Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

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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.

Medical Negligence - A difficult patient with a history of multiple ER visits and drug use alleged he was dumped by a hospital, discharged with instructions that if he returned, the police would be called – within hours of his release, he was dead of an undiagnosed and untreated duodenal ulcer

Gray v. St. Joseph Hospital, 00-1364
Plaintiff: Darryl L. Lewis, *Searcy Denny Scarola Barnhart & Shipley*, West Palm Beach, FL, William J. Gallion and Elizabeth R. Seif, *William Gallion & Associates*, Lexington and Shirley A. Cunningham, Jr., *Cunningham & Grundy*, Lexington
Defense: Robert F. Duncan and Jay E. Engle, *Jackson & Kelly*, Lexington
Verdict: $1,525,000 for plaintiff ($25,000 of compensatory damages assessed 15% to the hospital - the remaining $1.5 million represented punitive damages)
Circuit: **Fayette**, J. Robert Overstreet, 11-23-05

James Gray, age 39, was a quadriplegic when he presented in March of 1999 to the ER St. Joseph Hospital in Lexington. Gray had been involved in a shooting when he was sixteen. His life had been difficult since and had been plagued by drug abuse and homelessness. He also had a lengthy history of frequent ER visits – hospital staff remembered he was often a combative patient who regularly ignored medical advice.

Against this backdrop, Gray was seen on 3-9-99 by an ER doctor, Joseph Richardson – Gray was complaining of abdominal pain. Richardson ran several tests, including an x-ray. He did not come to a conclusive diagnosis, and Gray was released.

The key events in this case occurred on the evening of 4-8-99. Gray returned to the St. Joseph ER by ambulance at 8:00 p.m. He reported suffering severe abdominal pain for a period of four days. An ER doctor, Barry Parsley, evaluated Gray's condition. No diagnosis was made.

A little after midnight, St. Joseph was ready to discharge Gray. It sent him by ambulance to stay with family – they wouldn't take him. The ambulance returned to the hospital and social services got involved. Gray was wheeled across the street to the Kentucky Inn – a room at the motel was found for him.

Gray was in excruciating pain through the night – motel staff recalled hearing him scream for hours. At 5:10 a.m., an ambulance was called, and Gray was taken back to the ER – he was covered with bloody vomit. He was seen again by Parsley, a second ER doctor, Jack Geren taking over Gray's care when the shift ended.

On that second visit, fecal impaction was manually removed. Gray was also given a soap suds enema. His condition appeared to improve. He was released a second time just after noon. This time his wheelchair was rolled outside and he was given a taxi voucher.

There were fact disputes about what Gray was told next. It would later be alleged hospital staff told him that (1) he was abusing the hospital services, and (2) if he returned, the police would be called. Gray went to a family member's house. He was found dead four hours later. The cause of death was a ruptured duodenal ulcer.

In this lawsuit, Gray's estate targeted a variety of defendants. They started with Richardson, criticizing his failure to diagnose peptic ulcer disease on the first ER visit on 3-8-99. Then to the two visits on 4-8-99 and 4-9-99, Parsley, Geren and the hospital nurses were blamed for failing to diagnose the ruptured ulcer – essentially Gray's complaints of severe pain were ignored, the defendants acted to shuffle off rather than diagnose a difficult patient.

A second claim was presented against St. Joseph hospital alone – the estate alleged that Gray had been dumped in violation of EMTALA. Rather than make a diagnosis and treat his severe symptoms, the hospital staff got rid of him – it rolled him out the front door to die. The claim particularly alleged that he should not have been discharged until he was stable – screaming in pain with no diagnosis, it was postured, is not

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stable.

Experts for Gray were Dr. Frank Baker, ER, Oak Brook, IL, Dr. Mathias Okoye, Pathology, Lincoln, NE, Dr. Eric Munoz, ER, Newark, NJ and Dr. John Schriver, ER, New Haven, CT. If prevailing on the negligence count and against all defendants, the estate sought pain and suffering for Gray's suffering. The jury could also award punitives against St. Joseph if prevailing on the EMTALA count.

This case first came to trial in October of 2005. It was mistried. Following that trial, all defendants but St. Joseph settled. Thus, by the time the second trial started in November, the three doctors named above were non-parties, implicated only for purposes of apportionment.

St. Joseph defended the negligence case, posturing that Gray was properly treated and evaluated. At every instance when he was discharged, his condition was stable and improving. It also flatly denied dumping Gray – in this regard, hospital officials also denied advising him he'd be arrested if he returned. Hospital experts included Dr. Jeffrey McKinzie, ER, Nashville, TN, Dr. Kenneth Boniface, ER, Cincinnati, OH and Dr. Douglas Kennedy, Pain Management, Lexington.

The jury first considered negligence counts – it found fault with the hospital, Parsley, Geren and the plaintiff. Richardson was exonerated. On the negligence count, that fault was assessed as follows: Hospital-15%, Plaintiff-25%, and 30% each to Parsley and Geren. Then to compensatory damages, Gray's suffering was valued at $25,000.

The jury continued to the second count against the hospital which alleged an EMTALA violation. Again the verdict was for the estate, and continuing the jury assessed punitive damages of $1.5 million. When reviewed by the KTCR, no judgment had been entered. Presumably it would be for the estate as follows: $25,000 less 85% comparative fault against St. Joseph, the remaining $1.5 million in punitives not being subject to comparative fault. While no post-trial motions have been filed, St. Joseph has already promised a vigorous appeal.

Bad Faith - In a minor property damage claim, an auto insurer refused to pay, citing that its insured had waived coverage – plaintiff countered the insurer and its insured could not unilaterally waive coverage after a *loss* and then deny coverage

Thomas v. Grange Mutual, 01-8589
Plaintiff: John R. Shelton, *Sales Tillman Wallbaum Catlett & Satterley*, Louisville
Defense: Kim F. Quick, *Quick & Coleman*, Elizabethtown
Verdict: $150,000 for plaintiff
Circuit: **Jefferson**, J. Clayton, 10-14-05

On 1-8-00, Daniella Dolson was driving her mother's car when she hit a parked car. It belonged to Mark Thomas and his daughter, Michelle. [Hereinafter, Mark and Michelle will be referred to as Thomas – during the course of this litigation, Mark died, his estate continuing to pursue claims.] Daniella left a note and apologized for the damage.

Thomas called her, and the Dolsons, who were insured by Grange Mutual, indicated they would pay the damage – they didn't want their insurer involved. Thomas got an estimate of $1,502 for her ten-year old Ford – Dolson's father wanted another estimate and Thomas agreed. The second estimate was for just $1,015. Based on that second estimate, the father concluded not all the damage was caused by the wreck – he would pay no more than $300.

When Thomas could not work out a settlement directly with Dolsons, Thomas contacted Grange directly and made a claim for the $1,502 estimate. [Thomas did so even though the Dolson's hoped to keep Grange out of it.]

A claims adjustor at Grange, Millie Snyder, contacted Dolson – the father again indicated he wanted to pay the claim. The adjustor explained that to accomplish this, the Dolsons would have to sign a waiver of coverage. They did so and Grange considered the matter closed in terms of its involvement.

Thereafter Thomas was again unsuccessful in negotiating a settlement with Dolson. That December and now eleven months since the wreck, she again made a demand from Grange. Snyder explained that Dolson alone was responsible for the claim.

Thomas then retained an attorney, Robert Rosing of Ewen Kinney & Rosing, Louisville. Rosing demanded the $1,502 in a 1-9-01 letter. Grange again denied payment, citing that Dolson was considered "self-insured."

Rosing wrote back that Grange's position was not supported either in law or fact – an insurer and its insured cannot enter an agreement after a loss has occurred to defeat the claims of an innocent third-party claimant. Snyder replied that it could and would do exactly that.

Thomas sued in December of 2001 – the suit sought recovery for the property damage, also presenting a bad faith count. By that March, despite attempting to split the difference between the two estimates, Grange ultimately paid Thomas the full $1,502. [Important to this case, the payment came twenty-six months after the wreck.]

The property claim out of the way, Thomas turned to bad faith. The theory was not complex – as noted by Rosing in his letter, also serving as the expert in the bad faith case, the insurer and insured could not defeat coverage for an existing loss by their own agreement. Thus once liability became clear, Grange had a duty to settle the claim. Thomas postured the insurer preyed on plaintiff's financial vulnerability, forcing them to file a lawsuit to recover what they owed right from the start.

Grange thought Thomas had it all wrong. This was not a bad faith case, but rather a good faith dispute over property damage. In this regard, it noted the second estimate that indicated pre-existing damage. Grange also cited its insured's waiver of coverage. The insurance expert for Grange was Michael McDonald, Retired Judge, Louisville.

This case first came to trial in February of 2003. Judge Clayton granted Grange a directed verdict citing that (1) there was a reasonable dispute about the claim, and (2) as the claim was paid and there was no emotional suffering, plaintiffs had no damages. On this second point, Clayton noted there could be no punitives either if there were no compensatory damages. Thomas appealed.

The Court of Appeals ruled in a published opinion in June of 2004. [When Grange sought discretionary review and it was denied, the Supreme Court ordered the opinion de-published.] Judge Buckingham rejected Grange's waived coverage argument, noting the insurer held on to it even after Rosing's letter made it quite clear that it had no legal right to do so. The appellate court also reversed on the punitive damage question, finding an award of compensatory damages was not a

necessary predicate for such damages. On a third point raised on cross-appeal by Grange, the appellate court rejected a contention that plaintiff's failure to sign her CR 8.01(2) interrogatories was fatal to her claim – the answers themselves, while unsigned, still accomplished the purpose of putting Grange on notice of her claimed damages. Buckingham was joined in the opinion by Emberton and Vanmeter. **See** *Thomas v. Grange Mutual*, 2003-CA-449 and 2003-CA-505, rendered June 4, 2004.

After the trip to the Court of Appeals and back, the case was set for trial this October. The court's instructions were two-part regarding Grange's duties: (1) it lacked a basis in law or fact to deny plaintiff's claim and (2) it knew or should have known there was no basis to deny the claim or acted with reckless disregard. Thomas prevailed and then to damages, $150,000 in punitives was awarded. A consistent judgment followed.

Grange moved to vacate the judgment and called the award inconsistent with *State Farm v. Campbell* guideposts – the insurer noted the punitives were 100 times the property damage. Grange believed this represented an unconstitutional abuse of a large corporation. Thomas opposed that Grange inflicted an economic injury on the plaintiffs because it knew they were economically vulnerable.

The court sided with Grange and reduced the punitives to $15,000 – while giving lip service to *State Farm v. Campbell*, the court did not engage in any sort of analysis of the relevant factors or if it did, they were not reduced to writing. Thomas appealed and Grange took a cross-appeal.

Premises Liability - An employee at a car dealership suffered significant injuries when a second-floor room in a storage building collapsed around her

Perry v. Ethington et al, 02-0103
Plaintiff: C. Gilmore Dutton, III, *Dutton Salyers & Zimlich*, Shelbyville
Defense: William A. Miller, Jr., *Hummel Coan Miller & Sage*, Louisville for Ethington
Christopher Bates, *Seiller & Handmaker*, Louisville for Moser
Verdict: $153,230 for plaintiff assessed against Ethington only; Defense verdict for Moser
Circuit: **Shelby**, J. Rebecca Overstreet, 9-14-05

Beverly Perry, then age 48, was the long-time bookkeeper at Ethington Oldsmobile, a Shelbyville car dealership. On 2-21-01, she was working in a storage building next to the main dealership. She was on the second floor – Ethington Oldsmobile used the building to store file cabinets and auto parts.

The floor suddenly collapsed – she fell through. If that danger was not enough, heavy file cabinets began to fall on her. She was trapped for an hour before she could be rescued.

Perry suffered significant injuries, including spinal and knee fractures. Beyond physical injuries, she has also complained of post-traumatic stress. Her complex course of medical care incurred medicals of $86,642 – that included a spinal surgery and the reconstruction of her knee. Lost wages were $3,340. She also sought impairment and suffering damages – Rodney, her husband, presented a consortium count.

In this lawsuit, Perry was precluded from filing a tort claim against the dealership. However, she did target Donnie and Mary Ethington, the owners of the storage building. [Donnie, a one-third owner in the dealership with his two brothers, is described as the most involved partner in running the car dealership.]

Her theory alleged the building was not built to code – there was no permit, nor was it ever inspected. That shoddy workmanship led to the collapse and her injuries. The theory was predicated on negligence per se, Ethington having failed to follow federal, state and local ordinances and regulations regarding the building's construction. Perry also targeted John Moser, the contractor who built the building back in 1992.

The Ethingtons first defended procedurally that the claim was subsumed by worker's compensation – when that argument failed, they defended the merits and denied fault. Moser also denied fault, blaming the collapse on Ethington's decision to store heavy file cabinets and auto parts in the storage room.

The jury's verdict on liability found Ethington solely at fault – Moser was exonerated and any comparative fault to Perry was rejected. Then to damages and against Ethington only, she took her lost wages as claimed. Her medicals and impairment were both rejected. Pain and suffering was $150,000, the verdict totaling $153,230. [Husband's consortium interest was rejected.] A judgment less the already paid wage loss was entered for Perry.

While deliberating the case, the nuance of the parties was not lost on the jury. It asked two questions: (1) Did worker's compensation benefits pay for the surgery?, and (2) Were the other property owners sued? The court didn't answer either question.

Underinsured Motorist - A flagman at a construction site was hit by a car – he suffered a complex leg fracture

Smith v. Allstate, 01-1154
Plaintiff: Franklin A. Stivers, *Stivers & Stivers*, London
Defense: Terry Sellars, *Henry Watz Gardner Sellars & Gardner*, Lexington
Verdict: $168,247 for plaintiff
Circuit: **Madison**, J. Adams, 9-29-05

It was 11-20-00 and Timothy Smith, then age 25, was working as a flagman at a utility site. A car driven by Owen Riddell disregarded the warning to stop. He ran over Smith, knocking him into the air. He was hurt badly, sustaining a complex leg fracture.

It was surgically repaired. Smith's medicals were $18,247. He also sought $75,000 for future care. Lost wages totaled $29,000, Norman Hankins, Vocational Expert, Jonesborough, TN, valuing impairment at $652,129. He also sought $200,000 for pain and suffering.

In this litigation, Smith first moved against Riddell – Riddell paid his $100,000 policy limits. Above that sum, Smith sought UIM benefits from his carrier, Allstate.

The limits of the UIM coverage were $50,000. Thus to take the entire UIM limits, Smith needed a jury award that exceeded $160,000, representing (1) the underlying limits, (2) PIP and (3) Allstate's coverage. Allstate defended damages at trial.

Tried on damages only, Smith took his medicals as claimed, plus $10,000 for lost wages. $30,000 was the award for future care. He took $35,000 for impairment, plus $75,000 more for suffering. The verdict totaled $168,247. Having exceeded Riddell's $100,000 limits and PIP, Smith took the entire $50,000 UIM limits in the judgment. Allstate has since paid.

Whistleblower Act - An airport cop alleged he was forced out when he complained that a bigwig cop worked while drunk – the airport explained the plaintiff was let go for violating an internal rule that prohibited employees from holding public office (plaintiff is an elected Justice of the Peace)

Fields v. Regional Airport Authority, 04-2393
Plaintiff: Brent T. Ackerson, *Ackerson & Ackerson*, Louisville
Defense: Shannon Antle Hamilton and Demetrius O. Holloway, *Stites & Harbison*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Montano, 10-3-05

William Fields started working in November of 2001 as an airport policeman by Louisville's Regional Airport Authority (RAA). [The RAA operates Standiford Field.] Not just any policeman, Fields brought special qualifications to the job – he was an elected Justice of the Peace. This was noteworthy, the RAA remarking on it after he was hired in a company newsletter.

Fields did well in his employment into the fall of 2003. On 10-7-03, Transportation Security Administration officials had scheduled a test of the RAA police K-9 unit. The top dog in the K-9 unit was Lt. Kenny Freeman. During the course of the test, Fields began to suspect that Freeman had been drinking – this was confirmed to him the next day by another police officer. Fields made a decision to report Freeman's alleged intoxication to his RAA police supervisors.

Almost immediately, and quite by coincidence, the RAA would later explain, Fields' job came into jeopardy. Within days of his complaint, the RAA received an anonymous complaint that Fields was an elected official. The RAA has a law on its books that prevents such a duality.

The RAA's biggest bigwig, Skip Miller, began an investigation into the matter. He even sought an opinion from the county attorney – the opinion indicated there was no conflict. Miller thought the opinion was just that, an opinion, and he stuck to his guns regarding the rule.

In February of 2004, Fields was presented with two options: (1) resign as Justice of the Peace, or (2) be fired. Fields didn't resign and the RAA let him go.

From the perspective of the RAA, that should have ended the matter. Its rule regarding elected officials was neutrally applied to Fields and it resulted in his termination. As importantly, the firing had nothing at all to do with the earlier complaint that Freeman was drunk. In this regard, Miller denied even knowing that Fields had made a complaint.

Fields disagreed and in this whistleblower lawsuit, he alleged the RAA retaliated against him for having complained of on-the-job drinking. It suggested the reason for the firing was really a pretext – in this regard, he pointed out RAA officials knew he was a Justice of the Peace all along, it even being noted in the newsletter when he was hired.

Only after he reported drinking by Freeman did he come under scrutiny. If Fields prevailed, he sought punitive damages – they were limited in the instructions to $3,000,000.

The RAA defended the case as noted above on the facts. It also argued law, suggesting that (1) Fields didn't make a proper report within the meaning of KRS 61 as he only told his supervisor, an internal complaint being inadequate, and (2) as simply being drunk was not illegal, no government malfeasance could be exposed.

The court's instructions were multi-part. Fields prevailed that he made a good faith report to law enforcement and that the RAA knew of the report when it acted against him. However it was exonerated on an affirmative defense, having proved by clear and convincing evidence that this was not a material factor in the personnel action. Having so concluded, the deliberations were over and Fields took nothing. A defense judgment ended this case. The record indicates that before trial, RAA offered $1,000 – Fields was willing to settle for $1.5 million.

Medical Negligence - An orthopedist treated plaintiff for a rotator cuff tear in her right shoulder – however, when it came time for the surgery, the doctor operated on the *left* shoulder – the doctor defended "no harm no foul," posturing that the left shoulder needed a surgical repair

Tucker v. Taylor, 03-0255
Plaintiff: Ross T. Turner, *William McMurry & Associates*, Louisville
Defense: James A. Sigler, *Whitlow Roberts Houston & Straub*, Paducah
Verdict: $158,620 for plaintiff less 30% comparative fault
Circuit: **McCracken**, J. Hines, 10-28-05

Following a car wreck in December of 2001, Faye Tucker, then age 48 and a day care operator, complained of right shoulder pain. In March of 2002, she treated with an orthopedist, Dr. Douglas Taylor. Taylor performed an MRI which revealed a rotator cuff tear.

A surgery was scheduled for 3-15-02 at Western Baptist Hospital – because of a paperwork snafu, at their last meeting, Taylor presented and Tucker signed a consent form for her *left* shoulder. The form was transported to the surgical order and the surgery went forward. [An Ob-Gyn also performed a hysterectomy just before Taylor's surgery – there were no allegations of negligence regarding the gynecological procedure.]

Taylor operated on the healthy left shoulder. From his perspective, it was a stroke of good luck for Tucker – it turned out her left shoulder also had a rotator cuff tear. Taylor repaired it.

Tucker didn't feel as lucky. It was her position that the left shoulder was previously asymptomatic and didn't need a surgical repair. Because of the mix-up, it was her proof that she required two additional surgeries, one to repair the right shoulder that Taylor missed and a second to repair the damage done to the left shoulder.

Her expert in this negligence case was her subsequent treating orthopedist, Dr. Frank Bonnarens, Louisville. If prevailing, Tucker sought her medicals of $48,620, plus $500,000 for pain and suffering.

Taylor defended and acted as his own expert. That defense focused on several themes: (1) even if there was a mix-up between the left and right shoulders, Tucker still needed surgery on her left shoulder and thus there was no harm, and (2) Tucker herself shared some blame, having signed the wrong consent form. Had she spoken up, the chain of error

could have been broken. [Plaintiff countered it was the doctor and the doctor alone who made the decision to operate on the wrong shoulder.]

The jury's verdict was mixed on fault – it assessed 70% to the doctor, the remainder to Tucker. Then to damages, she took her medicals as claimed, plus $110,000 for suffering. The raw verdict totaled $158,620, which equaled $111,034 in the court's judgment.

Medical Negligence - During a difficult vaginal delivery, an infant boy sustained a shoulder dystocia injury – adding insult to injury, after dislodging the baby, the delivering Ob-Gyn accidentally dropped him on his head

Shoulders v. Schweichler, 02-2386
Plaintiff: Theodore L. Mussler, Jr. and Elizabeth M. Stepien, *Mussler & Associates*, Louisville
Defense: Gerald R. Toner and Emily A. Faith, *O'Bryan Brown & Toner*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Shake-2, 10-14-05

Pamela Shoulders was 36 weeks along with her pregnancy on 6-20-00 and she was in labor. At the hospital, her Ob-Gyn, Dr. Maria Schweichler attempted a vaginal delivery. Shoulders had asked for a c-section.

It was a difficult delivery, but Schweichler ultimately pulled a baby boy, Christian, out by his arm. It was a slippery business and the infant slid off Schweichler's chest and fell into a bucket of towels. He was immediately treated for a bruise on the top of his head.

During the delivery, Shoulders alleged her son sustained a shoulder dystocia injury – it was linked to the use of excessive force by Schweichler during the delivery. Having stretched his brachial plexus, Christian has a permanent Erb's Palsy and diminished use of his left arm.

Beyond the shoulder injury, Christian has also complained of a brain injury. His IQ has been measured as borderline retarded and he also suffers from ADHD. His proof linked that injury to being dropped by Schweichler right after the delivery.

Experts for the boy included Dr. Stuart Edelberg, Ob-Gyn, Baltimore, MD, Dr. Harlan Giles, Ob-Gyn, Sewickley, PA, Dr. Leon Charash, Pediatric Neurology, Hicksville, NY. Charash survived a *Daubert* challenge and developed proof linking the diminished cognitive function to the drop.

If prevailing, his medical bills were $19,760 and he sought $113,876 for future care. Education expenses were valued at $104,600. Impairment was uncapped. For his past and future suffering, capped in separate categories, Shoulders claimed the odd figures, respectively of $77,250 and $1,325,419.

In reverse order, Schweichler conceded the drop but denied it was negligence or an injury-causing event – she noted the boy fell into a bucket of towels and sustained only a minor bruise. She thought his diminished cognitive function was related to genetics, not trauma. [Plaintiff countered the fall was quite a blow, the baby actually bouncing.]

Then to the shoulder injury, Schweichler explained that her methods during the delivery were proper – the injury, while unfortunate, represented a complication, not negligence. Defense experts were Dr. William Robertson, Neurology, Lexington, Dr. Mark Wolraich, Pediatric Neurology, Oklahoma City, OK and Dr. Gary Hankins, Perinatology, Galveston, TX. Beyond defending her care, the mother's own care was implicated in bringing about a premature delivery: (1) she smoked, and (2) while she was an insulin-dependent diabetic, she did not observe a proper treatment regimen for that condition.

The verdict was for Schweichler on liability, this jury finding unanimously that she had not violated the Ob-Gyn standard of care. That ended the deliberations and there was no award of damages. A defense judgment followed.

Premises Liability - Plaintiff tripped on municipal sidewalk construction and broke both her elbows

Hammett v. City of Mayfield, 03-0323
Plaintiff: Richard D. Null, *Null Samson & Paitsel*, Mayfield
Defense: Glenn D. Denton, *Denton & Keuler*, Paducah
Verdict: $32,490 for plaintiff less 30% comparative fault
Circuit: **Graves**, J. Stark, 7-14-05

On 6-8-02, Sheila Hammett, then age 48 and a deputy jailer, walked in downtown Mayfield on the sidewalk. Watching for traffic and not paying attention to her feet, she tripped on an uneven section in front of 1st National Bank. At the time, the sidewalk was undergoing renovation.

Hammett lost her balance and fell hard. She fractured both her elbows, also sustaining a collapsed lung. Her medicals were $3,230 and she sought lost wages of $4,260. Suffering was limited to $60,000.

In this lawsuit, Hammett alleged negligence by the city in maintaining the sidewalk. Mayfield defended and denied notice of any defect.

The verdict was mixed on liability – the jury found both at fault, assessing 70% to Mayfield, the remainder to Hammett. Then to damages, she took her specials as claimed, plus $25,000 for pain and suffering. The verdict totaled $32,490 or $22,743 after a reduction for comparative fault. A consistent judgment followed and Mayfield paid it. While deliberating, the jury asked the court: Does comparative fault apply to lost wages and medicals or just to compensation?

Auto Negligence - In a most unusual car crash, an estranged wife chased her husband and rammed his car – in the process, the husband's girlfriend (now his wife) sustained an injury

Morgan v. Morgan, 02-0533
Plaintiff: Bruce R. Bentley, *Zoeller Hudson & Bentley*, London
Defense: Michael A. Goforth, *Crabtree & Goforth*, London for Betty
Rodney E. Buttermore, *Buttermore & Boggs*, Harlan for Doug
Verdict: Defense verdict on damages
Circuit: **Laurel**, J. Lay, 5-26-05

Betty and Doug Morgan were married for many years. They both worked at a London manufacturing company, Flower Snacks. Also working at Flower Snacks was a supervisor, Carolyn – her last name is now Morgan. In any event, Doug and Carolyn began a romance.

Betty didn't like it much at all. On 1-14-01, Betty saw Doug driving with Carolyn in the passenger seat. In an admitted rage, she followed her husband. At one point, Doug stopped to ask Betty to stop following him. She was not appeased.

A little further down the road, Betty began to ram Doug's pick-up. She did so several times – Betty only stopped when her car wouldn't go anymore. While it would appear she rammed her husband, she would later defend that he slammed on his brakes, leaving her no time to stop. Carolyn of course, now married to Doug, thought the jealous wife first chased Doug and then rammed the truck repeatedly.

Because of the crash, Carolyn has since complained of wide-ranging soft-tissue symptoms, including headaches. Despite pain management intervention, she has not had relief. Her medicals were $47,217 and she sought lost wages of $5,182. In uncapped categories, she also claimed suffering and impairment.

In this lawsuit, she thought Betty was solely to blame for the crash. Betty defended as noted above and brought in Doug as a third-party defendant. Betty also defended damages, noting there was no injury at the scene – it was however a moderate collision, the front of Betty's car having buckled.

There was a third claim, Carolyn seeking UIM benefits on Doug's policy. However that claim was dismissed as at the time, she did not yet live in his house.

The verdict was mixed on liability, the jury assessing 40% to Betty, the remainder to the husband. It didn't make any difference, the jury awarding Carolyn nothing for every claimed element of damages. A defense judgment followed. Carolyn sought JNOV relief, arguing her medical proof was not rebutted. The motion was denied and she has appealed.

Dental Negligence - Plaintiff alleged her dentist was negligent in mistreating an infection

Sanford v. Skiles, 02-6175
Plaintiff: David D. Fuller, Louisville
Defense: Craig L. Johnson, *Whonsetler & Johnson*, Louisville
Verdict: Directed verdict
Circuit: **Jefferson**, J. Wine, 9-28-05

On 8-18-01, Charles Sanford, then age 55, treated with a dentist, Dr. Robert Skiles, for complaints of pain with Tooth No. 19. Skiles identified the tooth was broken, also finding an abscess. He extracted the tooth.

The next day Sanford reported to the ER with a developing infection at the location of the extraction. He underwent a significant incision to drain the infection.

In this lawsuit, he was critical of Sanford for failing to (1) take an x-ray of the area, and (2) prophylactically proscribe antibiotics. Plaintiff's identified expert was Dr. James Hazard, Louisville. Skiles acted as his own expert and denied fault – he called Sanford's poor result a complication.

The case came to trial and it ended at the close of Sanford's proof. The trial court granted the dentist's motion for directed verdict. That ended the case and there was no appeal.

Employment Retaliation - Right after reporting an on-the-job injury, a factory employee was investigated and fired for giving false information on his employment application

Ortt v. Fontaine Trailer Co., 05-0052
Plaintiff: Willard B. Paxton, Princeton
Defense: Marvin P. Nunley, *McCarroll Nunley & Hartz*, Owensboro
Verdict: $25,000 for plaintiff
Circuit: **Caldwell**, J. Cunningham, 9-29-05

Jason Ortt, then age 28, started working in May of 2003 at the Princeton manufacturing plant of the Fontaine Trailer Company. He enjoyed his work and was regarded as an excellent employee. That changed when he sustained an on-the-job injury and made a worker's compensation claim.

Fontaine bigwigs instituted a review of his job application. They learned that he had falsified the application – particularly, he had denied making any prior worker's compensation claims. In fact he had. While off work because of the injury, the company called him in to discuss it. When he didn't come, Fontaine fired him.

From Fontaine's perspective, the firing was justified, Ortt having lied on his application. Ortt believed instead the company had retaliated against him for having filed a worker's compensation claim. While he had no direct evidence of retaliation, he pointed to circumstantial proof, noting that his application was only scrutinized after he got hurt.

Fontaine defended that the worker's compensation claim had nothing to do with its firing decision. It noted that in recent years, forty-two employees made worker's compensation claims. None were fired. More specifically to this case, the company postured that Ortt had no evidence of retaliation. Plaintiff continued to focus on the timing of the investigation after he reported an injury.

Ortt prevailed at trial, a Princeton jury concluding his worker's compensation claim was a substantial and motivating factor in the decision to discharge him. Having so found, it awarded him compensatory damages of $25,000. Pending is Fontaine's JNOV motion – it has argued that (1) there was no proof of retaliation, and (2) Ortt did falsify his employment application.

Auto Negligence - A soft-tissue suffering award was half the incurred medicals

Branson v. Fitzpatrick, 03-11007
Plaintiff: J. Andrew White, Louisville
Defense: Kevin P. Kinney, *Ewen Kinney & Rosing*, Louisville
Verdict: $9,000 for plaintiff
Circuit: **Jefferson**, J. Morris, 11-23-05

On 3-26-02, Cathy Branson, then age 47 and a Discover Card sales agent, traveled on Shelbyville Road near Oxmoor. An instant later she was rear-ended by Christopher Fitzpatrick. The impact resulted in minor damage, Fitzpatrick calling it a bump. Fault was no issue.

While not treated at the scene, Branson did follow up later that day at an Immediate Care Center – the next day she saw a chiropractor, Dr. Guy Petersen, Louisville. She incurred a total of $6,800 in medicals, most with Peterson. She also sought $30,000 for past suffering, half that sum for the in the future.

Fitzpatrick defended and minimized damages, noting the wreck was just a tap and that there was no injury at the scene. An IME, Dr. Thomas Loeb, Orthopedics, Louisville, minimized the claimed injury and pointed to degenerative conditions.

This case went to a Louisville jury on damages only. A question was asked of the court by the deliberating jury: Does the defendant have insurance that will cover all or part of the settlement? Continuing, the jury asked a follow-up: Is this question relevant?

Back to the facts, the jury had its verdict. Branson took $6,000 of her medicals and $3,000 for past suffering. Future suffering was rejected. The verdict totaled $9,000. A judgment less PIP followed.

Premises Liability - A woman with spastic cerebral palsy tripped over loose rubber stripping as she exited a bank

Hubbard v. National City Bank, 03–637
Plaintiff: Martha F. Copeland, *Copeland & Romines*, Corbin
Defense: Jeffrey A. Taylor, *Landrum & Shouse*, Lexington
Verdict: Defense verdict on liability
Circuit: **Knox**, J. Messer, 9-22-05

On 11-3-03, Tammy Hubbard, then age 37, visited a National City Bank branch in Barbourville. She was accompanied by her teenage son. Because Hubbard, a long-time customer,

suffers from spastic cerebral palsy, her son helped her into the bank. Completing her business, she prepared to leave.

On the way out of the door, Hubbard tripped over loose rubber stripping in the doorway. She fell backwards. No injury was reported at the scene.

Hubbard has since complained that the fall resulted in a soft-tissue injury that aggravated her cerebral palsy. She has treated with her family doctor, Glenn Uber, Corbin. Her medicals were $22,399 and she sought suffering in an uncapped category.

Hubbard's theory criticized the bank's failure to secure the rubber stripping. National City Bank defended and denied fault. It also diminished damages with an IME, Dr. Joseph Berger, Neurology, Lexington. The expert explained there was no apparent nerve injury sustained in the fall – he thought Hubbard's ongoing complaints were related to her cerebral palsy, not this fall.

The court's instructions asked if the bank violated a duty to exercise ordinary care to maintain its premises in a reasonably safe condition. The answer in Barbourville was no and Hubbard took nothing. There was no appeal from the court's judgment.

Auto Negligence - A soft-tissue pain and suffering award in Lexington was one-third of the incurred medicals

Branch v. Mauney, 02-0113
Plaintiff: Willie E. Peale, Jr., Frankfort
Defense: Ernest H. Jones, Jr., *Geralds Jones Swisher & Rohlfing*, Lexington
Verdict: $9,500 for plaintiff
Circuit: **Fayette**, J. Clark, 11-1-05

William Branch, then age 53, traveled on Patchen Drive on 1-12-00. Suddenly Jeremy Mauney pulled from an access road into his path. A moderate collision resulted. Fault was no issue.

Branch was not insured at the scene. He first treated two days later with a chiropractor. Branch has since been referred to Dr. John Gilbert, Neurology, Lexington – the doctor identified a ruptured lumbar disc. His medicals totaled $7,858 and he sought $10,000 for future care. If prevailing, Branch also sought sums for suffering and damage to his car.

Mauney defended the case with an IME, Dr. Russell Travis, Orthopedics, Lexington. Travis could identify no neurological injury – the purported disc injury, he thought, was actually just a degenerative condition.

This case advanced to trial on damages only. Branch took $6,000 of his medicals but nothing for future care. He took property damage of $1,500, plus $2,000 more for pain and suffering. The verdict totaled $9,500. A judgment less PIP followed.

Medical Negligence - While plaintiff agreed to a hysterectomy, she flatly denied that she consented to have her ovaries removed – because they were taken, plaintiff developed she will need a lifetime of hormone replacement therapy

Caudill v. Gordon, 02-0749
Plaintiff: Warren N. Scoville and Hailey Scoville Bonham, *The Scoville Firm*, London
Defense: Margaret M. Pisacano, *Jenkins Pisacano Robinson & Bailey*, Lexington
Verdict: Defense verdict on liability
Circuit: **Madison**, J. Adams, 9-22-05

By 2001, Marsha Caudill, then age 33, was prepared for a hysterectomy. She was the mother of three children and didn't want anymore. More significantly, she was complaining of heavy periods and pelvic pain.

On 7-27-01, a laparoscopic vaginal hysterectomy was performed at Pattie Clay Hospital in Richmond by an Ob-Gyn, Dr. John Gordon. There would be disputes about the extent of Caudill's consent regarding the surgery.

Caudill was quite sure that she didn't want her ovaries taken. She was concerned about the risk of osteoporosis. Gordon by contrast recalled that he had consent to visualize the area and repair what was necessary.

During the procedure, Gordon identified that her ovaries were deeply adhered to her uterus. One also had a cyst on it. Gordon made an on-the-fly decision to remove both ovaries. While Gordon would deny it, post-surgery when Caudill confronted him, he replied, "I must be senile."

In this lawsuit, Caudill alleged negligence by Gordon in (1) unnecessarily removing her ovaries, and (2) exceeding the scope of her consent. Her experts were Dr. Harry Frierson, Pathology, Charlottesville, VA and Dr. Jean Thresher, Ob-Gyn, Celina, OH. Because of the loss of her ovaries, Caudill's proof indicated she will require permanent hormone therapy – despite that care, she will still deal with assorted complications. Her medicals were $14,935 and she sought $27,648 for future care. Both her pain and suffering and the consortium claim of her husband were not capped.

Gordon defended and first noted the fact dispute regarding consent – that is, Gordon received consent to visualize and repair as necessary. Then to the decision to remove, his expert, Dr. Gerald Oakley, Ob-Gyn, Huntington, WV, called it sound. A second defense expert was Dr. James Dunnington, Pathology, Lexington.

Tried for four days in Richmond, the jury was asked if Gordon violated the reasonably competent Ob-Gyn standard. The answer was no and Caudill took nothing. A defense judgment followed and there was no appeal.

Assault/Outrage - Sisters who lived in a duplex they inherited from their mother just couldn't get along

Hornung v. Patterson, 04-6669
Plaintiff: Bert M. Edwards, Louisville
Defense: Sherry Hoard Long, Louisville
Verdict: Defense verdict on all claims
Circuit: **Jefferson**, J. Ryan, 7-19-05

Sadie Patterson owned a duplex condominium on Lexington Avenue. Her daughter, Lucy Patterson, had lived in one side of the duplex for years. When Sadie died, another daughter, Nancy Hornung and her husband, soon moved into the adjoining condominium. The sisters had conflict.

Nancy and Steve kicked off the litigation by alleging that Lucy violated the master deed by posting a fence in a common area. Lucy responded with her own counterclaim, alleging both assault and outrage.

The assault claim was predicated on a threat by Nancy to burn down Lucy's side of the duplex. [The record does not reflect any appreciation for the obvious fact that burning down one side of a duplex would have a deleterious effect on the other side.] The outrage represented a million insults, but included for example, playing loud music in the middle of the night.

The jury first rejected the claim of the plaintiff regarding the validity of the deed. Then to the counterclaims, Lucy lost on assault, but prevailed on outrage. The victory meant little, the jury awarding her nothing. A consistent judgment dismissed this entire legal brouhaha.

Auto Negligence - Plaintiff linked catastrophic pain to a minor rear-ender – a jury awarded him 10% of his claimed medicals, suffering being valued at half that sum

Cosby v. Jackson, 03-0094
Plaintiff: Craig Housman, Paducah
Defense: L. Lansden King, *Jackson & King*, Paducah
Verdict: $9,500 for plaintiff
Circuit: **Graves**, J. Stark, 9-23-05

Carlos Cosby, then age 47, drove in Mayfield on 5-15-99. He had just backed out of a driveway and was sitting in the street, preparing to switch gears and go forward. A moment later, Debra Jackson backed out of a driveway across the street – she crashed into Cosby's car. Fault was no issue.

While the wreck resulted in very minor damage, Cosby has since complained of catastrophic pain and fibromylagia. His proof linked those disabling symptoms to the aggravation of injuries from a prior 1997 MVA. His medicals were $68,330 and significant future medicals were claimed, including for the installation of a pain pump. Cosby also sought lost wages, impairment and suffering.

Jackson defended that this wreck was too minor to have caused a serious injury. Her IME, Dr. William Gavigan, Orthopedics, Nashville, TN, identified just a strain – he had no anatomical basis for the other complaints, although he did suggest symptom magnification played a role.

Tried on damages only, Cosby took medicals of $6,500 and $3,000 for pain and suffering. The other elements of damage were rejected. A judgment for $3,000 less PIP followed and Jackson has satisfied it. [A silent UIM carrier did not participate at trial – it was excluded, the court finding that as it didn't substitute its limits, this was not an *Earle v. Cobb* circumstance where identification of the UIM carrier is required.]

While deliberating, this jury also asked several interesting questions: (1) Did the plaintiff have car insurance?, (2) What did it pay?, and (3) Does the plaintiff have a medical card? The court didn't answer.

Medical Negligence - An attorney-plaintiff was left blind in one eye after suffering a complication during a diagnostic cerebral arteriogram

Cohen v. Paulsen, 02-7179
Plaintiff: Harry Hargadon, *Hargadon Lenihan Harbolt & Herrington*, Louisville
Defense: Richard P. Schiller and Terri E. Kirkpatrick, *Schiller Osbourn & Barnes*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Clayton, 11-18-05

In March of 2002, Louis Cohen, then age 70 and an attorney, was treating for residual effects from a stroke from six months earlier. On 3-14-02, Dr. Richard Paulsen, an interventional neuroradiologist, performed a diagnostic cerebral arteriogram on Cohen – the test was designed to provide a radiographic image of blood flow in Cohen's head.

The test began, Paulsen injecting Cohen's carotid artery. To get a better look, Paulsen then injected Cohen's right internal carotid artery. Secondary to that injection, Cohen has been left blind. Causation was no issue.

Cohen alleged negligence by Paulsen in injecting the right internal carotid artery. His expert, Dr. Kiernan Murphy, Interventional Neuroradiology, Baltimore, MD, explained that proper visualization was provided from the first injection. The second injection, the one that caused injury, was then unnecessary, its risks outweighing the benefits. If Cohen prevailed, he sought medicals of $37,793, plus $500,000 for pain and suffering.

Paulsen defended the case and called the injury an unfortunate but recognized complication that can and does occur in the absence of negligence. His liability expert was Dr. Charles Kerber, Interventional Neuroradiology, San Diego, CA.

The instructions asked if Paulsen violated the standard of care. The answer was no and Cohen took nothing. A defense judgment was entered for Paulsen.

Auto Negligence - A little boy suffered a broken leg when he darted into traffic

Sangabriel v. Price, 04-0279
Plaintiff: Lawrence I. Young, *Romines Weis & Young*, Louisville
Defense: Marc L. Breit, *Breit Law Office*, Louisville
Verdict: Defense verdict on liability
Circuit: **Shelby**, J. Hickman, 11-14-05

It was 5-18-02 and a barbeque was underway at a garage on Cropper School Road in Shelby County. Playing with friends at the party was little Daniel Sangabriel, then age 8. [It was his father's garage.]

Sangabriel wanted to play with trading cards and realized they were in a parked car. He went to get them, attempting to cross the road – by all accounts, Sangabriel ran into the road.

At the same time, Bessie Price, then age 70, had just turned onto Cropper School Road. She saw a blur in front of her. There was only time for Price to hit the brakes. It was too late.

Price remembered quite specifically that the little boy *hit her car* – denting the hood, the boy continued and flew into the air, his movement only being stopped when he fell back to the ground. It was a significant impact and Sangabriel sustained a broken leg.

In this lawsuit, while conceding he was running, he argued that had Price kept a proper look-out, she would have avoided him. In that regard, he noted that it was obvious children were in the area – it was near a playground and several children were playing at the party. If the plaintiff prevailed, he sought medicals of $8,452, plus $50,000 for pain and suffering.

Price's defense was not complex – the boy suddenly darted from between two cars and she couldn't avoid him running into her.

The verdict on liability was for Price and the plaintiff took nothing. A defense judgment followed.

Medical Negligence - A woman with a history of mania reported a new symptom of depression after taking an experimental drug – after she committed suicide, her estate alleged negligence by her psychiatrist in failing to diagnose and treat the newly developed depression

Milam v. El-Mallakh, 01-0639
Plaintiff: Martin H. Kinney, Jr., *Dolt Thompson Shepherd & Kinney*, Louisville
Defense: Christopher P. O'Bryan and Mitchell Page, *O'Bryan Brown & Toner*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Mershon, 11-4-05

Carol Milam, age 41 and a registered nurse, had a history of mania in the winter of 1999. During that December, she was hospitalized several times – her mania would manifest itself, Milam being unable to sleep for days at a time.

Just after Christmas of that year, she was admitted to U of L Hospital where she came under the care of her psychiatrist, Dr. Rif El-Mallakh. He suggested that she would be a good candidate for an experimental drug, Ziprasidone, that Pfizer was studying. Milam agreed to participate in the double-blind study.

She remained in the hospital for three weeks, being discharged on 1-20-99. Her condition improved as she took the drug. However after being discharged, Milam began to report a new symptom to El-Mallakh when she came home – while previously complaining of bi-polar mania, she was now depressed.

The depression only got worse and Milam disappeared on 2-22-99. She was not found until the next day. Milam had committed suicide by cutting her wrists – she was found in a wooded area near her home. She was survived by her husband and her ten-year old son.

The estate sued El-Mallakh and Pfizer, blaming her death on the mismanagement of her mental condition. There were interesting facts regarding the study of the drug. It turns out that while in the hospital and improving, Milam was actually getting a placebo – even El-Mallakh didn't know that. Only after she was discharged did she get the real drug. Pfizer was blamed for its management of the study and the effects of the drug. It settled with the estate before trial.

The claim against El-Mallakh was more nuanced. When she was discharged and began to report depression symptoms, it was argued the psychiatrist should have intervened. Had he appreciated the symptoms, anti-depressants could have been prescribed. His management of Milam in the drug study was also implicated.

The estate's liability expert, Dr. William Bernet, Psychiatry, Nashville, TN, explained that with intervention, Milam's death was preventable. If prevailing, the only elements of damage were Milam's destruction of $100,000 and $500,000 more for her son's consortium interest.

El-Mallakh defended the case and focused on several themes, (1) Milam's mental illness was longstanding and progressive, (2) her death was linked to that progression, not El-Mallakh's care, (3) there was no reason for the doctor to suspect she was a suicide risk, and (4) the double-blind study was proper, Milam having consented to participate. Defense experts were Dr. Gary Sachs, Psychiatry, Boston, MA and Dr. Susan McElroy, Psychiatry, Cincinnati, OH.

The verdict was for El-Mallakh by a 10-2 count, the Milam estate taking nothing. A defense judgment was entered for the doctor.

Auto Negligence/UIM - A school bus driver was injured when a drunk crashed into the bus head-on

Baker v. Elliott et al, 04-0341
Plaintiff: Samuel G. Davies, Barbourville
Defense: Max K. Thompson, *Smith Atkins & Thompson*, Pikeville for Elliott
Matthew B. Gay, *Boehl Stopher & Graves*, Louisville for Philadelphia Insurance
Verdict: $52,030 for plaintiff
Circuit: **Knox**, J. Messer, 11-23-05

On 12-11-03, Santa Clause was coming to town – more particularly, he was in Middlesboro. Bonnie Baker, then age 42, a school bus driver, took a group of children to see St. Nick. As she traveled on a narrow road, a drunk driver, Jackie Elliott, approached from the opposite direction. He hit the bus nearly head-on.

Baker has since treated for radiating pain – the injury was linked by her orthopedist, Dr. Ronald Dubin, Middlesboro, to a C6-7 disc injury. Baker's medicals were $12,030 and she sought $250,000 for future care. Lost wages were $18,870, a vocational expert, Norman Hankins, Jonesborough, TN, valuing impairment at $113,599. $500,000 more was sought for pain and suffering.

In this lawsuit, she moved first against Elliott. It is believed he tendered his $25,000 limits. Baker's UIM carrier, Philadelphia Insurance Company (PIC) advanced those limits. Thus at trial, Elliott and PIC were both named defendants. However there was no mention of Elliott's intoxication and punitives were not sought.

PIC defended the case on several fronts. An IME, Dr. Timothy Wagner, Orthopedics, Paintsville, identified just a temporary strain injury. He also explained he is paid $1,000 for an IME, plus $1,500 more for the deposition. PIC also relied on surveillance video that showed Baker engaged in all sorts of activity without pain – that included sitting on her porch and walking into a funeral carrying a purse.

This case went forward on damages only. Baker took her medicals as claimed, plus $10,000 each for future care and lost wages. Impairment was rejected, while Baker was awarded $20,000 for suffering. The verdict totaled $52,030.

While no judgment had been entered, it will be against PIC less the underlying limits and PIP. [While not reflected in the record, that presumes that PIC advanced Elliott's limits, Elliott remaining at trial pursuant to the duty to defend.]

Auto Negligence - While a plaintiff with a complaint of a disc bulge took special damages of over $60,000, her pain and suffering claim was rejected

Hoskins v. Martini, 02-1175
Plaintiff: Kenneth A. Sizemore, London
Defense: Bradford R. Breeding, *Farmer Kelley Brown Williams & Breeding*, London
Verdict: $63,743 for plaintiff less 40% comparative fault
Circuit: **Laurel**, J. Messer, 8-24-05

On 4-1-00, Josette Hoskins, then age 28 and a pizza delivery driver, prepared to make a turn. An instant later she was rear-ended by Tina Martini. It was a moderate collision and it fractured Hoskins' seat – she remembered it knocked her senseless.

She has since treated for radiating pain related to a disc bulge, all as identified by her family doctor, Robert Hoskins, London. Plaintiff's medicals were $10,543 and she sought $126,960 for ongoing care. Lost wages were $13,200, the instructions limiting pain and suffering to $100,000.

Martini defended the case and raised fact disputes regarding the crash.

Namely, Hoskins missed her turn and was backing up when he rear-ended her. Damages were also defended, an IME, Dr. William Robertson, Neurology, Lexington, finding Hoskins normal, her complaints being subjective.

Fault was mixed at trial. The jury assessed 60% to Martini, the remainder to the plaintiff. Then to damages, Hoskins took her medicals and lost wages as claimed – she was also awarded $40,000 for future care. Suffering was rejected. The verdict totaled $63,743, less PIP and comparative fault – that equaled $32,246 and a consistent judgment followed. Martini paid it.

Medical Negligence - Following a hip replacement surgery, plaintiff complained of sores on her feet from wraps that were placed too tightly

Hays v. Scutchfield, 00-0305
Plaintiff: William R. Erwin, *Helton Erwin & Associates*, Danville
Defense: Steven G. Kinkel, *Lynn Fulkerson Nichols & Kinkel*, Lexington
Verdict: Defense verdict on liability
Circuit: **Boyle**, J. Peckler., 6-28-05

June Hays, then age 77, underwent a hip replacement surgery on 7-19-99 at Ephraim McDowell Regional Medical center. It was performed by an orthopedist, Dr. Scott Scutchfield. The surgery itself was uneventful and there would never be any criticism of Scutchfield's surgical technique.

Following the surgery, Scutchfield ordered that pressure wraps be applied to Hays' legs. The wraps prevent the development of deep vein thrombosis.

Thereafter Hays suffered significant sores and ulcers on her ankles and feet. Her proof linked those injuries to the wraps being applied too tightly by hospital nurses. Following this event, Hays remained bedridden despite several repair surgeries – she died two years later. [This was not a death case.]

In this lawsuit, her estate alleged negligence by both the hospital nurses in applying the wraps and then Scutchfield in failing to supervise this process. The estate settled with the nurses.

The theory against Scutchfield advanced to trial – the estate expert, Dr. David Krant, Orthopedics, Hollywood, FL, criticized his failure to check and palpate her feet in the wraps. With a heightened awareness, Krant argued, the catastrophic injury could have been avoided. The medicals were $135,217 and $300,000 was sought for pain and suffering. Her surviving husband also presented a derivative consortium claim.

Scutchfield's defense of the case was simple and two part: (1) if there was a problem with the wraps, it rested solely with the hospital nurses that applied the wraps, and (2) the injury was neither foreseeable nor preventable, Hays being acutely at risk for skin breakdown because of a history of vascular problems.

As the case was deliberated, this Danville jury had a question that got to the heart of the matter. It asked: Why are we deciding the hospital's fault and comparative fault when it was clearly delineated that the hospital was not a party? The court's answer was not in the record.

The jury that asked this excellent question then went on to exonerate both Scutchfield and the hospital. That ended the deliberations and Hays took nothing. A defense judgment followed and there was no appeal.

Premises Liability - Exiting a restaurant, an insurance agent plaintiff fell in an icy puddle – she landed hard and sustained a knee injury

Edmonds v. O'Charley's, 04-0441
Plaintiff: Craig Housman, Paducah
Defense: E. Frederick Straub, Jr., *Whitlow Roberts Houston & Straub*, Paducah
Verdict: Defense verdict on liability
Circuit: **McCracken**, J. Hines, 10-5-05

It was 5-21-03 and Deborah Edmonds, then age 51 and an Allstate agent, met friends for dinner at O'Charley's Restaurant. As she exited and just outside the front door, she slipped and fell in an icy puddle – the condition was man-made, Edmonds slipping in ice cubes.

She landed hard on her knee. Edmonds sustained both a partial ligament tear and a fractured kneecap. It has affected her gait, Edmonds later treating with a chiropractor for back pain. Her medicals were $4,468 and lost wages totaled $3,450. Pain and suffering was uncapped.

Edmonds sued O'Charley's and alleged the premises were negligently maintained – she noted the ice cube hazard (it was springtime), was in full view of the hostess station. O'Charley's defended and denied knowing anything about the hazard – the restaurant also noted that after the fall, employees looked for the icy hazard and found nothing.

Deliberating a *Lanier* burden-shifting instruction, the verdict was for O'Charley's on liability and Edmonds took nothing. A defense judgment followed.

Medical Negligence - During a cholecystomy, plaintiff's surgeon clipped her hepatic duct – she criticized the surgeon's failure to properly identify the anatomy and avoid clipping the duct

McGinnis v. Theuer, 04-0390
Plaintiff: Michael L. Hawkins, *Michael Hawkins & Associates*, Frankfort
Defense: Gerald R. Toner, *O'Bryan Brown & Toner*, Louisville
Verdict: Defense verdict on liability
Circuit: **Shelby**, J. Robert Overstreet, 11-4-05

On 7-8-03, Ann McGinnis, then age 72, was evaluated by a surgeon, Dr. Christopher Theuer, for complaints of a bile-like sensation in her mouth. Theuer suggested and McGinnis agreed that her gallbladder should be taken out. The procedure was scheduled for a week later.

Before beginning the surgery, Theuer first passed an EGD scope into her throat – he checked for peptic ulcer disease. The scope was normal. Still under anesthesia, Theuer began the surgery. It appeared uneventful.

Thereafter McGinnis began to suffer complications. It was revealed that in Theuer's surgery, her hepatic duct had been clipped. The injury was repaired in a second surgery on 7-24-03. Plaintiff's incurred medicals were $110,000 – she sought $150,000 each for past and future suffering.

McGinnis alleged negligence by Theuer in performing the surgery. Through her expert, Dr. Christopher Daly, Surgery, Pittsburgh, PA, she developed error by Theuer in (1) failing to identify the anatomy, and (2) clipping the duct without realizing it. While there was no suggestion it was intentional, McGinnis postured the clipping still represented a deviation from the standard of care.

Theuer defended the case and denied there was an identification error – instead, while he did clip the duct, this clipping was called inadvertent. Such a complication, Theuer continued, can and does occur even in the best of hands. His expert was Dr. John Wright, Surgery, Nashville, TN.

The verdict in Shelbyville was for Theuer on liability by a 9-3 count, this jury finding he had not violated the

surgeon standard of care. A defense judgment followed.

Malicious Prosecution - When a landlord was stymied by a difficult tenant, the landlord simply had the tenant arrested on an involuntary mental health warrant – released an hour after being seen at the hospital, the tenant sued and alleged defamation and malicious prosecution
Reuys v. Hibbs, 03-2172
Plaintiff: Michael L. Boylan, Louisville
Defense: Ted Kozak, *Sewell & Associates*, Louisville
Verdict: Defense verdict on liability; $1,300 for defendant on counterclaim for unpaid rent
Circuit: **Jefferson**, J. Shake-2, 11-14-05

Clint Reuys and his girlfriend, Martha McCready moved into a duplex apartment on Taylor Drive. They were there three years when a new owner, John Hibbs, took over in 2002. By that December, Reuys was fed up.

He had made numerous complaints about problems with the apartment – the roof sagged and the plumbing leaked, among other problems. Despite his many complaints, Hibbs did nothing to repair the apartment.

Things came to a head in December of 2002. On 12-30-02, Hibbs wanted Reuys out. That presented a problem because an eviction proceeding takes time. Hibbs visited a police precinct and explained that Reuys was a troublesome tenant. He was threatening and had engaged in odd behavior – that included blocking parking spots.

A cop at the precinct had an idea. Why not file an involuntary mental health petition? Hibbs thought it was a splendid idea and he did just that. In the petition, Hibbs repeated the allegations that Reuys was threatening and most impolitic in how he parked his car. Worst of all, Reuys turned on the hot water non-stop and used up all there was – none remained for the other tenants. Presented with the petition, Judge Bartholomew in District Court was easily convinced. A warrant was issued.

Reuys was soon arrested and taken to University Hospital. It didn't take long for hospital staff to decide that Reuys was not a danger to himself. He was released within an hour. It was reported he returned to the apartment and declared, "I'm back."

While Hibbs's perfect plan was foiled, he wasn't finished yet with Reuys. He instituted an eviction proceeding and Reuys and McCready were finally out of the apartment by February.

Thereafter the litigation followed. Together, Reuys and McCready alleged the eviction was retaliatory. Individually, Reuys presented two claims: (1) malicious prosecution and (2) defamation. A simple case, Reuys alleged Hibbs knew there were no facts to support a mental health petition – in fact, most of the allegations, all denied by Reuys, were not even witnessed by Hibbs.

In terms of denying the events, Reuys had an explanation for everything. Regarding the hot water, it wasn't because he had turned on all his faucets – instead it was the leaky plumbing. If Reuys prevailed, he sought compensatory and punitive damages.

Hibbs defended the case and denied malice – he explained that the odd and potentially dangerous behavior by Reuys left him little choice but to act to protect his other tenants. That the allegations were justified, he noted the petition was signed by a judge. Hibbs also presented a counterclaim for unpaid rent.

Reuys lost both on the malicious prosecution and defamation counts – the jury also rejected the joint retaliatory eviction claim presented by both Reuys and McCready. The jury continued and Hibbs prevailed on his counterclaim for unpaid rent – he took $1,300. A consistent judgment followed.

Kentucky Supreme Court Tort Opinions

On its rendition date in November, the Supreme Court issued three tort opinions. All involved cases that were previously tried to a jury – they are summarized in this section.

Age Discrimination - In an age discrimination trial, while plaintiff met her prima facie burden and rebutted the defendant's non-discriminatory reasons, her case was still deficient as a matter of law
Williams v. Wal-Mart, 2004-SC-0080-DG
On Appeal from the Court of Appeals
Rendered: November 23, 2005
Petitioner's Counsel: Lee Huddleston, *Huddleston & Huddleston*, Bowling Green
Respondent's Counsel: Elizabeth U. Mendel, Kathryn A. Quesenberry and Erin M. Roark, *Woodward Hobson & Fulton*, Louisville

Linda Williams, a long-time Wal-Mart employee, was fired in October of 1995, the store believing she had stolen a fifty-eight cent bottle of water. Plaintiff alleged that she had permission to take the water and pay for it when her shift ended – this was because she suffered from a medical condition that required that she drink sodium-free water. Apparently on this day, Williams just forgot to pay.

Wal-Mart supported its firing, citing a strict anti-theft policy. Williams filed this lawsuit and alleged age discrimination – she noted that after her firing, she was replaced by a younger worker.

The case was tried in Glasgow in July of 2000 and Williams took an award of $539,237 – it included punitives of $250,000. Wal-Mart appealed.

The Court of Appeals reversed in September of 2003. Judge Dyche wrote that while Williams met her prima facie burden, he agreed reluctantly as Wal-Mart had conceded this point, he further concluded she had failed to rebut the anti-theft policy. Judge Johnson dissented that the majority had erred as it considered the proof in a light most favorable to Wal-Mart, not the plaintiff – this error skewed the analysis, it being plaintiff's proof that the supposedly strict anti-theft policy was inconsistently applied. Williams sought discretionary review and it was granted.
Holding: *Justice Roach* wrote for a

unanimous court and first noted that in considering the case, the court's standard required it to consider plaintiff's proof as true, drawing all inferences in her favor. [The Court of Appeals did the opposite.]

Then to the merits, Roach wrote that Williams had met her prima facie burden, showing she was terminated and replaced with a younger worker. Wal-Mart then replied with a legitimate non-discriminatory reason – its anti-theft policy.

Finally, Williams replied with a showing (he called it weak) of pretext. Despite this, there was still a burden on the trial court to consider if there was sufficient evidence for the trier of fact to conclude if Wal-Mart had unlawfully discriminated against her.

Roach explained that there were two important pieces of uncontraverted evidence that swung in Wal-Mart's favor: (1) two other younger employees were fired for stealing drinks, and (2) the decision-maker who fired didn't know her age. This case then was the instance where while a prima facie case is established and the pretext rebutted, "no rational factfinder could conclude that the action was discriminatory." [Roach relied heavily on *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).]

Ed. Notes

(1) This case presents an interesting study in pleading a case. It is obvious the jury that heard the proof disliked Wal-Mart's conduct in this case and sought to punish it. This is evidenced by the large award of emotional suffering damages and punitives.

The problem for the plaintiff was her theory – age discrimination – there was very little proof of it. What Williams had was a mountain of proof that Wal-Mart treated her badly. Thus, while the case was presented as an age discrimination case in the instructions, it was really tried as an outrage claim.

Might her case have been better presented from the beginning as outrage? Consider the Wal-Mart plaintiffs in the famous stealing-candy outrage case, *Stringer v. Wal-Mart*, 151 S.W.3d 781 (Ky. 2005). While the $20,000,000-plus verdict was reversed on appeal, the validity of the underlying outrage claim was endorsed by the high court.

Therein is the tough call – when a similar case is first prosecuted, should a plaintiff with atrocious and reprehensible behavior by an employer (1) stretch a discrimination case that isn't there, or (2) risk it with an outrage claim, always a tricky thing to do because there seems to be little agreement among appellate judges over what actually constitutes outrage.

In raising these questions, it is not our intention to second-guess the plaintiff's pleading of the case ten years ago, especially as not only had the *Stringer* case not yet been decided, the Wal-Mart Four hadn't even taken the candy that was set out for them by store managers. Our consideration is for 2005 and going forward – when facing an employment abomination, the employee-plaintiff should carefully weigh outrage versus discrimination.

Why the hurry to make the decision? If both claims are pled, doesn't that set up a tidy argument for the defense that the outrage claim was subsumed by the underlying discrimination? By contrast, if outrage alone is pursued and the court finds the conduct is insufficient as a matter of law, the entire claim is defeated.

That then is the dilemma. But as applied to this case, there wasn't a real dilemma – as a matter of law, as decided in this opinion, Williams never had an age discrimination case in the first place. Thus if she had initially pursued outrage and lost as a matter of law, she wouldn't have actually lost anything as there was no viable alternate discrimination claim.

(2) Doesn't this opinion, while being exceptionally cogent and well-written, also have a much quieter and perhaps unintended agenda – that is, think of the employment cases that will be defeated based on what will become known as the *Williams v. Wal-Mart* rule.

While a plaintiff will present a prima facie case and rebut the defense pretext, the trial court will still have an out to reject the close case – looking to this case, the evidence just won't fit in the view of the trial judge and the case will be dismissed before reaching a jury, mirroring Roach's admonition, "no rational factfinder could conclude the action was discriminatory."

In this case, a presumably rational jury in Barren County concluded Wal-Mart's conduct was discriminatory. Were they irrational? Roach clearly answers that they were. So too we think, will other judges, taking cases away from juries – what is troublesome about this opinion and its prospective application is the elusive and impossible-to-pinpoint standard.

When does it just not feel right? When can no rational fact finder find discrimination? That, we think in light of this opinion, will be decided less on the facts and more on the sensibilities of any particular judge.

(3) The original verdict report on this case is contained at Case No. 1411, the KTCR 2000 Year in Review.

Auto Negligence - When a truck with a trailer passes a bicyclist and then strikes the bicyclist with the trailer as he completes the pass, a directed verdict should be entered against the driver of the truck

Previs v. Dailey,
2004-SC-0131-DG
On Appeal from the Court of Appeals
Rendered: November 23, 2005
Petitioner's Counsel: David A. Weinberg, Lexington
Respondent's Counsel: Thomas L. Travis and Chadwick A. Wells, *Clark & Ward*, Lexington

Nollaig Previs, an Irish immigrant working in the horse industry, rode her bicycle on a rural road in Bourbon County on 5-29-99. A farmer, Pete Dailey, approached her from the rear – he was in a pick-up pulling a trailer.

Dailey began to pass the bicyclist. Without looking in his rear-view mirror, he merged back to the right. In the process, he collided with Previs. She was dragged a short distance and sustained significant abrasion injuries. Previs sued Dailey and alleged negligence. She moved for directed verdict. The motion was denied. A jury returned a verdict for Dailey.

The next day, the jury foreman contacted the trial judge and indicated the jury had not meaningfully deliberated Dailey's duties – it simply concluded that the plaintiff should have gotten off the road and yielded to the truck. This conversation formed the basis of a motion for a new trial. Motion denied.

Previs appealed, and the Court of Appeals affirmed in January of 2004. Judge Guidugli, joined by Dyche and McAnulty, noted that while it appeared that Dailey was at fault, there was enough evidence to send the case to a jury. The court also thought it was improper to impeach the verdict with the juror's testimony. The trial court was affirmed. The Supreme Court then granted Previs's motion for discretionary review.

Holding: *Justice Johnstone* wrote for the majority and noted that Dailey had "all but admitted" his fault in maneuvering his truck back into the right lane without looking in his rear-view mirror.

Johnstone thought that represented a frank admission of fault. Dailey's conduct then represented a "clear violation" of his duties, and he was negligent per se – he noted that the Court of Appeals's focus on plaintiff's purported negligence had no bearing on the defendant's negligence.

Remanding a for a new trial, Johnstone noted that while defendant's fault has been resolved, plaintiff's care will still be a jury issue. While acknowledging the issue of the juror communication was now moot, Johnstone went on to add that the Court of Appeals had acted properly, it being the rare circumstance where a verdict can be impeached by a juror. Cooper, Graves, Lambert, Roach and Scott joined the 6-1 opinion – Wintersheimer dissented without opinion.

Ed. Note

(1) Our original report on this verdict is contained at Case No. 2289, the KTCR 2002 Year in Review. The original trial concluded in Paris, KY on 11-8-01.

Underinsured Motorist - Fault may be apportioned against a non-party phantom in a UIM case even though because of the no-contact rule, there can be no recovery for the phantom's fault

Farm Bureau v. Ryan et al,
2003-SC-0944-DG
On Appeal from the Court of Appeals
Rendered: November 23, 2005
Petitioner's Counsel: Michael E. Krauser and Eric S. Moser, *Krauser & Brown*, Louisville
Respondent's Counsel: Tyler S. Thompson and Martin H. Kinney, Jr., *Dolt Thompson Shepherd & Kinney*, Louisville

This case started when a drunk driver lost control on I-64 and crossed the median – he crashed head-on into an oncoming elderly couple. They were killed instantly. The drunk blamed his loss of control on a speeding motorcyclist who had cut him off. The motorcyclist was never identified, nor did he make contact with any of the vehicles involved.

The plaintiffs sought UIM and UM benefits from their carrier, Farm Bureau. Farm Bureau defended with a nifty trick: (1) it sought to apportion fault to the phantom, or (2) defeat the UM claim because the phantom didn't make contact.

At trial, that's what happened – the jury assessed 50% to the phantom, the remainder to the drunk. In so doing, the damages of the estates, which were a raw $460,000, were reduced by 50% and the tortfeasor's underlying limits.

Plaintiffs appealed. The Court of Appeals reversed, Judge Knopf writing that KRS 411.182 controlled apportionment and that fault could not be assessed to a non-party who had not settled. Knopf thought apportionment to an empty chair would create "an unreliable and unjust result." The opinion reinstated the full verdict award less the underlying limits. [That finding made moot the UM no-contact issue.] Farm Bureau sought and received discretionary review.

Holding: *Justice Johnstone* delivered the court's opinion. He was joined in the 5-2 decision by Graves, Cooper, Roach and Wintersheimer.

The court first explained the intermediate court got it all wrong – KRS 411.182 only applies to tort actions and this was a case founded in contract. That was not the end of the story, Johnstone then describing the common law regarding comparative fault as first recognized in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984) – thus in 1988 when KRS 411.182 codified comparative fault, it didn't supplant the common law. Fundamental fairness then required that Farm Bureau be allowed to apportion fault to a third-party tortfeasor.

Johnstone also discounted the notion there would be an empty chair – he explained there were several witnesses that implicated the phantom's culpability. The trial court then was affirmed, Farm Bureau having properly joined the motorcyclist, the jury assessing 50% of the fault to that non-party.

Justice Scott Dissent - Scott wrote that KRS 411.182 did apply to this case and that apportionment could apply to parties strictly covered by the statute – as the phantom was not a party, fault could not be apportioned to him. Scott finished that for some "unfathomable reason," the court has now adopted (1) no personal jurisdiction apportionment and (2) a no-contact rule – by contrast, there is no protection for policyholders who paid their premiums with an expectation they were buying coverage. Lambert joined Scott's dissent.

Ed. Notes

(1) The majority didn't address the sleeping issue in this case – the absurdity of the application of the no-contact rule. The reasons for the no-contact rule are well-known – in a UIM/UM case, it acts as a safeguard against fraud and collusion. When there is no evidence of an actual hit, how can the insurer ever know if there really was a collision?

This case turns that rationale on its head. In this case, it was the insurer who claimed there was a phantom – then the insurer, relying on that phantom, was able to defeat the UM claim against it because otherwise, applying the no-contact rule, there would be a risk of collusion and fraud by the dead plaintiffs. The torture of this logic makes apparent the absurd results that follow from hard and fast rules – hard and fast rules are easier to promulgate in one instance, but difficult to apply to unforeseen fact circumstances.

We think in this case the majority's failure to even acknowledge the absurdity of addressing the effect of the no-contact rule indicates either (1) they were not discerning enough to notice (this would require incredible density), or the more likely, (2) it was painfully obvious to all and the pain was avoided by denial.

A more candid majority would have acknowledged the no-contact rule, its purposes and that it was odd that the insurer invoked its application in this case by seeking to prove there really was a phantom. That would have placed the court in a position then to (1) acknowledge the result was the same, but explain rules are rules and that's that, or (2) modify the no-contact rule to encompass the previously unconsidered fact set. In failing to do either, the majority, we think, undermines the credibility of the court.

(2) The original verdict report on this case is contained at Case No. 2282, the KTCR 2002 Year in Review. When we reviewed the intermediate court of appeals case, we suggested this seemed like just the sort of procedural pickle that Cooper and Johnstone love to sort out – as it turned out, they sorted out the case without taking a bite of the procedural pickle. **See** page 319 in the KTCR 2003 Year in Review for a our summary of the intermediate appellate opinion.

Discretionary Review at the Kentucky Supreme Court

At the November rendition date, review was granted in ten cases and denied in 49 others. Just two of the cases where review was granted implicated tort issues. They are summarized below.

Asbestos Liability - Are premises owners where plaintiff had an asbestos exposure protected by up-the-ladder immunity
Rehm et al v. Navistar et al,
2005-SC-0242
Review Granted: 11-23-05
Summary: James Rehm died of asbestos-related disease. His estate sued sixteen premises owners where Rehm had done work, blaming them for exposing him to asbestos. They prevailed by summary judgment. The estate appealed, and the Court of Appeals affirmed citing that the premises owners were protected by up-the-ladder worker's compensation immunity.

The estate sought discretionary review and it was granted.

Statute of Limitations - When a claim mixes false imprisonment and malicious prosecution, when does the statute of limitation begin to run on the imprisonment claim?
Dunn v. Felty,
2005-SC-0295
Review Granted: 11-23-05
Summary: The plaintiff in this action was arrested by the police. He was later acquitted at a criminal trial. A year after the criminal trial, he sued the police for malicious prosecution and false imprisonment.

The trial court dismissed the false imprisonment claim, finding it was not filed within a year of the arrest – the malicious prosecution count, filed within a year of the acquittal, was timely. That claim advanced to trial and a defense verdict was returned.

Plaintiff appealed only the dismissal of the false imprisonment claim. The Court of Appeals affirmed and concluded that while the malicious prosecution claim was timely filed, the clock began to run on the day of the arrest for the false imprisonment claim.

Plaintiff sought discretionary review and it was granted.

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

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

Defamation - Regarding judicial statements that are defamatory, Kentucky follows the American Rule that the statements are protected if relevant and pertinent to the subject of the inquiry
Smith v. Hodges,
2005-CA-0057-MR
Appeal from Jefferson Circuit Court
Rendered: November 23, 2005
Appellant's Counsel: David W. Hemminger, Louisville
Appellee's Counsel: David B. Mour, Louisville

Carol Hodges, the former finance manager at Bob Smith Chevrolet, was deposed in a case by a customer who alleged a Fair Credit Reporting Act (FCRA) violation. In her deposition, Hodges testified that Smith's CEO, Drew Smith was verbally abusive and that he regularly used cocaine.

Smith sued Hodges and alleged the remark was defamatory. Hodges defended that she was protected, the remarks being relevant and pertinent to the inquiry. [This is known as the American rule – the English rule grants an absolute privilege to judicial remarks.] The trial court granted summary judgment for her.

Holding: *Judge Guidugli* joined by Minton and Rosenblum, first recognized that Kentucky is governed by the American, not the English rule – the inquiry then was whether the remarks were relevant and pertinent to the subject inquiry. More particularly, was the allegation of cocaine use relevant to the FCRA violation?

The court concluded Smith's conduct in the workplace was relevant to the underlying case (although perhaps not legally relevant for purposes of admission) and thus Hodges was granted immunity. The trial court was affirmed.

Attorney Practice - The proper sanction is dismissal for a complaint when it has been filed by an out-of-state attorney who had not been admitted pro hac vice
Brozowski v. Johnson et al,
2004-CA-0256-MR
Appeal from McCracken Circuit Court
Rendered: November 18, 2005
Appellant's Counsel: Jack W. Flynn, Frankfort
Appellee's Counsel: E. Frederick Straub, Jr., Paducah for Johnson
L. Miller Grumley, Paducah for Western Baptist Hospital
Richard L. Walter, Paducah for Gwinn

Robert and Sharon Brozowski filed a medical negligence lawsuit against assorted defendants in McCracken County. The suit was filed by an out-of-state attorney, John Bradley – while not admitted pro hac vice, Bradley signed the complaint.

The defendants moved to strike the pleading and dismiss the case. The trial court did just that after a hearing – Bradley didn't attend the hearing. Plaintiffs appealed the dismissal.

Holding: *Judge Vanmeter* joined by Henry, concluded the dismissal was proper. While the failure to properly sign a pleading is rarely grounds for dismissal, it will usually be stricken. However, when a complaint itself is stricken, that has the practical effect of ending the lawsuit. The trial court was affirmed. Judge Miller dissented.

Statute of Limitations - In a waverunner accident, the statute of limitations is one year – plaintiff had argued that because of assorted statutory and regulatory violations, a five-year statute should prevail
Toche v. Polaris Industries et al,
2004-CA-1074-MR
Appeal from Jefferson Circuit Court
Rendered: November 4, 2005
Appellant's Counsel: Jonathan N. Amlung, Louisville
Appellee's Counsel: Donald P. Moloney, II and Andrew DeSimone, Lexington and George W. Soule and David S. Miller, Minneapolis, MN for Polaris Industries

Brandee Toche was a passenger on a waverunner on 5-17-02 on Lake Cumberland. The event at the lake was sponsored by Polaris Industries, a waverunner manufacturer, and other corporate entities. Toche's waverunner was involved in a crash – she was badly

hurt.

She sued Polaris and other defendants thirteen months later. The matter was dismissed, Toche having failed to file within a year as mandated by KRS 413.140(1). Toche appealed and argued that as liability was created by a boating statute (KRS 235.300) and regulatory violations, the applicable limitation from KRS 413.120 was five years

Holding: *Judge Schroeder* joined by Minton and Emberton concluded this was a basic personal injury claim under the common law – the one-year limitation applied and the trial court was affirmed.

Verdicts Revisited

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

Auto Negligence - While the plaintiff had substantial proof of an injury, the defense rebutted with an IME (Harkess) and thus the jury was properly instructed on the threshold issue

Brown v. Goncher et al
Appeal from Hardin Circuit Court
Trial Judge: Janet P. Coleman
Appeal Decided: 11-23-05
Heather C. Paynter and C. Wesley Durham, *Miller & Durham*, Radcliff for Appellant
Robert E. Stopher and Robert D. Bobrow, *Boehl Stopher & Graves*, Louisville for Appellee Goncher
Jason B. Bell, *Kerrick Stivers & Coyle*, Elizabethtown

Marshall Brown was a passenger in a vehicle that was rear-ended in Hardin County – the wreck occurred, one tortfeasor swerving to avoid another that had pulled into the road. The collision occurred with Brown's car – it resulted in minor damage and Brown didn't treat for six days.

In this lawsuit, Brown sought damages from both drivers. [Because of a settlement and the involvement of a UIM claim, the alignment of the parties was more complex at trial – however that alignment was not relevant to the issues on appeal.]

Brown alleged proof of a serious and permanent radiating disc injury – the defense countered with an IME, Dr. James Harkess. Harkess thought the chiropractic care was an outrage and diminished the claimed injury.

Tried to a jury in Elizabethtown, the defendant prevailed. As the instructions were constructed, it is not clear if it was a threshold verdict or a defense verdict on liability.

Post-trial, Brown moved for a new trial, arguing the evidence was insufficient to present the threshold issue. His motion was denied. Brown appealed.

Holding: Judge Knopf writing

Joined by McAnulty and Guidugli, Knopf wrote that while Brown did produce evidence of a substantial injury, it was rebutted by the testimony of the IME – given the testimony from the expert, Harkess concluded that there was substantial evidence upon which the jury could return a threshold verdict. The verdict was affirmed in all respects.

The Case for the Ages Goes National

In the July 2005 issue of the KTCR, we first discussed the very peculiar case of *Ogburn v. McDonald's*. Arising from a nearly unbelievable set of facts, a teenage girl was sexually abused in the office of a McDonald's restaurant in Mt. Washington.

The story is now long familiar – a caller in Florida posed as a cop and fooled a McDonald's manager into strip-searching the girl – the manager then brought in her fiancé to supervise the girl. At the direction of the phony cop, the fiancé sexually abused the girl – at the time of the abuse, she was naked minus a small apron and didn't have either her car keys or a cell phone. The hoax lasted for five hours. The events were all captured on a time-lapse camera in the office.

The girl, Louise Ogburn, has since sued McDonald's, alleging negligent security. Her theory is simple – McDonald's knew of the danger of these phony calls and yet took no affirmative steps to see that the warnings got to Mt. Washington. McDonald's has defended the case – their position is not entirely clear to the KTCR, but the defense has focused on blaming the caller as the sole tortfeasor in a wicked and sick game.

While we first previewed this case in July, we thought it deserved another look. Since that time, the *Courier-Journal* picked up the story and ran a lengthy spread on these events. The media attention turned up a few notches and a national television newsmagazine, *Primetime Live*, got involved.

In a program that aired on 11-10-05, reporter John Quinones traced the story in detail – he had interviews with Ogburn, the McDonald's manager and most revealingly, Quinones had the security video that captured the abuse in full color.

In our first story, we questioned the strength of McDonald's defense – we even wondered how many millions of dollars this case was going to cost the hamburger company. We noted that our sources indicated Ogburn had demanded in the range of $9,000,000.

In light of the significant media attention, we began to wonder how the underlying case had been affected, if at all, by that attention. Our conclusion is that Ogburn was a big winner.

Imagine the McDonald's bigwigs that watched that program in Oak Brook, IL. Imagine the executives that watched the show with their wives – we've taken that license as sixteen of McDonald's top eighteen executives listed on their website are men.

The reasonable executive wife would turn to their her bigwig husband with shock – Ogburn was an incredibly persuasive witness. This was contrasted with the McDonald's manager who seemed credibility-challenged. The wife would wonder, why I am watching these accusations about the beloved Golden Arches?

The theoretical McDonald's bigwig would then ask himself the same question: How did this case get so far? What advice did we get from our Kentucky lawyers that told us to keep defending this case? What does this kind of negative publicity cost?

Is it reasonable to assume that the next day (that would be Friday, November 11, 2005), they had discussions at McDonald's about this case in boardrooms? What instructions would the smart executive give?

We think it would be two-fold. First, he'd give instructions to resolve this case once and for all – he would instruct: "I don't ever want to hear about this case again. Settle it and settle it quietly. So it costs a few million dollars – what did it cost for the millions who watched the devastating report on *Primetime Live*?

Let's be done with it."

The reasonable bigwig would then do a second thing – he'd give instructions to make sure that nothing like this could ever happen again at a McDonald's. He might ask, Can it be that hard to train our employees about this?

Did any of this happen, and will the case settle? Who knows. The above discussion merely represents our thoughts about how the *Primetime Live* feature and Ogburn's overwhelming presentation affect the respective settlement positions.

Assume for sake of discussion that McDonald's disagrees with our analysis and pursues this case to trial. Her closing argument for the jury is so easy, yet so compelling:

What if McDonald's had cared more about its people than its hamburgers? What if the memo on safety had gotten to Mt. Washington? What if the manager had read it? If she'd instructed the employees? If she'd instructed Ogburn? Would there have been this sexual abuse?

As the jury today, each of you is on equal footing with McDonald's – you can send a message that they'll hear loud and clear in Oak Brook, IL In fact, they're watching this trial right now. The champagne is on ice. If they can pull the wool over this jury in Shepherdsville, they'll be celebrating tonight. The champagne bottles will be popping.

When you return your verdict, send McDonald's a message – put the champagne back on ice and get down to dealing with employee safety. Tell them they can't treat Kentuckians like that. They can't treat our children who serve their hamburgers so shabbily and with such indifference. [By focusing on the harm suffered in Kentucky, the plaintiff avoids the extra-territorial issues raised with large punitive damages awards.]

How do you send that message? Your only choice is to award damages, damages that are significant enough to get their attention.

Will $500,000 do it? That might seem like a lot to you and it does to me and Louise too, but is that going to get their attention? The champagne corks will still be flying.

But it can't be too high either. $100,000,000 would be too much. It wouldn't be fair to McDonald's. It wouldn't be fair to Louise. It wouldn't be justice.

The number is for you to decide. You've heard proof at the trial of the company's sales in Kentucky – you've heard the gross sales each year in Bullitt County. When you pick that number, make it fair and make sure it's enough that McDonald's gets the message. [This hypothetical closing paraphrases the great closing of Mark Gray, delivered in 1998 in the famous $13 million bad faith verdict against Humana. **See** Case No. 137 in the KTCR 1998 Year in Review.]

To the nuts and bolts, its time for the predictions. Is this case going to trial? No way. Is McDonald's going to pay? Yes. Will it be a secret settlement? Absolutely. We'll be watching.

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Notable Out-of-State Verdicts

The following verdict reports were taken from the December 2005 issue of our sister publication, the Federal Jury Verdict Reporter. It is a comprehensive nationwide reporter of civil verdicts in the federal system.

BAD FAITH

Arizona District - Phoenix

A dentist with a psychiatric disability was critical of his disability insurer's handling of his claim

Caption: *Leavey v. Provident Life & Accident Insurance*, 2:02-2281

Plaintiff: Steven C. Dawson and Anita Rosenthal, *Dawson & Rosenthal*, Sedona, AZ and Gregg H. Temple, Scottsdale

Defense: Stephen Bressler, Ann-Martha Andrews and Scott Bennett, *Lewis & Roca*, Phoenix, AZ

Verdict: $19,809,028 for plaintiff

Judge: Stephen McNamee

Date: October 7, 2005

Facts: Brett Leavey worked as a dentist until November of 1998. At that time, he abandoned his practice because of emotional disabilities. Leavey's psychiatric illness was wide-ranging, encompassing both depression and substance abuse. While his professional career was in jeopardy, Leavey was protected.

He had purchased a disability insurance policy from Provident Life and Accident Insurance. At the time he stopped practicing, Leavey made a claim for benefits. Provident began to pay benefits. [Interestingly, from 11-98 to the present, Provident has continued to pay benefits.]

While it did pay Leavey, it was interested in seeing his mental health improve so that he could return to productive dentistry. In this regard, it sent Leavey to several psychiatric evaluations. Those evaluations concluded that while Leavey did have a legitimate disability, it was believed he would benefit from cognitive treatment.

Leavey resisted the treatment. While it might return him to the practice of dentistry, it was argued that the pressure associated with the practice would lead him back to the vicious cycle of depression and substance abuse. Thus Leavey took the position he was permanently disabled because of his emotional condition and any attempt to improve it would only make things worse in the long run.

This dichotomy went to the heart of this case. Leavey alleged that Provident engaged in bad faith by seeking to have him participate in therapy. It was his argument that the policy only required him to be disabled – it placed no burden on him to seek treatment to continue receiving benefits.

In developing that it was an illegal scheme, Leavey noted that in December of 2001, Provident advised him that the claim was closed and benefits were terminated. [No idle threat, the reserve was released.] Withing a month, Provident backed off and continued to pay without interruption. Leavey further postured that when confronted about the denial, Provident lied about it. Thus in prosecuting his claim, Leavey pointed to proof of emotional harm associated with the temporary denial of his claim.

Leavey's claim went beyond the borders of the insurer's handling of his case – relying on testimony from former Provident bigwigs, it was his proof that the insurer called psychiatric claims "gray areas" that were to be exploited and denied. Why would Provident do this? Leavey answered that the insurer was motivated by money, having previously oversold professional disability policies. If Leavey prevailed on a single bad faith count, he sought emotional suffering, future benefits and the imposition of punitive damages.

Provident defended the case and focused on one key fact – that at all times and whether the claim was closed or not, (Provident called it a paperwork snafu), the insurer always paid Leavey his benefits. It further acted reasonably in questioning his care and his failure to return to the practice of dentistry. [Leavey countered as noted above that the policy said nothing about his seeking treatment to return to work.] Provident responded that regardless of whether mistakes were made in handling the claim, it certainly did not rise to the level of bad faith.

Jury Instructions/Verdict: The instructions asked if Provident had breached a covenant of good faith and fair dealing. The answer was yes, this Phoenix jury awarding Leavey $4,000,000 for emotional suffering. He took $809,028 more for future benefits. The jury also assessed punitive damages of $15,000,000. Leavey's verdict totaled $19,809,028. When reviewed by the FedJVR, Provident's post-trial motions were just beginning – they have argued among other things, that the verdict was excessive.

PRODUCTS LIABILITY/ MEDICAL NEGLIGENCE

West Virginia Southern District - Huntington

In this unusual product liability and medical negligence case, plaintiff alleged her knee replacement was disrupted by a combination of a faulty passive motion machine and negligent monitoring by hospital nurses

Caption: *Craig v. Ormed et al*, 3:03-2450

Plaintiff: R. Gary Winters, *McCaslin Imbus & McCaslin*, Cincinnati, OH and Robert M. Losey, Huntington, WV

Defense: Scott W. Andrews, *Offutt Fisher & Nord*, Huntington, WV for Ormed
Joseph M. Farrell, Jr., *Farrell Farrell & Farrell*, Huntington, WV for Pleasant Valley Hospital

Verdict: Defense verdict on liability for Ormed
$206,000 for Craig against Pleasant Valley

Judge: Robert C. Chambers

Date: November 1, 2005

Facts: Gloria Craig, then age 45, underwent a knee

replacement on 12-3-01. Thereafter, she recuperated at the Pleasant Valley Hospital. Part of her therapy involved using a continuous passive motion machine (CPM). Her leg was placed by nurses in the machine, which automatically worked the knee joint. The device was so passive, Craig could go to sleep while it worked.

That's just what happened on 12-13-01 as Craig was placed in the CPM – she fell asleep. When she awoke, her leg was in pain and the CPM had tipped over. Because it had tipped, her knee joint was manipulated at an odd angle. This damaged her knee replacement, leading to a second replacement and ultimately the development of RSD in the joint.

In this lawsuit, Craig targeted both the product manufacturer and the Pleasant Valley nurses. Regarding Ormed, she was critical of the device's failure to have an automatic shut-off device – when the CPM tipped, it should have shut down, thereby preventing injury. The nurses were also blamed for improperly setting up the CPM, that error causing it to later tip.

The nurses denied any fault, posturing they simply used the device as ordered by Craig's doctor. Causation was also disputed, the hospital's orthopedic expert blaming the knee replacement failure and other complications on Craig's pre-existing multi-factorial conditions, including a history of chronic knee pain. Similarly, Ormed denied the CPM was defective.

Injury: Hip replacement

Experts:
Plaintiff Edward Grood, Engineer, Cincinnati, OH
Steven Wunder, Physical Medicine, Cincinnati, OH

Defense Robert Benowitz, Engineer, Plymouth Meeting, PA for Ormed
Michael Joyce, Orthopedics, Pepper Pike, OH for PVH

Jury Instructions/Verdict: The verdict was mixed on liability – the jury exonerated Ormed on the products count, but found the nurses were negligent. Then to damages, Craig took $206,000 for her damages – husband's consortium interest was rejected. A consistent judgment reflected the split result.

MEDICAL NEGLIGENCE

Missouri Western District - Kansas City

A child died of a bowel injury, her estate blaming the death on her pediatric surgeon's failure to timely diagnosis a developing infection catastrophe

Caption: *Blevens v. Holcomb*, 4:03-713

Plaintiff: Dennis M. Murphy and Matthew D. Murphy, *The Murphy Law Firm*, Columbia, MO

Defense: Bruce Keplinger, *Norris & Keplinger*, Overland Park, KS

Verdict: $1,100,000 for plaintiff less 10% comparative fault

Judge: Ortie D. Smith

Date: September 22, 2005

Facts: Delanie Blevens, a minor, presented on 8-21-02 to Western Missouri Medical Center in Warrensburg, MO. Complaining of apparent constipation, she was admitted. Soon after, she was transferred to Children's Mercy Hospital in Kansas City, MO. During the day, she exhibited abdominal pain. That afternoon she was examined by Dr. George Holcomb, a pediatric surgeon. He suspected a small bowel obstruction.

Into the evening on 8-21-02, Blevens exhibited signs of a fever. The next morning her condition was worse, and a bowel resection was performed. Despite that intervention and a second repair surgery, the development of sepsis was too widespread. She died that night.

In this diversity lawsuit, she targeted Holcomb, alleging negligence by him in two distinct ways. One expert, Helikson, was critical of him for failing to order an Upper GI study. The second expert, Fleisher, believed that Holcomb's instructions to the nursing staff were inadequate – in light of her condition, he should have been advised when her fever rose.

Fleisher further explained that when Holcomb saw Blevens in the afternoon, she was likely in shock, the abdominal catastrophe having already begun. Had surgery been performed by 10:00 that evening, Fleisher opined, the girl could have been saved. A claim was also presented against Children's Mercy – it was resolved before trial.

Holcomb defended the case that, based on the girl's presentation that afternoon, his diagnosis was correct. He faulted the nurses who didn't tell a single physician that night when Blevens began to vomit and develop a fever. Holcomb also cited as a superseding event, the on-call doctor that night at Children's Mercy who failed to intervene. Finally, it was the defendant's argument that there was no competent proof the result would have been different even if the condition were diagnosed that afternoon instead of the next morning. [The record is silent as to Holcomb's experts.]

Injury: Death

Experts:
Plaintiff Mary Helikson, Pediatric Surgery, Portland, OR
David Fleisher, Gastroenterology, Columbia, MO

Jury Instructions/Verdict: The verdict was mixed on liability, the jury finding both Holcomb and the non-party hospital at fault – that fault was assessed 90% to Holcomb. Then to damages, the estate took $100,000 for economic damages and $500,000 each for past and future non-economic damages. The verdict totaled $1.1 million less 10% comparative fault.

Post-Trial Motions: Holcomb has moved for a new trial and cited among other grounds (1) plaintiff's causation proof was inadequate, (2) there were no economic damages beyond the funeral bill, and (3) to conform the verdict to the limitations of the Missouri cap on non-economic damages in medical cases of $350,000.

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