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.

Food Server Negligence - A restaurant worker was linked to plaintiff's case of Hepatitis A

Emberton v. Red Lobster, 04-1213
Plaintiff: Stephen L. Hixson and Casey A. Hixson, *Hixson Law Office*, Bowling Green
Defense: Stefan Richard Hughes, *Cole & Moore*, Bowling Green
Verdict: $233,866 for plaintiff
Circuit: **Warren**, J. Wilson, 9-29-05

On 7-28-01, Tim Emberton, then age 39, went to eat dinner at the Red Lobster. For nearly three years, he hardly thought twice about his visit. That changed in May of 2004 when he was visited by an attorney, Stephen Hixson. For the first time, Emberton learned he may have been a victim of negligence.

Going back to 2001, Emberton began to feel ill in late August. He was admitted to the hospital and diagnosed with Hepatitis A. He remained hospitalized for a week. For several months, Emberton was treated for symptoms. By the Spring of 2002, he was fully recovered. At the time, Emberton had no idea what led to his Hepatitis A.

Others in Bowling Green had an idea. In early August and before Emberton was diagnosed, the local health department became involved. It seems that a Red Lobster employee, Carissa Phelps, had Hepatitis A and was transmitting it to the community. [The disease can live for up to twelve hours on inert surfaces.] While a triumvirate link was made between Red Lobster, Phelps and the disease, no one was alerted publicly to the problem.

This silence was especially ironic as after Emberton was released from the hospital, he spoke to a health department investigator. In tracing his history, he told the investigator he had eaten at Red Lobster. While health department bigwigs knew there was a problem at Red Lobster, Emberton was told nothing. He stayed in that state of ignorance until the lawyer visited him unannounced in 2004. [At that time, Hixson was prosecuting another Hepatitis A case linked to Phelps – Red Lobster settled that matter before trial.]

Having learned that Phelps and Red Lobster might have been involved, Emberton filed a negligence lawsuit. It alleged Red Lobster negligently trained its employees in good hygiene – more specifically, the claim also alleged negligence in supervising Phelps.

In this regard, there was proof that Phelps was not the most hygienic food worker in Bowling Green. Co-workers noted that she smelled and frequently removed Red Lobster's signature cheese biscuits for personal consumption by hand and without tongs.

Emberton's expert, Dr. Arthur Reginald, Epidemiology, UC-Berkeley, was critical of Red Lobster's hygiene practices, focusing on training and cleanliness. If Emberton prevailed, he sought medicals and suffering damages.

Emberton also sued the local health department, focusing on its silence in responding to the Phelps epidemic. It noted that while it knew of her involvement in early August, nothing was done to alert the public. Particularly, had Emberton known of the risk, there was time for him to have begun a prophylactic drug regimen to minimize the Hepatitis A. The health department prevailed by summary judgment. [It was represented by Charles E. English, Jr., *English Lucas Priest & Owsley*, Bowling Green.]

Red Lobster defended the case and first cited a statute of limitation defense – it noted that while the disease was diagnosed in 2001, Emberton didn't conduct any investigation into causation until 2004 and after the visit by Hixson. Emberton countered that the veil of silence by both health department and Red Lobster officials made it impossible for him to discover the link before 2004. The court rejected Red Lobster's challenge in this regard.

To the merits, Red Lobster countered that it did have a training regimen that told its employees to wash their hands and otherwise exercise good hygiene. Then to the purported infection, it was argued there was no proof that Emberton's Hepatitis A was linked to Red Lobster.

This theory was buttressed by proof from Dr. Eugene Gangarosa, Infectious Disease, Atlanta, GA. The expert explained that Emberton could have caught the disease from a variety of sources including, (1) swimming in Barren River Lake, (2) working in his construction job, and (3) from his wife who taught elementary school. Gangarosa explained that young children frequently have the disease in an asymptomatic state. [Emberton thought Gangarosa's theories were bogus, poking particular fun at his "dirty lake" hypothesis.]

The verdict was mixed on liability – Phelps was exonerated regarding her duty to exercise good hygiene. By contrast, the jury went on to find that Red Lobster violated a duty to instruct its employees in good hygiene and to exercise ordinary care to prevent disease transmission. Then to damages, Emberton took $8,666, plus $225,000 for suffering. The verdict totaled $233,866. [The court directed a verdict on punitive damages.]

Red Lobster has sought post-trial relief in several regards. It has first sought to call unconstitutional the 12% interest rate imposed by KRS 360.040 – the fish store has argued that it doesn't reflect current market conditions.

Red Lobster has also challenged the verdict. It has postured that (1) the verdict was inconsistent, Phelps prevailing but inexplicably Red Lobster being found at fault, and (2) damages were excessive, Emberton having recovered fully several months later.

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Medical Negligence - Plaintiff alleged a jabbing stick by her phlebotomist left her with a median nerve injury and permanent RSD

Gilliland v. Laboratory Corporation of America et al, 00-2856
Plaintiff: Mark J. Hinkel, *Landrum & Shouse*, Lexington
Defense: Renee S. Filiatraut and Jane E. Garfinkel, *Thompson Hine*, Cincinnati, OH for LCA
David C. Trimble, *Frost Brown Todd*, Lexington for Matthews
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Goodwine, 9-15-05

In August of 1999, Sharon Gilliland, then age 40, was referred for blood tests by her family doctor, Keith Applegate. The blood was drawn on 8-3-99 by Wilma Matthews, an employee of Laboratory Corporation of America (LCA).

Gilliland remembered the event clearly. While drawing blood, Matthews jabbed her hard in the arm. The pain was immediate. Despite protests to remove the needle, Matthews kept it in.

Gilliland later linked a proximal median nerve injury to the needle stick. That initial injury developed into permanent and disabling RSD. At the time her blood was drawn, Gilliland, then age 40, was employed as a teacher. Chronic pain ended her teaching career.

In this lawsuit, Gilliland sued Matthews and LCA, alleging negligence regarding the rough needle stick that injured her median nerve. Her expert, Dennis Ernst, Phlebotomy, was critical of Matthews for (1) jabbing plaintiff's arm, (2) not removing it when she complained of pain, and (3) attempting to stick the basilic vein without first surveying for a better vein.

Causation proof for Gilliland came from a neurologist, Dr. Kenneth Graulich, Lexington. Plaintiff sought $250,000 for past and future medicals, plus $726,679 for impairment. Her vocational expert was Ralph Crystal, Lexington. Gilliland also sought $2.5 million for pain and suffering. LCA and Matthews defended the case and denied fault. The record is silent as to their experts.

The verdict was for the defendants on liability and Gilliland took nothing. A defense judgment followed. [Gilliland's first attorney, Shirley A. Cunningham, Jr., who withdrew soon after the suit was initiated, later filed an attorney's lien.]

Common Carrier Negligence - A blind diabetic customer in a van sustained an injury when her wheelchair flipped backwards – her estate blamed the incident on the failure to properly strap in the wheelchair

Rankin v. Mainstream Transportation, 04-8942
Plaintiff: Kenneth H. Baker, Louisville
Defense: David S. Strite and Jeremy A.Winton, *O'Bryan Brown & Toner*, Louisville
Verdict: $52,372 for plaintiff
Circuit: **Jefferson**, J. Conliffe, 9-2-05

It was 10-24-02 and Mary Rankin, then age 52, was picked up from an adult day care center by a Mainstream Transportation van. Rankin suffered a variety of medical conditions – she was blind and an insulin-dependent diabetic, as well as morbidly obese. A mainstream employee, Connie Michaud, strapped Rankin into the van – her wheelchair was secured with straps.

Traveling on Bardstown Road, Michaud heard a bump. She looked back and saw that Rankin's wheelchair had flipped over backwards. In the flip, Rankin sustained a blow to the top of the head.

Taken to the ER, she was treated for bleeding on her brain, as well as broken ribs. The event triggered chest pain and Rankin was hospitalized for nine days. Her medical bills were $34,372.

She died of an unrelated heart condition eighteen months later. In this lawsuit, her estate alleged common carrier negligence by Mainstream. The theory was simple – Michaud had not strapped her in. Beyond the medicals, the estate also sought $200,000 for pain and suffering. [This was not a death claim.]

Mainstream defended the case, Michaud recalling that Rankin was properly strapped in – the transportation company countered that the only conclusion was that Rankin had undone the wheelchair straps. Damages were also diminished, Mainstream pointing out that much of Rankin's hospitalization was related to her pre-existing problems and not injuries sustained in this accident. [Plaintiff's proof took an opposite position that the accident triggered her hospitalization.]

The court's instructions held Mainstream to the utmost skill in non-emergency transport. It found a deviation and then to damages, the estate took the medicals as claimed, plus $18,000 for suffering. The verdict totaled $52,372. A judgment less PIP followed. Deliberating the case, the jury asked when Mainstream's insurer was notified – there was no answer.

Mainstream sought JNOV relief and argued there was no evidence Rankin wasn't properly strapped in – it suggested she unstrapped herself. The medicals were also called speculative, Mainstream noting most of Rankin's treatment was for pre-existing conditions. The motion was denied and Mainstream has appealed.

Truck Negligence - Rear-ended by a trucker on the interstate, the plaintiff has complained of disabling neck and back pain

Gentry v. Caraustar Trucking, 02-2159
Plaintiff: Scott A. Best, Cincinnati, OH
Defense: Thomas F. Glassman, *Smith Rolfes & Skavdahl*, Cincinnati, OH
Verdict: $102,693 for plaintiff
Circuit: **Kenton**, J. Jaeger, 9-30-05

Brian Gentry, then age 22, traveled on I-75 in a construction zone on 8-23-00. He quickly came to a stop in traffic. Behind him was Kurt Greer, driving a tractor-trailer for Hazard Express. Greer hit the brakes hard and he too came to a stop.

Lawrence Clouse, also in a tractor-trailer and working for Caraustar Trucking, couldn't stop in time. He hit Greer hard, knocking Greer forward into Gentry. That secondary impact was significant and sent Gentry's pick-up careening across the median and into several orange construction barrels.

Gentry has since treated for radiating neck and back pain. His treating doctor, Matthew McGlaughlin, Physical Medicine, Cincinnati, OH, linked Gentry's chronic pain to an L5-S1 facet syndrome. The effect of these injuries has left Gentry unable to work.

His medicals were $19,393 and the instructions limited future care to $4,000. Lost wages were $59,400 – Gentry had worked as a truck driver. He also sought $100,000 each for past and future suffering.

In this lawsuit, he targeted both Greer and Clouse. Greer defended that he was stopped, only to be struck by Gentry – plaintiff countered with a suggestion there were two impacts. Greer ultimately settled before trial.

Clouse stayed in the case through trial. While he conceded his own fault, he did seek apportionment to Greer. Plaintiff's duties were no issue. The defense also diminished damages with an IME, Dr. David Randolph, Occupational

Medicine, Cincinnati, OH. [Randolph was Gentry's worker's compensation IME.] It was Randolph's opinion that Gentry suffered nothing more than a strain.

While Clouse's duties were no issue, the jury did consider if Greer was at fault. It rejected that contention and then to damages, Gentry took his medicals as claimed plus $1,700 for in the future. Lost wages were $36,600. Moving to non-economic damages, Clouse took $32,500 for past suffering and $12,500 more for in the future. The verdict totaled $102,693. A judgment less PIP followed.

Disability Discrimination - A family doctor who suffered cognitive problems because of a prior brain tumor alleged her hospital employer forced her out because of her condition

Flowitt v. King's Daughters Medical Center, 98-0250
Plaintiff: Garis L. Pruitt, *Pruitt & Thorner*, Catlettsburg
Defense: Carl D. Edwards, Jr. and Leigh Gross Latherow, *VanAntwerp Monge Jones & Edwards*, Ashland
Verdict: $543,333 for plaintiff
Circuit: **Boyd**, J. Hagerman, 10-3-05

Catherine Flowitt, then age 43, was hired in 1996 by King's Daughters Medical Center (KDMC). Board-certified in family practice, Flowitt was lured from Arizona by KDMC to work at its outreach center in Grayson. Her contract was for twelve months and in addition to assorted allowances, Flowitt was to be paid $130,000.

Flowitt had a complex medical history. In 1988, she was treated for a brain tumor – when it was excised, a portion of her brain was also taken. Despite the surgery, Flowitt returned to her medical practice.

By the summer of 1997, KDMC bigwigs were concerned that Flowitt was suffering from cognitive deficits that affected patient care – there was particular concern about her focus and attention to details. On 6-19-97, she was asked to take a leave of absence so that her condition could be evaluated.

A prompt battery of tests were administered in conjunction with the Kentucky Physicians Health Foundation. Following the tests, recommendations were made to Flowitt for a follow-up plan of treatment. Flowitt resisted the recommendations, noting there were no real guidelines for her sort of condition – the health foundation primarily focused on administering the impaired physicians program which dealt with drunk and drug-addicted doctors.

KDMC was not willing to let Flowitt return without meeting the foundation care plan. Things seemed to be resolved when Flowitt interviewed for a job at a Mississippi hospital. With all but the t's crossed and i's dotted, the Mississippi hospital received an adverse recommendation about Flowitt. The offer was withdrawn. [While later withdrawn, the recommendation formed the basis of a defamation claim.]

Her dream job in Mississippi up in smoke, Flowitt sought an immediate reinstatement to her position at KDMC. The hospital again refused. This litigation followed.

In it Flowitt alleged two distinct counts. The first was contract, KDMC terminating her without cause – in this circumstance, she was entitled to three months severance pay. Her lost wages were $43,333.

Flowitt also alleged disability discrimination, the hospital forcing her out because of her brain condition. While Flowitt didn't think she had a disability, in this so-called *regarded as* case, she asserted KDMC regarded her as disabled. In proving her case, she cited an internal e-mail between a KDMC bigwig (it's general counsel) and the head of the impaired physicians program that they should attempt to "get rid" of her. On this count, predicated on the Kentucky Civil Rights Act, Flowitt sought emotional damages.

KDMC denied there was any breach, it having acted reasonably when it suspected Flowitt's brain injury affected patient safety – thus her failure to complete the foundation's care and recovery plan justified the decision to not let Flowitt return to work.

It also denied disability discrimination, vehemently denying that Flowitt had any disability – namely, no major life activity was substantially impaired by the residuals from her 1988 brain surgery. In this regard, it cited that even Flowitt conceded she wasn't disabled. [Plaintiff successfully hurdled this question with her "regarded as" theory, the trial court directing a verdict on this question.] That still left the jury to consider if KDMC discriminated, the hospital continuing to deny that it had.

KDMC also raised a procedural defense. In 2002, Flowitt filed bankruptcy in Tennessee. The hospital argued she failed to properly apprize the bankruptcy trustee of this lawsuit. This formed the basis of a lengthy summary judgment motion. Flowitt opposed that she had in fact told the trustee and he discharged the case.

The trial court granted summary judgment for Flowitt. Flowitt then sought to amend her complaint to allege abuse of process by KDMC in filing a purportedly frivolous motion regarding the bankruptcy. Judge Hagerman rejected plaintiff's motion, reasoning it might have been malpractice for defense counsel to not raise the issue.

The instructions in this complex case were unusually detailed, rejecting a barebones approach. Flowitt first prevailed on the contract count that she had been terminated without just cause.

The conclusion was more complex on disability discrimination, but still for Flowitt. The jury answered that she was (1) qualified for the position and (2) she could do essential functions. On the next element, the court's instructions indicated that as a matter of law, KDMC regarded Flowitt as disabled.

Back to the instructions, the jury went on to find that this belief was correct and that KDMC discriminated against Flowitt because of her disability. Finally to damages, plaintiff took lost wages as claimed, plus $500,000 for emotional suffering. The verdict totaled $543,333.

A consistent judgment followed, the court reserving the matter of attorney fees. In a post-trial motion, Flowitt has suggested $50,000 would represent a reasonable fee. When reviewed by the KTCR, while the hospital had not filed a JNOV motion, it has promised such a motion will be forthcoming.

Ed. Note - KDMC has had a poor litigation history with its doctors. A year ago in February of 2004, a neurosurgeon became embroiled in a dispute with the hospital. After it was resolved, the neurosurgeon's father, a fancy Beverly Hills, CA labor lawyer, sought unpaid fees for advice given to KDMC bigwigs during a labor dispute. The lawyer took an award of $100,000. **See** Case No. 2861, the 2004 KTCR Year in Review.

Race Discrimination - A black desk clerk at a motel alleged she was fired because of her race

Brown v. Super 8 Motel, 04-0068
Plaintiff: Lawrence R. Webster, *Webster Law Offices*, Pikeville
Defense: David C. Stratton, *Stratton Hogg & Maddox*, Pikeville
Verdict: Defense verdict on liability
Circuit: **Pike**, J. Coleman, 7-26-05

Hazel Brown started working as a desk clerk in December of 1999 at the Super 8 Motel in South Williamson. Her tenure with the motel was rocky. On several occasions, she was fired and rehired. The last straw came on 9-1-03 when she was caught sleeping with her boyfriend in the motel office.

This time Super 8 bigwigs fired her for good. From their perspective, the firing was fully justified – Brown was let go because of a history of employment problems including insubordination and sleeping on the job.

Brown, who is black, disagreed and believed she was a victim of race discrimination. It was her contention that she was treated differently and subjected to greater scrutiny and discipline because of her race. The Super 8 defended as above that race had nothing to do with its employment decisions.

As the jury deliberated, it had an interesting question: "Can we vote no discrimination and still give plaintiff a monitary [*sic*] settlement?" The court told the jury to read the instructions.

Back with a verdict, it was for the Super 8 and Brown took nothing. This is gleaned from the court's judgment as the verdict itself was sealed. [To even look at the verdict, the plaintiff had to make a motion to the court to permit it to be unsealed.]

Brown has since moved for a new trial, arguing the jury was confused, believing it had to prove discrimination – as her prima facie case was not rebutted, proof of discrimination was not required. The Super 8 defended that discrimination proof was required, there being ample evidence of non-discriminatory reasons to support the firing. The motion was pending when reviewed by the KTCR.

Medical Negligence - An ER doctor was criticized for giving plaintiff a third dose of anti-clotting drug – it was alleged that while the first two doses were proper, the third was excessive and led to fatal intercranial bleeding

Roberts v. Woody, 01-495
Plaintiff: Yancey L. White, *Morgan & White*, Manchester
Defense: Mark E. Nichols, *Lynn Fulkerson Nichols & Kinkel*, Lexington
Verdict: Defense verdict on liability
Circuit: **Boyle**, J. Peckler, 8-29-05

Janice Roberts, age 50, came to the ER at Ephraim McDowell Regional Medical Center on 12-8-00. She was suffering from a heart attack. An ER doctor, James Woody, recognized the signs of the myocardial infarction and administered a dose of Retavase. This thrombolytic drug has anti-clotting properties. Per the drug's protocol, Woody administered a second dose.

Roberts's condition improved and she was admitted to the hospital's ICU by a cardiologist, Dr. Aslam Ahmad. A short time later, her condition began to deteriorate. Despite repeated pages, Ahmad did not respond.

The nursing staff finally found Woody and he came to the ICU. Seeing Roberts was again suffering a heart attack, he ordered a third dose of Retavase. Initially Roberts stabilized and Ahmad again returned to monitor her.

The improvement didn't last – within minutes, Roberts was much worse. A decision was made to transfer her to Central Baptist in Lexington. She became unconscious on the helicopter and on arrival in Lexington, it was determined she had suffered intercranial bleeding. Roberts did not awaken and died the next day.

Her estate alleged negligence by Woody regarding the third dose of Retavase. An expert, Dr. Gary Vigilante, Cardiology, Philadelphia, PA, while not critical of the first two doses, explained the third dose was far too high. It then led to her fatal intercranial bleed. A second expert for Roberts was Dr. Charles Sheppard, ER, Springfield, MO.

Roberts's medicals were $1,500 and the funeral bill totaled $10,538. Also sought were her conscious suffering and destruction. An economist from Knoxville, John Moore, quantified this loss – she had done factory work. Plaintiff's husband also sought his consortium interest for the single day from the time of the third dose until her death.

Woody defended the case that he responded properly to plaintiff's heart attack, the third dose not being a deviation from the standard of care. He also countered causation, there being no competent proof that it was the third dose that caused the intercranial bleeding – it could just as well have been from the first or second dose. That tied into the second part of the causation defense – namely, intercranial bleeding is a risk of Retavase and whether there had been a third dose or not, Roberts's condition was already very grave. Defense experts were Dr. Joseph Stapczynski, ER, Lexington and Dr. Paul Colavita, Cardiology, Charlotte, NC.

Ahmad was also sued by the estate. This claim was dismissed before trial by an agreed order. The record does not indicate there was a settlement. In any event, the jury could still apportion fault to the non-party Ahmad.

The jury that heard this case in Danville sided with Woody, finding he had not violated the reasonably competent physician standard. Having so found, the jury did not reach damages or the duties of the non-party, Ahmad. A defense judgment ended this litigation.

Medical Negligence - During a disc surgery, plaintiff suffered a cauda equina spinal injury that left her with diminished bowel and bladder control

Ireland v. Hodes, 01-2245
Plaintiff: Douglas H. Morris and Lea A. Player, *Oldfather & Morris*, Louisville
Defense: Donald K. Brown, Jr., *O'Bryan Brown & Toner*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. McDonald, 9-27-05

Starting in 1994 and after a car wreck, Debra Ireland began to complain of low-back pain. Beginning in 2000, she was treated by a neurologist, Dr. Jonathan Hodes. On 3-30-00, he performed an L3-4 laminectomy.

Following the surgery, Ireland suffered a rare complication known as cauda equina syndrome. It occurs when the nerves in the spinal column are compressed – the result is a loss of sensation in the "saddle" area where one would contact a saddle on a horse. Beyond diminished sexual function, the nerve injury left her with diminished bowel and bladder function.

She blamed her injury on negligence by Hodes in performing the surgery. Because of her pre-existing spinal stenosis (a narrow spinal canal), she was especially at risk for nerve compression.