it came to trial, with Valenzula as a pro se plaintiff. The jury instruction asked if Jeffrey had used excessive force. The answer was no, and Valenzula took no damages. His luck was no better a month later, when just released from the halfway house, Valenzula became embroiled in a publicized stand-off with the Louisville Police, which culminated with another arrest.

Police Negligence - Estate of a woman killed by her estranged husband sues the local police for a negligently conducted search and sweep of her home that failed to detect the hiding husband

Eaton v. Brown & Eldridge, 95 CI 0598
Plaintiff: Terri Schoborg, Latonia & Anthony Brinker, *Wehrman & Wehrman*, Covington
Defense: Stephen McMurtry, Covington
Verdict: Zero Verdict
Circuit: **Kenton** (3), J. Bartlett, 11-4-99

On 4-9-93, a tragedy came to be in the middle of the night at the home of Susan Eaton, age 37. A resident of public housing in Covington, her estranged husband, Davis Eaton, emerged from an attic hiding place. He then shot and wounded his wife. After a brief struggle, he strangled her to death.

Her estate, also representing her four minor children, brought this action against two Covington police officers, Derek Brown & Jeff Eldridge. This matter began to unfold on 4-6-93, when after a beating, Susan took out an EPO on Davis. On the evening of 4-8, Brown and Eldridge entered Susan's home to secure it before the locks were changed.

A search was conducted, and by all appearances, Davis was not present. It was only a few hours later that he emerged from his hiding spot to kill his wife. The estate contended the officers were negligent in failing to detect Davis in the attic. Key proof on this matter came from Davis himself, who noted no one checked the attic door, nor could it have been locked from the inside. Thus, but for the officer's negligently conducted search, Davis would have been detected and the murder averted. The estate sought Susan's suffering and destruction of power to earn money, plus consortium damages for each of the four minor children.

The officers had a different version of the search, namely, that they specifically checked the attic door and it appeared locked. Moreover, as the search was conducted, Susan advised the officers that no one could be in the attic area as only maintenance had keys. Instead, the police postured that the search was proper and that the well-trained defendants acted as they should have.

The jury instructions asked if each of the defendants exercised ordinary care in searching Susan's premises. The answer was no as to both, and the panel did not consider apportionment to Davis or damages, awarding the estate nothing. Judgment has since been entered for the defendants.

Underinsured Motorist - Soft-tissue plaintiff fails to exceed the $25,000 threshold

Sprigler v. State Farm, 98 CI 0355
Plaintiff: David Blandford, *Hughes & Coleman,* Bowling Green
Defense: Robert DeGolian, *Bennett Bowman Triplett & Vittitow*, Louisville
Verdict: $22,263 for plaintiff
Circuit: **Bullitt**, J. Waller, 11-10-99

On 4-29-95, Jessica Sprigler, age 37, was on Preston Highway near Pioneer Village when Ma Vue Xiong struck her car after running a red light from an inferior drive. Apparently, the newly immigrated Xiong misunderstood the signal. Liability was no issue, and she settled with Xiong for her policy limits.

In this action, Sprigler turned to State Farm for excess UIM coverage. To prevail, she needed to exceed a $25,000 threshold. Since the wreck, she has complained of headaches and radiating back pain. A Louisville chiropractor, David Zemba, treated Sprigler and noted a permanent soft-tissue injury. Her medical bills were $23,428 and lost wages were capped at $345. The instructions limited suffering to $150,000.

While State Farm did not contest liability, it did tend to minimize damages. The insurer called it just a strain injury, with excessive treatment, also noting an MRI exam was normal.

The jury instructions explained that Xiong was solely to blame, and further that State Farm was the UIM carrier. The panel awarded her $7,263 of her medical bills, but no lost wages. Suffering was valued at $15,000, and the verdict totaled $22,263. Post-trial, judgment has been entered for State Farm, as the verdict did not exceed the $25,000 UIM threshold.

Auto Negligence - Jury rejects a disc injury claim where plaintiff had a lengthy medical history, including a prior disc surgery

Robb v. Morgan, 98 CI 0488
Plaintiff: James Garvin, *Brown Lippert Heile & Evans,* Cincinnati, OH
Defense: Thomas Yocum, *Benjamin Yocum & Heather*, Cincinnati, OH
Verdict: $294 for plaintiff
Circuit: **Campbell** (2), J. Kopowski, 11-20-99

It was 5-23-96, and Bonnie Robb, age 48, was traveling on one-way York Street in Newport. Next to her car on the right side was Elisa Morgan, unfamiliar with the area, searching for a side street. Suddenly, Morgan attempted a left-turn onto 8th Street, and as she did, her car broadsided Robb's in a low-speed impact.

Robb has since complained of radiating pain to her legs that has left her disabled. She was treated by Dr. Jeffrey Stambough, Orthopedics, Cincinnati, who performed a L4 fusion surgery in September of 1996; a second follow-up procedure soon followed. It is important to note that Robb had a history of prior back problems, including (1) a disc surgery in 1982, and (2) an April 1995 fall injury while working at Frisch's. However, Stambough opined that this wreck aggravated the prior conditions, also noting that until this wreck, plaintiff did not have radiating leg pain. Robb's medical bills exceeded $60,000, and she also sought suffering damages.

The defense contested liability and damages, employing an IME, Dr. Bret

Ferree, Orthopedics, Cincinnati, who failed to causally link her disc injury to this wreck. Morgan focused on the April incident at Frisch's as the causal factor, noting that from 1982 until April of 1995, Robb made no complaint of injury. Plaintiff responded that while injured in April at work, by the time of the crash, her condition was improving.

The jury looked at liability first and found the defendant solely to blame for the wreck. Moving to damages, it awarded Robb just $294 of her medical bills, and nothing for suffering. The court's judgment (1) dismissed the case, (2) awarded Robb nothing per the offset for PIP, and (3) assigned each party to bear their own costs.

Underinsured Motorist - Three injured in a head-on collision, but verdict fails to implicate UIM coverage

Mikesell et al v. State Farm, 97 CI 2305
Plaintiff: Mark Smith, Louisville
Defense: Dennis McGlincy, *Sitlinger McGlincy Steiner, Theiler & Karem*, Louisville
Verdict: $11,000 for Angela, $4,200 for Tyler & $20,460 for John, but all less than the UIM threshold
Circuit: **Jefferson** (1), J. Jasmin, 12-2-99

Roy Miller was an uninsured driver on 3-19-95, when he attempted to pass another car on Greenwood Drive. Instead he struck a car driven by Angela Mikesell head-on, resulting in significant front-end damage. Also with Angela, age 29, was her son, Tyler, then age 5, and John Vandever, age 36. In this action, the three sued the UIM carrier, State Farm, for excess coverage. The jury knew that State Farm was the defendant and that UIM coverage was implicated.

Liability was no issue and the trial only considered the plaintiffs' damages. Because of the wreck, Angela, who was pregnant, suffered soft-tissue symptoms, plus knee pain from having impacted the dash. Her son, Tyler, sustained minor injuries, while John has complained of soft-tissue whiplash symptoms. Appropriate medical proof was presented, including proof from a chiropractor, Marcel Quiones, Louisville, who saw all three plaintiffs.

Angela sought her medicals of $7,984, plus $50,000 for suffering; Tyler's medicals were $3,967, and he claimed $15,000 for suffering. Lastly, John sought his medical bills of $10,502, lost wages of $3,960, plus $80,000 of suffering. To prevail in this action, all three plaintiffs needed to exceed different thresholds for non-PIP damages. They were: Angela - $25,000, Tyler - $6,250, & John - $12,250.

McGlincy began his closing reiterating a voir dire commitment that just because there was significant car damage did not prove injuries were sustained. Then as to each of three plaintiffs, he conceded they suffered temporary and minor injuries, but criticized excessive chiropractic care. He concluded asking the panel only to award that which was related to the MVA.

Smith explained the UIM nature of the case to the jury, then tracing the injuries sustained by his clients. While we know what the medical bills are, Smith argued, it is pain and suffering that is difficult. As this was the plaintiffs' only day in court, he asked for the sums claimed for suffering.

While deliberating, the jury had a question, wanting to know whether the medicals were paid, and by whom. The panel only considered damages and awarded Angela $6,000 of her medicals, plus $5,000 for suffering, but less than her $25,000 threshold. Tyler took $2,700 of his medicals, plus $1,500 for suffering, totaling $4,200. His award failed to exceed the $6,250 threshold. Last, John took $8,500 of his medicals, the wage loss as claimed, plus $8,000 for suffering. The verdict totaled $20,460, but Non-PIP elements did not exceed his $12,250 threshold. An appropriate judgment for State Farm has since been entered.

Premises Liability - Woman cuts her hand when knocking on a glass door; defense denies negligence, pointing to plaintiff's intoxication

Kannady v. Malone, 96 CI 1866
Plaintiff: Ronald McDermott, Covington
Defense: Thomas Yocum, *Benjamin Yocum & Heather*, Cincinnati, OH
Verdict: Zero Verdict
Circuit: **Kenton** (4), J. Summe, 11-9-99

It was 10-5-95, and Phyllis Kannady, age 40, went to the home of Flossie Malone on West 12th Street in Covington looking for her brother. As Kannady knocked on the glass window inside the storm door, her hand and wrist went through a crack in the window. She suffered a significant cut to her wrist and arm, which required two surgeries and left a 8-10 inch scar.

In this action, Kannady sued Malone, contending negligence in maintaining the glass door. Particularly, she pointed to proof that Malone knew the window was cracked and indicated she planned to fix it. At trial, her only claimed element of damage was suffering.

Malone denied negligence or any defect in the door. Instead, she noted proof that Kannady was intoxicated, drinking and using drugs. Kannady responded that she had three glasses of beer that evening, but denied intoxication.

Originally, an arbitration panel in Northern Kentucky found for Malone on liability. Kannady appealed and the matter came to trial. The liability instruction asked if Malone was negligent in maintaining her entryway. The answer was no, and the panel did not reach plaintiff's duties, apportionment or damages, awarding nothing. Judgment has since been entered for the defendant.

Medical Negligence - A forgotten red hair is alleged to cause infection for four years after surgery

Allen v. St. Mary & Elizabeth Hospital, 94 CI 6064
Plaintiff: Freeda Clark, Louisville
Defense: Terri Kirkpatrick & Todd Thompson, *Thompson & Miller*, Louisville
Verdict: Zero Verdict
Circuit: **Jefferson** (8), J. Knopf, 12-2-99

In March of 1989, Helen Allen, then age 53, underwent surgery to have part of her stomach removed. It was performed by Dr. Ben Reid, Surgeon, Louisville at the St. Mary & Elizabeth Hospital. The surgery was uneventful, but beginning some nine months after surgery, Allen began to experience an infection along the surgical incision.

For a period of four years, until 11-15-93, these infection symptoms persisted. On that day, Reid was examining the incision area when he detected something strange. He reached into the incision and removed an 8-10 inch reddish-blond hair, remarking that's the "darndest thing" he ever saw. Shortly after, the troublesome wound area healed.

In this action, Allen sued the hospital for negligence in permitting the hair to enter her body during the 1989 surgery. She relied on proof from Reid that the item may have been a human hair. In 1996, J. Knopf granted summary judgment, noting Allen's lack of expert proof. The Court of Appeals reversed,

relying on Reid's reluctant proof about the object.

At trial, she sought suffering damages of $500,000, plus her medical expenses of $3,892. Her husband, Herbert, presented a consortium claim, limited in the instructions to $250,000.

The hospital denied negligence and contended the object was likely not a human hair. Through their expert, Dr. Julio Melo, Infectious Disease, Louisville, the hospital developed that (1) had it been a hair, the infection would have developed quickly, not waiting nine months, (2) a human hair would have decomposed over a four year period, (3) opined that it may have been synthetic in nature, arising from a surgical patch that was used, and (4) regardless of whether it was a human hair, it would not have caused infection.

Nurses at the 1989 surgery testified about their procedures to maintain a sanitary environment. The defense also focused on Reid's testimony that indicated it was unlikely the object was a human hair. The hospital further suggested that were it a hair, it likely entered the wound near in time to 1993, and the defense argued that at this time, plaintiff's hair was the same color.

Plaintiff countered the notion that the nine-month delay was important, arguing that Reid's antibiotics masked the development of an infection. Allen also pointed to Reid's backtracking about the nature of the object, noting this only happened when a lawsuit was filed. While plaintiff proceeded without an expert, her counsel explained that it was unnecessary where the mere presence of the hair indicates negligence.

The liability instruction asked if the hospital breached a duty to exercise ordinary care. Finding no deviation, the panel did not reach damages, awarding the Allens nothing. Judgment has since been entered for the defendant.

Auto Negligence - Jury exonerates the defendant who was rear-ended by plaintiff's car

McCoy v. Ramey, 96 CI 0934
Plaintiff: Kelsey Friend, Jr., *Friend & Case*, Pikeville
Defense: William Baird, *Baird Baird Baird & Jones*, Pikeville
Verdict: Zero Verdict
Circuit: **Pike** (2), J. Lowe, 11-18-99

Wanda McCoy, age 44, was a passenger with her husband, Clifford, on 4-19-96 in Elkhorn City on Russell Street. Ahead of the McCoys was Jack Ramey, who had begun to slow down for traffic that was waiting to turn left. Ramey already going slowly, didn't brake, but merely let off the gas, such that no brake lights were illuminated.

Clifford didn't see the brake lights and he rear-ended Ramey's vehicle. Because of the wreck, Wanda has since complained of radiating back pain, headaches, a sleep disturbance and then depression, all linked to the symptoms aforesaid. She also reports the debilitating injury has limited her ability to do housework, yardwork or participate in her hobbies. Medical bills were $4,000, and her treating doctor was Dr. David Pursley, Neurology, Lexington. Pursley noted the strain injury and the depression symptoms, linking it all to the wreck.

In this action against Ramey, Wanda sought her medical bills, plus an uncapped sum for suffering. On liability, Wanda blamed Ramey for driving too slowly, and without illuminating his brake lights. For his part, Ramey denied negligence. He also hired an IME, Dr. Robert Goodman, Neurology, Lexington, who contended the wreck merely temporarily aggravated an existing degenerative condition.

The jury instructions contemplated the duties of the defendant and plaintiff's husband, Clifford. It found Clifford 100% to blame and awarded Wanda no damages. Judgment has since been entered for the defendant.

Auto Negligence - Chronic pain injury nets a $30,000 suffering award in a right of way MVA

Moore v. Adkins, 98 CI 7038
Plaintiff: Robert Beale, *Beale & Humphrey*, Louisville
Defense: Michael Stevens, *Ricketts & Travis*, Louisville
Verdict: $36,748 for plaintiff
Circuit: **Jefferson** (6), J. Ryan, 12-21-99

It was 3-17-98 near Hurstbourne Lane, and Mary Adkins pulled across Shelbyville Road from the SuperAmerica, heading for Haverty's furniture store. At the same time, Michelle Moore, age 31, was proceeding on Shelbyville Road near this intersection. As Adkins crossed the superior drive, her car was t-boned by Moore's. The impact was significant, knocking Adkins' car onto its side.

Originally, Adkins sued Moore, but that claim was resolved, leaving only Moore's counterclaim against Adkins. Because of the wreck, Moore was taken to the ER, and the tests were negative for a fracture. She has since complained of a bruised knee from striking the dash, plus soft-tissue neck and shoulder pain.

Moore was treated by Dr. Terry Davis, Pain Management, Louisville. Davis noted her injuries and diagnosed chronic myofascial pain. Her medical bills were $5,748, and $1,000 was sought for lost wages. Suffering was capped at $100,000.

While the court determined Adkins was at fault as a matter of law, Moore's duties also remained in issue. The defense also contested damages with an IME, Dr. James Harkess, Orthopedics, Louisville. Harkess discounted the myofasical pain diagnosis, as it contemplates a muscular deficiency, which is not caused by trauma. It was his opinion that Moore suffered minor injuries, which should have resolved quickly.

Stevens went to damages first in his closing, criticizing the diagnosis of myofasical pain, relying on Harkess' opinion that it was not supported by research. While Moore may have had some pain, Stevens opined that there was possibly a psychological component. Turning to liability, he noted Moore was traveling too fast and not paying close attention. Finishing he told the jury, an award of the medicals, plus one dollar for suffering, would be sufficient.

Beale talked first to the jury about liability, pointing to an eyewitness who indicated plaintiff could not avoid the crash. Beale called it a serious collision that destroyed both cars and injured his client, all as discussed by Dr. Davis. He finished asking the jury to award $100,000, the full sum requested for suffering.

The jury, instructed that Adkins was at fault, considered the duties of Moore. It found no deviation, placing 100% of the blame upon the defendant. Turning to damages, she took her medical bills and lost wages as claimed, plus another $30,000 for suffering. Her verdict totaled $36,748, and judgment has since been entered on her behalf.

Auto Negligence - Plaintiff, with persistent soft-tissue injury, awarded $10,000 for suffering

Turner v. Neeley, 97 CI 0271
Plaintiff: Thomas Carroll, Monticello
Defense: Marcia Milby Ridings, *Hamm Milby & Ridings*, London
Verdict: $13,000 for plaintiff
Circuit: **Laurel** (1), J. Hopper, 1-10-00

A strange car wreck occurred on 10-7-95, a few miles west of London on Ky Hwy 80. Pamela Turner, age 34, was driving the speed limit on a clear and straight stretch of highway when she was suddenly rear-ended by Oscar Neeley. So surprised was Turner to be struck in this crash that left moderate damage to her Jeep, she first thought there must have been an earthquake. Regardless of why Neeley struck Turner's car, liability was resolved for plaintiff, leaving the panel only to consider damages.

Her symptoms have included a burning pain in her neck and headaches, all of which have impaired her from her position as a office manager at a boat building company. Dr. Ronald McFarland, Family, Monticello, treated Turner and noted the permanent soft-tissue injury; also for Turner was a Somerset chiropractor, Ronald Cooper. Her medical bills were $5,527, while every other damage element was uncapped. They included future medicals, lost wages, impairment and suffering.

As Neeley died prior to trial, the matter was then prosecuted against his estate. It defended with an IME, Dr. Kenneth Graulich, Neurology, Lexington. Calling his role exactly like a second opinion, he identified a simple whiplash injury which should have resolved quickly.

The jury was only asked to resolve damages, as the instructions indicated Neeley was negligent as a matter of law. Turner was awarded $3,000 of her medical bills, plus another $10,000 for suffering. She took nothing for future medicals, lost wages or impairment, leaving her with a total of $13,000. Judgment has since been entered for plaintiff in the sum of $10,000, representing an offset for PIP payments.

Auto Negligence - In rear-end case where liability is no issue, jury finds low back injury not causally related to the wreck

Ayyad v. Schwmacher, 98 CI 2063
Plaintiff: Paul Kaplan, Lexington
Defense: Perry Bentley, *Stoll Keenon & Park*, Lexington
Verdict: Zero Verdict
Circuit: **Fayette** (4), J. Adams, 1-6-00

Abdel Ayyad, age 59, was stopped at a light on 6-23-94 when he was rear-ended by Benjamin Schwmacher. Schwmacher admitted fault and the only trial issue was Ayyad's damages. Since this wreck, which resulted in very minor damage, Ayyad has complained of low back pain, all of which has impaired him vocationally.

Ayyad was treated by Dr. Harry Lockstadt, Orthopedics, Lexington, who recognized a permanent L4-5, L5/S1 disc injury. Plaintiff's medical bills, totaled over $6,000. The injury had another component, as Ayyad claimed the low back pain had led to impotence problems. His wife, Fatimala, presented a consortium claim.

He delivered papers for the Herald-Leader, and after the wreck, his productivity was cut in half. Ralph Crystal, Lexington, was the vocational expert, who quantified the lost wage and impairment claim.

Schwmacher defended the claim and noted, (1) the wreck was minor, (2) he did not seek treatment that day, and (3) his employment with the newspaper continued after the incident. The defense IME was Dr. Daniel Primm, Orthopedics, Lexington, who found no impairment and looked instead to non-trauma related degenerative problems. **See the KTCR** *1999 Year in Review*, The IME Report, page 78, for a complete report on Primm's forty-four defense IME appearances at trial in 1998 and 1999.

While the instructions did not contemplate fault, Ayyad first had to hurdle a causation instruction before receiving damages. The jury panel answered "no" when asked if the wreck caused plaintiff's injuries. That response ended the inquiry and Ayyad was awarded nothing.

Auto Negligence - Suffering award is $35,000 in radiating back pain case

Anderson v. Bingham, 97 CI 4321
Plaintiff: Greg Munson, Louisville
Defense: Kevin Mathews, *Ricketts & Travis*, Louisville
Verdict: $35,420 for plaintiff
Circuit: **Jefferson** (16), J. Shake, 12-16-99

On 9-14-95, Mark Bingham, a teenager, turned in front of Joan Anderson, age 49, on Bardstown Road. Bingham admitted fault, and this trial only concerned Anderson's injuries. Because of this wreck, she has complained of radiating back pain, emanating from a C6-7 problem.

A substitute teacher, Anderson described her pain as constant. She was treated by Dr. John Sullivan, Family, Louisville, and Dr. Lounette Humphrey, Pain Management, Louisville. Humphrey treated Anderson's chronic pain with epidural blocks. Sullivan's opinions tended to oppose Humphrey's findings. The defense called no IME, but noted that Anderson had a longstanding history of disc injury.

Her medical bills, not sought, were $14,199. She did seek lost wages of $1,140, plus permanent impairment which was capped at $200,000. Her suffering claim was limited to $130,000 in the instructions.

Mathews, in closing statements, minimized damages and noted, (1) plaintiff had no cuts or bruises, (2) she was not hospitalized, nor was there a surgery, while in 1978, she did have an operation on her back, and (3) eight months before this MVA, Sullivan's x-ray identified a neck problem. He opined that there was little, if no injury from this wreck, instead pointing to Anderson's history of problems. Finishing, Mathews asked the jury not to be lured into awarding damages just because plaintiff had asked for a large sum.

Munson responded that to find for Bingham would require the panel to believe that Anderson began to suffer from pre-existing physical problems that just coincidentally, began the day of the wreck. He defended the suffering claim as just $10,000 for thirteen years, and challenged the jury to turn Anderson down if she was not to be believed.

The jury did not have to contemplate liability, considering damages only. It awarded plaintiff $420 for lost wages, but nothing for impairment. It valued her suffering at $35,000, and the verdict

totaled $35,420. Judgment in that sum has been entered on her behalf.

Auto Negligence - Rear-end MVA results in soft-tissue symptoms; jury awards $750 for suffering

Peace v. Perkins, 96 CI 0728
Plaintiff: David Smith, Corbin
Defense: Ernest Jones, *Geralds Jones Sherrow Schrader &* Rice, Lexington
Verdict: $2,731 for plaintiff
Circuit: **Laurel** (1), J. Hopper, 1-11-00

On 5-11-96, Sean Peace, age 27, was in a car with Ricky Messer when they were rear-ended by Louise Perkins on U.S. 25 in London. Perkins had seen the Messer vehicle in front of her, but failed to immediately note it wasn't moving. By the time she did notice it, she didn't have time to stop, and instead honked her horn just before rear-ending it. While the impact resulted in only minor damage, Peace recalled that it sounded like " a boom." The court resolved liability for Peace, leaving the jury only to consider damages.

Peace was arrested at the scene on an unrelated overdue traffic citation, and later that day after he was released, he sought emergency care. For several months after the wreck, he complained of soft-tissue symptoms and headaches - the injuries have since resolved. A Corbin chiropractor, Greg Bargo, treated the plaintiff, identifying muscle spasms and the injury. His medical bills were $6,610, while lost wages and past suffering, his other elements of damage, were uncapped in the instructions.

The jury only considered Peace's damages and awarded him $1,181 of his medical expense, plus $750 for lost wages. Similarly, he took $750 for past suffering, and the verdict total $2,731. While deliberating the jury had two questions, wanting to see Bargo's deposition and an itemization of the medical bills.

Slip and Fall - Woman sustained a gash to her head when she fell over a ripple in the vestibule entryway floor mat

Burnett v. Wal-Mart, 99 CI 0102
Plaintiff: Walter Swyers, Jr., Louisville
Defense: Jeffrey Thompson, *Woodward Hobson & Fulton*, Louisville
Verdict: Zero Verdict
Circuit: **Oldham**, J. Fritz, 1-10-00

Marlene Burnett entered the Wal-Mart in LaGrange on 1-1-99 with the intention of buying craft supplies. While it was not snowing at the time, snow was still on the ground, and the store had floor mats in the vestibule area. As Burnett came into the vestibule area, and before she reached the second set of doors to the main store, she tripped over a "roll" or "ripple" in the floor mat. As a result, she was thrown forward, striking her forehead against the steel frame of the door.

The impact left her with a large gash to the forehead, which required more than twenty-five stitches to repair. She incurred medical bills of $590, and her suffering damages were limited to $5,000. In this action, she sued Wal-Mart, alleging negligence in failing to tape down or otherwise secure the mats to prevent just the condition which caused her fall. In support, Burnett noted that store policy contemplated doing just that to avoid a trip hazard.

Wal-Mart denied negligence and countered with employee witnesses who indicated Burnett fell because she was walking with her head down and not paying attention. At the scene, a Wal-Mart employee reported that Burnett made no mention of the floor mat. Finally, the defense contended there was no necessity to tape down the mats, and that on this day, there were no other complaints or injuries.

The jury considered the duties of the parties, and found Wal-Mart not to blame, awarding no damages.

Uninsured Motorist - Threshold verdict returned in case of a claimed herniated disc

Davidson v. Farm Bureau, 98 CI 0556
Plaintiff: John Kidney, Newport
Defense: Frank Benton, *Benton Benton & Luedke*, Newport
Verdict: Zero Verdict
Circuit: **Campbell** (2), J. Kopowski, 11-29-99

On 7-24-97, Ruth Davidson was a passenger with her husband, Pittman, on 11th Street near Isabella in Newport when a car pulled from a parking spot and into their path. In that car was Donnie Applegate, an uninsured driver, who immediately began a left-hand turn from the parking spot. As Applegate did so, he turned into the path of the Davidsons and struck their car.

Ruth was taken to the ER complaining of a laceration to her head, among other injuries. She has since been treated by Dr. Michael Grefer, Orthopedics, Southgate, who noted a herniated disc at T-11, T12, which he linked to the crash. Her medical bills were $7,749, while suffering damages were uncapped.

In this action, she sued her UM carrier, Farm Bureau. At arbitration, Davidson was awarded $25,249, from which Farm Bureau appealed, leading to this trial. Therein, Farm Bureau contested liability and damages for the wreck.

The IME was Dr. Thomas Bender, Orthopedics, Cincinnati. His opinions included, (1) finding no disc injury and (2) identifying prior pain complaints from pre-existing problems. From this proof, Farm Bureau raised the threshold defense.

The jury's first interrogatory asked if Davidson had incurred $1,000 of reasonably necessary medicals. The answer was no, and the panel did not consider liability or damages, awarding plaintiff nothing. Judgment has since been entered for the UM carrier, Farm Bureau.

Slip and Fall - Retrial of a case where the jury first awarded medicals but no suffering; this panel awarded plaintiff $1.00 for an ankle injury

Moore v. Lexington Center Corp., 96 CI 0757
Plaintiff: Steven Thornton, *Broderick & Thornton*, Bowling Green
Defense: Benjamin Hicks, Lexington
Verdict: $1.00 for plaintiff
Circuit: **Fayette** (3), J. Isaac, 1-3-00

This matter began on 3-15-95, when Bonnie Moore, age 41 and of Bowling Green, was in Lexington to attend the boy's high school basketball tournament. Outside Rupp Arena, she slipped and fell over a cracked and sloped portion of the sidewalk. In the fall, she sprained her ankle and injured her knee.

She was treated by Dr. Frank Buono, Orthopedics, Bowling Green, who noted the chronic knee injury, which may require arthroscopic surgery. Her decreased mobility has also impaired Moore in her vocation with the tourism

department in Bowling Green. Her medical bills were $1,288. The defense countered with an IME, Dr. Dennis O'Keefe, Neurology, Bowling Green, who recognized just a bruised knee, pointing to a 1987 incident as the source of the long-term injury.

In November of 1998, a jury trial was conducted and the panel found both she and the defense to blame. Fault was assigned 80% to the defendant, remainder to plaintiff. As to damages, she took her medicals as claimed, but nothing for suffering. Plaintiff moved for a new trial on the issue of inadequate damages, which the court granted. That retrial, on the issue of suffering damages only, was conducted early this month.

The sole jury instruction in the retrial asked what suffering damages Moore should be awarded. The jury selected $1.00, and an appropriate judgment has since been entered for the plaintiff. The report on the first case is contained in the KTCR *1998 Year in Review*, Case No. 253.

Auto Negligence - Hit and run defendant, also a state trooper, exonerated by a threshold verdict

Davis v. Simon, 98 CI 5255
Plaintiff: Kevin King, Columbus, Indiana
Defense: Scott Karem, *Sitlinger McGlincy Steiner Theiler & Karem*, Louisville
Verdict: Zero Verdict
Circuit: **Jefferson** (6), J. Ryan, 12-10-99

Cynthia Davis, age 33, was traveling with her family from Florida to their home in Indiana on 1-31-95 when they stopped for a snack at the Waffle House at the Brooks exit in Bullitt County. While her family went in to eat, Davis remained in the van to sleep, where she was reclining on a bench. Suddenly, she was awakened and knocked from the bench to the floorboard by an impact with the van.

She was able to quickly exit the van and discern that it had been struck by another car. Davis also observed a Kentucky State Trooper who was leaving the impact scene in his cruiser. On this night, several troopers had congregated to discuss crimefighting at the Waffle House, and she flagged another one down as he walked out of the restaurant. Quickly, that officer radioed to the "hit and run" trooper, asking him to return to the scene of the impact.

It turned out that trooper was Todd Simon, and he explained that (1) the impact was just a tap, (2) that he believed he bumped another trooper's cruiser, and (3) that the latter occurrence is common, and he thought nothing of it. Despite this explanation, liability was resolved for plaintiff and this jury trial contemplated damages only.

From the impact, which left just a minor scrape on the van, Davis has complained of radiating pain from a ruptured disc. She presented appropriate chiropractic and neurologic proof from Indiana about her condition. Her medical bills were $12,202, and it was developed that she will need ongoing epidural treatments. Future medicals were capped at $219,960, while suffering was limited to $100,000 by the instructions.

The defense, besides noting the minor impact, also hired an IME, Dr. James Harkess, Orthopedics, Louisville. Harkess believed that (1) the precipitating incident was of trivial magnitude and (2) that there was only proof of superficial bruising and none of a disc injury.

Karem, in summation, turned to the plaintiff's medical proof, noting (1) gaps in treatment, and (2) also criticized her doctor's conclusory opinions of injury that contradicted objective tests that showed no injury. After minimizing the injury, he repeated Simon's explanation for leaving the scene of the wreck, namely that he thought he had merely struck another trooper's vehicle. As no damages were caused by this wreck, he asked for a threshold verdict.

After first explaining the proof burden as just "tipping the scales," King explained the nature of the radiculopathy injury as diagnosed by her neurologist. There was no proof, King argued, that plaintiff's injury in this impact was not sufficient to cause injury - moreover, that they did not manifest at the hospital is normal, as such injuries do not develop for several weeks. For suffering damages, he asked that the jury, which acts as the conscience of the community, determine a fair and reasonable sum for plaintiff's damages.

As the jury did not consider damages, the panel went first to the threshold question. It found that Davis had not incurred $1,000 of reasonably necessary medicals, and that ended the panel's inquiry with no consideration of damages. A judgment has been entered for the defendant.

Dogbite - 7 year old boy bitten by "Brutus"

Crowley v. Wilder, 97 CI 1004
Plaintiff: Paul Musselwhite, *Musselwhite & Meinhart*, Radcliff
Defense: Nick Pearl, *Pearl & Gohman*, Radcliff
Verdict: $1,470 for plaintiff
Circuit: **Hardin** (2), J. Roark, 11-22-99

On 4-10-97, Jon Crowley, age 7, was a victim of a dogbite attack, sustaining wounds to his arm and shoulder. The dog, Brutus, belonged to George Wilder, who was sued in this case. Plaintiff sought his medical bills and suffering damages, both uncapped.

The instructions contemplated three items: first they asked if Wilder's dog had bitten the plaintiff, second if the boy was negligent, and lastly, the panel was to consider damages. Wilder was found solely to blame and plaintiff was awarded $470 for medical expense, plus $1,000 for suffering. Judgment has since been entered for Crowley in the sum of $1,470. This summary is limited as the court record did not include depositions or other descriptions of the facts of this matter.

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