Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

January 2010 **Published in Louisville, Kentucky Since 1997** **14 K.T.C.R. 1**

Comprehensive Statewide Jury Verdict Coverage

Civil Jury Verdicts

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

Auto Negligence - A motorcyclist suffered multiple injuries when he was struck by an oncoming propane truck – his pain and suffering was valued at $1,000,000

Puccini v. Amerigas Propane et al, 07-6307
Plaintiff: Cara W. Stigger and Kerstin Schuhmann, *Kaufman Stigger & Hughes*, Louisville
Defense: Nancy B. Loucks, and Erwin Roberts, *Frost Brown Todd*, Louisville
Verdict: $1,200,626 for plaintiff
Circuit: **Jefferson**, J. McDonald-Burkman, 11-20-09

Stephen Puccini, then age 33 and an active duty Staff Sergeant at Fort Knox, was riding his Suzuki motorcycle on 9-9-05. He was with a group of riders that proceeded on Blevins Gap Road in rural Jefferson County. At the same time, Robert Hoffman, an employee of Amerigas Propane of Kentucky, approached from the opposite direction in a truck.

Puccini recalled that as they approached, Hoffman's truck encroached his lane. Attempting to evade Hoffman, Puccini hit the brakes – as the two passed, Hoffman's truck clipped Puccini. Puccini crashed.

He was badly hurt, sustaining a lacerated spleen and dislocated shoulder. He also suffered a toe fracture, another toe being amputated. Puccini's most serious injury concerned his brachial plexus – he has since lost the partial use of his left arm. While he continues with the military, Puccini is significantly impaired.

In this lawsuit, Puccini sought damages from Hoffman and his employer. An accident expert for the plaintiff was William Cloyd, Lexington. Puccini's medicals were $125,000 and he sought $479,748 for impairment. [Robert Pulsinelli, Economist, Bowling Green discussed impairment.] The jury could also award him $1.5 million for pain and suffering.

Amerigas Propane defended the case on liability and cited Hoffman's recollection that before the impact, he had heard motorcycles and that it sounded as if they were racing. Then to the crash itself, it was noted the crash happened in Hoffman's lane. A defense accident expert was Robert Miller, Louisville.

The jury's verdict was for Puccini on liability – it found Hoffman solely at fault. Then to damages, he took his medicals as claimed plus $75,000 more for impairment. Pain and suffering was valued at $1,000,000. The verdict totaled $1,200,626. A consistent judgment was entered.

Amerigas Propane moved for a new trial and argued that (1) there was proof Puccini was speeding and the jury should have apportioned fault to him, and (2) damages were excessive, the award being nearly ten times the medicals. The motion was denied.

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Auto Negligence - An elderly woman was hit in a chain reaction rear-ender, the collision sending her careening off the roadway – she sustained a broken arm and rotator cuff injury in the crash – her pain and suffering was valued at $100,000

Bault v. Bryant, 08-0190
Plaintiff: Russell W. Goff and John D. Henderson, Greensburg
Defense: John C. Miller and Joseph A. Bott, *Bertram Cox & Miller*, Campbellsville
Verdict: $219,914 for plaintiff
Circuit: **Adair**, J. Weddle, 1-5-10

Ernestine Bault, then age 75, traveled on Hwy 55 on 11-10-06. She was stopped to make a turn. Behind her Gary Bryant approached in a box truck. [There was a second vehicle stopped behind Bault and in front of Bryant.] Bryant's brakes failed and his truck kept coming.

Bryant struck the middle vehicle which then collided hard with Bault's sedan. The impact knocked her car off the road, Bault sustaining a broken arm and a rotator cuff injury.

In this lawsuit, Bault sought damages from Bryant – fault for the wreck was no issue. Her medicals were $20,000 and she sought $100,000 more for future care. Impairment was limited to $50,000 – she could take $350,000 more for suffering. Her treating orthopedist was Dr. Richard Sanders, Campbellsville. Bryant defended the case and minimized the claimed injury.

A jury in Columbia deliberated damages only. Bault took $19,914 of her medicals and $75,000 more for future care. Impairment was $25,000, Bault taking $100,000 more for suffering. The verdict totaled $219,914. A consistent judgment was entered.

The jury had asked two questions related to insurance as it deliberated: (1) Did the defendant not have commercial insurance to cover the medicals?, and (2) Does the plaintiff have Medicare or supplemental coverage? If the court answered the questions, it did not become a part of the court record.

Medical Negligence - During a surgery to repair a hernia, the plaintiff suffered a bleed – discovered and surgically repaired a day later, the plaintiff suffered a downward cascade and died 47 days later

Wiggington v. Stevens, 04-8907
Plaintiff: Joseph White and Matthew R. McCubbins, *White & McCubbins*, Louisville
Defense: Richard P. Schiller and Terri Kirkpatrick, *Schiller Osbourn Barnes & Maloney*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Eckerle, 1-12-10

Lindsey Wiggington, age 80 and a semi-retired real estate agent, underwent a hernia surgery on 10-24-03. It was performed at Baptist Hospital East by a surgeon, Dr. Greg Stevens. The procedure, performed on an out-patient basis, was uneventful. That evening Wiggington had trouble voiding his bladder and he returned to the ER – a catheter was placed.

Wiggington was back again the next day to the ER and his vital signs were troubling. A CT scan showed a bleed in his pelvis. Taken into surgery by Dr. Pokorny, a hematoma (a one liter bleed) was evacuated. During the initial surgery, Stevens had injured a blood vessel near the Cooper's ligament.

Initially following the surgical repair, Wiggington appeared to improve. But still hospitalized, he developed pneumonia, renal problems, a stroke and ultimately multiple organ failure. He died 47 days later. Wiggington was survived by, Nancy, his wife of 50 years.

The estate sued Stevens and alleged error by the doctor in performing the surgery at all. It was argued that Wiggington was not a good candidate because of his age, underlying heart condition and a pre-operative elevated white blood count. Then to the technical performance of the surgery, the plaintiff was critical of Stevens for closing the surgery without identifying the bleed.

Plaintiff's liability expert was Dr. Marco Bonta, Surgery, Columbus, OH. If prevailing, the estate sought medicals of $160,000, the funeral bill of $8,000 and $20,000 for destruction. Wiggington's pain and suffering was limited to $750,000. His wife too sought $500,000 for her consortium interest – this case is notable, it being the first presentation of a post-mortem consortium claim since *Martin v. Ohio County Hospital* was rendered by the Kentucky Supreme Court last fall.

Stevens defended the two criticisms, (1) Wiggington was properly worked up and was cleared for the surgery by cardiology, anesthesia and Stevens's own professional judgment, and (2) there was no bleeding during the surgery, Stevens doing an appropriate inspection of the surgical field.

The jury returned a verdict by a 12-0 count for the doctor on liability and the estate took nothing. A consistent judgment will be entered.

Ed. Note - This new class of cases, post-mortem spousal consortium, creates a whole new realm of considerations. Historically, spousal consortium, limited to death, was a function of the impact of the injury on the relationship. How much care did the spouse have to provide?

In the context of post-mortem spousal consortium, there is no relationship after death. The claim then is for the loss of the spouse altogether. Thus it becomes a function of the quality and length of the relationship. Certainly in this case, the evidence was of a happily married couple that shared half a century together. What makes this noteworthy is that it represents such a significant departure from how spousal consortium used to be valued.

Dental Negligence - A dentist extracted the wrong tooth in a girl's mouth in 1998, inadvertently pulling a permanent tooth – he knew the mistake right away as the tooth had a root – the girl (the daughter of a lawyer and now a WKU cheerleader) filed suit when she reached majority

Thornton v. Morgan, 06-0674
Plaintiff: Liz J. Shepherd, *Dolt Thompson Shepherd Kinney & Wilt*, Louisville
Defense: W. Currie Milliken, *Milliken Law Firm*, Bowling Green
Verdict: $71,269 for plaintiff
Circuit: **Warren**, J. Tyler Gill, 12-4-09

Margaret Thornton, then age 11, was treated on 10-23-98 by a Bowling Green dentist, Dr. Jeffrey Morgan, to have a baby tooth extracted. Morgan pulled a tooth and realized immediately he had made a mistake. The tooth in his hand had a root – baby teeth don't have roots. He had pulled a permanent tooth, No. 22. Morgan was aggrieved and recalled he felt as if he had suffered a heart attack.

Morgan immediately reimplanted the tooth and bonded it. He did not

immediately tell his patient or her mother in the waiting room. Two days later, Morgan called her father, Bowling Green attorney, Steve Thornton. He wrote a letter as well, describing he was insured and that "I will forever regret this." [Morgan and the Thorntons were social friends at the time.]

Thornton instituted a conservative course of care to follow the reimplanted tooth. While it is still in place, there was evidence there is an increased risk of complications with the tooth. Her incurred medicals were $2,769 and she claimed $6,000 for future care. Suffering damages were not capped.

In this lawsuit (filed after Thornton reached majority in 2006), she alleged error by Morgan. [Thornton is now a student and a cheerleader at WKU.] Morgan conceded his error. He did defend damages and suggested that beyond the initial medicals, Thornton had suffered no harm – that is, she still has the tooth and it is functional.

Morgan having admitted his fault, the case was tried on damages only. Thornton took $2,769 in past medicals, plus $6,000 for future care. Her pain and suffering was valued at $62,500. The verdict totaled $71,269. The jury asked questions during deliberations, but the court elected to treat those questions as secret.

Premises Liability - A customer was directed into a bathroom at Big Lots – it was dark when the man entered and while reaching for a light switch, he fell on the wet floor – briefly knocked out, he awoke and called for help – nobody came and he used his phone to call 911 to summon help

Delguzzo v. Big Lot Stores, 06-1201
Plaintiff: Jay Vaughn, *Busald Funk & Zevely*, Florence, Jerry H Shade, *Whitaker & Shade*, Mason, OH and Warner M. Thomas, Jr., *Volkema Thomas*, Columbus, OH
Defense: Michael Foley and W. Jonathan Sweeten, *Rendigs Fry Kiely & Dennis*, Cincinnati, OH
Verdict: Defense verdict on liability
Circuit: **Boone**, J. Frohlich, 12-11-09

John Delguzzo, then age 41 and in home remodeling sales, visited a Big Lot Store in Florence. He was directed to a bathroom in the back of the store by an employee. Walking into the bathroom, Delguzzo noticed it was dark. He started to reach for the light switch. Delguzzo never made it.

As he reached around for the switch, he slipped and fell on the wet floor. The initial impact knocked him out. Delguzzo cried out for help – no one came. Still immobilized on the floor (his back was hurting), he called 911. EMTs came and took him to the ER at St. Luke Hospital.

Delguzzo has since treated for radiating pain related to a cervical disc injury – the pain persisted despite a fusion surgery. The plaintiff also alleged a mild brain trauma, the fall also causing an emotional injury. His medicals were $63,579 and in uncapped sums, he sought future care, suffering and impairment. An economist, William Baldwin, Lexington, quantified his vocational loss.

Delguzzo sued Big Lot and alleged negligence regarding the condition of the floor – he cited that while he never saw water on the floor, it was dark, when he awoke, his clothes were cold and wet.

Big Lot defended the case and suggested there was no hazard on the floor. Arriving on the scene (after the 911 call with Florence Police), no one saw any moisture. Pictures taken at the time show a dry floor. Big Lot also noted it regularly cleans the bathroom and at its last cleaning interval, it was clean. [Plaintiff countered that while Big Lot claimed to check the bathroom religiously, it kept no record of it.]

Big Lot also diminished the claimed injury and suggested it was exaggerated. In this regard, it relied on extensive surveillance video. Delguzzo was followed for hours and hours on end, the video footage catching him doing the most mundane of things, walking around, drinking coffee and shopping. [The surveillance reports did not seem to indicate any smoking gun, e.g., that the plaintiff was a gymnast, hang-glider, alpine skier or had otherwise engaged in strenuous activity.]

As the jury deliberated, it told the court it needed clarification on the substance on the floor. It had a second query, "Do they have to tip the scales that there was a substance?" The court's answer is not known.

The jury returned a verdict (pursuant to the court's *Lanier v. Wal-Mart* burden-shifting instruction scheme) and first found that the bathroom was not unreasonably dangerous and a substantial factor in causing Delguzzo's injuries. Thus the burden didn't shift and the deliberations were over. Nearly a month later, no judgment had been entered.

Auto Negligence - While a Somerset jury found the parties equally at fault for the crash, it elected to award the plaintiff none of his claimed damages

Coleman v. Speaks, 07-0010
Plaintiff: Billy J. Moseley, *Webster Law Offices*, Pikeville
Defense: Joe L. Travis, *Travis Pruitt & Powers*, Somerset
Verdict: Defense verdict on damages
Circuit: **Pulaski**, J. Burdette, 11-11-09

Christopher Coleman of Raccoon in Pike County traveled through Somerset (returning from Nashville) on 10-14-06. He had stopped for gas and was preparing to reenter U.S. 80 near its intersection with U.S. 27. As Coleman merged onto the roadway, he was struck by Lucille Speaks.

Coleman recalled that as he merged (safely), Speaks unexpectedly sped up and attempted to cut him off – Coleman believed she was solely to blame for the wreck. Speaks replied on liability that Coleman pulled from a merge lane and into her path.

However it happened, there was a collision and Coleman has since treated for soft-tissue back pain. At this trial he sought medicals, lost wages, impairment and suffering. Initially the lawsuit was filed in Pike County, but venue was transferred to Pulaski County. Speaks defended the case and cited that Coleman had similar pain symptoms following an early crash in January of 2005.

The jury's verdict was mixed on fault – it was assessed equally to the parties. The distinction made little difference, the jury further writing "0" for every claimed element of damages. A defense judgment was entered and there were no post-trial motions.

Medical Negligence - Following a liver transplant, a temporary ureteral stent was placed to facilitate plaintiff's urine flow – his medical team forgot about the stent, leading to infection and ultimately the loss of the donated kidney

Bickle v. Granger et al, 03-2550
Plaintiff: Gregory J. Bubalo and Leslie M. Cronen, *Bubalo Hiestand & Rotman*, Louisville
Defense: James P. Grohmann and Andie Camden, *O'Bryan Brown & Toner*, Louisville for Granger
John D. Phillips and Katie Tipton, *Phillips Parker Orberson & Moore*, Louisville for Klein
Karen L. Keith and Timothy Napier, *Napier Gault Keith*, Louisville for Jewish Hospital
Verdict: $340,526 for plaintiff assessed 38% to Granger and 9% to Klein; Defense verdict on liability for Jewish Hospital and Lederer
Circuit: **Jefferson**, J. Eckerle, 9-2-09

Hiram Bickle, then age 46 and a mechanical engineer by trade, underwent a donor kidney transplant on 6-12-00. It was performed at Jewish Hospital by a transplant surgeon, Dr. Darla Granger. Immediately following the surgery, Granger installed a ureteral stent to facilitate urine flow – the stent was always designed to be temporary, this sort of device usually being removed within six weeks.

Following the surgery, Bickle's post-transplant process was monitored by both hospital nurses and two nephrologist, Dr. Jon Klein and Eleanor Lederer. Lederer for her part saw Bickle just twice – Klein was more involved in following Bickle.

By February of 2002 an infection had developed at the site of the stent. It was the plaintiff's proof that the stent complication caused the transplant to become unstable. It ultimately failed and Bickle returned to dialysis in November of 2006. He was dead a year later of cardio-renal failure.

Bickle's estate sued the hospital, Granger, Klein and Lederer, alleging negligence in managing the stent. The theory started with the premise that the stent (a foreign object) needed to be removed in a timely fashion and that but for this error, the transplant would have been a success.

Jewish Hospital was criticized for not having a system and discharge plan in place to see that the stent was removed. Similarly, Granger knew the stent was installed (she placed it) and thus needed to be part of the plan to remove it. Finally the nephrologists, Klein and Lederer were blamed for failing to inquire and manage the removal of the stent.

Experts for the estate included Dr. Carl Blond, Nephrology, San Antonio, TX and Dr. Timothy Hammond, Nephrology, Duke. If the estate prevailed, it sought medicals of $1,044,015 plus impairment of $1,711,444. Bickle's suffering was limited to $4,176,062 – his wife also presented a consortium claim. The estate's economist was Lawrence Lynch, Lexington.

While the defense on the merits of their care was nuanced as to each party, they shared one common theme. Namely, the kidney failed not because of the stent, but instead a recognized complication known as cyclosporine toxicity. Bickle's subsequent cardio-renal death, while related to the failure of the transplant, was not caused by the stent.

Then to the merits, Granger explained she simply placed the stent – the overall management of its removal rested with others. By contrast, Klein and Lederer took an opposite position – they hadn't placed the stent and they were not responsible for its removal. [Lederer diminished her role, noting she only saw Bickle twice.]

Jewish Hospital too explained its follow-up and discharge plans were proper. The defendants believed that if there was fault regarding the failure to remove the stent, Bickle too shared some of it in failing to return for treatment despite being instructed to do so. Defense experts included Dr. Sundaram Hariharan, Nephrology, Milwaukee, WI, Dr. Harold Helderman, Transplant Nephrology, Vanderbilt, Dr. Frank Serratoni, Pathology, Sea Ranch, CA and Dr. Peter McCullough, Cardiology, Royal Oak, MI.

The jury's verdict was mixed. Jewish Hospital was exonerated, deviations were found by both Klein and Granger. The plaintiff too was found to be negligent. That fault was then apportioned 53% to the plaintiff, 38% to Granger and the remaining 9% to Klein.

Turning to damages, Bickle took his medicals of $91,526 plus $3,000 for impairment. His suffering award was $245,000. The consortium claim (to death) of plaintiff's wife was rejected. The raw verdict totaled $340,526. It was assessed consistently in the court's judgment to Granger ($129,399) and Klein ($30,674). Because of a clerical error, the court subsequently entered an amended judgment. [The award of damages to the Bickle estate was consistent with the removal of the stent and resulting complications, but not the subsequent kidney failure and death.]

Within ten days of that amended judgment, the plaintiff moved for a new trial arguing that in light of the subsequently decided *Martin v. Ohio County Hospital* (it came down a month after this trial), it should have a new trial with post-mortem spousal consortium. The defendants replied that the case was tried by the correct controlling precedent at the time of trial. It was also argued that the plaintiff had not filed the motion within ten days of the original judgment. Months later the court wrote in the record (it was not an opinion, but a hand-written finding on a tendered and rejected order) that the matter was time-barred and the court has lost jurisdiction. From this order, the plaintiff has appealed. [**Ed. Note** - It would be expected that on appeal, the defendants will argue that this appeal is time-barred, the plaintiff not taking an appeal within 30 days of the amended judgment – that is, the handwritten order explaining the court had lacked jurisdiction would not represent an appealable order.]

Underinsured Motorist - In a minor chain reaction rear-ender, the defendant argued that there had not been a contact – while the jury found contact, it further rejected the case finding that the plaintiff was not injured

Vereen v. Travelers Home, 08-0017
Plaintiff: Kevin B. Sciantarelli, *Bubalo Hiestand & Rotman*, Louisville
Defense: Lawrence H. Belanger, *Ferreri & Fogle*, Louisville
Verdict: Defense verdict on causation
Circuit: **Carroll**, J. Bates, 10-23-09

Mary Vereen, then age 43, was involved in a rear-end wreck on 2-2-06. It occurred in Madison, Indiana as Vereen stopped to turn into a parking lot. The tortfeasor, Velma Brown, struck a car behind Vereen, that first impact knocking the middle car into Vereen. Fault would never be in issue.

Vereen has since treated extensively for low-back pain. She underwent a diskectomy, among other care. Her complaints also concerned a cervical

injury. Plaintiff's medicals were $81,571 and she sought $100,000 for future care. Disabled from factory work, lost wages were $4,325, $100,000 being claimed for impairment. She could additionally be awarded $150,000 and $250,000, respectively, for past and future suffering.

Vereen moved first against Brown and took her policy limits. [The record does not reveal what those limits were.] Above that sum Vereen sought UIM coverage from her carrier, Travelers Home.

The insurer defended the case that not only was the wreck minor, there in fact was no impact at all – its best evidence of this was that there was no damage to Vereen's vehicle. Even if there was an impact alternatively, an IME, Dr. Russell Travis, Orthopedics, Lexington, concluded that at best, Vereen had suffered only a minor soft-tissue injury.

While fault was no issue, the jury considered two prefatory questions before reaching damages. The first was whether there was an impact. The answer was yes.

The second interrogatory asked if the wreck injured Vereen. The jury said no and that ended the deliberations, Vereen taking nothing. A consistent judgment was entered.

Vereen has moved for a new trial and argued the verdict was inconsistent – the thrust of the defense had been that there was no impact at all, the UIM IME even conceding some injury. Thus if there was an impact, certainly there was an injury. The motion is pending.

Insurance Coverage - The plaintiff's two daughters were killed in a car crash just weeks after his insurance was canceled – in this lawsuit, he sought to enforce coverage, citing error by the insurer in sending the cancellation letter to the wrong address

Riggs v. State Farm, 08-0124
Plaintiff: Timothy E. Geertz, *Mehr Law Offices*, Lexington
Defense: Douglas L. Hoots and Tyler G. Smith, *Landrum & Shouse*, Lexington
Verdict: For defendant on coverage question
Circuit: **Harrison**, J. McGinnis, 7-23-09

John Riggs insured his vehicles with State Farm. The insurer sent a cancellation notice on 7-23-07 – just days earlier, Riggs had placed a stop payment order on his insurance premium. The cancellation notice was mailed to Riggs at 2045 Jones Lane – he lived at 1045 Jones Lane. Two weeks later, Riggs had not responded and the coverage was cancelled.

There was a tragedy a month later on 9-17-09. His two teenage daughters (one was driving) were killed in a car wreck. Thereafter Riggs sought survivor benefits under his State Farm policy. The insurer denied the claim, citing the cancellation and that Riggs had not been truthful in his application in stating that youthful drivers lived with him. [Riggs and his wife were divorced – the insurer postured that the children did live with him, but he lied to avoid paying a higher premium.]

Riggs countered that he had not actually received the notice (it was mailed to the wrong address). State Farm replied that it was reasonable to expect in spite of that error that on a rural route with few houses, the letter was likely still delivered. Riggs also explained his children did not live with him at the time. Thus per the policy, he was entitled to the benefits. In this lawsuit, Riggs sought to impose coverage.

The jury's verdict was for State Farm on the two coverage questions, (1) that Riggs actually received the cancellation notice, and (2) the girls actually lived with him. Based on those findings, the judge ruled there was no coverage.

Riggs moved for JNOV relief and argued there was no evidence to support either that the girls did live with him or that he had received the notice. The motion was denied.

Legal Negligence - A lawyer was blamed for mismanaging a large estate and breaching a fiduciary duty by overbilling

Willeroy v. Calvert, 06-3998
Plaintiff: C. Cliff Stidham and Lynn C. Stidham, *Stidham & Associates*, Lexington
Defense: Larry C. Deener, *Landrum & Shouse*, Lexington
Verdict: $207,451 for plaintiff
Circuit: **Fayette**, J. Goodwine, 12-16-09

Nancy Willeroy died in February of 2004 and left an estate that was valued at some $2.6 million. A Lexington attorney, Gerry Calvert, Sr. of the Calvert Law Offices, was an administrator for the estate. Calvert had a 1977 will for Willeroy, but he exerted significant effort to locate a newer one. None was found.

Calvert also began the complex process of identifying the estate's assets, managing their investments and otherwise closing the estate. Randy Willeroy, Nancy's son, was not pleased with how he it was handled. Ultimately Calvert was removed from the estate and attorneys from Miller Griffin & Marks concluded the matter.

This lawsuit followed, Randy alleging a combination of legal negligence and a breach of fiduciary duty by Calvert. The plaintiff believed Calvert had overbilled the estate (his fees were more than $300,000) and included some 63 separate days when the estate was billed at Calvert's full rate ($200.00 an hour) for eight hours. Plaintiff particularly thought this seemed ridiculous and especially to do so for relatively minor clerical tasks – plaintiff noted Calvert had even billed for attending his mother's funeral.

The plaintiff was also critical of Calvert for exerting such significant efforts to locate another will – he thought this was an attempt by Calvert to cheat him out of the proceeds of the will. [The 1977 will favored Randy.] There were additional criticisms that Calvert mismanaged the investment of the estate assets.

If prevailing on either negligence or fiduciary duty counts, the plaintiff could take $337,659 in excessive attorney fees, $485,636 for imprudent investments and $27,363 in unnecessary fees paid to Miller Griffin & Marks. The jury could further impose punitive damages of $5,000,000. Attorney experts for the plaintiff were Whitney Wallingford, Richmond and Richard Wehrle, Lexington.

Calvert defended the case that his representation was proper at all times. The matter was complicated by the poor record-keeping of the decedent and her complex and fractious family. He further explained his efforts to find a newer will – it wasn't to cheat Randy, but instead because he had a reasonable belief there had been a more recent will. Regarding his investments for the estate, Calvert postured he simply relied on financial advisors. An expert for Calvert was Frederick Irtz, Lexington.

The jury's verdict was mixed at trial. By a 9-3 count, the jury found that Calvert had not violated the standard of care. Conversely it ruled 10-2 for the plaintiff that Calvert had breached his fiduciary duty. Then to damages, the

estate took $180,088 for imprudent investments and $27,363 for additional attorney fees. The jury rejected that Calvert's own fees were excessive – similarly, it declined to impose punitive damages. Several weeks post-trial, no judgment had been entered. As the jury deliberated it had asked the court for three things, (1) KBA books, (2) A Webster's dictionary, and (3) a calculator.

Auto Negligence - While the defendant crossed the centerline and struck the plaintiff's vehicle (she was a passenger and sustained a knee injury), he successfully defended that an unknown third party had pulled into his path

Goins v. Fraddosio, 06–0516
Plaintiff: Lloyd R. Edens, *Wilson Polites & McQueen*, Lexington
Defense: E. Douglas Stephan, *Sturgill Turner Barker & Moloney*, Lexington
Verdict: Defense verdict on liability
Circuit: **Jessamine**, J. Daugherty, 5-5-09

Ginny Goins, then age 36, was a passenger in a box truck with a co-worker, William Sparks. They both worked for the uniform supply company, Cintas. As they traveled on the road, their box truck was suddenly struck by the oncoming Doyle Fraddosio. It was a significant impact, the box truck turning on its side. For a time, Goins was hanging upside down in her seat belt inside the truck.

She has since treated for a knee injury – she related that injury to her knee having been in a locked position at the moment of impact. Goins underwent two surgical repairs. Her medicals were $70,681 and she sought lost wages of $126,000. Impairment was $511,000 and she could take $200,000 more for suffering.

Goins sought damages in this lawsuit from Fraddosio. He defended the case and blamed the wreck on a phantom third-party. This phantom, driving a gold car, backed out into the roadway. Fraddosio suddenly swerved to avoid that peril and crashed into the Cintas box truck. As the case went to a jury, the court included a sudden emergency instruction and also permitted apportionment to the non-party phantom. Goins had contested this scheme, arguing that since the jury was permitted to apportion to the third-party, there was no need for a sudden emergency charge.

The case was resolved on the first question, the jury finding that Fraddosio had not violated the standard of care, that standard including the sudden emergency charge. That ended the deliberations and Goins took nothing. The case has since been dismissed as settled.

Breach of Contract - A bank alleged a general construction contractor essentially guaranteed to repay loans made to a sub-contractor

First National Bank of Russell Springs v. Gray Construction, 07-0162
Plaintiff: Joel R. Smith, Jamestown
Defense: Charles E. English, Jr., *English Lucas Priest & Owsley*, Bowling Green
Verdict: $32,500 for plaintiff
Circuit: **Russell**, J. Miniard, 12-17-09

In 2006, a company called Industrial, Inc., was selected by a construction contractor, Gray Construction, to provide fencing on a project. While Gray Construction was successful and had good banking relationships, Industrial was more shaky. It could not get financing to buy the raw materials.

Gray Construction prevailed upon First National Bank of Russell Springs to help. Gray Construction provided a letter to the bank that it would repay two specific loans to Industrial directly from its proceeds.

The loans were made, $58,740 on 1-10-07 and $26,109 on 2-13-07 – Industrial did not repay the loans and Gray Construction didn't step up either. The bank sued Gray Construction and sought to enforce a contract as created by the letters. That is, Gray Construction agreed to repay the two loans from the project and did not.

Gray Construction defended the case that the agreement provided it would only repay the loan to the extent that Industrial earned the payments. Industrial didn't finish the job and didn't pay its suppliers – thus Industrial didn't earn it and nothing was owed to the bank. It is noteworthy that instead of paying the bank, Gray Construction paid Industrial's suppliers who had threatened to place liens on the construction project. First National Bank countered that the letters did not permit Gray Construction to prioritize its payments – it was required to repay the bank.

The jury would find for First National Bank if Gray Construction intended to provide letters to the bank to encourage it to make the loan to Industrial, Inc. [The key inquiry was upon the intent of Gray Construction.] The jury said yes and regarding the two loans, it awarded the bank $16,250 on each one, the verdict totaling $32,500. A consistent judgment was entered.

Gray Construction has since moved for JNOV relief arguing that there was nothing for the jury to decide – that is, the agreement itself determined the terms. That a bank officer failed to read it and thus didn't understand the terms did not obviate the contract terms – Gray Construction further noted that the parties were sophisticated and the contract was not ambiguous. The motion is pending.

Trespass - The defendant created a privacy berm that encroached on the plaintiff's property – when the plaintiff complained, the defendant simply moved the berm slightly, creating a steep and unstable berm – the berm also caused storm water to collect on the plaintiff's property

Wimmers v. Summe, 06-1310
Plaintiff: Todd V. McMurtry, *Dressman Benzinger LaVelle*, Crestview Hills
Defense: Scott R. Thomas, *Hemmer Pangburn DeFrank*, Ft. Mitchell
Verdict: $17,000 for plaintiff
Circuit: **Kenton**, J. Sheehan, 11-20-09

The estate of Mary Wimmers owned a parcel in the Ivy Hill Lane subdivision in Ft. Mitchell. On an adjacent lot, Mark Summe constructed a large berm. The berm was designed to increase his privacy.

The estate complained and alleged the berm infringed on its property. In response, Summe moved part of the dirt pile. While this diminished the trespass, a new hazard was created – the new berm was steeper and unstable. It was also alleged that the berm caused storm water to collect and flow unnaturally across the estate's property.

This lengthy and contentious litigation followed. The estate sought compensatory damages, alleging both trespass and nuisance. Its valuation expert assessed the loss from the berm at $40,000. Summe defended as well as he could, suggesting the interference was de minimus at best – he thought the loss was no more than $300.

The court became frustrated with the litigation as motion after motion came before it. In one order, Judge Sheehan wrote that incredibly, this three-year lawsuit concerned nothing more than "a

pile of dirt." He further wrote it called to mind Shakespeare's admonition regarding lawyers. The judge's opinions aside, the litigation didn't stop and the matter advanced to a jury trial.

The estate prevailed on the trespass and private nuisance counts, the jury awarding $17,000 in compensatory damages. A consistent judgment was entered.

Auto Negligence - The verdict in a disputed right of way turning crash was for the defendant

Taylor v. Tommasini, 07-7143
Plaintiff: D. Tysen Smith, II, *Dolt Thompson Shepherd Kinney & Wilt*, Louisville
Defense: Kenneth J. Henry, *Henry & Associates*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Shake-2, 12-16-09

Jerry Taylor, age 60 and an architect, traveled on Lexington Road on 1-12-07. He was preparing to make a right turn into a parking lot. Just as Taylor made his turn, the defendant, Matthew Tommasini (employed at the library) behind Taylor, tried to outrun Taylor and make a turn into the same parking lot. A collision occurred as this happened.

Tommasini disputed this version. He alleged that it was Taylor who turned into him. The dynamics of this crash were unusual (both traveling the same direction and both making right turns) as were the divergent recollection of the litigants.

However it happened, there was an impact and Taylor was injured. He has suffered from ongoing soft-tissue symptoms including to his hip – he has followed with a course of pain management care. Taylor incurred medicals of $17,277 (most of that care was chiropractic) and he sought $15,000 more for future care. His past suffering was $60,000 and he sought three times that sum for in the future.

In describing his damages, Taylor explained that before this wreck, he was an active runner and golfer – made sedentary from these activities by his injuries, Taylor has since gained thirty pounds. Tommasini defended on liability (relying in part on an accident expert, Michael Barnes, Louisville) and also diminished the claimed injury.

The jury's verdict was for Tommasini on liability (it incorporated a sudden emergency charge regarding Taylor turning into his path) and that ended the deliberations. A defense judgment was entered.

Will Contest - The relatives of an elderly deceased man alleged his younger female caretaker manipulated him into altering his will to make her the sole beneficiary

Froehling v. Cox, 08-5043
Plaintiff: Fred E. Peters and Rhey Mills, Lexington
Defense: Thomas W. Miller, *Miller Griffin & Marks*, Lexington
Verdict: For defendant
Circuit: **Fayette**, J. Goodwine, 12-28-09

Thomas Adams was 86 in 2006 and he needed help at home. Adams' brother, Walter, hired a caretaker to do just that. She was the younger Evelyn Cox. Initially Cox was paid $175 a week. Moving into 2007, Cox became more involved in the care of Adams.

Her pay went up too. She began to be paid a few thousand dollars a week. Adams too made changes. He made a new will in June of 2007 that listed Cox as his sole beneficiary. In a separate codicil several months later, he transferred assets to Cox upon his death. In a third action, Adams changed his annuity to make Cox the beneficiary.

When Adams died in 2008, his new will was admitted for probate. His brothers didn't think that was a good idea and believed Cox had exercised undue influence upon Adams and/or he had lacked sound mind because of his feeble condition. They thus sought to set aside the decision by Adams. Cox defended that (1) Adams made the decision on his own, and (2) she didn't even know that their had been changes made to the will.

This case was tried to a jury – there were openings, evidence and closing arguments. The jury even announced it had reached a verdict. Following that announcement, but before the verdict was read, the parties entered a settlement.

The verdict (now a verdict about nothing) was for the defendant on all five counts regarding the will, its codicils and the change to the annuity. The case is closed.

Auto Negligence - While complaining of a serious back injury and a lengthy course of chiropractic care, a Mt. Sterling jury awarded the plaintiff only a portion of his medicals and nothing for pain and suffering

Bowen v. Fletcher, 08-90374
Plaintiff: James E. Davis, Mt. Sterling
Defense: B. Ellen Cochran and Sarah E. Noble, *Golden & Walters*, Lexington
Verdict: $2,198 for plaintiff
Circuit: **Montgomery**, J. Maze, 12-14-09

Roy Bowen, then age 56 traveled in Jeffersonville (KY) and came upon traffic that was stopped because of a prior wreck. Bowen started forward past the scene (as motioned by a police officer) but then came to a stop. A moment later he was rear-ended by Mr. Fletcher. Fault was no issue.

While Bowen declined treatment at the scene and drove his truck home, he would later recall intense neck pain. He subsequently treated with two chiropractors (both of whom testified live at trial) who described his wide-ranging pain.

Bowen's medicals were $10,602 and he sought $144,813 for future – he continues to see a chiropractor three times a week. His past suffering was $24,250 and he claimed $174,652 for that in the future.

Fletcher defended the case and looked to proof from a treating neurologist, Dr. James Bean. [Bowen had been referred to Bean by his chiropractor.] Bean could find no injury and suggested at best that Bowen had suffered a minor strain. The defense also focused on (1) Bowen's history of back pain that pre-dated the wreck, and (2) significant gaps in his care.

Tried on damages only, Bowen took $2,198 of his medicals and nothing more. It is expected that a judgment less PIP will be entered. While deliberating, the jury had asked for a demonstrative exhibit used by Fletcher in closing argument that highlighted gaps in the plaintiff's care. Because it was not evidence, the exhibit did not go back to the jury room.

Auto Negligence - The plaintiff suffered a hand injury in a right of way crash

Buckler v. Mathis, 07-0226
Plaintiff: Perry R. Arnold, *Arnold & Dunaway*, Bedford
Defense: Ben T. White, *Phillips Parker Orberson & Moore*, Louisville
Verdict: Threshold verdict
Circuit: **Henry**, J. Conrad, 10-28-09

Donald Buckles, then age 47, traveled on Hwy 22 near Eminence on 9-1-05. At that location, Terri Mathis turned left in front of him. A minor right of way collision resulted. Mathis conceded her fault.

Buckles has since treated for an injury to his right hand and index finger – he also reported soft-tissue symptoms. His injury was discussed by an orthopedist, Dr. Robert Jacobs, Louisville.

Buckles incurred medicals of $2,901 and sought $131,400 more for pain and suffering. He did not present a vocational claim – he had previously been a dogcatcher but that career was sidelined by an animal cruelty conviction regarding horses he owned.

In this lawsuit, Buckles sought to recover damages from Mathis. Mathis defended and minimized the claimed injury. Pointing to proof of pre-existing conditions, Mathis presented a threshold defense.

Fault having been admitted, the jury first considered the threshold question. It answered for Mathis that Buckles had not sustained $1,000 in medicals and that ended the deliberations. A defense judgment was entered.

Buckles has since moved for JNOV relief arguing in light of the uncontradicted medical proof, the issue of the threshold should never have gone to the jury. The motion is pending.

False Arrest - A Winn Dixie shopper was stopped and arrested by store security for stealing a pacifier – it was plaintiff's third lawsuit of this sort, he having advanced (and lost) a jury trial against Kroger in 1995

Allen v. Winn Dixie et al, 02-8551
Plaintiff: *Pro se*
Defense: R. Hite Nally and Victoria E. Boggs, *Weber & Rose*, Louisville for Winn Dixie
Richard G. Segal, *Lynch Cox Gilman & Mahan*, Louisville for Anderson
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Willett, 12-3-09

Ernest Allen, a part-time security guard, shopped on 11-13-01 at a Winn Dixie store on Bardstown Road. As Allen shopped, a store security guard, Talmay Anderson of Moore Security, watched Allen. He saw Allen open a package of pacifiers – he took one out and put it in his pocket. Allen put the pacifiers back on the shelf.

Anderson continued his surveillance and saw Allen take some meat. Now with contraband and a pacifier, Allen paid for a six-pack of Coke and started to walk out. Anderson swept in and took Allen to a back room. The police were called — Allen was arrested and held over night. In June of 2003, Allen was acquitted of criminal charges.

This lawsuit followed, Allen suing Winn Dixie and its security guard, alleging they lacked probable cause to arrest and that his detention was unreasonable. Allen believed Anderson was a liar and flatly denied any theft. If Allen prevailed, the jury could award him suffering damages – it was his contention that he was roughly handled and suffered soft-tissue and emotional injuries.

This case was not Allen's first foray into civil litigation. He pursued a similar case to a jury trial in October of 1995 against Kroger. A defense verdict was returned. He also pursued two other similar claims, but did not make it to trial.

The defendants relied on the version above (based on Anderson's recollection) that Allen had stolen merchandise and was properly detained. Looking to his past litigation history, it also suggested that Allen might have acted intentionally to be arrested, thereby setting the stage for this lawsuit. Allen denied this.

As the case went to a jury, it considered two questions. If the answer was no to either, the jury would consider damages. The queries were: (1) Did the defendants have probable cause to detain Allen?, and (2) Was the detention reasonable. The answer was yes to both and that ended the deliberations. A defense judgment was entered.

Malicious Prosecution - The plaintiff owned an elderly horse that had a medically managed nutrition problem and appeared underfed and mistreated – neighbors and those passing on a nearby highway thought the plaintiff was starving the horse – a humane society bigwig then instituted a prosecution against the plaintiff for animal cruelty

Roberts v. Jessamine County Humane Society, 06-0262
Plaintiff: Henry E. Davis, Lexington
Defense: Michael E. Hammond and Elizabeth Winchell, *Landrum & Shouse*, Lexington
Verdict: Directed verdict
Circuit: **Garrard**, J. Daugherty, 12-15-09

Cynthia Roberts owned a quarter horse, Deadline Darlin', for nearly 23 years. As the horse aged, it suffered medical problems. Her veterinarian diagnosed the horse with colic. The treatment included two surgeries that removed part of the horse's intestine. A side effect of the surgery was that the horse had trouble acquiring nutrition, horses absorbing nutrients from the intestine.

Despite the best efforts of Roberts, the horse had difficulty maintaining weight. Roberts lives on the well-traveled Kennedy Bridge Road and the horse's wasted condition was noted by multiple passing motorists. Kim Hurst at the Jessamine County Humane Society learned about Deadline Darlin' and an investigation was launched.

It was verified that the horse appeared malnourished. Hurst showed up at the Roberts homestead on 12-30-04 with a trailer and took Deadline Darlin away. She also instituted charges against Roberts for animal cruelty. Roberts was later acquitted and the horse returned to her.

This litigation followed, Roberts alleging that Hurst's institution of charges represented malicious prosecution. She noted that had Hurst done any investigation at all, including contacting the horse's veterinarians, she would have learned that while sick and old, the horse was receiving proper care. Hurst and the Humane Society defended that it was the sheriff who conducted the investigation and brought charges – she also denied any malice, explaining she was motivated only by a desire to help an apparently mistreated animal.

At the close of the proof, the defendant moved for a directed verdict.

Judge Daugherty granted the motion finding that while Hurst had initiated the prosecution and that it lacked probable cause, there was no proof of malice. That is, she was motivated by the good intention to help the horse.

Roberts has since moved to alter the order, arguing that malice could be inferred by her inadequate investigation – Hurst could have easily verified that the horse was receiving veterinary care. The motion is pending.

Kentucky Supreme Court Tort Opinions

At the rendition date in December, the Supreme Court rendered just one opinion. It concerned a worker's compensation question.

Discretionary Review at the Kentucky Supreme Court

At the rendition date on December 17, 2009, the Supreme Court granted discretionary review in a medical case as described below.

Medical Negligence - A large medical verdict including a punitive award of $3.75 million will be reviewed at the high court
University Hospital v. Beglin,
2009-SC-229
Review Granted: 12-17-09
Summary: The plaintiff suffered a catastrophic hypoxic injury during a colon surgery and died months later. In this lawsuit, she blamed bungled communications that delayed the delivery of extra blood when an intra-operative clotting problem developed. The verdict was for the plaintiff against the hospital only (two doctors were exculpated and the estate took a total of $9,047,003 including $3.75 million in punitives. [The case was tried in July of 2006. Kentucky's present Attorney General Jack Conway, was the lawyer for the plaintiff.]

The Court of Appeals fully affirmed the verdict upon the hospital's appeal. The Supreme Court granted the motion for discretionary review. While the issues are wide-ranging, including evidence questions, it seems likely the court will entertain the punitive damages question.

Verdicts Revisited

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

Auto Negligence - In a car wreck case where the plaintiff had threatened to harm defense counsel (this led to a continuance) it was not error to introduce evidence of the threat at trial – nor was it error for a picture of the plaintiff to have been posted at the entrance of the courthouse declaring him a "Person of Interest"
Slone v. Igbert et al
Appeal from Fayette Circuit Court
Trial Judge: Sheila R. Isaac
KTCR Cite: 3853
Date of Trial: 7-30-08
Appeal Decided: 12-11-09
Charles W. Gorham, Lexington for Appellant
Sandra Spurgeon and William W. Tinker, III, Lexington for Appellee

Joshua Slone was injured when he was rear-ended by Craig Igbert. Igbert would later blame the crash on a black-out defense – he suffers from sleep apnea and two treating doctors opined that it was possible he blacked out.

As the trial approached, Slone expressed to a psychiatrist that he wanted to harm defense counsel if the trial did not work out well. This led to a continuance.

Then at the jury trial, the court permitted evidence of Slone's threat. There was also a posted picture in the courthouse lobby of Slone that declared him a "Person of Interest"

Igbert prevailed at trial on the sudden emergency defense and took nothing. Slone appealed and challenged (1) the black-out defense, (2) the introduction of records of his threat, and (3) the bias that inured to him by the lobby photograph
Holding: Judge Stumbo writing

Joined by Thompson and Wine first concluded the medical proof supported the black-out defense and there was no error. Similarly the evidence of the threat was admissible because it went to the nature and extent of plaintiff's emotional injury.

Stumbo wrote about the picture in the lobby that there was no error when in voir dire, no juror recognized Slone – from the record, Slone and his father were the only two people that saw the picture and thus there was no error.

Boat Negligence - A novice jetskier was injured when she crashed into a boat – she was critical of the admission of proof that she was a novice and the boater was experienced, this being in her judgment, improper character evidence
Kelley v. Poore
Appeal from Fayette Circuit Court
Trial Judge: Ernesto Scorsone
KTCR Cite: 3874
Date of Trial: 10-16-08
Appeal Decided: 12-18-09
Charles W. Gorham, Lexington for Appellant
John W. Walters and Melissa Thompson, Lexington for Appellee

Kendra Kelley, age 19, operated a jet ski on Herrington Lake – she was by all measures, inexperienced on the watercraft. Soon after there was a collision between Kelley and a boater, John Poore. Poore by contrast was an experienced boater. Each blamed the other for the crash.

At trial the court permitted evidence of Kelley's inexperience and by contrast, it also allowed proof that Poore had operated his boat for years. A defense verdict was returned. Kelley appealed and cited error in that the admission of the so-called character evidence was inconsistent with KRE 404(a).
Holding: Judge Combs writing

Joined by Lambert and Moore held that experience or inexperience in boating was not evidence one's character or a trait of character. It was however probative, Combs continued, as to why the collision occurred. The trial court was affirmed.
Ed. Note - This case was denoted "To Be Published."

The Kentucky Trial Court Review is published at 9462 Brownsboro Road, No. 133 Louisville, Kentucky 40241; Denise Miller, Publisher; Sandra Tharp, Editor Emeritus, Shannon Ragland, Editor; Aaron Spurling, Assistant Editor. Annual subscriptions are $249.00 per year. [Including sales tax, $263.94 for Kentucky residents.]
E-Mail - Info@juryverdicts.net

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