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.

Auto Negligence/UIM - A small-town lawyer suffered a disabling brain injury in a rear-end crash

Sparks v. USAA et al, 04-0044
Plaintiff: William McMurry and Ross T. Turner, *William McMurry & Associates*, Louisville
Defense: Reford H. Coleman, *Coleman Lochmiller & Bond*, Elizabethtown for USAA
Timothy L. Mauldin, *Bell Orr Ayers & Moore*, Bowling Green for Faulkner
Verdict: $2,907,386 for plaintiff
Circuit: **Metcalfe**, J. Patton, 9-16-05

Herbert Sparks, then age 56 and an Edmonton lawyer, traveled on U.S. 68 in front of the Dollar General on 9-16-01. Behind was Kimberly Faulkner, then age 20. Hoffman didn't stop in time and she rear-ended Sparks. [She was in a tiny sedan, a Dodge Neon – Sparks drove by contrast, a huge 1974 Jeep Cherokee.]

At the scene of the crash, Sparks was dazed. Self-described as addled, he was taken to the ER in Glasgow. He was treated and released for an apparent soft-tissue injury. His wife did notice that Sparks was unusually emotional in the ER – while generally a stoic, Sparks was crying uncontrollably.

That proof would become more important later when Sparks began to complain of symptoms of a traumatic brain injury. It has affected his concentration and memory. A former JAG lawyer, Sparks had cultivated a country practice, focusing on personal injury car wrecks and estate work. He also runs a cattle farm.

While still functioning, Sparks does so with difficulty – a former workaholic, his work is limited by memory problems and depression. The brain injury was quantified by his neuropsychiatry IME, Dr. Robert Granacher, Lexington, as a 20% impairment. Proof of the injury was also confirmed by a neuropsychologist, Jane Brake, Lexington. It was Brake's testimony that Spark must now give up complex cases. Beyond the brain injury, Sparks also suffers from radiating neck pain – an orthopedist from Lexington, Dr. William Lester, discussed this injury.

Sparks's medical bills were $22,240 and he sought $105,682 for future care. Lost wages from his law practice were $279,464 – as noted above, his doctors have told him to stop practicing complex litigation. Impairment was capped at $772,218. Finally Sparks sought an even $2,000,000 for pain and suffering.

Initially he moved against Faulkner – she never contested fault. She tendered her $25,000 limits. Sparks's UIM carrier, USAA, then *Coots*-advanced those limits. Faulkner remained in the case and was represented at trial pursuant to the duty to defend. In the post Earle v. Cobb era, USAA participated and was identified at trial.

The heart of the defense went to the testimony of a single IME, Dr. David Shraberg, Neuropsychiatry, Lexington. Shraberg thought Sparks had only sustained a minor injury, noting he never lost consciousness. The expert further opined that Sparks was articulate and functioning well – his only injury in the crash was a soft-tissue strain.

On cross-examination, while Shraberg didn't keep records, he conceded most of his work was for defendants. He also took umbrage when asked about billing USAA for having his assistant (also his wife), administer a PAI test to Sparks. In fact, the test was self-administered.

Mauldin gave his closing argument first and explained this case was important to his client – while she accepted responsibility for the crash itself, it would be for the jury to determine the extent of his injury. Then to that injury and looking to the jury instructions, Mauldin told the jury this case was about money, noting the $2,000,000 in the verdict form for suffering – that figure wasn't selected by the defense or the judge, it was inserted by the plaintiff and his lawyer.

Turning to the proof and diminishing economic damages, Mauldin questioned if Sparks was impaired from practicing his personal injury practice. He noted that in 2005, Sparks filed and then successfully prosecuted a UIM case for $125,000, collecting a $41,000 fee for his services. Moving from this argument, Mauldin explained that in addition to the exhibits and proof, the jury could take something else back to deliberations – the jury's collective common sense. That common sense would indicate that Sparks is a competent attorney who as demonstrated his skills, repeating that he earned $41,000 from one just lawsuit. Mauldin further believed that Sparks will continue to do good legal work in this community, just as he did in the UIM case, something that was evidenced by the court itself having appointed him as a Master Commissioner. He finished and told the jury to do what was right, to be fair and use their common sense.

Coleman argued next for USAA and told the jury that part of the purpose of his closing argument was to separate the wheat from the chaff – in this case, Coleman thought, there was a lot of chaff. The jury's role, by contrast, was to be fact or truth finders, not fiction finders – this was an awesome responsibility, permitting jurors to make judgments about others.

As the fact finders, the jury wasn't required to accept any evidence or numbers that had been presented – he repeated the common sense argument, there being no requirement that it be checked at the jury door.

To the plaintiff's proof, he questioned Granacher's testimony, noting Sparks paid $11,000 for it – would it have been the same, Coleman wondered, if he wasn't paid $11,000? He also thought Granacher's $7,500 fee for a live appearance was high. [Brake by contrast only charged $2,000 – Coleman suggested she needed to "raise her pay."]

Coleman continued, Granacher, in

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fact, is so good at what he does, he teaches other experts how to make money as an expert. What then are we left with that is real in this case?

Coleman thought in the back of his mind as Sparks reached age 55, he came to a realization he was working too hard – even Coleman himself wished he could stop trying cases and to remember things, he has to use Post-It notes. Shifting gears, he called plaintiff's experts, in all their testifying glory, added up to "diddly." Coleman continued and called McMurry the best he'd ever seen, with the best choreographed "show" – never had he seen so many testifiers and so few treaters. [Jumping to an aside, he explained he didn't mean to be mean in filing a cross-claim against the tortfeasor – that was just "the way the law is."] Finishing, he explained that despite McMurry's rhetorical flourish, the case came down to what were the "real honest-to-God injuries" that were caused by this wreck. The easy decision would be to award Herb some money and go home – it would be harder to apply common sense and tell Herb, "I don't think so."

McMurry closed last and said the entire human history was a struggle for human freedom and dignity – in ancient times, you were either elite or you were a peasant. Our country, as peasants, fought a war with England to shed this elitism. He then turned to a quote inscribed on the local judicial center (recently opened) that our Constitution does not know or tolerate classes – the humble are equal to the powerful.

But the struggle continues and this jury will resolve it – Herb only wants fairness, his equality, his dignity. In all its power, USAA could simply say it wouldn't pay – all it had to do was find Shraberg and have him testify through a television set that the injuries were fantasy.

For thirty-three years, Sparks paid premiums to USAA – he faithfully paid and USAA made the profits. When disaster struck, USAA found Shraberg and made fun of Herb and his lawyers for spending money to prove the case.

What kind of world do we want to live in, McMurry asked? Where insurers can just say no and base it on "absolutely nothing." This case has gone on four years and Shraberg was just hired. What has been going on for the last four years? [Coleman objected that USAA hadn't hired Shraberg.] McMurry didn't skip a beat and pointed out that USAA never even bothered to hire a doctor to contradict plaintiff's proof.

In our society, it's not an eye for an eye – if you negligently injure someone's arm, they don't lop off your arm. In our system, there is no other way than money to compensate victims. He agreed with the defense – the case was all about the money. Despite all the money, the premiums that Herb had paid, USAA denied the claim. As citizens, we must take full responsibility for the harm we cause – instead of that, USAA hoped to drive a wedge between plaintiff and his treating doctors.

McMurry continued and told the jury that if Herb is to believed, the verdict must be substantial. In that regard, Herb had demonstrated a lifetime of loyalty – while he graduated at the top of his law school and could have gone anywhere, he chose to come back home and serve the community. His client didn't want or need sympathy – he only wants to be treated equally, fairly and honestly.

McMurry then addressed a lottery ticket reference made by Coleman – he noted that we usually buy lottery tickets with pocket change. In this case, Herb paid much more for his ticket. The lottery ticket was only injected by the insurer, McMurry thought, because they wanted the award to be pocket change. He finished regarding the brain injury that from the simplest to the most complex function is derived from our reasoning – McMurry asked the jury to consider a value on 20% of his brain capacity having been taken.

Tried on damages only, Sparks took everything he sought for suffering, medicals, future medicals and lost wages. Impairment was just $500,000, the verdict totaling $2,907,386. Presumably a judgment will be entered for Sparks for $1.2 million, representing the limits of USAA's coverage.

Sparks has since moved to file an amended complaint alleging bad faith by USAA. It is expected that part of the proof will turn on Sparks's lengthy history of paying premiums – however when he made a claim for a brain injury, USAA thought the underlying $25,000 was enough. [It did later offer $200,000 at mediation.]

Medical Negligence - A second-year family-practice resident diagnosed plaintiff with insomnia – in fact plaintiff was suffering a TIA warning stroke, a debilitating stroke following several weeks later

Warfield v. Cooney, 01-0449
Plaintiff: Samuel E. Davies, Barbourville
Defense: William J. Gallion and Elizabeth R. Seif, *Gallion & Associates*, Lexington
Verdict: $1,256,552 for plaintiff assessed 10% to the defendant
Circuit: **Whitley**, J. Winchester, 8-12-05

Paul Warfield, then age 46, reported to the Corbin Family Clinic on 11-6-00. He reported assorted symptoms including light-headedness and numbness in his leg. Cooney was evaluated by a family doctor, Paul Cooney. Cooney considered the patient and concluded Warfield had insomnia and a benign syncope.

Cooney couldn't just make that diagnosis by himself. At the time, while he was a licensed doctor, he had only been so licensed for several months. He was in fact a second-year resident, working in Corbin through a program administered by UK. All his work was monitored. On this day, he was supervised by Dr. Glen Uber. Uber, also a family practitioner, concurred with Cooney's diagnosis. Warfield was told to follow up in a week.

Warfield didn't come back until two weeks later. At this time, he was seen by a full-fledged family doctor, Stephen Toadvine. Toadvine was immediately suspicious of a cardiac event known as a transient ischemic attack (TIA). [A TIA is described as a warning mini-stroke, often proceeding a more serious stroke.]

Based on Warfield's presentation, Toadvine ordered a serious of tests, including a sonogram of the patient's carotid artery. However they were not scheduled until ten days later.

Three days later, Warfield suffered a debilitating stroke that started in his occluded carotid artery. He then spent three weeks in Cardinal Hill Rehabilitation Hospital. Warfield has since suffered from a serious brain injury that has resulted in dramatic cognitive defects. A psychologist, William Kraft, Louisville, discussed the effect of the injury.

Before this event, he was employed as a lab technician for a manufacturing home. He made $40,000 a year. Lacking the mental capacity to continue the work, he is unemployed. His wife, Connie, has also quit her job to stay home and take care of him.

Plaintiff's incurred medical bills were $82,844 and lost wages totaled $223,708. Impairment was capped at $774,178. Warfield's economic expert was William Baldwin, Lexington. The instructions capped suffering at $2,000,000 – his wife sought $400,000 for her consortium interest.

In this lawsuit, Warfield and his wife sued a variety of defendants. Uber was first blamed for his supervision of the resident. Also sued was Toadvine – while he suspected TIA, he did not see that tests were promptly administered. Both these defendants settled before trial.

Warfield also targeted the resident. His proof indicated the insomnia/syncope diagnosis was flat error, Warfield having classic symptoms of TIA. Plaintiff suggested Cooney missed the obvious signs because of his lackadaisical approach to the patient.

His expert on liability, Dr. Paula Maionchi, Family, Richmond, was critical of Cooney's care – she also thought it was no excuse that he was just a resident. As a licensed doctor, the standard of care required that he make the right diagnosis based on this presentation.

Cooney, the only defendant at trial, countered that his diagnosis was reasonable based on the presentation.

Moreover, it was made after consultation with Uber, who signed off on it. This went to the second prong of Cooney's defense.

Namely at the time he saw Warfield, he was just a second-year resident who had been licensed for just a few months. Because of that status, he couldn't admit patients nor could he make a diagnosis without consulting a supervising doctor. His experts included Dr. Larry Russell, Family, Hendersonville and Dr. Bruce Coull, Neurology, Tucson.

Among other things, Cooney also pointed to the comparative fault of the settling parties, as well as the clinic. Then to causation issues, Cooney made a two-pronged argument, (1) even if he erred, Toadvine's intervention two weeks later was a superseding event, and (2) the stroke would have been lessened on 11-23-00 if TPA therapy had been promptly administered.

The jury in this case considered the duties of the two parties, plus three non-parties – all were found at fault. It was assessed 10% each to the plaintiff and defendant. The family health clinic was 50% at fault, 20% and 10% respectively, being assigned to Uber and Toadvine.

Then to damages, Warfield took his medicals and lost wages as claimed. Impairment was $400,000. He took $500,000 more for suffering. Finally his wife's consortium interest was valued at $50,000. The verdict totaled $1,256,502. A judgment was entered against Cooney for ten percent of that, or $125,655.

Medical Negligence - A pediatrician was criticized for missing a mass in a girl's breast – while it wasn't cancerous, the mass led to Horner's Syndrome and a disfiguring injury

Skaggs v. Newstadt, 01-5504
Plaintiff: Linda Y. Atkins and Thomas H. Atkins, *Atkins & Atkins*, Louisville
Defense: David B. Gazak and Ashley J. Butler, *Darby & Gazak*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Montano, 8-25-05

Megan Skaggs was born on 4-29-91 at Norton Hospital. Her mother initially took Megan to a pediatric group that included Joseph Babey, Robert Senese and Paul Diebold – she was seen by members of that group into the fall of 1993.

At that time, Megan started with a different group, Joseph Clan, PSC. Besides seeing Clan, she was also seen by an pediatrician-employee of Clan, Dr. Mark Newstadt. To the first key event in this case, Newstadt treated Megan for a collarbone injury in November of 1993.

An x-ray was taken. It showed a mass in her chest. A repeat x-ray the next month showed the same thing. Newstadt made no note of the mass.

Then three years later, Megan first showed signs of Horner's Syndrome – it manifests as an asymmetry of the pupils. While Clan suspected Horner's Syndrome, he did not follow up and rule out the condition. It essentially went untreated for four more years.

During an appendectomy in 2000, the mass in her chest was investigated. At this time the benign mass was removed and a diagnosis of Horner's Syndrome was noted. Horner's is a condition where the ganglionic longitudinal cords are compressed by a mass – it results in a disfiguring injury, including asymmetrical pupils, eyelid droop and eyes that appear sunken in the eye socket. She also has a diminished lung function. The condition is permanent.

Thus while Megan's condition has been diagnosed, it is not treatable. Now age 14 and entering high school, the girl suffers from depression and frustration about her appearance. Megan's medicals were just $1,880, but she sought $4,000,000 for pain and suffering.

In this lawsuit, she targeted an army of doctors. The theme that ran the complaint against all of them was simple – had any of them intervened to remove the mass, the Horner's Syndrome could have been averted. After the nerve damage was sustained, it was irreversible. Megan first settled her claims with Senese, Babey, Diebold, Clan and the Clan, PSC. The only defendant still standing at trial was Newstadt.

Megan's criticism of him focused on the two x-rays in the fall of 1993. While the mass was revealed, Newstadt did nothing. Plaintiff's experts, Dr. Arnold Rosenberg, Surgery, Portsmouth, RI and Dr. Richard Karsh, Radiology, Colorado Springs, CO, identified the mass was present in the 1993 x-rays and Newstadt should have seen it. Standard of care proof also came from a pediatrician, Dr. Shane Bennoch, Ash Grove, MO.

A causal link was then made by a neurologist from Laurel, NJ, Dr. Joseph Campellone – Campellone explained 42 months passed after the missed diagnosis in 1993 until symptoms were first seen in 1996. Also discussing the mechanism of the injury was Dr. David Porta, Anatomy, Louisville.

Newstadt defended on both his read of the x-ray and causation. On the first issue, his analysis of the film was called compliant with the standard of care – his pediatric expert was Dr. Marc Weber, St. Louis, MO.

On causation, there was proof from Dr. Mark Wulkan, Pediatric Surgery, Atlanta, GA, about the development of the Horner's. Wulkan explained that even had there been a surgery in 1993, the result would have been the same – that was because the mass in her chest grew as Megan grew, the Horner's already existing in 1993.

The jury's verdict exonerated Newstadt by a 10-2 count, finding he had not violated the reasonably competent pediatrician standard. A defense judgment followed.

Auto Negligence/UIM - A right of way crash left plaintiff with a knee injury that was surgically repaired

Day v. Sparks et al, 04-0203
Plaintiff: D. Randall Jewell, *Jewell Law Office*, Barbourville
Defense: Martha L. Brown, *Farmer Kelley Brown Williams & Breeding*, London for Sparks
Rodney E. Buttermore, *Buttermore & Boggs*, Harlan for Grange Indemnity
Verdict: $54,107 for plaintiff less 10% comparative fault
Circuit: **Knox**, J. Messer, 5-16-05

On 9-30-03, Brandon Day, then age 22, traveled on Hwy 25E in Barbourville. It was a foggy night. As he passed Yeager's Shoe Store, a car pulled out from a side street into his path – it was driven by Roy Sparks. There would never be any dispute that Day had the right of way.

A significant impact followed, Day's sedan t-boning Sparks. In the crash, Day's knee struck the dashboard. He subsequently treated for persistent pain, ultimately having an arthroscopic repair performed by Dr. Ronald Belhasen, Orthopedics, Middlesboro.

Day, a garden manager at Lowe's, incurred medicals of $11,482 – his lost wages were $2,625. [These sums were directed by the court.] Day also sought pain and suffering in an uncapped category.

In this lawsuit, he first targeted Sparks. Sparks offered his $25,000 limits. At this juncture, plaintiff's UIM carrier, Grange Indemnity, *Coots*-advanced the limits. Thus at trial, the matter was aligned Day v. Sparks and Grange Indemnity. Sparks remained on the duty-to-defend, Grange Indemnity

being the real defendant. In the post *Earle v. Cobb* world, Grange Indemnity's role was revealed to the jury.

Sparks and Grange Indemnity defended on fault – while conceding his fault, the defense implicated plaintiff's own look-out. That is but for his improper look-out and failure to have his headlights illuminated, the crash could have been avoided. An IME, Dr. David Muffly, Orthopedics, Corbin, thought the knee injury was superficial. Moreover, while Muffly believed the surgery was necessary, it was minimally invasive and Day had a good recovery.

The verdict was mixed on fault. It assessed 90% to Sparks, the remainder to plaintiff. Then to damages, Day took pain and suffering of $40,000. With the directed specials, the award for Day totaled $54,107. A judgment followed less (1) $10,000 of PIP, (2) the 10% comparative fault and (3) the underlying $25,000 limits – that left Day with a net verdict of $14,696 against Grange.

Auto Negligence/UIM - Despite a significant interstate crash and a claimed closed head injury, the plaintiff was awarded no damages

Franklin v. Lester et al, 03-7219
Plaintiff: Allen K. Gailor, *Gailor Law Office*, Louisville
Defense: Marc L. Breit, *Breit Law Office*, Louisville for Lester
Timothy G. Hatfield, *Wyatt Tarrant & Combs*, Louisville for ANPAC
Verdict: Defense verdict on damages
Circuit: **Jefferson**, J. Montano, 9-1-05

It was 12-1-01 and Betty Franklin, age 51 and a grant writer for the City of Louisville, traveled on the Watterson near the Fairgrounds. A few lanes over, Kelvata Lester lost control of her car as she swerved to avoid a pillow that was in the road. She spun around and t-boned Franklin. It was a significant crash. Fault was no issue.

In the impact, Franklin struck her head on the windshield. While initially complaining of only soft-tissue symptoms, she has since complained of a closed head injury. Beyond affecting memory, visualization and concentration, Franklin has also suffered from the loss of smell and taste. Her medical bills were $18,042 – pain and suffering was capped at $500,000. At trial, Franklin had appropriate neurological and ENT proof of her injury. [While her husband, a bigwig with the administration of Mayor Abramson, testified at trial, no consortium claim was presented.]

In this lawsuit, Franklin first moved against Lester – Lester rolled over and tendered her $25,000 policy limits. Franklin's UIM carrier, American National Property and Casualty (ANPAC), substituted the limits. Franklin remained at trial pursuant to the duty to defend. The jury would know that ANPAC was the UIM carrier, but not the amounts of coverage.

Lester and ANPAC defended the case and minimized the claimed injury. Lester, particularly, suggested there was no smell and taste injury – she noted that while plaintiff said she couldn't smell anything, she later testified that coffee smelled like wood. From Lester's perspective it seemed that sometimes she could smell and sometimes she couldn't. While Lester and ANPAC made these arguments, there was no defense IME.

The case was tried on damages only, Lester's care being no issue. Montano did include a prefatory instruction that the defendant had "accepted responsibility" for causing the wreck. [Lester's acceptance of responsibility went no further than that.]

In any event, the jury deliberated damages and elected to award Franklin nothing for both categories. A defense judgment ended the litigation. [Because of this verdict, not only will Franklin not recover anything, neither will ANPAC be able to go back against Farm Bureau for the $25,000 it had *Coots*-advanced.]

Thereafter, Franklin moved for a new trial. She called the award inadequate, the defense having conceded there was an injury. Before the motion could be heard, it was withdrawn, the parties fully compromising their dispute.

Products Liability (Asbestos) - An elderly pipefitter linked cancer to asbestos exposure forty years earlier

Dexter v. Garlock et al, 02-0310
Plaintiff: Joseph D. Satterley and John R. Shelton, *Sales Tillman Wallbaum Catlett & Satterley*, Louisville
Defense: John K. Gordinier and Berlin Tsai, *Pedley Zielke Gordinier & Pence*, Louisville for Garlock
David C. Marshall and Eric A. Ludwig, *Hawkins & Parnell*, Atlanta, GA for CertainTeed
Verdict: $5,073,126 for plaintiff assessed 35% to Garlock and 30% to CertainTeed
Circuit: **Marshall**, J. Rosenblum, 5-25-05

James Dexter, age 79, died of lung cancer related to asbestosis after suffering from the disease for twenty-one months. [The lung cancer metastasized to his groin and Dexter's death process was described as horrific and painful.] While Dexter retired in 1986, he worked for forty years a pipefitter. In this lawsuit, his estate targeted a variety of manufacturers who either made asbestos or had it in their products.

It was the estate's proof that Dexter was regularly exposed to asbestos from Garlock's gaskets and CertainTeed's pipe. [The exposures occurred in the 1960s.] In this lawsuit that alleged strict liability and negligence, the estate blamed the two manufacturers for manufacturing asbestos products, (even in the 1960s) when the dangers were known.

The Dexter estate had also targeted several other manufacturers – it settled on the day of trial with GE, Westinghouse and National Service Industries. That left only CertainTeed and Garlock to face a jury. If the estate prevailed, it sought medicals of $66,376, plus the funeral bill of $6,750. Beyond Dexter's pain and suffering and his wife's consortium interest, the jury could also award punitive damages.

CertainTeed and Garlock defended the case and first argued there was no competent evidence they knew their products were dangerous. Garlock, particularly, argued, it only manufactured gaskets and its asbestos, if any, was contained in encapsulated fibers.

The defendants also sought to apportion fault to 26 other manufacturers (all non-parties at trial) who also used asbestos in products that would have been encountered by Dexter. Importantly, the defense of the case also blamed Dexter's lifetime of smoking – he quit smoking in 1982 after having lit up for fifty years.

This complex case was tried for two weeks in Benton. The verdict was mixed on liability. It found fault with both defendants, Garlock and CertainTeed,

assessing that fault 35% and 30%, respectively. Plaintiff was also assessed 30% of the fault. The 26 other non-parties were exonerated. The jury did reject the imposition of punitives.

Then to damages, the estate took medicals of $66,736 plus the funeral bills. Pain and suffering was $5,000,000, the raw verdict totaling $5,073,126. Wife's consortium interest was rejected. The verdict was assessed in the judgment $1,775,594 to Garlock and $1,521,938 to CertainTeed.

Pending JNOV motions by the defendants have argued among other things, (1) the verdict was irrational, finding the defendants at fault, but exonerating the non-parties who unquestionably were responsible for asbestos exposures and (2) the suffering award was excessive, $1.625 million being the largest suffering award ever approved in a reported Kentucky case.

Police Officer Negligence - **The plaintiff was struck by a police officer who was racing to the scene of a robbery call – the case featured a battle between psychiatry heavyweights, Granacher and Shraberg**

Whitney v. Somerset Police, 03-1303
Plaintiff: John P. Chappell, London
Defense: Joe L. Travis, *Travis Pruitt Powers & Yeast*, Somerset and William R. Tooms, *Taylor Keller Dunaway & Tooms*, London
Verdict: Defense verdict on damages
Circuit: **Pulaski**, J. Burdette, 8-16-05

A crime wave struck Somerset on 7-4-00. A call came out over police radio that there was a robbery attempt in the parking lot at Kroger. Jeffrey Phillipi, a Somerset cop, heard the call and raced to the scene. With his lights flashing and his siren screaming, he trailed another officer.

They went with great haste. At the intersection of Oak Hill Road and U.S. 27, the first officer flew through the intersection. Mark Whitney, age 46 and an employee at a manufacturing plant, was sitting on Oak Hill. When his light turned green, he started into the intersection.

He was hit hard by Phillipi's speeding cruiser. It was a significant impact, Whitney's car being knocked on its side. Whitney, for his part, didn't remember anything about the crash – he later woke up in an ambulance. He has since treated for a brain injury.

His IME expert, Dr. Robert Granacher, Neuropsychiatry, Lexington, identified a mild injury, assessing a 10% impairment. Whitney's medicals were $8,085, plus lost wages of $8,725. Future lost wages and suffering were not capped.

In this lawsuit, Whitney targeted the City of Somerset and Phillipi – the theory alleged negligence by Phillipi for racing through the intersection. While Whitney didn't remember what happened, he theorized that Phillipi's lights and sirens were not on. Had they been, he would have noticed and there would have been no crash.

Whitney's response on liability was simple – he did have his lights and sirens on and as he went through the intersection, Whitney pulled into his path. Damages were also diminished with an IME, Dr. David Shraberg, Neuropsychiatry, Lexington. The expert thought Whitney had sustained just a mild concussion. Thereafter Whitney had a rapid and complete recovery, suffering no permanent cognitive disorder.

The jury's verdict was mixed on fault. It assessed 20% to the officer, the remainder to Whitney. The distinction made little difference, the jury continuing to value each element of Whitney's damages at zero. A defense judgment followed.

Bad Faith - **While an insurer set a reserve of $65,000 for a tort claim involving a broken ankle, it only offered $30,000 to settle the case, plaintiff arguing this was low-balling – the insurer explained there was a misunderstanding, the $30,000 offer being exclusive of the medical and lost wages specials**

Hodge v. State Farm, 01-8216
Plaintiff: Steven M. Frederick and Paul J. Hershberg, *Seiller & Handmaker*, Louisville
Defense: Richard W. Edwards, *Boehl Stopher & Graves*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Ryan, 8-10-05

There was a car crash on 9-11-00. Stephen May hit a car that was propelled into a vehicle driven by Susan Hodge. It was a moderate collision. Hodge sustained a comminuted ankle fracture in it.

She incurred medicals of $18,728 and lost wages of $2,275. Retaining an attorney, Carl Frederick, she pursued a tort claim against May. May was a State Farm insured.

Hodge made a demand to settle the case for $400,000. A State Farm adjustor, Cody Tipton, evaluated the claim. In an internal document, he valued the claim at $65,000. Yet his offer to settle the claim was for only $30,000.

Hodge responded to the offer with a lawsuit, suing both May regarding the wreck and State Farm for bad faith. The underlying case ultimately settled for $72,000. [May had limits of $100,000.] The bad faith case then geared up.

Hodge's theory was simple. State Farm knew the case was worth $65,000, per its own records, yet it chose to offer only $30,000. She thought that represented one thing – low-balling her in a flagrant violation of the bad faith statute. If she prevailed, she sought $100,000 in compensatory damages associated with the delay. The jury could award punitives of $200,000.

State Farm countered that the whole thing was a big misunderstanding. Its adjustor made an offer of $30,000, but the offer was exclusive of the medical and lost wage specials. As soon as it was served with the bad faith lawsuit, a letter was fired off to explain the mix-up. Michael McDonald, Retired Judge, Louisville, was State Farm's expert on claims handling.

Plaintiff countered there was no misunderstanding – State Farm's settlement offer was global and it would have been highly unusual to handle the matter in any other way. Tipton even conceded that in all his experience as an adjustor, this was the first case where he had ever offered to settle general damages while reserving the right to negotiate the specials.

Thus the alignment of the facts left two choices, either it was misunderstanding or State Farm had low-balled the plaintiff. The jury was instructed by Judge Ryan to find for Hodge if: (1) State Farm didn't have a reasonable basis for its $30,000 offer and (2) State Farm knew or acted with reckless disregard as to whether the offer was unreasonable. Plaintiff's claim was rejected and she took no damages. A defense judgment was entered for the insurer.

Medical Negligence - **Plaintiff, just twenty-four years old, died of a Demerol overdose following an elective obstetrical surgery**

Beisker v. Harpel, 04-0003
Plaintiff: Eric C. Deters, Independence
Defense: Clayton L. Robinson, *Jenkins Pisacano Robinson & Bailey*, Lexington
Verdict: Defense verdict on liability
Circuit: **Harrison**, J. McGinnis,

8-11-05

On 9-19-03, Jennifer Beisker, then age 23, underwent an elective obstetrical surgery. The laparoscopic procedure was performed at Harrison Memorial Hospital by her Ob-Gyn, Dr. Gerald Harpel. The surgery was uneventful.

Following it, Harpel gave orders for Beisker's pain management. He directed that she be given 50-100 mg of Demerol as needed either an IV or injection. In the middle of the night, a nurse gave Beisker an intravenous injection of Demerol at a 100 mg dose.

An hour later a nurse looked in on Beisker. She was not responsive. Despite attempts to revive her, Beisker died. A pathologist, Dr. Greg Davis, Lexington, performed an autopsy that day. He blamed Beisker's death on a meperidine overdose. [Meperidine is Demerol.]

Beisker's husband, Levi, prosecuted a lawsuit against Harpel and the hospital. The theory was simple. The Demerol dosage was excessive and it led to her death. Plaintiff's expert, Dr. Kendall Hansen, Pain Management, Florence, thought 100 mg was far too high, especially for an intravenous dose – he thought it would have been reasonable to start at 12.5 mg. Another expert for the estate was Dr. David Burkons, Ob-Gyn, Beachwood, OH.

Tying the estate's proof together, it relied on causation proof from the pathologist Davis as noted above – Beisker died of a Demerol overdose. If the estate prevailed, the only claimed damage category was destruction. The instructions capped that sum at $1,278,524. Settling with the hospital, the case advanced to trial only against Harpel. [However at trial, the instructions did not permit apportionment to the hospital.]

Harpel's defense was two-pronged: (1) the Demerol dosage was not excessive, and (2) Beisker didn't die of an overdose. To the first issue, Harpel looked to standard of care proof from Dr. William McKemie, Internist, Cynthiana and Dr. Hugh Randall, Ob-Gyn, Atlanta, GA.

On the causation issue, Harpel thought there was no overdose. His proof indicated this was especially unlikely as Beisker had an increased tolerance to pain drugs – she had a history of using prescribed narcotics. [Plaintiff countered that her use of Oxycontin was minimal.]

Why then did she die? Harpel had an answer. His proof from a cardiologist, Dr. Donald Wakefield, Lexington, blamed her death on an underlying cardiac condition.

This case took an exceptionally strange turn during Harpel's discovery deposition. Harpel excused himself from the deposition to take a phone call, apparently from his son. Deters thought this was just a ruse perpetrated by the doctor and his lawyer to avoid a tough question and confer as to an answer.

Outside the deposition room, Deters spied Harpel and Robinson in conversation. He loudly protested. Harpel started to walk away. There were disputes about what happened next. Deters would recall he touched Harpel in the mildest possible fashion. Harpel and Robinson thought it was something more sinister, Deters aggressively grabbing the doctor.

The near lawyer-doctor riot threatened to erupt. To ease the tensions, someone called 911. This brouhaha only ended when a Lexington police officer arrived. No charges were filed. However a race was on to the courthouse to file a motion for sanctions. Deters struck first and the doctor opposed the motion. It was denied and the litigation pressed on to jury trial in August of 2005.

As this case was deliberated, the jury asked a question of the court: We want to see McKemie's testanoney [sic] of what the standard of quality for Demerol is for the hospital. The court sent the jury a transcript of McKemie's testimony.

Back with a verdict, it was for Harpel and the estate took nothing. A defense judgment followed this three-day trial. The estate has since appealed.

Truck Stop Negligence - **While changing a tire at a truck stop, a novice employee suffered a crush injury to his lower leg when another tractor-trailer backed over him**

Wolsing v. Star Transportation et al, 2:03-1303
Plaintiff: David M. Blank, Covington
Defense: John J. Garvey, III, *Freund Freeze & Arnold*, Cincinnati, OH
Verdict: Mixed verdict on fault
Federal: **Covington**, J. Bertelsman, 9-1-05

On 9-2-03, Thomas Wolsing was in training at the Travel America Stop in Walton. One of his duties was to become proficient in changing a tire on a tractor-trailer. At the key moment in this case, that very skill was being challenged in a timed test.

Wolsing worked as fast as he could. At the same time in a nearby bay, a trucker, Shannon Williams, was driving a tractor-trailer for Star Transportation. Having just had work done on his truck, Williams was backing out. He looked in his mirrors and it appeared clear. In fact, Wolsing had just entered the truck's path to get a wrench.

Just as Williams began to back out, his tandem wheels ran over Wolsing's lower leg – he suffered a significant crush injury to his ankle and foot. This litigation proceeded on fault issues and damages were not fully developed.

Wolsing alleged negligence by Williams in failing to keep a proper look-out. It was his suggestion that Williams's inattention was related to his being in a hurry and driver fatigue.

Williams and Star Transportation countered and blamed Wolsing for going behind the truck. That Wolsing was inattentive, it noted he was still in training and as importantly, he was in the middle of a timed test. The defense also pointed to the fault of a non-party, the truck stop that employed Wolsing. But for Travel America's negligent training, Wolsing never would have been in the path of the truck.

This case was tried on liability only. The jury found fault with all involved – it assessed 48% to Williams and Star Transportation, 12% to plaintiff and the remaining 40% to plaintiff's non-party employer. The case has since been set for settlement negotiations.

Conversion - When a romance went sour and a live-in boyfriend got kicked out, he promptly emptied the joint account he shared with his girlfriend – his timing was impeccable and he removed the entire $108,500 that had just been deposited by his girlfriend's ex-husband as a part of her earlier divorce settlement agreement
Falconite v. MacPhail, 03-0037
Plaintiff: Brad Goheen, *Bryant & Kautz*, Paducah
Defense: Daniel C. Thomas, Wickliffe
Verdict: $139,500 for plaintiff; $40,000 for defendant on counterclaim
Circuit: **McCracken**, J. Hines, 6-30-05

In 1995 Patricia Falconite was divorced from her husband. As a part of the settlement agreement, husband was to make ten annual payments of $108,500 to his now ex-wife. Starting in the summer of 1997, Falconite found love again – it was in the person of Daniel MacPhail, a self-employed artist who specializes in western motifs. It bloomed and MacPhail moved in with Falconite at her residence in Kevil. They also shared a bank account – this would later become very important.

That romance couldn't last. By the summer of 2002, Falconite was finished with MacPhail. She kicked him out of the house. On the same day the relationship ended, MacPhail did a little banking.

He presented to the Paducah Bank where he and Falconite shared their account. MacPhail took $108,500 for the account via a wire transfer. [It had just been put there by her ex-husband.]

Falconite believed that MacPhail had converted money from her account – she noted the amount that he wired out was exactly equal to the amount that had been deposited by her ex-husband. She sued him in state court and wanted the money back with interest. Falconite also sought punitive damages.

MacPhail defended the case and filed his own counterclaim. Having made improvements to a parcel of property owned by Falconite, he alleged she breached an oral promise to convey the property to him.

The court simplified the matter for the jury and directed a verdict as to the $108,500 MacPhail transferred. That left the jury to consider interest on the money and punitives. Falconite took $15,000 in interest, plus $16,000 more in punitives. Her verdict totaled $139,500. MacPhail also prevailed on his counterclaim regarding the oral promise to convey real estate – he was awarded $40,000. A judgment less set-off was entered for Falconite and MacPhail paid it.

Batting Cage Negligence - A little league baseball coach lost his eye when he was struck in the head by a baseball pitched from a machine
Gant v. Batt-N-Putt, 04-4282
Plaintiff: Ronald P. Hillerich, Louisville
Defense: Barry M. Miller and Heather M. McCollum, *Fowler Measle & Bell*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Montano, 9-22-05

It was 4-21-04 and DuWayne Gant, then age 45, was a little league baseball coach. He took his team for batting practice to the Batt-N-Putt batting cage. At this juncture, he was not a novice – he had played and coached his whole life. He also served as a special education teacher at Central High School.

While Gant was the coach, he still wanted to take a few swings. He entered the cage that had the fastest speed – 67 mph. Gant noticed the machine was pitching the ball too low. He asked an employee to adjust it.

She did just that – Gant stood in front of the batting cage in the batter's box. As she adjusted, a pitch came in high and tight. It struck Gant in the face. The impact caused his cornea to be detached. Despite medical intervention, Gant ultimately lost his eye. He now has a prosthetic. His medical bills were $15,290 and he sought $1.5 million for pain and suffering.

In this lawsuit, he alleged negligence by the Batt-N-Putt in several regards. First he was critical of the operator for adjusting the pitch height while Gant was standing in the batter's box. The theory was also nuanced regarding the wet conditions.

Just before Gant entered the batting cage, it had rained. Plaintiff's proof indicated that the dimpled balls used the Batt-N-Putt have a tendency to be less accurate when wet – despite this, the Batt-N-Putt didn't warn Gant. Plaintiff had a world class expert on batting cage safety and baseball trajectory. He was LeRoy Always, Engineer, Bensalem, PA – Always has written extensively on the pitched baseball, so much so that the Hall of Fame in Cooperstown extended him a lifetime pass.

The Batt-N-Putt denied negligence and suggested that Gant may have been hit by the ball after it first ricocheted off his bat. [Gant for his part wasn't sure if it hit his bat or not – he was sure he didn't swing at the ball.] The batting cage also defended that it was reasonable to adjust the pitch's height while the batter was standing in – if the batter wasn't in the box, how would the operator know the proper height? Then to the open and obvious nature of the danger, the Batt-N-Putt pointed to a prominent sign that warned users that just this thing could happen.

The liability instruction regarding the Batt-N-Putt's duties was framed as follows: the jury was asked if the Batt-N-Putt violated a duty of ordinary care, including to warn of dangers that are not open and obvious. The Batt-N-Putt prevailed on liability and Gant took nothing. When reviewed by the KTCR, no judgment had been entered.

Auto Negligence - An underage driver who had been drinking crashed into the plaintiff – a jury in Scottsville assessed punitive damages of $10,000
Shields v. Brown, 04-0312
Plaintiff: Brent Travelsted, *Hughes & Coleman*, Bowling Green
Defense: Thomas N. Kerrick and Eric A. Hamilton, *Kerrick Stivers & Coyle*, Bowling Green
Verdict: $32,599 for plaintiff
Circuit: **Allen**, J. Harris, 7-28-05

On 8-19-03, Matthew Brown, then age 20, was drinking beer. Traveling in Scottsville on Main Street, he crashed into Ricky Shields, then age 35. While Brown wasn't drunk, his intoxication level was .076. He later pled guilty to a DUI. [If he'd been 21, it would not have been a crime.]

In any event, there was an injury and Shields was hurt. He has since treated for a knee injury – an orthopedist in Bowling Green, Dr. Philip Karpos, performed an arthroscopic repair. Shields's medicals were $17,359 and he sought lost wages of $5,200. [At the time, Shields was an out of work ex-convict.] He also sought $50,000 each for suffering and punitive damages. Brown defended the case as well as he could.

Tried on damages only, Shields prevailed and took his medicals, plus $240 in lost wages. Pain and suffering was $5,000, the jury assessing another $10,000 in punitives. The verdict totaled $32,599. A consistent judgment followed less PIP and Brown has paid it.

Premises Liability - While visiting

a friend at her house, plaintiff slipped and fell on a steep and icy driveway – she suffered a broken arm and wrist in the fall

Garcia v. Seaton et al, 03-0006
Plaintiff: Mat A. Slechter, *Sampson Smith & Slechter*, Louisville
Defense: D. Craig Dance, *Greenebaum Doll & McDonald*, Lexington
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Ishmael, 9-6-05

It was 1-7-02 and Margaret Garcia, then age 63 and a telephone operator, went to visit a friend. The friend, Jamie Winsett, had a home gym in her residence. Garcia arrived and parked outside. She then began to navigate the Winsett driveway. [Winsett shares the home with her husband, Michael Seaton.]

The ascent of the driveway was tricky, in part because of (1) its steepness and (2) a dusting of snow. Garcia never made it. She slipped and fell, landing hard on her wrist. It was badly broken, the injury being surgically set. Garcia has continued to complain of diminished function in her wrist, hand and fingers. Her medicals totaled $13,443 and she claimed $100,000 for pain and suffering.

In this lawsuit, Garcia sued Winsett and Seaton, citing the condition of the driveway. A somewhat nuanced theory, they alleged the defendants knew the driveway had a particular propensity to be slick. That the defendants knew this and did nothing, Garcia cited, (1) Winsett herself would walk through the grass when it snowed instead of using the driveway, and then despite this superior knowledge, (2) defendants failed to warn her.

Winsett and Seaton thought the snow and ice were an obvious condition – plaintiff was well-aware the driveway was slick. Moreover, she was acquainted with the slope and nature of the driveway, having previously housesat for Winsett's dogs when Winsett was out of town.

The court's liability instruction may have been bare-boned, but it required Garcia to hurdle seven skeletons, (1) that she was present with permission, (2) the premises were not in a reasonably safe condition, (3) defendants knew or should have known of the condition, (4) there was time to prevent the hazard, (5) defendants should anticipate Garcia will not appreciate the hazard unless warned, (6) she was not warned, and (7) the absence of a warning was a substantial factor in the fall. The verdict was for the defendants and Garcia took nothing. A defense judgment followed.

Ed. Note - As we discussed before, this liability instruction virtually guarantees a defense verdict. What jury could ever be satisfied that all seven prongs were proven?

Premises Liability - A pedestrian amateur photographer out taking pictures near the reservoir in Louisville, tripped and fell on a broken sewer grate

Starr v. MSD, 03-0644
Plaintiff: Ronald E. Johnson, Jr., *White Johnson & Associates*, Louisville
Defense: Lawrence J. Zielke, II and Kenneth J. Henry, *Pedley Zielke Gordinier & Pence*, Louisville
Verdict: $45,087 for plaintiff less 10% comparative fault
Circuit: **Jefferson**, J. Montano, 9-9-05

Cynthia Starr, then age 51 and a retired firefighter, awoke earlier on the morning of 10-26-02. She drove to her parents' home near Brownsboro Road and Zorn Avenue. Just before dawn, she walked to the Crescent Hill Reservoir. An amateur photographer, Starr intended to take several pictures of a historic stone building at the reservoir.

As Starr crossed the street near a TARC bus stop (she wasn't in the crosswalk), she stepped into a broken sewer grate. [The grate was maintained by the Metropolitan Sewer District (MSD).] A portion of the steel grate was missing. Falling to the ground, Starr began to cry. She was able to hobble her way to a nearby bench. A passerby heard her cries and called 911.

Starr has since treated for an MCL tear to her knee. It was surgically repaired by Dr. Todd Hockenbury, Orthopedics, Louisville. Her medical bills were $14,100 and she sought lost wages of $880. Starr also wanted property damage of $96. Pain and suffering was capped at $30,000.

Starr sued MSD regarding the condition of the broken gate. It was especially hazardous, Starr noted, because at the time she stepped into it, there was very little pre-dawn light.

MSD defended the case on several grounds. Its multiple arguments included that (1) it had no notice of the grate's condition, (2) the condition was open and obvious, and (3) Starr wouldn't have fallen if she had crossed the street at a crosswalk. MSD also defended with an IME, Dr. Gregory Gleis, Orthopedics – he suggested the knee injury was degenerative in nature.

Judge Montano's instructions were two-part, asking if the grate was in a reasonably safe condition and if it had existed long enough in that condition that Starr knew or should have known of it. The jury's verdict was mixed on liability – it found both parties at fault, apportioning 90% to the MSD, the remainder to Starr. Then to damages, Starr took every penny she sought, totaling $45,087. After a reduction for comparative fault, a judgment was entered for her in the sum of $40,578.

MSD has moved for post-trial relief, arguing among other things (1) that there was no notice how long the grate was broken, something that is especially difficult as there are 57,000 grates in Louisville, and (2) it was error to instruct on an invitee standard when as plaintiff was not in the crosswalk, she was actually a licensee. MSD has also moved to reduce the interest rate on the judgment to a more reasonable 6%. When reviewed by the KTCR, all motions were pending.

Race Discrimination - A black food services worker for a subcontractor at a university alleged she was fired because of her race – the company countered she was let go because she was stealing food

Smith v. Aramak, 03-0582
Plaintiff: Edward E. Dove, Lexington and Michael Dearing, *Wilson Sowards Polites & McQueen*, Lexington
Defense: Douglas L. Hoots, *Landrum & Shouse*, Lexington
Verdict: Defense verdict on liability
Circuit: **Knox**, J. Lay, 6-21-05

Vernice Smith, then age 49, started working in 1999 for a successor to Aramak – the company provided food services at Union College in Barbourville. Important to this case, Smith is black.

She began to believe the Aramak workplace was tinged with race discrimination. It was not lost to Smith that she was the only black face at Aramak – even more insidious, she believed white employees were paid more.

This led her to file an EEOC and Human Rights Commission complaint in 2001. While Aramak denied any wrongdoing, a settlement was reached. Aramak paid her $365 to resolve the claim.

Following this resolution, Smith

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Notable Verdicts in The Premiere Issue

The Premiere October issue contains more than 100 recent jury verdict reports with forty-five states represented.

Arizona - *False Arrest* - The head of the Arizona ACLU was arrested while protesting during a presidential visit - Zero
Arkansas - *Airport Negligence* - A commercial flight slid off the runway and into a catwalk - $2,157,265
District of Columbia - *Disability Discrimination* - A lawyer in a wheelchair at the Commerce Department alleged her new boss failed to accommodate her disability - $3,000,000
Florida - *Products Liability* - A military plane crashed and eighteen National Guardsmen were killed - Defense verdict
Georgia - *Bad Faith* - Adjustment of an injury claim by Allstate - Zero
Hawaii - *First Amendment* - A city worker suffered reprisal when he raised safety complaints - $1,500,000
Illinois - *Products Liability* - An electrical worker was injured by an exposure to PCBs - Defense verdict
Indiana - *Products Liability* - Catastrophic injury sustained when a Kia rolled over - Defense verdict
Kansas - *Gender Discrimination* - A teenage boy was taunted at school for purportedly being gay - $250,000
Kentucky - *Products Liability* - A woman was burned when her Sony TV caught fire - $2,102,221
New York - *Entertainment Management* - The lead singer of Nine Inch Nails alleged his manager breached a fiduciary duty - $2,927,213
New York - *Products Liability* - Plaintiff blamed a shooting accident on a safety-switch malfunction - Defense verdict
Oklahoma -*Race Discrimination* - A white employee at a black college alleged she was passed over unfairly - $298,335
Oregon - *Wrongful Death* - A Portland police officer shot an unarmed suspect as she drove away - Zero
Tennessee -*Negligence (Swimming Pool)* - A catastrophic injury was sustained when plaintiff dove into a shallow apartment pool - $2,500,000
Texas - *Race Discrimination* - A white courier at Fed Ex alleged reverse discrimination - $100,000
Texas - *Products Liability* - A toddler was run over by a Ford Expedition and his estate blamed the failure of the vehicle to have a back-up alarm as standard equipment - Zero
Texas - *Sexual Harassment* - Same sex harassment alleged at a porno shop in San Antonio - Zero

NEGLIGENT BUS SECURITY

Tennessee Eastern District - Winchester

Plaintiff was left a paraplegic when a Greyhound bus overturned after a psychotic passenger attacked the driver – her liability theory implicated Greyhound's lack of security to prevent this attack.

Caption: *Surles v. Greyhound Lines*, 4:01-107

Plaintiff: Andrew L. Berke and Marvin B. Berke, *Berke & Berke*, Chattanooga, TN, Stanley Jacobs and Jodi J. Aamodt, *Jacobs Manuel & Kain*, New Orleans, LA and Phillip F. Cossich and Walter J. LeBlanc, Jr., *Cossich Sumich & Parsiolo*, Belle Chasse, LA

Defense: Frederick N. Sager, Jr., Mark R. Johnson, Richard H. Hill, II and Thomas Allen, *Weinberg Wheeler Hudgens Gunn & Dial*, Atlanta, GA

Verdict: $8,000,000 for plaintiff

See the October 2005 issue of the FedJVR for the Full Report

Verdict of the Month

alleged a pattern of retaliation followed. She was given more duties and subjected to more intensive discipline. Things all came to a head on the evening of 11-11-02.

From the perspective of Aramak, the facts were quite simple. A security officer saw rounds of meat being loaded into Smith's vehicle. When confronted, the meat was found and Smith confessed. The following Monday she was fired. Aramak thought that was the end of the matter.

Smith disagreed. To the meat incident, she denied any theft. Instead she had let a friend use her car – that friend apparently got some meat out of the dumpster and loaded it into her car. Smith would explain in deposition that "black folks" don't eat beef – racially incapable of committing such a theft, she noted that blacks prefer ribs and chicken Thus there was no theft and the purported reason for the firing was just a pretext to mask race discrimination.

While there were not overt racial remarks, Smith thought the proof could be inferred. She explained that she was the only "black folk" and was then accused of stealing – Smith quipped rhetorically, "You don't see the prejudice in that?"

Her legal team put the law to her theory and she advanced three counts to the jury, (1) she was fired because of her race, (2) Aramak retaliated against her because of the Human Rights complaint and (3) it retaliated because of a wage and hour complaint. If prevailing, she sought damages for lost wages and embarrassment.

Aramak defended the case as noted above. There was no race discrimination in its workplace or its hiring decisions. Smith was fired for one simple reason – she was stealing food.

The verdict was for Aramak on both the discrimination and retaliation counts. Having so found, Smith took nothing. A defense judgment followed. There was no appeal.

Auto Negligence - While stopped at a red light, plaintiff was rear-ended – the defendant successfully explained that he faced the sudden emergency of an icy roadway

Jones v. Pierce, 02-1412
Plaintiff: Mat A. Slechter, *Sampson Smith & Slechter*, Louisville
Defense: Renee G. Hoskins, *Smith & Hoskins*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Ryan, 8-12-05

On 12-18-00, Felix Jones, then age 43 and a self-employed janitor, came to a red light on the Outer Loop. He stopped. Behind on the road, Christopher Pierce could not stop. He hit a patch of ice and slid into Jones's vehicle. A minor collision resulted.

Jones has since treated for a soft-tissue shoulder injury. His medicals were $6,145. Jennifer, his wife and a passenger in the car, was also hurt in the crash. She has complained of radiating neck pain that was linked to a disc bulge. Her medicals were $9,659. While husband sought $40,000 for suffering, his wife claimed $100,000.

Pierce defended the dual claim and cited that while he had slid into the Jones vehicle, he had a good excuse – he explained the icy roadway represented a sudden emergency. He also diminished the notion this wreck was serious enough to cause an injury – his expert, David Porta, Biomechanics, Louisville, thought the force of the collision was inadequate to injure the plaintiffs.

The Joneses replied with their own expert, Christopher Brown of Versailles, IN. While a dentist by training, Brown also specializes in biomechanics. It was his opinion that the vehicle damage or lack thereof is not the only factor in determining if the occupants are injured.

Pierce prevailed on liability, the court's instruction having incorporated a sudden emergency theory. A defense judgment followed. Jones has since appealed, indicating the appellate issue will turn on an interpretation of *Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004), the 2004 Supreme Court opinion that approved a sudden emergency instruction in an icy crash.

Wrongful Termination - A deputy jailer alleged he was fired for supporting the jailer's political opponent

Martin v. Daviess County Jailer, 04-0375
Plaintiff: Michael T. Lee, *Neal Mitchell & Lee*, Owensboro
Defense: Marvin P. Nunley, *McCarroll Nunley & Hartz*, Owensboro
Verdict: Defense verdict on liability
Circuit: **Daviess**, J. Griffin, 9-9-05

Michael Martin started working in 1994 as a deputy jailer in Daviess County. He served under the Republican jailer, David Osborne. By early 2003, Martin was a Captain at the jail. On 3-14-03, he was fired.

The jail cited that he had engaged in sexual conduct with female inmates. Several inmates had come forward to claim that he had either propositioned them or engaged in sexual conduct. While Martin denied it all, he was let go.

This lawsuit followed, Martin alleging two tort counts. First, he was terminated without cause in violation of KRS 71.060 which protects deputy jailers. Martin's second count asserted the firing was in retaliation for his having supported Osborne's Democratic opponent in the 2002 election. If prevailing, Martin sought lost wages, as well as embarrassment and punitive damages.

The jailer defended the case and explained Martin was let go for just one reason – the substantiated allegations of sexual misconduct. That the election had nothing to do with it, Osborne cited several months had passed between the election and the firing.

Martin countered with proof that the sexual allegations were bogus, the jailer using the fake allegations from embittered inmates as a pretext to fire. In this regard, Martin pointed to inmate proof that the complaining witnesses were not actually involved in sexual conduct. Instead they concocted the falsehoods after they were denied a prized trustee position at the jail.

The jury was for the jailer on both counts, (1) the statutory claim that he was terminated without cause and (2) that the firing was retaliation for his political support of the jailer's opponent. A defense judgment followed.

Defamation - An Iranian immigrant alleged she was defamed by her sister – the defamation occurred when the sister falsely listed the plaintiff's address as her own on an immigration application, that action leading to government surveillance of the plaintiff

Ghasem v. Moattar, 04-5893
Plaintiff: Scott P. Zoppoth, *Scott Zoppoth, PLLC*, Louisville
Defense: Harley N. Blankenship, Louisville
Verdict: Directed verdict
Circuit: **Jefferson**, J. Conliffe, 7-27-05

Reza Ghasem and her husband, Azita, immigrated to the U.S. from Iran, settling in Louisville. They are both U.S. citizens, now operating a Subway restaurant in Anchorage. In February of 2003, Reza's older sister, Yassamin Moattar, also came to America. For several weeks, she stayed at her sister's house on Club Vista Place.

Thereafter Yassamin submitted an INS application for a green card. She listed her permanent address as living with her sister. This was false, as she had only stayed there a short time.

Thereafter, Reza believed this false statement exposed her to distrust and suspicion within the community, especially by government officials. Essentially the Ghasems had been implicated by the false statement as contributing to immigration fraud.

The Ghasems sued Yassamin and alleged they were defamed by the false application that listed their address. In discussing her sister, Reza made several strange remarks. She testified that Yassamin was tricky – incredibly, it was also alleged that back in Iran, Yassamin had drowned another sister in the family pool. This and other conduct made Reza especially suspect of her sister.

Yassamin, who is self-described as the shoe lady at Steinmart, defended the case on truth – she had in fact lived with her sister and the application wasn't false. Alternatively, she made two other procedural arguments, (1) the remarks were not published, and in any event, (2) the listing of the address by itself is not defamatory.

The court directed a verdict for the defendant. It concluded as a matter of law that the use of an address did not represent defamation, especially when it was not published. A defense judgment followed.

Auto Negligence - A collision left plaintiff with eighteen stitches to his head – the jury awarded pain and suffering of $10,000

Fletcher v. Hughes et al, 04-0815
Plaintiff: Patrick Kilgore, *Hughes & Coleman*, Bowling Green
Defense: Thomas N. Kerrick and Elizabeth Ashley Bruce, *Kerrick Stivers & Coyle*, Bowling Green for Hughes
Michael K. Bishop, *Michael Bishop & Associates*, Bowling Green for Grace
Verdict: $12,795 for plaintiff assessed against Grace only; Defense verdict for Hughes
Circuit: **Warren**, J. Wilson, 9-8-05

It was 12-21-03 and William Fletcher, then age 41, went out for pizza with Sharon Harmon. They traveled on Scottsville Road. They slowed to let a car make a turn.

At the same time, Jimmy Hughes traveled from the opposite direction. He too was stopped for a turning car. In his rear-view mirror, he saw a car coming fast – it was driven by the elderly Anna Grace.

Grace rear-ended Hughes, his car then hitting the Harmon vehicle nearly head-on. It was a moderate collision. Fletcher was acutely treated for a cut to his scalp. The wound required eighteen stitches. He has since treated for soft-tissue symptoms. His medical bills were $2,795. Suffering was capped at $100,000.

In this lawsuit, he targeted both Hughes and Grace. The theory was dual as both defendants had a different spin on how it happened. Hughes for his part, explained that he was stopped when hit, Grace propelling him forward. Grace countered that Hughes hit the Harmon car first. [Hughes had also sued Grace – that claim settled before trial.]

This unusual crash case was resolved on liability for plaintiff against Grace alone – Hughes was exonerated. Then to damages, Fletcher took his medicals as claimed, plus $10,000 for pain and suffering. The verdict totaled $12,795. A consistent judgment followed.

Underinsured Motorist - A significant t-bone crash left plaintiff with a knee injury – the verdict was less than the floor of UIM coverage

Carty v. Allstate, 04-0957
Plaintiff: John R. Shelton, *Sales Tillman Wallbaum Catlett & Satterley*, Louisville
Defense: Fran Geralds Rohlfing, *Geralds Jones Swisher & Rohlfing*, Louisville
Verdict: $47,851 for plaintiff
Circuit: **Fayette**, J. Goodwine, 9-6-05

On 3-6-02, Kyle Carty traveled on Alumni Drive. Suddenly the intoxicated Bobby Hall pulled into her a path. A significant crash resulted, smashing the front of Carty's Jeep Cherokee.

In the impact, Carty's knee struck the dashboard. She has since followed with Dr. Veronica Vasicek, Orthopedics, Lexington, who performed a surgical repair. Carty sought medicals and suffering damages at trial.

She first settled with Hall, taking his policy limits of $100,000. Above that sum, she sought UIM coverage from her carrier, Allstate. It was identified at trial. Fault was not a jury issue. Allstate diminished the claimed injury, looking to proof from a subsequent treating orthopedist, Dr. Raymond Shea, Louisville – Shea could not identify an ongoing problem.

Tried on damages only, Carty took medicals of $12,851, plus $35,000 for pain and suffering. A judgment was entered for Allstate, plaintiff having failed to implicate the floor of UIM coverage.

Defamation - An appointed member of a small-town refuse board alleged he was defamed by a letter to the editor of the local newspaper

Dotson v. Lutterman, 03-0396
Plaintiff: Donald E. Thomas, Benton
Defense: Marvin Lee Wilson, *Wilson Law Firm*, Eddyville
Verdict: Defense verdict on liability
Circuit: **Marshall**, J. Foust, 7-28-05

Gerald Lutterman, age 73 and a retired Lieutenant Colonel in the Air Force, had settled in Marshall County. For some reason, Lutterman was especially interested in the affairs of the local refuse board. On 9-3-03, Lutterman wrote a letter to the editor of the Tribune-Courier, Benton's local paper.

In it he was critical of how the refuse board was operated. He suggested the board's chairman, unnamed in the letter, had acted suspiciously by "ramrodding" a land purchase. The deal was fishy, the letter continued, because it was done

after (1) an illegal meeting and (2) it benefitted another used-car dealer in the county, the chairman also working in used cars.

While the chairman was unnamed, he did read the paper. His name was Doug Dotson and he wasn't happy about what Lutterman had written. He countered that the land deal was proper and that there had been no illegal meeting. In sum, the entire contents of the letter was false.

He sued Lutterman for defamation. Dotson gained a concession from Lutterman in deposition that Dotson had no facts to support several of his allegations – they were mere beliefs. If Dotson prevailed, he sought compensatory and punitive damages.

Lutterman defended the case and while he wasn't sure where his facts came from, he still believed his allegations were true. He also defended technically, suggesting (1) that Dotson wasn't even named in the letter and (2) that ramrodding wasn't a derogatory term.

The verdict was for the defendant on the defamation count, Dotson taking nothing. The instructions had required only a reckless disregard standard, the court ruling that the plaintiff was a private figure. Several months post-trial, no judgment had been entered.

Auto Negligence - A pedestrian was hit by a car in Old Louisville as he crossed the street

Williams v. Cobble, 03-9659
Plaintiff: Mark A. Weis, *Romines Weis & Young*, Louisville
Defense: James P. Dilbeck, *Dilbeck & Myers*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Willett, 9-9-05

Jeremy Williams, then age 24 and a sometimes actor at Actor's Theatre, was walking on Fourth Street near St. Catherine's in Old Louisville. While crossing the street, with a green light, he alleged he was hit by a passing car. It was driven by Nyree Cobble.

Williams was hurt badly. He sustained from the top to the bottom, facial fractures, a rotator cuff tear, a broken arm and a compound leg fracture. His medical bills, which were stipulated, totaled $147,905. The only claimed element of damages at trial was pain and suffering – they were limited in the instructions to $250,000.

While Williams's memory of the events wasn't completely clear, he did remember the light was green for him. Cobble defended the case and pointed to a different version. Namely, she had a green light and he darted into traffic after having walked in front of a pick-up.

This case was resolved on liability for the defendant and plaintiff took nothing. A defense judgment followed. While deliberating, the jury had asked for drawings of the scene made in trial by the witnesses. The court answered that they were not in evidence.

Auto Negligence - A Somerset jury in a disputed rear-end case awarded the plaintiff $500 for pain and suffering

Beshears v. Neikirk, 03-0479
Plaintiff: Jason E. Williams, *Farmer Kelley Brown Williams & Breeding*, London
Defense: Clayton O. Oswald, *Taylor Keller Dunaway & Tooms*, London
Verdict: $2,096 for plaintiff less 50% comparative fault
Circuit: **Pulaski**, J. Cain, 4-13-05

On 1-8-02, Roger Beshears, then age 40, was a passenger in a vehicle driven by Scott Curry. They traveled on Hwy 39. An instant later, they were rear-ended by Mark Neikirk. Neikirk defended the case that the Curry vehicle had turned into his path.

However it happened, there was a moderate collision. Beshears has since treated for radiating pain related to the aggravation of pre-existing conditions. His treating doctor, Harold Rutledge, Pain Management, Lexington, linked Beshears's chronic pain to the wreck.

Plaintiff's medicals were $14,045 and he sought $88,563 for future care. Pain and suffering was not capped in the instructions. Neikirk defended the case on damages, minimizing the claimed injury and noting plaintiff's history of prior injuries. Fault was defended as noted above.

The jury's verdict was mixed on fault – it was assessed 50% each to plaintiff's driver and the defendant. Then to damages, Beshears took $1,596 of his medicals, but nothing for future care. Pain and suffering was $500, the raw verdict totaling $2,096. A consistent judgment was entered for Beshears for $250, representing a reduction for PIP and comparative fault.

Whistleblower Act - The dog warden alleged he was fired for intervening to seize abused dogs from a citizen

Henry v. Allen County, 04-0037
Plaintiff: Nancy Oliver Roberts, Bowling Green
Defense: D. Gaines Penn, *English Lucas Priest & Owsley*, Bowling Green and William P. Hagenbuch, Scottsville
Verdict: Defense verdict on liability
Circuit: **Allen**, J. Harris, 3-11-05

In April of 2003, Robert Henry was hired by Allen County to serve as its dog warden. He reported directly to the animal control director who in turn served the County-Judge Executive, Johnny Hobady. On 11-1-03, there was a report that a red tick coon dog had been dragged down the road by a local resident, Lonnie Douglas.

Henry investigated and went to the scene. When Henry first showed up, Douglas showed him two healthy dogs. Henry looked further and saw a third dog – its hind area was raw, indicating it had been dragged. Douglas explained he was just exercising the animal. Henry seized all three dogs.

As Henry picked up the phone and called the animal control director to report the suspected animal cruelty. He had already called animal control in Bowling Green. This would be Henry's last day on the job. [Douglas was later convicted on animal cruelty charges.]

The next day on a Sunday, he was terminated by Hobady. Hobady cited that he was fired for violating the chain of command in putting in a call to Bowling Green and for seizing the healthy dogs. From the perspective of Allen County, that should have been the end of the matter – an at-will employee was let go for failing to follow procedure.

Henry by contrast portrayed himself as a whistleblower. He alleged the phone call as he left the Douglas home represented a good faith report of a criminal violation (animal cruelty) and that the firing the next day represented retaliation. The only award the jury could make to Henry was for punitive damages.

Allen County denied that Henry's firing had anything to do with his report of Douglas's animal cruelty. Moreover, it couldn't have represented whistleblowing as the alleged abuse was already known because a citizen initiated Henry's investigation by initially making the first call reporting abuse. The county also disputed the call to the animal control director constituted a reporting of a crime – if there was any reporting at

all, from the county's perspective, it occurred the Monday *after* the firing when Henry contacted the city attorney.

To prevail, Henry was required to prove that (1) he made a good faith report of actual or suspected violations of the law to an appropriate authority and (2) that good faith report was a contributing factor in the decision to fire. The jury needed just twelve minutes to find for the county. A defense judgment followed. Henry has appealed.

Municipal Liability - Metro Government in Louisville demolished a residence the plaintiff had just purchased – because of the timing of the sale, the purchasor never got notice of the demolition

Pasley v. Metro Government, 04-2158
Plaintiff: Mark D. Mitchell, Louisville
Defense: Winston E. King, *Assistant County Attorney*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Ryan, 8-17-05

In September of 2002, Jeff Pasley, who operated JP Properties, bought a residence on Prentice Street – Pasley buys, fixes up and then sells homes. He paid $5,000 for the home at a commissioner's sale. It was in foreclosure.

The closing was conducted on 10-16-02. Just five days before, Metro Government in Louisville had sent out a demolition notice. The home had apparently fallen into disrepair. Unfortunately, the agents for the sellers had not yet received the demolition notice.

On 12-12-02, the windows on the home were boarded. Five months later on 4-4-03, the home was demolished. When Pasley first came by to see his real estate, he feared the home had burned. A nearby resident explained it was no accident – a bulldozer had knocked the house down.

Pasley was out his investment and filed a lawsuit against Metro Government. He alleged it failed to comply with statutory notice requirements. Namely, the owner of record was not properly served, nor did the city publish a notice in the paper. If prevailing, the jury would determine the home's fair market value. This was not capped in the instructions.

Pasley had also sued his realtor, alleging the realtor knew of the condemnation, but failed to advise him. This claim settled before trial. Metro Government defended that it had complied – when it sent out the required notice, they were sent to the then-owner of record.

This rare involuntary home makeover case was resolved by a Louisville jury for the government. Having so found, Pasley took nothing. A defense judgment ended this litigation.

Insurance Agent Negligence

After a commercial property in Covington burned, the owners were unhappy to learn their insurance agent had only secured cash value coverage and not the replacement value

Odd Fellows v. Kinker-Eveleigh Insurance, 2:03-166
Plaintiff: John A. West and Carrie A. Shufflebarger, *Greenebaum Doll & McDonald*, Covington
Defense: John F. McLaughlin, *Rendigs Fry Kiely & Dennis*, Cincinnati, OH
Verdict: Defense verdict on liability
Federal: **Covington**, J. Wehrman, 8-25-05

In 2001, the Odd Fellows building in Covington was for sale. The structure, which was built in 1856 by the Odd Fellows fraternity, had fallen into disrepair. It was still considered the most historically significant building in the area.

An company called Odd Fellows, LLC, purchased the building, intending to renovate it for use as a commercial structure. The Odd Fellows that purchased the building are unrelated to the fraternity.

As the renovation began, Odd Fellows sought to insure the building. It relied on its agent, Samuel Tuten of the Kinker-Eveleigh Insurance Agency. Odd Fellows wanted $4.2 million in replacement value coverage. In fact, in April of 2002, Odd Fellows specifically asked to shift from actual cash value coverage to replacement value coverage.

Kinker-Eveleigh forwarded the request to the insurer, Ohio Casualty. Because of a paperwork snafu (Ohio Casualty has a fool-proof system that is paperless), the coverage was not bound. This would become important a month later when on 5-21-02, the building caught fire. It was a total loss.

Immediately after the fire, Odd Fellows breathed a sigh of relief. With the replacement value coverage in place, it had protected not just its original investment, but also the value of the already completed renovations. Tuten as agent for Kinker-Eveleigh, confirmed as much right after the fire.

Three days post-fire, Ohio Casualty dropped a bomb – there was only actual cash value coverage. Instead of the $4.2 million Odd Fellows thought it was owed, Ohio Casualty first offered $638,000. Odd Fellows ultimately settled with Ohio Casualty and took $2.1 million.

In this lawsuit, Odd Fellows targeted the insurance agency. It alleged three counts, (1) breach of contract, (2) breach of fiduciary duty and (3) negligent misrepresentation. Each count was founded in essentially the same facts – Odd Fellows sought to bind replacement value coverage and were assured it was in place, when in fact it was not.

Kinker-Eveleigh denied fault, blaming the snafu on Ohio Casualty and its paperless system. The defense cited that the agency did believe that coverage was bound. The real culprit was Ohio Casualty, Kinker-Eveleigh pointing to internal e-mails that indicated the insurer knew about the coverage request before the fire – it still elected to initially deny the claim. Thus on the negligence counts, the jury was permitted to apportion fault to Ohio Casualty.

Tried for four days, the verdict was for the agency on all three counts. Having so found, the jury did not reach the duties of the non-party Ohio Casualty, apportionment or damages. A defense judgment followed.

Pending is the Odd Fellows motion for a new trial. It has argued instruction error in permitting Kinker-Eveleigh to argue that Ohio Casualty was solely to blame without including a corresponding curative instruction that the insurer was no longer a party. Kinker-Eveleigh has opposed the motion, explaining Kentucky follows a bare-bones approach to instructions.

Kentucky Supreme Court Tort Opinions

On its rendition date in September, the Supreme Court issued three tort opinions, two of which involved the review of previously reported jury verdicts. By far, the most interesting opinion involved the reversal of a $1.03 million dollar verdict, *Farm Bureau v. Rodgers* – also noteworthy, while the opinion was not unanimous, it was still written as a memorandum opinion with no justice accepting responsibility for the writing.

Bad Faith - A bad faith verdict was reversed, the trial court having erred in admitting proof of prior bad acts where the insurer had low-balled another claim in the same county

Farm Bureau v. Rodgers,
2002-SC-1044-DG
On Appeal from the Court of Appeals
Rendered: September 22, 2005
Petitioner's Counsel: Michael D. Risley and Bethany A. Breetz, *Stites & Harbison*, Louisville and Michael J. Schmitt, *Porter Schmitt Jones & Banks*, Paintsville
Respondent's Counsel: M. Austin Mehr and Wesley B. Deskins, *Austin Mehr Law Offices*, Lexington and Paul E. Salamanca, Lexington

This case started with a car wreck in October of 1997. Tina Rodgers was rear-ended by a drunk driver. She sustained a rotator cuff tear, among other injuries. She settled with the drunk driver for her $25,000 policy limits. Above that sum she sought $50,000 in UIM coverage from her carrier, Farm Bureau.

Farm Bureau balked and a UIM trial was conducted in April of 1999. Rodgers prevailed and took $98,618, far exceeding the policy limits. She then sued the insurer for bad faith. Key proof in her case was adjustor training manuals that encouraged low-ball and delay tactics, preying on the fears of its insured.

There was also proof that Farm Bureau had low-balled another case, herein referred to the as Raines litigation. In Raines, a UIM plaintiff took $219,071 from Farm Bureau. It was plaintiff's position this represented a pattern.

Rodgers also impeached Farm Bureau's own bad faith expert, attorney Paul Hibberd – she noted he was the very attorney who represented Raines. While Hibberd had criticized plaintiff's failure to send a proper settlement package in this case, plaintiff noted that Hibberd's settlement package was similarly ignored in the Raines case.

A jury in Lincoln County found for Rodgers on the bad faith count. It awarded her $30,000 for pain and suffering and another $1,000,000 in punitives. Farm Bureau appealed.

The Court of Appeals affirmed in September of 2002, Judge Combs blistering Farm Bureau's conduct in handling Rodgers's claim. Farm Bureau sought discretionary review and the motion was granted. [Almost five years post-trial, the Supreme Court had its final word on the case.]

Holding: In a *Memorandum Opinion* the high court, by a 4-3 count, reversed the Court of Appeals and ordered a new trial. The opinion focused on the introduction of prior bad acts evidence (the Raines testimony) that violated both KRE 404(b) and *State Farm v. Campbell*.

Important in this discussion, the court noted that in the Raines case, Farm Bureau was the insurer for the tortfeasor – by contrast in the instant case, Farm Bureau was the UIM carrier. Thus the two coverages were not analogous.

This was just the sort of dissimilar bad act that was disproved of in *State Farm v. Campbell*. As written in *State Farm*, the conduct need not be identical, but it can't have had nothing to do with the underlying case.

The matter was also reversed, the majority finding the Raines evidence (prior bad acts) was introduced in contradiction to KRE 404(b). Again the court relied on its argument that the two cases were so different the Raines' proof did not help prove a pattern of conduct.

The court did concede that the proof could be used to impeach Hibberd, but if permitted on this basis, the court would be required to give an admonition that it could not be used to prove conformity with other wrongful acts.

While it is unclear who wrote the opinion, Cooper, Johnstone, Graves and Roach all joined it.

Justice Lambert Dissent – In a short dissent, Lambert wrote that the trial judge had not abused its discretion in admitting Raines's testimony – when a jump ball occurs, as it did here regarding the evidentiary question, "the arrow always point to the judge." Scott and Wintersheimer joined him.

Justice Wintersheimer Dissent – Wintersheimer wrote separately both to affirm the trial court and also to criticize the majority for failing to give direction on the matter of punitive damages.

Dealing first with the testimony from Raines, Wintersheimer wrote that it was not introduced to prove that Farm Bureau's conduct was bad in this case – instead it proved an awareness of a pattern of conduct consistent with the KRE 404(b)(1) exception.

It was also relevant, Wintersheimer thought to the issue of punitive damages – Raines's testimony revealed that Farm Bureau didn't merely fail to settle the case inadvertently, but that it was acted intentionally making a highly profitable business decision.

Wintersheimer then went into a lengthy discussion of the award of punitive damages, considering their propriety within *State Farm v. Campbell* guideposts. Considering reprehensibility, he noted Farm Bureau marketed that helping people quickly was "what we do best." This was contrasted with its actual conduct as evidenced by its manuals that adjustors should seize upon claimant's fear and anxiety. He would have affirmed the trial court in all regards, including both the introduction of proof about Raines and punitive damages. Lambert and Scott joined the dissent.

Ed. Notes

(1) The majority's attempt to distinguish Rodgers and Raines on the basis that one was UIM coverage while the other was a liability coverage seems like a distinction with no real difference. The handling of the claims was similar, the subject matter was similar and the allegations of low-balling were similar. This seems like the unnamed author of the opinion was results-oriented – that is, by whatever method, a $1,000,000 punitive award could not and would not stand.

As the proven conduct by Farm Bureau in this case was so atrocious, it was impractical to reach that end with a direct attack on the punitives. How could the majority have explained away the training manuals? It couldn't. Instead it deftly selected an ancillary issue and drew a distinction that didn't exist, all in a not-so-transparent attempt to exculpate the insurer.

(2) We've written extensively on this case as it traversed the courts. A list of citations is included herein:

Raines v. True, Original Trial - Case No. 432, the 1998 Year in Review

Rodgers v. Farm Bureau - UIM Trial – Case No. 961, the 1999 Year in Review.

Rodgers v. Farm Bureau - Bad Faith Trial – Case No. 1421, the 2000 Year in Review.

Farm Bureau v. Rodgers, Court of Appeal Opinion, Discussed at page 136

of the 2002 Year in Review. While it has long since been forgotten, Combs's majority opinion at the Court of Appeals that affirmed this verdict excoriated Farm Bureau. She wrote the insurer acted outrageously, swindled its insured, deliberately refused to conduct an investigation and that is conduct was wholly despicable and devious.

Assault/Respondeat Superior

When the son of a car dealer shoots at the driver of a car during repossession, he is furthering the interest of the car dealer and thus the car dealer may be held liable for the shooter's conduct under a respondeat superior theory

Patterson v. Blair et al,
2003-SC-0646-DG
On Appeal from the Court of Appeals
Rendered: September 22, 2005
Petitioner's Counsel: James W. Owens and Donald R. Green, Jr., Paducah
Respondent's Counsel: Mark D. Pierce, Paducah

This case started on 9-28-95 when Tommy Blair, the son of a car dealer who operated Courtesy Autoplex in Paducah, went to repossess a car. Things didn't go well. To effectuate the repossession, Blair was forced to fire four shots into the tires of a car driven by Tommie Patterson. Blair was later convicted of wanton endangerment charges by a Paducah jury.

Patterson sued Blair and the car dealership, alleging assault. He prevailed at trial, the jury found for Patterson, rejecting a contention that Blair had become scared. Importantly, the jury also found that Blair was acting in the scope of his employment with Courtesy Autoplex. Patterson took damages of $42,465. The verdict was returned on 6-28-01.

Courtesy Autoplex appealed and argued that shooting at customers was not in the scope of Blair's employment. Patterson also appealed, citing the trial court's failure to instruct on punitive damages.

The Court of Appeals had its decision in May of 2003. It reversed for both parties – Judge Barber wrote that there was no proof that Blair fired into Patterson's car at the direction of his employer. The trial court was also reversed with instructions that a new trial be conducted on punitive damages.

Blair sought discretionary review on the respondeat superior issue – the punitive damage issue was not appealed. The Supreme Court granted review in the summer of 2004.

Holding: *Justice Roach* wrote for a unanimous court and set forth the general rule – an employer's liability is limited only to those employee actions committed in the scope of employment. Inevitably, Roach explained, the question becomes: What does that mean?

He then traced the history of Kentucky law on the subject, concluding the rule had been applied as follows – the master is liable for the intentional tort of the servant when its purpose, however misguided, furthers the master's business. Applying the rule to this case, Roach wrote that the testimony indicated Blair confronted Patterson to retrieve company property, Blair's father confirming that was his son's purpose. Finally, while the conduct was criminal, it was not so outrageous to indicate that Blair's motion was a personal one. The Court of Appeals was reversed on the respondeat superior issue, the matter being remanded for proceedings consistent with the opinion.

Ed. Notes

(1) It is not clear exactly how the proceedings at the trial court should be consistent. While the judgment has been reinstated against Courtesy Autoplex, is the plaintiff entitled to a retrial on the issue of punitive damages? He prevailed at the issue at the Court of Appeals and that decision was not disturbed by the Supreme Court.

(2) Our original report on this verdict is contained at Case No. 1754, the KTCR 2001 Year in Review.

Settlement and Release - When a plaintiff signs a release in the hospital thinking she has a bruised leg, the claim has been fully resolved and it is immaterial if she learns a week later that her bruised leg is broken

Coomer v. Progressive Northwestern Insurance et al,
2004-SC-0294-DG
On Appeal from the Court of Appeals
Rendered: September 22, 2005
Petitioner's Counsel: Bridget L. Dunaway and Amanda L. Hill, *Taylor Keller & Dunaway*, London
Respondent's Counsel: John W. Walters and Timothy C. Feld, *Golden & Walters*, Lexington for Phelps
Donald L. Miller, II, Louisville and Diane R. Conley and Kristi M. Smith, both of Lexington, all of *Frost Brown Todd* for Progressive Northwestern

Margaret Coomer sustained a leg injury when her friend, Charlie Phelps, ran over her leg in a driveway. Initially Coomer thought she had a bruise. While still at the hospital, a Progressive adjustor (Phelps's insurer) came to settle the claim. He offered $250.

Coomer balked. She shrewdly negotiated and sought $500. The adjustor crumbled and capitulated. A release was executed.

Coomer questioned the settlement a week later when she learned her leg was broken. She sought to set aside the release, arguing mutual mistake, constructive fraud or that she lacked capacity to contract. A lawsuit followed, also alleging bad faith. It was dismissed by the trial court.

Coomer appealed. In a non-published opinion, the Court of Appeals affirmed on 3-12-04. Judge Knopf affirmed and wrote that while the settlement was hasty (the statute did require a prompt offer), there was no suggestion the insurer pressured or coerced Coomer. Coomer sought discretionary review and it was granted.

Holding: *Justice Roach* wrote for a unanimous court that to find a mutual mistake would overturn a long-standing rule and then cast "great doubt on the finality" of all releases, thereby complicating settlement considerations. The general rule that releases are final results in the orderly settlement of disputes and avoids chaos. The finality rule applies regardless of how or when subsequent injuries are discovered.

The court also rejected her claim of alleged incapacity – Roach wrote this "bald allegation" was insufficient to overcome summary judgment. [Plaintiff had asserted she was on pain medication and didn't even remember reading or signing the release.] This was contrasted by Roach with proof that Coomer was

lucid enough to enter negotiations and remember the adjustor coming to see her.

The court next turned to bad faith – Roach argued there was no duty imposed on an insurer to double-check a plaintiff's injury. There is no further obligation placed on an insurer who agrees to pay the plaintiff's demand. In short, Coomer couldn't claim bad faith by Progressive when "she received a settlement for the amount she demanded."

Discretionary Review at the Kentucky Supreme Court

At the September rendition date, review was granted in four cases and denied in 52 others. Only one of the four cases where review was granted involved tort issues.

Insurance Coverage - Is there insurance coverage for a hit and run crash by an unidentified driver when such coverage is not explicitly covered in the policy?
Dowell et al v. Safe Auto,
2003-SC-2661
Review Granted: 9-22-05
Summary: Debra Dowell was injured when rear-ended by a Chevrolet Blazer. The other driver first got out and asked if she was okay. He then drove away, never to be identified. Dowell made a claim for UM benefits to her insurer, Safe Auto. Safe Auto denied the claim, citing that the policy did not cover hit and run accidents. Plaintiff sued and the trial court (Judge McDonald-Burkman-Jefferson County), sided with Safe Auto and granted summary judgment.

Plaintiff appealed. The Court of Appeals affirmed, Judge Tackett writing that as a matter of public policy, a UM carrier is not required to cover hit and run accidents. As the policy was tailored to only provide coverage where the insured status of the tort feasor vehicle could be ascertained, there was no coverage for a mystery hit and run vehicle.

The plaintiff moved for discretionary review and the motion was granted. In yet another twist on the UM-Contact-Coverage theme, the high court will consider if a when a UM policy is silent as to hit and run coverage, has coverage then been excluded?

Prosecutorial Immunity - A prosecutor who pursues criminal charges to gain an advantage in a real estate dispute enjoys absolute immunity
Wells v. McKeehan,
2004-SC-1024
Review Denied: 8-25-05
Summary: Erby McKeehan, the county attorney in Whitley County, instituted criminal charges against James Wells. Wells alleged malicious prosecution, McKeehan pursuing the charges to gain an advantage in a pending boundary dispute. Wells prevailed at trial and took an award of $160,000.

McKeehan prevailed at the Court of Appeals -- it held he enjoyed absolute prosecutorial immunity. The Supreme Court denied to hear Wells's appeal. **See** the KTCR 2003 Year in Review, Case No. 2580 for the original verdict report.

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.

Wrongful Termination/Outrage - When an employee is fired in contradiction of a statute (here having complained about safety training), the remedy is limited to the administrative remedy provided by the statute and no separate cause of action exists
Benningfield v. Pettit Environmental,
2004-CA-1632-MR
Appeal from Jefferson Circuit Court
Rendered: September 16, 2005
Appellant's Counsel: Kenneth L. Sales, Joseph D. Satterley, Jesse A. Mudd and D. Matthew Kannady, Louisville
Appellee's Counsel: Donna King Perry and Wendy C. Hyland, Louisville

Danny Benningfield was employed by Pettit Environment as a technician in 2000. In 2002, he complained to state authorities at OSHA that training was inadequate at Pettit. Several months later, the company laid him off, citing that he lacked a CDL.

Benningfield thought he was fired in retaliation for having reported the training issue and thus while an at-will employee, a public policy exception existed. The trial court granted summary judgment. Benningfield appealed.

Holding: *Judge Barber* joined by Miller wrote that generally it is true that a suit may follow if terminated in violation of a well-defined public policy – however that exception only applies when the statute creating the public policy exception does not provide a remedy. In this case, the relevant statute, KRS 338.121, did provide a remedy, permitting an administrative complaint to be filed seeking reinstatement. Thus the statute provided both the public policy exception and the exclusive remedy which preempted the filing of a lawsuit.

The trial court was also affirmed on Benningfield's outrage claim, Barber writing that Pettit's conduct was not extreme, nor was his emotional distress severe.

Judge Johnson Concurrence and Dissent
While he agreed with the majority on outrage, Johnson dissented on the wrongful discharge claim. Johnson wrote that had the legislature intended the statute to be the exclusive remedy, it would have said so explicitly.

Legal Negligence - The trial court's grant of summary judgment with prejudice was reversed with orders to dismiss the cases without prejudice, as when filed the alleged litigation negligence case was not yet final and thus there was no subject matter jurisdiction as the claims were not yet ripe
John Does v. Golden & Walters et al,
2004-CA-0639-MR
Appeal from Fayette Circuit Court
Rendered: September 9, 2005
Appellant's Counsel: James M. Morris, Lexington
Appellee's Counsel: Guy R. Colson and Ellen A. Kennedy, Lexington for Golden & Walters
Calvin R. Fulkerson and Melanie R. Marrs, Lexington for Goss defendants
John M. Famularo and Alex L. Scutchfield, Lexington for Fernandez Friedman Grossman & Kohn
Linda B. Sullivan, Lexington for Craig Johnson

This exceptionally complex litigation involved multiple class actions alleging civil rights violations by the metro government in Lexington. Several class members sued the attorneys for the class alleging negligence. The suit was filed before the underlying class action litigation was final.

The trial court dismissed the case with prejudice by summary judgment. The plaintiffs appealed. [In the interim, the Sixth Circuit issued opinions in the underlying class action lawsuits.]
Holding: *Judge Minton* joined by Henry and Huddleston, reversed the trial court. It ordered that the alleged negligence in this case was related to litigation conduct – thus any legal negligence lawsuit did not become ripe until after the underlying case was final. That occurred when the

Sixth Circuit case was decided in May of 2005.

As the plaintiffs filed their lawsuit before the action had accrued, it lacked subject matter jurisdiction. The order reversing directed the trial court to dismiss the action without prejudice. [The opinion did not address at all the merits of the alleged legal negligence.]
Ed. Note – While not discussed in the opinion, it would appear that if refiled, the alleged legal negligence action would not be time-barred as the Sixth Circuit opinion was rendered just this spring. A more interesting question would have been raised if the court reached the same result, but the Sixth Circuit opinion had been issued a year earlier – thus while the plaintiffs claims would have been dismissed as not being ripe when filed, they would have rotted during the pendency of this appeal!

Legal Negligence - A claim of substandard representation in a criminal case is not tolled by a separate habeas corpus appeal
Bryant v. Howell,
2004-CA-0052-MR
Appeal from Campbell Circuit Court
Rendered: August 5, 2005
Appellant's Counsel: Dennis G. Bryant, West Liberty
No brief for Appellee

Dennis Bryant pled guilty in 1999 to an assault charge and received a sentence of ten years. He was represented by attorney, Jack Howell. The deal at first seemed a good one -- if he went to trial, he faced PFO status and a life sentence.

Bryant later filed a habeas corpus challenge to his incarceration citing that he was not given a proper extradition hearing. The habeas case is presently before the U.S. Supreme Court on a petition for a Writ of Certiorari.

In 2003, Bryant sued Howell and alleged legal negligence. The trial court dismissed citing the failure to file the suit within a year of the plea deal. Bryant appealed pro se and argued the statute was tolled by the habeas corpus action.

Holding: *Judge Henry* joined by McAnulty and Minton, called the question before it one of first impression. Henry concluded that Kentucky law has consistently held that an injury "becomes definite and non-speculative when the underlying case is final."

The court held that a habeas corpus petition was akin to a CR 60.02 motion and thus was an extraordinary remedy that didn't toll the statute. If it did act as a toll, the statute of limitations would become meaningless as several CR 60.02 sections have no time limit. 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 - In a rear-end case where the plaintiff was not injured at the scene of the wreck, a jury verdict awarding no damages was affirmed on appeal
Dixon v. Brown et al
Appeal from Henderson Circuit Court
Trial Judge: Stephen A. Hayden
KTCR Cite: 2004 YIR,
Case No. 2807
Date of Trial: 2-26-04
Appeal Decided: 9-16-05
Thomas P. Jones, Beattyville and Patricia A. Corino, Henderson for Appellants
Stephen M. Arnett, Morganfield for Appellee Brown
Stephen D. Gray, Henderson for Appellee State Farm
Max S. Hartz, Owensboro for Appellee Farm Bureau

Wendy Dixon, a school teacher, was rear-ended on 11-2-98 by Judy Brown. Dixon was not injured at the scene. She has since complained of post-traumatic headaches and other neurological conditions. She sued Brown and sought money damages at trial. While claiming a total of $2.4 million on the verdict sheet, a Henderson jury elected to award Dixon nothing.

She appealed and cited error by the trial court in failing to order a new trial on the issue of past medicals, lost wages and pain and suffering.
Holding: Judge Buckingham writing
In addressing plaintiff's appeal, the court noted the standard of review was abuse of discretion and that the trial court's decision was "presumptively correct." As there were fact issues regarding plaintiff's damages, the matter was properly presented and resolved by a jury, which "obviously determined" the claimed damages were "not incurred due to the accident." He was joined by Knopf.
Judge Knopf Concurrence – While he concurred fully, Knopf thought the verdict was "troubling." Knopf further found it "very difficult to justify the jury's conclusion that Dixon suffered no injury loss whatsoever as a result of the accident."

But Knopf further reasoned, this was not the standard of review and while the verdict may have been harsh, he had to agree there was no basis to disturb it.
Judge Combs Dissent - Combs believed the evidence was "overwhelming" that Dixon sustained a serious injury and no reasonable jury could have found otherwise. She would have reversed and ordered the trial court either to grant a directed verdict for the plaintiff or to grant a JNOV.

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E-Mail - Info@juryverdicts.net

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