Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

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Comprehensive Statewide Jury Verdict Coverage

Civil Jury Verdicts

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

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

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

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

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

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

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

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

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

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

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

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

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stable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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