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 - Plaintiff suffered complications after a sponge was left behind during a hysterectomy – pain and suffering valued in Lexington at $1.5 million

Hammons v. Central Baptist Hospital, 05-0746
Plaintiff: J. Robert Stansbury, *Law Offices of Robert Stansbury*, London
Defense: Benny C. Epling, II, *Jenkins Pisacano & Robinson*, Lexington
Verdict: $1,749,289 for plaintiffs
Circuit: **Fayette**, J. Clark, 12-19-06

Helen Hammons, then age 65, underwent a hysterectomy on 6-7-04 at Central Baptist Hospital – it was performed by Dr. Helle Bradley. Following the procedure, Hammons returned to Bradley complaining of abdominal pain. Diagnostic tests were ordered and they revealed a sponge had been forgotten in the first surgery.

A month later, Hammons underwent a second surgery to remove the sponge. Despite the removal, she continues to complain of pain, but most troubling, frequent bowel movements. She describes having from six to eight every day.

In this lawsuit, Hammons sued the hospital and alleged negligence in leaving the sponge behind. It admitted fault for the incident. Plaintiff claimed her medicals of $48,164, plus $1,125 in lost wages. Her suffering was capped at $3,000,000 – her husband, Ray, sought $200,000 more for his consortium interest.

Central Baptist's concession of fault simplified the trial. It was left to defend damages and in that regard, it identified a Nashville surgeon, Dr. Alan Herline. Herline, (a former NFL punter as well), minimized plaintiff's injuries and any long-term residual effects from the sponge snafu.

Tried on damages only for a single day, Hammons took her medicals and lost wages as claimed plus $1.5 million for suffering. Her husband took $200,000 more for his consortium interest, the verdict totaling $1,749,289. Ten days post-trial, no judgment had been entered.

The record indicates the hospital made a pre-trial offer of judgment of $250,000 to resolve the case. The hospital has also moved to conduct juror interviews, a notion the plaintiff has resisted.

Auto Negligence - In an unusual case, the plaintiff suffered a broken hip when struck by a driver who fled the scene – in this lawsuit, she targeted a used car dealer, who had only recently sold the vehicle to the evading driver and title had not yet transferred

Matheny v. Carter's Auto Sales, 04-1007
Plaintiff: Brian S. Katz, Paducah
Defense: E. Frederick Straub, Jr. and James R. Coltharp, Jr., *Whitlow Roberts Houston & Straub*, Paducah
Verdict: $190,444 for plaintiffs
Circuit: **McCracken**, J. Hines,

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Another year has passed and the one-of-a-kind text Kentucky litigators have relied upon since 1998 is back with its ninth edition. At more than 500 pages, the KTCR 2006 Year in Review includes the complete verdict summary from every reported case in 2006, statewide from Paducah to Pikeville, Covington to London and all points in between. Beyond the full text of the 300 verdict summaries, the Year in Review has all the reports that makes the individual cases useful – even better for this year, all the reports bring together **nine** years of data in an encyclopedic format.

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12-6-06

There was a car crash on 8-25-04. Shawn Haley, it is believed, crashed his van into a vehicle driven by Patricia Matheny. It was a moderate collision. Patricia was seriously hurt, sustaining a disabling hip injury. Despite two repair surgeries, she now ambulates with a cane. Her husband, Kenneth, a passenger, suffered a soft-tissue injury.

Haley ambulated just fine and fled the scene of the crash. He later pled guilty to that charge. By the time his case came to trial, he was in jail on other charges. His testimony was preserved by deposition. Despite his plea, Haley would later testify he wasn't driving the van, a friend having taken it without his permission. That matter became ancillary when the court directed a verdict against the pro se Haley.

The key question in this case turned on the title of the Haley van. Just a month before the wreck, he had purchased it from Carter's Auto Sales. However in that intervening month, title had not been transferred. Plaintiff sued Carter's Auto Sales and alleged two theories, (1) negligent entrustment, and then vicariously, (2) if title wasn't transferred, then the dealership's insurance would be responsible to the extent of its limits.

The dealership defended the case that it had given the transfer paperwork to Haley – although Haley denied this, the paperwork was found in the van a month later at a salvage yard. It also diminished the claimed damages.

As the case concluded, the court directed a verdict against Haley on liability – it also directed a verdict for Carter's Auto Sales on negligent entrustment. Thus the jury would only consider the ownership issue as it implicated the dealership's insurer, Empire Fire & Marine, not any tortious conduct by the dealership on its own.

As it turned out, the jury concluded that ownership had not been transferred. That finding then placed the dealership's insurer on the hook. Moving to damages, Patricia took her medicals, future medicals and lost wages as claimed, but nothing for impairment. Her suffering was valued at $100,000, her verdict totaling $175,885. Her husband also took his medicals of $14,556, but nothing for his suffering or consortium. A consistent judgment followed.

As the jury deliberated, it asked the court a question that got to the heart of the matter. The court had excluded any explicit mention that a finding about ownership would implicate Carter – the jury then asked what would be the effect of a finding regarding title against the dealership. The court didn't answer. Pending is a defense motion for a new trial that has argued the verdict was against the weight of the evidence, Carter having taken steps to transfer title.

Medical Negligence - A family doctor was blamed for missing signs of a gastric ulcer – because of the delay, it was alleged, the ulcer invaded plaintiff's pancreatic artery, leading to a nearly fatal catastrophic bleed

Bradley v. White, 04-0001
Plaintiff: Kirsten Daniel, *Seiller Waterman*, Louisville and Gerald S. Leeseburg, *Leeseburg & Valentine*, Columbus, OH
Defense: James P. Grohmann, *O'Bryan Brown & Toner*, Louisville
Verdict: $173,990 for plaintiff assessed 25% to White (Despite this interrogatory finding, the jury *also* completed a verdict for White)
Circuit: **Henry**, J. Conrad, 12-4-06

Sarah Bradley, then age 41, was a patient since 1997 of Dr. Steven White, a general practitioner in Campbellsburg. Beginning in the fall of 2002, Bradley began to report abdominal symptoms. White linked them to gastritis and prescribed Nexium.

This regimen of care seemed to provide some temporary relief. As 2002 ended, Bradley's symptoms continued. White made a referral to a gastroenterologist in December for diverticulitis – still Bradley continued to have pain, that doctor not finding the cause of the problem.

The nature of the problem revealed itself in January. Bradley began to bleed profusely, it being learned she had a gastric ulcer that had spread and invaded her pancreatic artery. Her condition was grave, but she underwent three surgeries and had portions of her stomach removed. While Bradley recovered, she continues to complain of pain and scarring – her diet is also affected.

Bradley sued White and alleged negligence by him in failing to diagnose the gastric ulcer when it was a still a manageable condition. Quite simply, it was present for several months and White just missed it. In fact his permitting Bradley to keep taking aspirin exacerbated the ulcer. He was also criticized regarding the referral, looking just for diverticulitis – that referral led only to an upper GI scan, when a lower GI test was needed.

Plaintiff's liability expert was Dr. Blanche Borzell, Internist, Watkins Glen, NY. If Bradley prevailed, she sought her medicals and lost wages, respectively of $4,604 and $7,987, plus $750,000 for pain and suffering.

White defended the case that he carefully and properly followed Bradley's condition, her symptoms being consistent with gastritis, not an ulcer. He also cited non-compliance by Bradley as a factor in her injuries. Defense experts were Dr. John Lach, Family, Louisville and Dr. Whitney Jones, Gastroenterology, Louisville.

The case was tried from a Tuesday to a Friday – the jury then deliberated until late in the evening on Friday. No verdict was reached. The court brought the jury back on Monday morning.

After three more hours of deliberations, a verdict was reached. In the interrogatories, the jury found both White and the plaintiff negligent. That fault was assessed 25% to the doctor, the remainder to Bradley.

Then to the verdict forms, the jury unanimously signed both the form for White *and* Bradley. In completing the form for Bradley, she took her medicals and lost wages as claimed, plus $125,000 for suffering. The raw verdict totaled $173,990, or $43,497 less comparative fault.

However as the verdict was returned, if anyone noticed the apparent inconsistency (finding both for and against the doctor), no one spoke up. Nearly a month later, neither a judgment had been entered nor had post-trial motions been filed.

Ed. Note - In the history of the KTCR, stretching to 1997, this is the first time this question has arisen. That is, the jury completed interrogatories finding fault, assessing fault and awarding damages, but it then completed inconsistent verdict forms.

What are the options for the court? The first and most obvious is to perhaps fully read the verdict before releasing the jury – in this case, apparently everyone

got excited about the award and didn't focus on the details. [There is a coounter-argument that the jury's verdict, whether inconsistent or not, is complete once returned.]

Now facing this predicament, again the question, what can the judge do? The judge might first enter an order of trial and judgment that reflects what happened and wait for motions by the parties.

Then having received the motions, she could rule by fiat and reconcile the verdict forms with the intent of the jury. In this case, there was certainly an intent to find against White, the jury doing both in the fault and comparative fault interrogatories. We also think there are two other options: (1) she could interview jurors, or (2) simply declare a mistrial.

Auto Negligence - The plaintiff sustained a tibial plateau fracture in a disputed red light crash – pain and suffering was valued at $150,000

Bohn v. French, 05-5854
Plaintiff: David C. Travis, *Travis & Herbert*, Louisville
Defense: James P. Dilbeck, *Dilbeck Myers & Harris*, Louisville
Verdict: $185,386 for plaintiff
Circuit: **Jefferson**, J. Montano, 12-7-06

There was a red light crash in Louisville on 10-21-03 at the intersection of Whipps Mill Road and New LaGrange Road. The defendant, Linda French, elderly and since deceased, alleged she had a green turn arrow that permitted a turn. Adam Bohn, then age 32, approached from the opposite direction.

Bohn too believed he had a green light that permitted him to pass through the intersection. French turned in front of Bohn and a moderate collision resulted.

In the wreck, Bohn sustained a tibial plateau fracture. He remained hospitalized for four days and thereafter as the injury healed, he progressed from a wheelchair to a walker. His medical bills were $10,386 and he sought $50,000 for impairment. Pain and suffering was limited to $300,000.

Bohn sought damages from French in this lawsuit – a simple theory from his perspective, Bohn had the light and French ran it. Before the case could be tried, French died. Her estate took up the defense and continued to posture that at all times, French had a turn arrow.

The verdict on liability was for Bohn, the jury finding French 100% at fault. Then to damages, he took his medicals as directed by the court, plus $25,000 for impairment. Suffering was $150,000, the verdict totaling $185,386. A consistent judgment followed.

While deliberating, the jury asked two questions: (1) Can we have a copy of the police report, and (2) Can you define the "loss of power to earn money?" Montano didn't answer either query.

Truck Shipping Negligence - A trucker shipping frozen chickens passed out after an exposure to C02 in the form of dry ice, then falling from his truck and suffering a paralyzing injury – he blamed the chicken shipper, a food conglomerate, for exposing him to the dry ice

Knous v. ConAgra Foods, 5:04-102
Plaintiff: Thomas L. Osborne, *Osborne & Harris*, Paducah
Defense: Kerry D. Smith, *McMurry & Livingston*, Paducah
Verdict: Defense verdict on liability
Federal: **Paducah**, J. Russell, 11-30-06

Edward Knous was a long-haul trucker and on 10-31-03, he picked up a load of frozen chickens from the ConAgra plant in Mayfield. He first opened the door on the trailer to inspect his load. Standing there just fifteen seconds, he felt a little dizzy from the C02 fumes that were emitted from dry ice. Still he began his journey, heading on to Chattanooga.

Knous never made it. He was not feeling well and pulled off at a truck weigh station in Lyon County. Stepping from his cab, Knous lost consciousness. He fell some six to eight feet from his cab to the asphalt below. In that fall, Knous sustained a significant T7-8 fracture. Because of the fracture, he sustained a spinal cord stroke, which in turn caused permanent paralysis.

The liability theory in this diversity case blamed ConAgra for the initial C02 exposure and then the resulting injury. Plaintiff's theory was that ConAgra knew of the danger of the dry ice (its knowledge being superior to his) and that it should have warned him and kept the doors on the trailer locked.

A truck safety expert for plaintiff was Roland Brown, Navarre, FL – the toxicology of the C02 was described by Henry Holtzman, Pipersville, PA. Finally causation regarding the exposure, the fall and the stroke were developed by a neurologist, Dr. James Metcalf, Paducah.

ConAgra defended the case and denied the load was improperly prepared in any regard. It also disputed the injury in a bit of a chicken and the egg theory. That is, the spinal cord stroke wasn't a result of the fall, but rather the cause of it.

There was proof that Knous had amphetamines in his system (the incident occurred at 2:00 in the morning), the stroke being linked to that drug use. [Knous denied using drugs.] His credibility was diminished in part as he is a convicted persistent felony offender.

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

Premises Liability - Plaintiff sustained a disc injury in a truck stop slip and fall – the jury, considering a pre-*Lanier* notice instruction, found fault and awarded special damages, but rejected pain and suffering

Bustetter v. Flying J, 05-47
Plaintiff: William C.O. Reaves, Ashland
Defense: William H. Wilhoit, *Wilhoit Law Office*, Grayson
Verdict: $8,936 for plaintiff less 60% comparative fault
Circuit: **Boyd**, J. Hagerman, 11-7-06

Lewis Bustetter, then age 42 and a trucker, stopped on 1-18-04 at the Flying J in Cannonsburg. Inside the truck stop, he stepped across the floor to grab a bottle of water from a cooler. The floor was wet and Bustetter slipped.

He has since complained of an L4-5 disc injury as confirmed by Dr. Douglas Deitch, Neurology, Ashland. Bustetter's medicals were $5,686 and he sought lost wages of $6,503. Impairment was $15,000, plaintiff seeking $6,413 for future care. Finally the jury could award $41,000 for suffering. Bustetter's liability theory was critical of the wet floor hazard, there being no warning. Flying J defended and cited that at the time of the fall, an employee had been mopping and the floor was wet. However before falling, Bustetter had stepped over the bucket to reach the cooler – the bucket itself put the plaintiff on notice, it explaining clearly that the floor was wet.

Both fault and damages were also diminished, the Flying J explaining that

after the fall, Bustetter purportedly remarked, "I'm fine, it's just that these darn cowboy boots are hard to walk in." A defense expert, Dr. Joseph Zerga, Neurology, Lexington, linked plaintiff's symptoms to degenerative conditions.

The court's instructions were unusual (at least in the post-*Lanier* regime), requiring plaintiff to prove that the defendant should have anticipated plaintiff won't notice the wet floor and because of the wet condition, it was not reasonably safe. The jury answered for Bustetter under this instruction – it also found him at fault. That fault was apportioned 50% to the Flying J, the remainder to Bustetter.

Then to damages, plaintiff took his medicals as claimed, plus $3,250 for lost wages. Future care, impairment and suffering were all rejected , the raw verdict totaling $8,936. A judgment less comparative fault was entered for $3,574, the Flying J satisfying it. There were no post-trial motions.

Auto Negligence/UIM - The verdict less comparative fault for a plaintiff with a broken foot and sternum was not enough to implicate the UIM limits in this *Coots*-advance case

Hill v. Jankowski et al, 03-1299
Plaintiff: John K. Carter and David Thompson, LaGrange
Defense: Wm. Clifton Travis, *Travis & Herbert*, Louisville for Jankowski
Deborah Campbell Myers, *Dilbeck Myers & Harris*, Louisville for State Farm
Verdict: $82,748 for plaintiff less 45% comparative fault
Circuit: **Hardin**, J. Coleman, 11-17-06

Terry Jankowski traveled on I-65 near Elizabethtown on 4-9-03. On the rainy interstate, her vehicle hydroplaned. Jankowski crossed the median and collided with a van. A second later, Angela Hill, then age 33, rear-ended the stopped van. It was a moderate impact.

Hill sustained a mid-foot fracture – a significant injury, it was surgically set with pins. She also broke her sternum and sustained a soft-tissue shoulder injury. Her medicals were $18,711 and she sought $18,500 for future care. Lost wages were $14,186 (Hill is a respiratory therapist) and future lost wages were $15,600. Impairment was limited to $184,481, while suffering was capped at $292,000.

Hill moved first against Jankowski and her $50,000 limits – that claim was settled for $45,000. Hill's UIM carrier, State Farm, advanced that sum and entered the litigation directly. Thus at trial, Hill sought to exceed the UIM floor against State Farm – Jankowski continued to participate pursuant to the duty to defend and in response to State Farm's cross-claim. The defense of the case was two part, (1) damages were diminished, and (2) plaintiff was blamed for her look-out, the defendants noting she rear-ended the stopped van.

Fault was mixed at trial. It was assessed 55% to the tortfeasor, the remainder to plaintiff. Then to damages, Hill took her medicals as claimed, plus $15,000 for future care. Lost wages were $9,237, Hill taking $4,800 for those in the future.

Impairment was rejected, while suffering was valued at $35,000. The raw verdict totaled $82,748. However less the underlying limits, PIP and comparative fault, it was not enough to exceed the $50,000 floor of UIM coverage. A consistent judgment dismissed the plaintiff's claim and sorted out the respective cross-claims.

Premises Liability - An elderly theater patron fell when a folding chair shifted and she sustained a knee injury

Sadler v. Jenny Wiley Drama Association, 04-0790
Plaintiff: Garis L. Pruitt, *Pruitt & Thorner*, Catlettsburg
Defense: Henry E. Kinser and Dustin J. Calhoun, *Wyatt Tarrant & Combs*, Lexington
Verdict: Defense verdict on liability
Circuit: **Floyd**, J. Caudill-2, 12-5-06

On 8-14-03, Hazel Sadler, then age 85 and the widow of a minister, visited the Jenny Wiley State Park to see a performance of *Big River* with her church. The show went on at an outdoor amphitheater operated by a non-profit, the Jenny Wiley Drama Association.

It was a big crowd and to accommodate Sadler's church group (so they could all sit in the same row), an extra folding chair was added at the end of the second row. The folding chair was white – the rest of the chairs were red and were permanent.

At the conclusion of the show and while the lights were still dim, Sadler started to exit down her row. Coming to the end of the row, Sadler stopped at the last chair (the temporary folding chair) and set her purse down. When she went to get it again, the chair scooted. Sadler fell backwards and landed on her knees. Initially she believed she was okay.

But back home again in Boyd County, Sadler continued to complain of knee pain. She later underwent an arthroscopic surgery that was performed by Dr. George Aitken, Orthopedics, Ashland. Despite that surgery, the once active Sadler is now limited, ambulating with a walker and a cane.

She pursued a tort lawsuit against Jenny Wiley, alleging negligence regarding the placement of the temporary folding chair. It was noted that of the 580 chairs in the dark amphitheater, there was just a single white folding chair. She thought its placement represented a deviation from the standard of care. If Sadler prevailed, she sought her medicals of $52,997, plus uncapped sums for future care and suffering.

Jenny Wiley defended the case and denied fault in placing the extra chair. It focused that the regular stadium chairs were red and that this chair (the one that scooted) was white. Damages were also diminished.

The court's instructions required Sadler to prove notice, that is that the condition of the chair existed long enough that Jenny Wiley should have discovered it. In the post-*Lanier* world, Sadler could not meet the burden and the defense prevailed on liability. Nearly a month later, no judgment had been entered.

Auto Negligence/UIM - Suffering from a soft-tissue injury in this Coots-advance UIM case was $5,000 – the total verdict ($27,983 less PIP) was not enough to trigger the $25,000 floor of UIM coverage

Thomas v. Brown et al, 06-0005
Plaintiff: Thomas K. Herren, *Herren & Adams*, Lexington
Defense: Mark J. Hinkel, *Landrum & Shouse*, Lexington for Brown
Thomas L. Travis, *Clark & Ward*, Lexington for Auto-Owners Insurance
Verdict: $27,983 for plaintiff
Circuit: **Fayette** , J. Clark, 12-13-06

Wanda Thomas, then age 55, stopped for a red light in Lexington at the intersection of Georgetown Street and Roosevelt Boulevard. As Thomas came to a stop, she was rear-ended by Wilmore Brown. Brown defended the

wreck, blaming a sudden stop by Thomas.

However it happened, there was an impact and Thomas was taken to the ER at St. Joseph where she treated for a soft-tissue injury. She has since complained of radiating neck pain, linking her symptoms to having struck the headrest during the impact.

Dr. Sara Salles, Physical Medicine, Lexington, linked plaintiff's symptoms to myofascial pain. The incurred medicals were $14,983 and Thomas sought $150,000 for future care. She also sought $100,000 each for past and future suffering.

Procedurally Thomas first moved against Brown. He offered his $25,000 policy limits. Plaintiff's UIM carrier, Auto-Owners Insurance, advanced those limits and stepped in to defend. Brown remained at trial pursuant to the duty to defend – however for plaintiff to prevail, she had to exceed the $25,000 floor of coverage plus PIP. The case then was defended on fault as noted above – damages were also diminished, photographs showing very minor damage.

This jury first resolved fault for Thomas, finding Brown solely at fault. Then to damages, she took her medicals as claimed, plus $8,000 for future care. Past suffering was $5,000, while that in the future was rejected. The verdict totaled $27,983, but less PIP, it was not enough to implicate the insurer's coverage. A defense judgment followed.

Deliberating the case, the jury had questions for the court. It asked: Once plaintiff receives any payment, is there any oversight as to how she spends the money? They further queried: Is there a guarantee she will spend it on future medicals? The court told the jury those matters were not for it to consider.

Fraudulent Inducement - In a commercial dispute between brother and sister, brother alleged sister induced him to forego another profitable opportunity to rejoin the family business – then several years later, she kicked him out of the business, the brother then suing to recover the profits he would have earned had he struck out on his own

Shircliff v. Kentucky Petroleum Recycling et al, 04-9558
Plaintiff: Stuart E. Alexander, III and William J. Walsh, *Tilford Dobbins Alexander Buckaway & Black*, Louisville
Defense: Craig C. Dilger and Justin D. Clark, *Stoll Keenon & Ogden*, Louisville
Verdict: $532,000 for plaintiff
Circuit: **Jefferson**, J. Montano, 9-21-06

Many years ago Leo Shircliff founded a company called Kentucky Petroleum Recycling (KPR) – as its name implies it recycles oil products from commercial enterprises. Two of Leo's children, Charles and Denise Shircliff Jett, entered the family business. Charles, with the company for twenty-plus years, struck out on his own in 1992.

He started his own company and sold it five years later. For five more years, Charles was encumbered by a non-compete. By the fall of 2002, Charles was ready to rejoin the industry. He met with his sister and a deal was struck.

Charles would invest some $250,000 in KPR – the company then would provide him a salary and make him a part-time owner. Things fell apart and Charles was fired in October of 2004.

Thereafter he pursued this action against his sister and KPR, alleging he was fraudulently induced to rejoin the company. That is, his sister falsified their agreement (removing a page that contained the company's consideration) – Charles then relied on the inducement with expectations of sharing in bonuses if certain targets were met. The targets were met and no bonus materialized. Thus it was the plaintiff's argument that his sister owed $532,000 in lost profits – those were purported to be profits Charles would have earned had he started on his own in 2002 instead of joining KPR and bringing his abilities and contacts to that entity.

Sister defended this case and denied there was any false inducement. In fact, she thought Charles was paid everything he was owed – he was fired, the defense theory went, because of misconduct. Finally sister thought the damage claim was absurd, there being no proof Charles had lost anything. [She noted in this regard that the $250,000 loan Charles secured was paid back.]

The fraudulent inducement theory was resolved for the plaintiff. Charles then took the $532,000 in lost profits he had claimed. A defense judgment was entered for him.

Denise moved for JNOV relief arguing there was no evidence Charles lost anything. The motion was denied. Jett has appealed. Charles has also begun filing a flourish of non-wage garnishments against Jett and KPR.

Employment Retaliation - The newly elected county clerk fired three deputies who had not supported her candidacy

Conlin et al v. Boyd County Clerk, 0:03-30
Plaintiff: Michael J. Curtis, Ashland
Defense: Phillip Bruce Leslie, *McBrayer McGinnis Leslie & Kirkland*, Greenup
Verdict: Defense verdict on liability
Federal: **Ashland**, J. Bunning, 12-7-06

Patty Conlin, Teresa Caudill and Cheryl Fields (the plaintiffs) were longtime deputy clerks with the Boyd County Clerk. In the fall of 2002, the seat was open. Doris Hollan ran to fill it. The plaintiffs did not support Hollan and openly supported her opponent.

That this was not a good career move (should the election go the wrong way) was first forecast after an October 2002 fundraiser for Hollan. Held at a Ponderosa steakhouse, the plaintiffs didn't come. Following their absence, there were rumors they'd be sacked if Hollan won.

Hollan did win the election and took office in January of 2003. On their first day of work in January, the three plaintiffs were not reappointed. Hollan explained the three plaintiffs were just not good workers.

The plaintiffs thought something different was afoot. In this federal lawsuit, it was alleged that they were not reappointed because of their political opposition to Hollan's candidacy. If prevailing, plaintiffs could be awarded lost wage damages of approximately $30,000. Hollan defended as above – the failure to reappoint was all about performance, the election having nothing to do with it.

The verdict was mixed, but ultimately for the clerk. The jury first found that a substantial or motivating factor in the failure to appoint was the exercise of First Amendment rights. Continuing however the clerk prevailed, this jury further finding that the clerk had proved she wouldn't have reappointed the plaintiffs for non-political reasons.

Three weeks post-trial, no judgment had been entered. While deliberating this federal jury went to Bunning with the following concerns: We are stuck on substantial and motivating being in the same sentence. If the court replied, that

reply was not made part of the court record.

Ed. Note - Didn't the court's instructions invite this inconsistent result, that is, the speech by the plaintiffs was a substantial or motivating factor in the decision not to reappoint, but by contrast, the jury also found they would have been fired anyway. Which was it? Fired because of their speech or other reasons? The jury concluded it was a case of mixed motives.

Underinsured Motorist - Suffering from neck pain and symptoms of a mild brain injury were valued in Beattyville at $70,000

Brandenburg v. Farm Bureau, 02-0197
Plaintiff: Thomas P. Jones, Beattyville
Defense: Guy R. Colson, *Fowler Measle & Bell*, Lexington
Verdict: $98,924 for plaintiff
Circuit: **Lee**, J. Trude, 12-9-03

On 3-30-02, James Brandenburg, then age 73, traveled on West Railroad Street in Beattyville. At the same time, Mabel McKinney backed from a driveway into his path. A moderate crash resulted, Brandenburg broadsiding McKinney.

Brandenburg's liability theory was not complex – McKinney backed into his path, leaving him no time to evade. She countered that it was clear when she started to back out. It was her suggestion that he was speeding. Brandenburg countered that he was going just 15 mph.

An accident expert for the defense, Jerry Pigman, Lexington, thought Brandenburg's version was unlikely – if traveling just 15 mph, he had plenty of time to stop.

However it happened, there was a wreck and Brandenburg has since complained of neck pain. He has also suffered from a mild brain injury – once active, his children describe that he now frequently cries.

Brandenburg moved first against McKinney and took her $25,000 policy limits. Above that sum he sought UIM coverage from his carrier, Farm Bureau – its limits would be exhausted at $50,000. If prevailing, he sought his medicals of $23,924, plus $10,000 for future care. Suffering, presented in two categories, past and future, was not capped.

Farm Bureau defended on liability as above, employing Pigman – Brandenburg continued to describe that McKinney shot out into his path. The insurer also diminished the claimed injury, relying on a neurologist IME, Dr. Russell Travis, Lexington. [Plaintiff's counsel thought little of the expert and referred to him as a scoundrel.]

The jury in this case found the tortfeasor solely at fault. Then to damages, Brandenburg took his medicals as claimed, plus $5,000 for future care. He also took $20,000 and $50,000, respectively for past and future suffering. The verdict totaled $98,927. The court entered a judgment for the plaintiff for $50,000 (Farm Bureau's limits), representing the verdict less PIP and the $25,000 underlying limits.

Farm Bureau sought post-trial relief, arguing the verdict was the result of passion and prejudice – it suggested the jury had disregarded proof the plaintiff was speeding. The motion was denied.

Farm Bureau appealed. The Court of Appeals affirmed on 2-11-05, Judge Buckingham with Judge Vanmeter joining him. Judge McAnulty (now Justice McAnulty) dissented without opinion. Returned to Lee County, Farm Bureau satisfied the judgment.

Jones Act - A deckhand linked a disc injury to being forced to carry heavy rigging – tried on damages only, he prevailed at trial

Martie v. American Electric Power, 2:04-247
Plaintiff: Meredith L. Lawrence, Warsaw
Defense: Todd M. Powers and Megan C. Ahrens, *Schroeder Maundrell Barbiere & Powers*, Cincinnati, OH
Verdict: For plaintiff
Federal: **Covington**, J. Bertelsman, 11-29-06

Paul Martie, then age 41, was working as a deckhand on the A/V Prentice, a vessel operated by American Electric Power. He alleged that on 11-10-03 and already with a sore back, he was forced to handle heavy rigging. Martie did his work as instructed, but it purportedly left him disabled with a C6-7 disc injury. Despite a fusion repair, he has been unable to return to work.

Martie sued his employer in this Jones Act lawsuit, alleging both negligence and seaworthiness claims. The gravamen of his theory was that the ship was understaffed, forcing Martie to do too much lifting and thereby creating the injury.

American Electric Power defended that there was no injury event, nothing being reported at the time. It thought the plaintiff had simply sustained a temporary strain injury while performing his ordinary duties. It thought the disc injury was related to degenerative conditions. This version of the proof contrasted with Martie's presentation that he was a disabled seaman.

This case was tried to a jury on fault issues only. Martie prevailed on both the Jones Act and seaworthiness claims. The court entered a consistent judgment and has ordered the parties to mediation.

Auto Negligence - Plaintiff sustained a minor injury when the defendant backed out of a bar and into plaintiff's path

Reid v. Cerami, 05-8842
Plaintiff: Michael A. Schaefer, Louisville
Defense: Curt L. Sitlinger, *Sitlinger McGlincy Theiler & Karem*, Louisville
Verdict: Threshold verdict
Circuit: **Jefferson**, J. Kemper, 12-6-06

On 9-15-03, Yvette Reid, then age 34, traveled on Dixie Highway. Suddenly Joyce Cerami backed out of a bar parking lot and into Reid's path. A moderate crash resulted. The police tested Cerami at the scene for alcohol – she passed.

Reid has since treated for a soft-tissue injury incurring medical bills of $6,063. Lost wages were $13,333 and she sought pain and suffering of $25,000. In this action, she sought damages from Reid, blaming her for the wreck.

Cerami defended and to the wreck, explained she was distracted after dropping her cigarette. Then to the crash, it was Cerami's position that the wreck was too minor to cause a compensable injury. A threshold defense was presented.

This case was resolved before the jury reached damages. It returned a threshold verdict for Cerami, Reid taking nothing. A defense judgment followed.

Car Repair Negligence - A Cadillac Escalade caught on fire, the owners losing personalty – they sued the dealership, alleging a faulty repair led to the fire

Ball v. Quantrell Cadillac, 04-1120
Plaintiff: Jeffrey A. Darling, *Darling & Reynolds*, Lexington
Defense: Peter B. Jurs and Michael P. Foley, *Rendigs Fry Kiely & Dennis*, Cincinnati, OH
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Goodwine, 12-12-06

Tina and Kerry Ball leased a 2002 Cadillac Escalade from Quantrell Cadillac in Lexington. In the first year they had the car, they made some nine trips to have the cigarette power outlet repaired. They believed after a 2-7-03 visit that it was finally fixed.

A month later with the Balls in the SUV, along with their infant daughter, smoke started to pour out of the lighter. The Balls escaped the car, but the Escalade was a total loss. The plaintiffs settled a claim with GM that got them out of the lease. In this lawsuit, they sought some $20,000 in personalty that was lost in the fire – that included cash, jewelry and luggage.

The Balls advanced two theories to trial. The first went to the repairs, it being argued the wrong fuses were used, thereby leading to the fire. Plaintiff's mechanic expert was Van Kirk, Lexington.

Originally Quantrell Cadillac prevailed by summary judgment, the plaintiffs not replying to the dealership's motion. Summary judgment was later set aside, plaintiff's counsel citing excusable error by a paralegal that didn't open the envelope with the motion. In defending the merits, Quantrell Cadillac denied the repairs were made negligently, instead citing a defect with the Escalade.

The multiple repairs, none fixing the problem, also formed the basis of a consumer protection claim. If the plaintiffs prevailed, they could also be awarded punitive damages.

The verdict on liability was for Quantrell Cadillac and the plaintiffs took nothing. Three weeks later, no judgment had been entered.

Surveyor Negligence - The plaintiff trespassed after relying on a faulty survey – he was later sued and after settling that quiet title lawsuit (ten years after the survey), he sued the surveyor for the purportedly negligently performed survey

Sparks v. Stagg, 02-90322
Plaintiff: Jeffrey N. Lovely, *McFarland & Lovely*, West Liberty
Defense: Earl Rogers, III, *Campbell Rogers & Blair*, Morehead
Verdict: Defense verdict on liability
Circuit: **Rowan**, J. Maze, 7-31-06

In 1992, Emery Sparks of the Big Caney Creek area of Morgan County, sought a survey of his property to resolve a dispute with neighbors. Sparks selected Richard Stagg, a licensed surveyor from Morehead to do to the work.

The survey was completed and relying on it, Sparks began to plow and otherwise improve low-lying land he thought he owned. His neighbors disagreed and sued him in a quiet title action. That Morgan County lawsuit was settled in 2002, Sparks capitulating after a second survey contradicted Stagg's original survey. Sparks believed he spent some $20,503 in legal fees and other expenses to resolve the survey error by Stagg.

In this lawsuit, Sparks sought to recover those damages from Stagg, blaming him for the faulty survey. He also hurdled the considerable statute of limitation question, explaining that he waited to sue for two reasons: (1) the quiet title action was not finished yet, and (2) throughout the pendency of the Morgan County litigation, Stagg continued to stand by his first survey.

That was Stagg's continued position in this lawsuit – he flatly denied fault. That position may have been undercut as in 1994, the state licensing agency for surveyors suspended him for a month and ordered a $2,500 fine, all arising from the botched Sparks survey.

The court's instructions were simple, asking if Stagg violated the reasonably competent surveyor standard – the answer was no and Sparks took nothing. A defense judgment closed this case.

Negligent Misrepresentation - Homeowners in a subdivision alleged they paid a premium for lots that were next to a protected forest easement – several years later they learned the protected forest wasn't protected at all and it would be developed

Gutting et al v. Mareli Development Corporation, 04-4894
Plaintiff: Bill V. Seiller, *Seiller Waterman*, Louisville
Defense: F. Larkin Fore, *Fore Miller & Schwartz*, Louisville
Verdict: $18,500 for plaintiffs
Circuit: **Jefferson**, J. Conliffe, 9-14-06

In 1998, D.R. Horton, a national home development company, acting through a local subsidiary, Mareli Development Corporation, began selling lots in an Okolona-area subdivision, Bridlewood. Several purchasers of lots (six relevant to this case), paid a premium of some $4,000 to $8,000 for certain lots.

While the promise was slightly different, Mareli agents assured the purchasers that for this extra consideration their lots would abut a protected watershed that was owned by MSD. For all times, this forested area (also called a nature preserve) would never be developed. Several years later the plaintiffs learned the promise was false – development began and the protected forest was no more.

The six plaintiffs then instituted this lawsuit against Mareli alleging both negligent misrepresentation and fraud. [Fraud did not survive to trial.] Thus there were no punitive damages, the plaintiffs only seeking the diminution in the value of their property because of the phony promise – that amount represented the extra amount they had originally paid. Mareli denied the misrepresentation.

The verdict on liability was for all six plaintiffs – however only four took damages, those awards ranging from $4,500 to $6,000 and all totaling $18,500. A consistent judgment followed.

Truck Negligence - The driver of a coal truck lost control in a curve, his truck and its load tipping onto the plaintiffs – the wife, a passenger, was hurt more seriously, complaining of persistent neck and shoulder pain

Owens v. Danco Trucking, 05-1178
Plaintiff: Thomas W. Moak, *Moak & Nunnery*, Prestonsburg
Defense: John G. McNeill and Evan B. Jones, *Landrum & Shouse*, Lexington
Verdict: $101,567 for Bonnie and $22,987 for John
Circuit: **Floyd**, J. Caudill-1, 11-2-06

It was 9-6-05 and John Owens, then age 54, was traveling on Ky 979 – his wife, Bonnie, the same age, was a passenger. At the same time, Gary Cole, driving a loaded coal truck for Danco Trucking, approached from the opposite direction and into a curve.

Cole took the curve wide and he saw the Owens vehicle approaching – he shifted back into his lane. However his rear wheel was nearly dropping off the roadway so he shifted back across the double-yellow. As he did so, his coal truck tipped over, miraculously just sideswiping Owens. However its load did pour onto their vehicle, cracking the windshield.

Bonnie, hurt more seriously, has since complained of persistent neck and shoulder pain. Her medicals were $21,639. Working in the kitchen at Hardee's, lost wages were $4,928. She also sought $299,999 for suffering.

John, not hurt at the scene, has since complained of a soft-tissue injury. His medicals were $12,987 and like his wife, he also sought $299,999 for suffering. In this lawsuit, both targeted Danco Trucking, implicating Cole for losing control. Danco Trucking defended and minimized the claimed injuries.

The court having directed a verdict on fault, the jury went to damages. Bonnie took her medicals and lost wages as claimed plus $75,000 for suffering. Her verdict totaled $101,567. John similarly took his medicals, but just $10,000 for suffering – his verdict was $22,987. A judgment less PIP was entered for the plaintiffs.

Medical Negligence - A cardio-thoracic surgeon was criticized for even attempting a coronary artery bypass on an elderly patient with an already weakened heart – in the procedure, complications developed and the plaintiff died

Holmes v. Reed, 97-0892
Plaintiff: Michael J. Curtis, Ashland and Walter J. Wolske, Jr., *Wolske & Barclay*, Columbus, OH
Defense: Benny C. Epling, II, *Jenkins Pisacano & Robinson*, Lexington
Verdict: Defense verdict on liability
Circuit: **Boyd**, J. Hagerman, 12-12-06

Elva Holmes, then age 68, had a long history of heart trouble. By the fall of 1996, he had previously undergone open heart surgery. His troubles continued and on 8-9-96, he went to the hospital with chest pain. A month later, he saw a cardio-thoracic surgeon, Dr. Laura Reed.

Reed recommended a coronary artery bypass – she explained to Holmes that the procedure had an 8-10% mortality rate. Based on these representations, Holmes agreed to undergo the surgery.

Performed on 9-10-96 by Reed, things did not go well. Early in the surgery, Reed discovered that plaintiff's aorta was enlarged and heavily calcified. This discovery gave Reed pause and she stopped the procedure to consult with colleagues and consider her next course of action.

Reed believed it was best to continue the procedure – however the risk associated with continuing increased plaintiff's mortality to some 30%. She advised his family (Holmes couldn't speak for himself) and they agreed. The surgery was not a success and despite repeated interventions and two more surgeries, Holmes was dead two days later.

His estate then pursued this medical claim against Reed. The theory was two-fold and was predicated on (1) performing the surgery in the first place as at the time, while plaintiff's heart was weak, he was doing well, and (2) failing to properly advise him of the true risks of the surgery. Plaintiff's expert was Dr. Merrill Bronstein, Cardio-thoracic Surgery, Daly City, CA. Bronstein, particularly, was critical of starting the procedure at all, noting that the aorta complication Reed encountered was completely predictable.

If the estate prevailed, it sought the funeral bill of $8,000, plus $36,000 for destruction. Pain and suffering was limited to $1,000,000. While this case was originally filed in 1997, it took nearly ten years to go to trial – that delay had multiple causes, but included the fact that Reed was insured by the since-defunct PIE.

Reed defended that the surgery was properly selected, Holmes was fully informed and finally that the aorta problems represented an unforeseeable complication, one which Reed addressed. The poor result was blamed not on her care, but rather on plaintiff's fragile cardiac condition. Defense experts included two cardio-thoracic surgeons, Dr. Geoffrey Graeber, Morgantown, WV and Dr. Robert Cordell, Winston-Salem, NC.

This Catlettsburg jury found that Reed had not violated the reasonably competent cardio-thoracic surgeon standard and it awarded the estate nothing. A defense judgment followed.

Auto Negligence - In a minor rear-end case, the plaintiff was awarded medicals of $4,820 and $1,000 more for suffering for a purported seizure disorder

Wilson v. Mathis, 03-2996
Plaintiff: Albert B. McQueen, Jr., *Wilson Polites & McQueen*, Lexington and Lee Vanhorn, Lexington
Defense: Luke A. Wingfield, *Clark & Ward*, Lexington
Verdict: $5,820 for plaintiff
Circuit: **Fayette**, J. Ishmael, 12-7-06

It was 11-27-00 and Henry Wilson, then age 25, was rear-ended by Walter Mathis. Wilson had been stopped at a red light. Fault was no issue. The wreck resulted in minor damage.

Wilson went to the ER the next day to treat for soft-tissue symptoms. A more significant symptom developed eight months later when Wilson began to suffer from seizures. His neurologist, Dr. Patrick Leung, Lexington, linked the seizures to this wreck.

Plaintiff's medicals were $17,704 and he sought $155,509 for future care. Impairment was $25,480 – Wilson is a self-employed glass blower. Suffering was limited to $180,000.

Mathis defended on damages and looked to proof from an IME, Dr. Joseph Zerga, Neurology, Lexington. The expert conceded there were seizures, but could find no link between them and this wreck. He noted in that regard, the delay in their onset and that Wilson did not lose consciousness at the scene of

the wreck.

This case was first mistried in September of 2006 for reasons not described in the record. Back to trial in December on damages, Wilson took $4,820 of his medicals, but nothing for future care or impairment. Suffering was $1,000 more, the verdict totaling $5,820. A consistent judgment followed.

Auto Negligence - Soft-tissue suffering sustained in a rear-end case was valued at $3,975

Jones v. Osling, 04-2946
Plaintiff: Timothy R. McCarthy, *Nutt Law Office*, Louisville
Defense: Mary Jo Wetzel, *Kightlinger & Gray*, New Albany, IN
Verdict: $14,873 for plaintiff
Circuit: **Jefferson**, J. Kemper, 12-20-06

On 8-11-03, Clarence Jones, then age 23, was on an I-65 at the Outer Loop. A heavy rain was falling. Behind him in traffic was a teenager, Andrew Osling. Behind Andrew was his mother, Ramona. While the exact nature of who hit whom is not clear, it is known that mother and son collided and then son was pushed forward into Jones.

Jones himself couldn't figure it out either and filed a lawsuit against both Oslings. While the Osling defendants were separate at trial, they were represented by the same counsel.

However it happened, Jones was hurt in the crash. He has since treated with a chiropractor, Dr. Mark Green, Louisville, complaining of soft-tissue symptoms. His incurred medicals were $7,398. He also sought property damage of $4,000 and lost wages of $540. Suffering was capped at $15,000.

The two defendants, mother and son, blamed one another for the wreck, also implicating the plaintiff for a sudden stop. Besides diminishing damages, the Osling defendants also pointed to the heavy rain as a primary factor in causing the collision.

The verdict was mixed on fault, the jury assessing it equally to the Osling defendants. Then to damages, Jones took his medicals as claimed, plus $3,500 in property damage. While lost wages were rejected, the suffering award was $3,975. The verdict totaled $14,873 – two weeks post-trial, no judgment had been entered. During trial a juror had asked: Did either of the parties have insurance and did it pay anything?

Kentucky Supreme Court Tort Opinions

At the December rendition date, the Supreme Court issued three tort opinions. They are summarized in this section.

The December opinions mark the departure of Justices Wintersheimer and Graves. It also marks the arrival of Justice Noble who joined her first opinions this month. The lineup moving forward is finally set: Lambert, Scott, McAnulty, Schroder, Cunningham, Minton and Noble.

Sovereign Immunity - A police officer is not immune when he leaves the key in the ignition in his unattended cruiser (a statutory violation) and a prisoner in the backseat gains control of the cruiser and crashes into the plaintiff

Pile v. City of Brandenburg
2005-SC-0047-DG
On Appeal from the Court of Appeals
Rendered: December 21, 2006
Petitioner's Counsel: Brett Butler, Louisville
Respondent's Counsel: David P. Bowles and Robert T. Watson, *Landrum & Shouse*, Louisville

John Miller, a police officer for the City of Brandenburg, arrested a drunk driving suspect, Timothy Blackwell. Blackwell was secured in handcuffs in the back of Miller's police cruiser. Miller left Blackwell in the cruiser to further investigate. The keys were in the ignition and the engine was running.

Blackwell somehow got into the front seat and drove away. He crashed head-on into an oncoming vehicle driven by Theresa Foltz. Both Foltz and Blackwell were killed.

The Foltz estate sued the police alleging negligence. The trial court granted summary judgment, finding the actions of Blackwell were not foreseeable. The Court of Appeals affirmed on different grounds, concluding the police were protected by immunity as there was no special relationship between the decedent and the police. [Minton authored the intermediate opinion.] Plaintiff sought discretionary review and it was granted in August of 2005.

Holding: *Justice Wintersheimer* wrote for a 4-2 court and first pointed to KRS 189.430(3) which makes it unlawful to leave an unattended vehicle with the keys in the ignition. The police officer's disregard of the applicable traffic laws, Wintersheimer wrote, made the "special relationship" doctrine irrelevant. Thus the question of negligence by Miller was "reserved for a jury." Wintersheimer continued that plaintiff would also be able to pursue a negligence per se theory, Miller clearly having violated the statute referenced above.

The court also addressed the government argument that Blackwell's conduct was a superseding cause. Wintersheimer wrote that it was clear that leaving the keys in the cruiser was a negligent act that created the opportunity for the prisoner to escape and operate it.

Concluding the opinion reversed the Court of Appeals holding that the responsibility of the officer was to remove the keys and thus the ultimate theft was neither an intervening nor a superseding event. Lambert, Graves and Scott joined the majority. Minton did not sit.

Justice McAnulty Dissent - McAnulty disagreed with the majority and thought the wrong party had been sued as it was a Deputy Sheriff. That is, Miller placed the handcuffed Blackwell in the back of the cruiser and left him in the custody of the deputy. It was then not foreseeable for Miller that the prisoner would be left alone and permitted to escape.

Like Minton's opinion at the Court of Appeals, McAnulty also thought this was a case for the application of the special relationship test – the real question, he thought, was whether the plaintiff was not protected by the police from the drunk driver. As there was no special relationship, the plaintiff wasn't in state custody, there then was no affirmative duty to protect her. *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995). The neophyte Noble joined his dissent. While Minton did not join this opinion, having sat it out because of his participation at the Court of Appeals, it seems certain he would have been a third vote in dissent.

Uninsured Motorist - In interpreting this specific UM policy, an unidentified hit and run vehicle is not excluded – Lambert wrote that as the driver could not be located, no insurance policy "applied" at the time of the accident and thus plaintiff had satisfied her UM proof burden

Dowell v. Safe Auto
2005-SC-0153-DG
On Appeal from the Court of Appeals
Rendered: December 21, 2006
Petitioner's Counsel: Kevin C. Burke, Louisville and Dan E. Siebert, *Siebert & Johnson*, Louisville
Respondent's Counsel: Robert L. Steinmetz, *Frost Brown Todd*, Louisville

Debra Dowell was rear-ended on Preston Highway by the driver of a Chevrolet Blazer. That other driver got out and asked if she was okay. He then drove away, never to be identified. Dowell then sought UM coverage from her carrier, Safe Auto.

The trial judge (McDonald-Burkman-Jefferson County) 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 provide hit and run coverage, the policy being tailored only to provide coverage when the status of the tortfeasor can be ascertained. Plaintiff appealed and discretionary review was granted in September of 2005.

Holding: *Justice Lambert* wrote for a 6-1 court, joined by Graves, McAnulty, Noble, Scott and Wintersheimer. Beginning the opinion, Lambert framed the question: Does this policy cover the uninsured vehicle? He noted that the Safe Auto policy had a total of 24 UM exclusions, but it did not exclude "hit and run" vehicles. The settled rule then was to construe the ambiguity in favor of the insured.

Lambert also addressed Safe Auto's argument that as the tortfeasor is unknown, his insurance status is not knowable. The court replied that as the driver couldn't be located, definitionally then, no insurance applied and the plaintiff had satisfied her proof burden.

The court finished and held that pursuant to this policy, an unidentified hit and run driver is not excluded from UM coverage.

Justice Minton Dissent - Minton, writing alone, thought the majority found a "nonexistent ambiguity" that "quietly buries decades of precedent" that hit and run drivers are only covered under UM policies if the policy itself clearly says so. That decision then will "upset the settled state of our UM jurisprudence, as well as the settled expectations of both insurers and insureds."

Ed. Note - Was this opinion much ado about nothing, it only applying to this Safe Auto policy as written? How long will it take for insurers to write UM policies that exclude hit and run drivers? We'd think that would happen immediately, making this opinion only relevant to the poorly drafted UM policy.

Minton's dissent also seems to make quite a stretch when he suggests that the opinion had upset the apple cart of expectations by insureds. I think it would be difficult to find an insured, in any county in the Commonwealth, who understood UM jurisprudence and even more particularly their hit and run UM expectations.

Uninsured Motorist - While it is required that an insurer provide UM coverage, that coverage is extinguished when the plaintiff rejected that coverage by checking a box on her insurance application

Moore et al v. Globe American Casualty
2005-SC-0544-DG
On Appeal from the Court of Appeals
Rendered: December 21, 2006
Petitioner's Counsel: Warren A. Taylor, Hazard
Respondent's Counsel: William D. Kirkland and Karen G. Chrisman, *McBrayer McGinnis Leslie & Kirkland*, Frankfort and J. Bradford Derifield, *Frost Brown Todd*, Lexington

Patricia Moore was driving a vehicle that was struck by an uninsured motorist, Ralph Morgan – Polly Rice was a passenger with Moore. Moore then sought UM coverage from her carrier, Globe American. The insurer denied coverage, citing that in applying for coverage, Moore had specifically rejected UM coverage.

The trial court agreed and granted summary judgment to Globe American. Moore appealed – the Court of Appeals affirmed. This court granted discretionary review.

Holding: *Justice Scott* wrote for a 4-2 court (McAnulty not sitting) and found the answer very easily. Moore had rejected coverage in the application, it not mattering that Moore contended the application was deceptive. Scott could find no fault with the application, repeating that Moore "simply rejected UM coverage." He was joined by Graves, Minton and Noble.

Justice Lambert Dissent - Joined by Wintersheimer, Lambert was critical of the insurance application's "opt in" structure as opposed to "opt out."

Justice Wintersheimer Dissent - Joined by Lambert, Wintersheimer similarly wrote that the application had an incorrect explanation and whether that made a difference was a question of fact that should have been determined by a jury.

Early Forecasting at the Supreme Court

In what direction are the new justices on the court headed. It's a little early to say, but there is now some data on which to begin forecasting how certain justices will rule.

Noble kicked off her participation this month in three civil opinions. In two of the three opinions, she joined the interest associated with a civil defendant, (1) for the police officer who left his cruiser running and (2) for the insured when the insurer purportedly rejected UM coverage. In a third case, she thought hit and run coverage was not excluded under the interpretation of a particular policy. Again its early in the Noble era, but she begins at least with some sympathy for civil defendants.

Minton's trend is even more sympathetic to defendants. In two of the three opinions he participated in, Minton sided with the insurer in UM disputes. In one of those opinions, the interpretation case regarding hit and run drivers, he went into an impassioned discussion of the status quo of settled UM expectations. In the third opinion, Minton sat out, having participated at the Court of Appeals. However at the intermediate court, he had also ruled in favor the defense interest.

Of course for Minton, while that's a solid three for three for civil defendants, it is just one month. At the September rendition, he dissented for a government defendant in a malicious prosecution case, *Davis v. Winchester Police*, (See our discussion in the 2006 KTCR Year in Review in

Supreme Court Civil Tort Opinion Summaries. In the same month, he was part of a unanimous court that found for a lawyer in a legal negligence case, *O'Bryan v. Cave*.

A month later in October, he joined the majority in a products liability case for the manufacturer, *Compex International v. Taylor*. Then in December, (1) he dissented for a civil defendant in a statute of limitations case, *Harralson v. Monger et al*, (2) for LGE in a death case regarding duty, *LGE v. Roberson*, and (3) for an insurer in a settlement and release dispute, *Abney v. Nationwide*.

For Minton its too early to call a trend, but the trend seems ready to jump out. For each of the first eight civil tort opinions which Minton has participated in, in every one, he's sided with the defense or insurance interest. If that trend continues, that will make forecasting a Minton vote remarkably easy: Just pick the interest of the civil defendant and chalk up Minton's vote.

Discretionary Review at the Kentucky Supreme Court

At the December 2006 rendition date, review was not granted in any tort cases – review was only granted in two cases overall.

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.

Premises Liability - A landlord owes no duty to a resident regarding an open and obvious condition
Pinkston v. Audubon Area Community Services et al, 2006-CA-0473-MR
Appeal from Daviess Circuit Court
Judge Thomas O. Castlen
KTCR Cite: Case No. 2914, 2004 YIR
Rendered: December 1, 2006
Appellant's Counsel: David M. Taylor, Owensboro
Appellee's Counsel: Max S. Hartz, *McCarroll Nunley & Hartz*, Owensboro

The plaintiff, Colleen Pinkston, leased an apartment from her landlord, Lincolnshire North Apartments. After moving in, she made repeated complaints about oil on a stairway. Lincolnshire took no action. She was also critical of a loose handrail.

Soon after, Pinkston slipped on the steps and reached for the handrail. It came loose and Pinkston fell. She sustained an injury. Pinkston then sued Lincolnshire, alleging it had failed to maintain the premises in a reasonably safe condition.

The trial court granted summary judgment, finding Lincolnshire enjoyed tort immunity as the subsidiary of a charitable organization and there was no duty for Lincolnshire to maintain the handrail. [Lincolnshire operates a part of a non-profit, Audubon Area Community Services.] Pinkston appealed.

Holding: *Judge Wine* joined by Henry and Buckingham, considered the handrail to be an open and obvious hazard, known to the plaintiff for at least several weeks before she fell.

Similarly, plaintiff had no protection in seeking to enforce a provision of her lease that obligated the landlord to make repairs. Wine wrote that the only remedy for any breach was the cost of the repair and not a civil suit for personal injuries.

While affirming on the above basis, Wine also wrote that the charitable corporation rule was abrogated and not too recently, citing an opinion from 1961. The trial court was affirmed.

Verdicts Revisited

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

Auto Negligence - While it was error to permit an ex-wife to testify about a confidential marriage communication (that the plaintiff had an affair), the error was harmless and a threshold verdict was affirmed
Mack v. Ammons
Appeal from Hardin Circuit Court
Trial Judge: Kelly Mark Easton
KTCR Cite: Case No. 3117, 2005 YIR
Date of Trial: 9-1-05
Appeal Decided: 12-1-06
Alan W. Roles, Louisville for Appellant
Lynn M. Watson, Louisville for Appellee

Robert Mack was rear-ended by Mary Ammons while stopped to turn. Mack complained of a closed head injury. The defense diminished damages with an IME, Dr. James Harkess, Orthopedics, Louisville, who concluded there was just a short-term strain and no brain injury. [Harkess also added in his deposition that the KTCR was a "scurrilous organization, I might say."] The defense also called plaintiff's ex-wife, who thought plaintiff's affair, rather than this wreck, was the most likely cause of plaintiff's problems.

Tried to a jury, a threshold verdict was returned after fifteen minutes of deliberation. Mack appealed and criticized the admission of his ex-wife's testimony.

Holding: Judge Taylor writing

Joined by Dixon and Knopf, affirmed permitting the wife's testimony as there was no spousal privilege anymore as the parties weren't still married. However it was error to permit the wife to testify about the affair, as she learned of it in a confidential marriage communication. But despite that error by the trial court, the result was still affirmed as there was no substantial probability the trial result would have been different.

Bad Faith - In a bad faith case arising from a property damage dispute, the trial court was affirmed in reducing an award of punitives from $150,000 to $15,000

Thomas v. Grange Mutual
Appeal from Jefferson Circuit Court
Trial Judge: Denise Clayton
KTCR Cite: Case No. 3002, 2005 YIR
Date of Trial: 10-14-05
Appeal Decided: 12-1-06
John R. Shelton, *Sales Tillman Wallbaum Catlett & Satterley*, for Appellant
Kim F. Quick, *Quick & Coleman*, Elizabethtown for Appellee

Mark Thomas owned a car that was hit when parked by Daniella Dotson. Thomas called Dotson who was apologetic and agreed to pay the claim without notifying her insurer, Grange Mutual. Thereafter plaintiff submitted a bill for $1,502 – Dotson would pay no more than $300.

Thereafter Thomas contacted Grange directly and sought payment of the $1,502 bill. Grange then contacted the insured, Dotson, who signed a waiver of coverage. Thomas still could not resolve the claim with Dotson and again turned to Grange. Grange denied payment, citing that Dotson was now "self-insured" having waived coverage.

Thomas thought that was silly – an insurer and an insured can not enter an agreement to defeat the claims of an innocent third-party claimant. Grange stuck to its guns. Litigation followed and Grange ultimately paid the $1,502 some twenty-six months post wreck.

Thomas then alleged bad faith in failing to pay the claim. First tried in February of 2003, Judge Clayton granted a directed verdict, finding that as plaintiff had no emotional suffering, there were no damages. The Court of Appeals reversed in 2004, Judge Buckingham writing the opinion.

Back to trial, plaintiff prevailed on bad faith and took $150,000 in punitives. The trial court reduced the punitive award to $15,000. Plaintiff appealed the reduction.

Holding: Judge Knopf writing

Joined by Combs and Acree, the court engaged in a de novo analysis as required by *State Farm v. Campbell*. [Clayton at the trial court had not engaged in this analysis.] Knopf, noted among other things, that Clayton's 10-1 ratio was appropriate and reasonable. A cross-appeal by Grange was also rejected that argued the award of damages was excessive. On this case's second trip to the Court of Appeals, the trial result was fully affirmed.

Notable Out of State Verdicts

All of the following reports appeared in recent issues of our sister publication, the *Federal Jury Verdict Reporter*.

Products Liability - A star high school student, headed to Stanford in the fall, was killed in a single car roll-over accident while driving a 1995 Ford Explorer

Moody v. Ford Motor Company, 4:03-784
Plaintiff: Clark O. Brewster and Montgomery L. Lair, *Brewster & De Angelis*, Tulsa, OK
Defense: Mary Quinn-Cooper and James A. Richardson, *Eldridge Cooper Steichen & Leach*, Tulsa, OK
Verdict: $15,000,000 for plaintiff
Court: **Oklahoma Northern - Tulsa**
Judge: Claire V. Eagan
Date: 11-20-06

On 1-7-03, Tyler Moody, then age 18, was driving a 1995 Ford Explorer in Tulsa on Delaware Street. Moody was a bright boy and a National Merit Finalist who was headed that fall to attend college at Stanford. In a one-car crash (Moody attempted to pass in a no-passing zone), the boy rolled the Explorer. During the roll, his neck was pushed into his chest by the roof – he died at the scene of positional asphyxia.

His estate sued Ford and alleged the Explorer was defective in that the roof was too weak. The proof described this as a slow and easy roll – except for a bruise on his head, Moody was uninjured beyond the roof structure failing to protect him. Plaintiff further developed this sort of roll-over was foreseeable and Ford should have designed for it. Experts for the estate were George Hall, Accident Reconstruction, Tulsa, OK, Stephen Forrest, Engineer, Goleta, CA and Joseph Burton, Biomechanics, Alpharetta, GA.

Ford defended that the boy's death was unfortunate, but blamed it on his speed and poor driving. The Explorer was described as safe and exceeding federal standards. The company also developed that as designed, 98% of belted passengers avoid injury in a roll-over – it is simply impossible to develop an accident proof vehicle. Ford experts were Ken Orlowski, Design, Lake Orion, MI and Alfred Bowles, Biomechanics, San Antonio, TX.

This jury first found for the estate on the products count and awarded the estate a general award of $15,000,000. However it went on to reject a claim of reckless conduct by Ford, thereby precluding punitive damages.

Bad Faith - In a third-party bad faith case arising from a car wreck, an insurer was blamed for low-balling and misrepresenting policy limits – the insurer defended that the claim was fairly debatable and it acted reasonably

Nicholas v. Bituminous Casualty Company, 1:03-276
Plaintiff: Ancil G. Ramey, *Steptoe & Johnson*, Charleston, WV
Defense: James D. McQueen, Jr. and Amanda Davis Haddy, *McQueen & Murphy*, Charleston, WV
Verdict: Defense verdict on liability
Court: **West Virginia Northern - Clarksburg**
Judge: Irene M. Keeley
Date: 11-15-06

This case began on 11-9-01 with a car wreck. The tortfeasor, Anthony Iezzi, struck a vehicle driven by Shauntelle Nicholas. Nicholas was then stopped at a red light – her husband, Paul, was a passenger. The third plaintiff, their daughter, Erin, presented a consortium claim.

The Nicholas family litigated against Iezzi, the matter settling on the eve of trial in December of 2004 for $700,000. Iezzi was represented by Bituminous Casualty Company. After the resolution of the underlying case, the Nicholas plaintiffs sued the insurer alleging third-party bad faith.

The purported bad faith included, (1) misrepresenting policy limits, (2) offering $15,000 to settle just a month before trial, then upping that offer to $700,000 without any new facts, and (3) otherwise delaying payment of the claim.

Bituminous defended that the injury claims were fairly debated – it first noted that there was no injury at the scene, the plaintiffs not treating until seven hours later. There was also proof that Shauntelle's vocal cord injury was suspicious – making it even more suspicious was what the insurer viewed

as evidence this rear-ender was staged. Thus the sum of the defense was that this complex case, with disputed medical proof, was properly defended.

The bad faith claim was rejected by this jury. Plaintiffs have since moved for a new trial, citing error in excluding (1) the insurer's reserve activity, and (2) improperly permitting an advice of counsel defense to this statutory claim.

Products Liability - A high school football player linked a cervical injury and quadriplegia to a defective helmet

Green v. Schutt Sports, 5:05-164
Plaintiff: Larry E. Coben, Scottsdale, AZ and Thomas J. Turner, *Turner & Jordan*, Lubbock, TX
Defense: Phillip M. Davis, *Davis White & Sullivan*, Boston, MA, Richard E. Harrison, *Harrison & Hull*, McKinney, TX and G. Douglas Welch, *Jones Flygare Brown & Wharton*, Lubbock, TX
Verdict: Defense verdict on liability
Court: **Texas Northern - Lubbock**
Judge: Sam R. Cummings
Date: 11-16-06

Jeremy Green, then age 17, was a cornerback for the Levelland High School football team on 8-20-04. His team played a varsity scrimmage in Hobbs, New Mexico. Green was wearing a Schutt Sports DNA model helmet at the time of the incident.

As Green moved to tackle an opposing player, the top of his head struck the ball at an angle. In the impact, the boy sustained a C-4 to C-6 fracture that has left him a quadriplegic. In this lawsuit, Green sued Schutt and alleged his helmet had a design defect.

The purported defect was that the Schutt Sports designed helmet did not effectively attenuate energy to protect the cervical spine. There was additional evidence that alternatively designed helmets on the market would have protected Green, including safe shock technology.

Schutt Sports countered that the injury-causing event was Green's decision to make head-first contact with the opposing player. It was also noted that it was Green who made the voluntary decision to play football, a sport with high-speed violent collisions where risk is inherent. Bringing this to causation, the defense further argued there was no helmet that could have prevented or mitigated this injury.

The verdict in this case was for Schutt Sports and Green took nothing. A defense judgment was entered.

Religious Discrimination - An IRS agent with no religious beliefs alleged he suffered hostile environment discrimination from his pious supervisor who criticized the agent's lifestyle of fast cars, drinking and womanizing

Nichols v. IRS, 3:03-341
Plaintiff: Kathleen L. Caldwell, Memphis
Defense: Mercedes Maynor-Faulcon, *Assistant U.S. Attorney*, Nashville
Verdict: $150,000 for plaintiff
Federal: **Nashville**
Judge: John T. Nixon
12-8-06

Patrick Nichols was working in the summer of 2001 as a revenue agent in training for the IRS. His trouble started that August while in Dallas for training. Along with other agents, Nichols was preparing to go to a Karaoke bar. His supervisor declined to go, citing a religious objection. Nichols, who professes no religion, had no problem going.

Thereafter Nichols noted that his boss was hostile to him – that hostility took the form of objections to his apparent pagan lifestyle. That is, instead of getting married, settling down and saving money, the sinful Nichols drove a Corvette, wore a Rolex, had nice clothes and enjoyed meeting women at bars. In the view of his boss, this was not good Christian living.

The hostility came to a head by October. Nichols was accused of improperly completing his time sheets. He was given a choice to quit or be fired – Nichols elected to resign.

This lawsuit followed, Nichols alleging he suffered religious discrimination in two ways, (1) as a non-Christian, he suffered a disparate impact, and (2) that the lifestyle criticism from his boss represented hostile environment discrimination. The IRS defended and denied that plaintiff's boss (who had the power to fire) was a co-employee. It also argued that the complained of conduct was sporadic at best, plaintiff's employment problems having more to do with his time sheet discrepancies than his religion or lack thereof.

The jury's verdict was mixed. Nichols lost on a disparate impact claim, but he did prevail on the hostile environment claim. The jury awarded damages of $150,000.

The IRS has moved for post-trial relief arguing, among other things, that (1) the complained of conduct was not severe and pervasive, (2) plaintiff's supervisor wasn't a supervisor but a co-employee, and (3) damages were excessive. The motion is pending.

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