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.

Nursing Home Negligence - An elderly nursing home patient died just nine days into his stay – his death was linked to dehydration as while he had an NG tube, nurses failed to see that the plaintiff received enough water to survive – the jury was apparently angered, it imposing punitive damages of $40,000,000

Offutt v. Harborside Healthcare, 09-529
Plaintiff: Lisa E. Circeo, Lexington and A. Lance Reins, Tampa, FL, both of *Wilkes & McHugh* and Jerry P. Rhoads, *Rhoads & Rhoads*, Madisonville
Defense: Robert Y. Gwin, *Gwin Steinmetz & Baird*, Louisville and Peter J. Molinelli, *Quintairos Preito Wood & Boyer*, Tampa, FL
Verdict: $42,750,000 for plaintiff
Circuit: **Hopkins**, J. Brantley, 11-16-10

Joseph Offutt, age 92, was admitted to Harborside Healthcare (a nursing home) in Madisonville on 3-25-08. His medical condition was complex – he suffered from multiple co-morbidities including cancer and stroke. Until just four years before his admission, Offutt (a World War II veteran) had been active and planted crops. Offutt's condition had gone down in recent months after a stroke and his wife (Pearline) had realized she could no longer care for him.

Offutt was dead nine days later. At the time of his death, he was severely dehydrated and malnourished. He also had infections and bed sores. State protective services investigated the case and substantiated allegations that Offutt had been neglected.

In this lawsuit, Offutt's estate sued the nursing home and alleged negligence in neglecting him. The plaintiff's proof developed that as Offutt had a feeding tube, there was no excuse for him to become dehydrated. The facility simply failed to ensure he got enough water to survive during his short stay – the plaintiff pointed to proof that Offutt's water intake was not monitored or charted.

Offutt was also allowed to develop necrotic and painful pressure sores. Upon his admission, he merely had a reddened area and a blister. If prevailing, the estate sought suffering damages for the decedent and the wife's consortium claim.

The case also had a punitive damages component. The estate alleged the nursing home acted recklessly and in the pursuit of money. That is, its primary holding company was more focused on attracting high-reimbursement and high acuity Medicare patients (like Offutt) than actually caring for them. Experts for Offutt were Dr. Leonard Williams, Tampa, FL and non-retained, the investigating nurse for the state, Anna Turpin, Somerset.

The nursing home defended and focused on causation. It noted Offutt's age and his significant pre-existing conditions (prostate cancer, renal problems, stroke, malnutrition, pleural effusions) among many others. The defense also developed that the doctor did not immediately order water flushes, nurses at all times following orders as written. To the notion of charting, the nursing home explained that while there were mistakes, good care is not about charting. Experts for the nursing home were Dr. Danny Woo, Nephrology, Louisville, Dr. Joseph Banis, Plastic Surgery/Wound Care, Louisville and Dan Moles, Nursing Home Administration, New Jersey.

After a three week trial, the jury's verdict was for the plaintiff on liability. The estate took $1,000,000 for the decedent's suffering – his wife took $1.75 million more for her consortium interest. The jury continued and assessed $42,000,000 more in punitive damages. The verdict totaled $42,750,000.

Since the verdict, a nursing home spokesman has expressed her belief that the size of the verdict was outrageous. A "vigorous" challenge on appeal (**Ed. Note** - As opposed to a half-hearted one?) has been promised.

Ed. Note - Had this verdict been returned five years ago when Cooper, Lambert and Johnstone were on the Kentucky Supreme Court, among others, that contentious court could have been guaranteed to ultimately decide this matter. And it would do so in a flourish, Cooper likely to insult those that disagreed with him. [Cooper preferred to talk about out-of-control Eastern Kentucky juries, but that paradigm would

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be challenged by this Western Kentucky jury.]

In the current Minton regime, the opposite seems to be true. No result except an uninteresting one seems to be guaranteed. There are no insults thrown at the court. The current justices go out of their way even in dissent (some former justices were rarely happy dissenters) to express comity. It is not just that there are no insults (which are fun but worthless in terms of jurisprudence), but as importantly, the court (like Chief Justice John Roberts) goes to great pains to decide very little. The predictive quality is then quite limited. By that, there is no real prediction that this case will advance to the Kentucky Supreme Court (assuming it does not settle) or as importantly that the court will have anything interesting to say.

Civil Rights - A rogue volunteer deputy sheriff struck the plaintiff in the head with the butt of his gun, the volunteer intervening to protect his son in a fight – the plaintiff sought damages from the elected sheriff, arguing he had failed to properly train the volunteer – the sheriff defended that the volunteer was a rogue who acted on his own

Brewer v. Whitley County Sheriff, 6:08-183
Plaintiff: Michael T. Cooper and Hal D. Friedman, *Cooper & Friedman*, Louisville
Defense: Jane Winkler Dyche and R.W. Dyche, III, London
Verdict: $6,282,480 for plaintiff
Federal: **London**, J. VanTatenhove, 11-10-10

Dalton Brewer, age 26 and an electrician, bought a gun in the summer of 2007 from Perry Ramey. He paid $300 for the gun. Ramey's father, Tony Ramey, a volunteer deputy sheriff, was not happy about the sale. It seems that Master Perry had stolen the gun from his father.

Deputy Ramey gave his son orders to get the gun back and accompanied Perry on a mission to Brewer's house in Corbin to do just that. Brewer had no problem returning the gun. He just wanted his $300 back. That was something Perry could not do.

In the doorway of Brewer's home, a fight broke out. It was obvious to all, including Deputy Ramey (sitting nearby in his car) that Perry was taking the worst of it.

The deputy, a lawman first, got out of his car and headed to the home. He withdrew his gun and announced his status as a deputy and that Brewer was under arrest. Ramey then struck Brewer in the head with the butt of his gun. The pistol-whipping briefly left Brewer unconscious.

Brewer's girlfriend heard the commotion and called the real cops. [The 911 tape captured part of the ruckus, including Ramey's announcement that he was a cop and Brewer was under arrest.] The Corbin police showed up and Ramey wanted Brewer arrested. When it became clear that Ramey had no real credentials, the police left.

Brewer has since complained of a permanent brain injury related to the pistol-whipping. It has manifest as seizures, blurred vision, post-traumatic stress disorder and myofascial pain. He has not worked since.

In this lawsuit, Brewer targeted the Whitley County Sheriff, Lawrence Hodge. He alleged that the sheriff had a pattern, policy and custom of failing to properly train its volunteer deputies such

that the failure to train represented a constitutional violation. If Brewer prevailed, he sought medicals, lost wages, impairment and other non-economic damages. As the government is immune from punitive damages, the claim sought only compensatory damages. [Ramey for his part was later charged with crimes related to the pistol-whipping and he pled guilty – he is no longer a volunteer deputy.]

The sheriff defended the case and focused on developing a single theme – namely, Ramey was not a deputy sheriff as he had not completed required training. When Ramey acted (and this was critical to the defense), he did so as a rogue without the endorsement of the sheriff.

The sheriff also diminished damages and looked to proof from an IME, Dr. David Shraberg, Neuropsychiatry, Lexington. The expert thought Brewer suffered from psuedo-seizures that were unrelated to any trauma. He also described the plaintiff as self-dramatic.

The jury answered for Brewer that Ramey acted under the color of law and that he had intentionally deprived Brewer of a constitutional right. The jury further found against the sheriff that its training was inadequate and that this represented a pattern, policy or custom.

The jury continued that this pattern represented deliberate indifference and represented a constitutional violation. Then to damages, Brewer took medicals of $103,180 plus $184,000 for future care. Lost wages were $183,300, Brewer taking $2,512,000 for impairment. To the last two categories of damages, physical pain and suffering and emotional pain and suffering, Brewer took $1.65 million each.

The verdict totaled $6,282,480. Rather than enter a judgment, the court conducted a settlement conference. The case did not settle nor has a judgment been entered.

The receipt of the verdict was interesting in this case. Deliberating three hours, the jury first returned to the court. The foreperson read the verdict as unanimous. There was no request for a poll.

However after the jury was dismissed, a single juror asked for a polling and the judge agreed. This juror explained she had voted against the verdict. She had explained her difficulty with the deliberations and made a Biblical reference.

The court struck her from the jury and sent the jury to deliberate a second time. After just ten minutes, a second verdict was returned. It was the same as the first and the court accepted it.

Negligent Security - Leaving a German-themed restaurant, a bouncer asked the plaintiff's wife to search her purse for stolen beer steins – the plaintiff (a lawyer at one of the world's largest law firms) objected and walked out of the restaurant – the bouncer gave chase and proceeded to attack and choke the lawyer – the bouncer would later explain his instructions were to stop stein theft and take any means necessary to do just that

Amicone v. Hofbrauhaus Newport, 10-247
Plaintiff: Jamie L. Turner, *Turner Law Services*, Cincinnati, OH and Robert Amicone, II, Burlington (*Pro se*)
Defense: Curtis E. Kissinger, *Rendigs Fry Kiely & Dennis*, Cincinnati, OH
Verdict: $5,000 for Robert less 33% comparative fault; $500 for Kelly
Circuit: **Campbell**, J. Ward, 10-26-10

Robert Amicone, then age 27 and a lawyer at the Cincinnati office of Squires Sanders & Dempsey (it has lawyers all over the world), visited the Hofbrauhaus restaurant in Newport on 12-27-09. [Robert is a self-described civil litigator with a steady docket of ten cases.] Hofbrauhaus has a German theme and serves beer in steins. Some covet the highly regarded steins and there have been reports of customers stealing them.

Robert was jointed at Hofbrauhaus by his wife, Kelly, then in her final year of law school. They joined friends and ate dinner. The night concluded, the Amicones (who live in Burlington) prepared to leave. They were met at the door by a club bouncer, Christopher Bridges.

Bridges sought to enforce the club's "no-stealing beer stein" policy. It required him to check the bags of patrons. Bridges (a convicted felon) asked to see Kelly's purse. Robert took it from her and explained there would be no search. Kelly for her part objected because it contained private items (an extra pair of panties and feminine products).

The Amicones continued walking outside. Bridges would later explain it was bar policy to stop stein theft and that it was his job at any cost to prevent stein slippage. He followed the Amicones outside.

Suddenly Bridges grabbed Robert by the back of his coat and threw him to the ground. Bridges then jumped on Robert and began to violently choke him. Onlookers took cell phone pictures of the attack. They show Bridges over Robert, a stricken and very shaken Robert being choked about the neck. As the choking was taking place, a second bouncer, Jamie Mendoza, stood by and did nothing. The police were called and came to the scene but arrested no one.

Robert has since treated for wide-ranging pain symptoms related to this attack. Those include migraines and a severe emotional injury. If prevailing at trial, he sought medicals, future medicals and pain and suffering. Similarly his wife sought damages for emotional distress related to the attack.

In this lawsuit, the Amicones sued the restaurant and presented a variety of counts against it including, assault, battery, civil conspiracy, false imprisonment, defamation, invasion of privacy, negligent hiring and retention, negligent supervision and general negligence in failing to summon emergency aid. A liability expert on security matters for the plaintiffs was Tony Jarana, Indianapolis. He explained that (1) Bridges, a felon, should not have been hired, and (2) there was no basis to choke a customer to search for stolen beer mugs. [The Amicones had not stolen anything.]

If prevailing, the jury could also award punitive damages. Hofbrauhaus defended this case as well as it could at trial. That included suggesting the claimed damages were exaggerated and that the plaintiffs too shared some fault for this event.

The jury's verdict was mixed on fault. Robert prevailed on battery as well as negligent hiring and retention and false imprisonment.. His wife prevailed too but only on negligent hiring and retention. The defendants prevailed on the other counts, assault, civil conspiracy, defamation, invasion of privacy and negligence in failing to summon emergency assistance.

This Newport jury also found negligence by Robert. Then to damages, he took $5,000 of his medicals, but nothing for every other claimed element. His wife took $500 in medicals too, but non-economic damages were rejected. Similarly the jury elected not to impose punitive damages. Thus the verdict for Robert was $5,000 less 67% comparative

fault – his wife took $500 as well less 67% comparative fault. A consistent judgment was entered.

Plaintiffs have moved for a new trial and argued the damages were grossly inadequate. Particularly Robert introduced proof of $170,000 in future medicals for migraines and his emotional injury, yet he took just $5,000. The plaintiffs have also criticized permitting the jurors to deliberate until two in the morning, the lateness of the deliberations leading to an unfair compromise. The motion is pending.

Telecommunications Cable Negligence - **A telecommunications cable dragged too low and was struck by a passing truck – it was then whipped into a passing motorcyclist who crashed and sustained multiple fractures**

Calhoun v. Mediacom Southeast, 09-311
Plaintiff: Brent Travelsted, *Hughes & Coleman*, Bowling Green
Defense: James A. Sigler, *Whitlow Roberts Houston & Straub*, Paducah for Mediacom
G. Kennedy Hall, Jr. and John M. Matter, *Middleton Reutlinger,* Louisville for McGraw Lumber
Verdict: $164,907 for plaintiff assessed against Mediacom only; Defense verdict for McGraw Lumber
Circuit: **Marshall**, J. Foust, 11-18-10

Lonnie Calhoun, then age 43 and an electrician, was operating a motorcycle on 5-19-09. He traveled on Brewers Highway in Marshall County. This was soon after the ice storm that devastated the area and numerous trucks serviced the damaged limbs. The trucks then proceeded on the highways with limbs sticking out at all angles.

There was proof that some of those limbs extended higher than normal and started to strike overhead lines. To this case particularly, a telecommunications cable maintained by Mediacom Southeast had been struck and it was drooping.

Against this backdrop, a truck driven by John Grubbs for McGraw Lumber passed through the area. It struck the low-hanging line which was just 13 feet, 6 inches high. The line should have been two feet higher.

The line then whipped around and struck Calhoun (who was behind Grubbs, causing Calhoun to lose control of his motorcycle. He crashed hard and suffered several injuries. They included a broken leg as well as fractures of his ribs, thumb and collarbone. His scalp was lacerated and he has complained of general road rash.

Calhoun's medical bills were $95,530 and he sought $16,500 for future care. Lost wages were $13,877. The instructions limited Calhoun's pain and suffering to $1.5 million.

Calhoun sued Grubbs and his employer, alleging negligence by him in striking the line. The plaintiff also targeted Mediacom, citing evidence it knew debris trucks were in the area and that its line could be in peril. The lumber company defended that Grubbs had no way to anticipate or avoid striking the line. Mediacom defended as well and denied it had negligently failed to maintain the cable.

This jury found Mediacom 100% at fault for the accident and then to damages, Calhoun took his medicals as claimed plus $5,500 more for future care. He too took his lost wages as claimed and $50,000 for pain and suffering. The verdict totaled $164,907. A consistent judgment reflected the mixed result, the McGraw Lumber driver being exonerated.

Employment Contract - **The CEO of an aluminum company alleged he was fired without cause and thus was entitled to the unpaid portion of his contractual salary**

Boyle v. Ohio Valley Aluminum, 09-3398
Plaintiff: Hans G. Poppe and Warner T. Wheat, *Poppe Law Firm*, Louisville
Defense: Jeremiah A. Byrne and Tanya Y. Bowman, *Frost Brown Todd*, Louisville
Verdict: $750,000 for plaintiff
Circuit: **Jefferson**, J. Cowan, 10-29-10

Michael Boyle inked a contract in January of 2008 with Ohio Valley Aluminum Company (OVACO). OVACO is a subsidiary of a closely held holding company known as Interlock Industries. [Interlock also owns Yellow Cab.] The deal provided that Boyle would be paid $300,000 annually and he would also be entitled to targeted bonuses.

Boyle could only be terminated for cause. That was defined in the contract specifically as a felony, significantly missing budget goals or other serious misconduct. The contract also provided a liquidated damages provision that if Boyle was terminated without just cause, he would be entitled to 18 months salary plus a targeted bonus. Boyle remained with OVACO until he was sacked in January of 2009.

OVACO explained that Boyle was let go because of poor performance. Namely his budget goals were off dramatically, OVACO failing to meet a pre-tax profit goal. The company cited this as so-called "just cause" and postured that Boyle was owed nothing.

Boyle disagreed and filed this lawsuit against OVACO. He argued that his performance was good, his efforts improving the company's prospects. This was especially so as the aluminum market was difficult and contractual problems (that pre-dated his tenure) limited profitability. He also cited that the so-called pre-tax profit goal was unreasonable. An aluminum industry expert for Boyle was Leon Kozierok, Toronto, Canada.

The real reason for the firing, Boyle suspected, was a desire by the owners of Interlock (four brothers) to save money by firing several high paid executives. [The same month Boyle was fired, the vice-president of Human Resources was also canned, the company saving $500,000 in salary.]

Thus as there was no just cause to terminate, he sought the liquidated damages of $750,000. OVACo defended as above that the firing was justified.

The jury's verdict was for Boyle on the contract count. He was awarded the $750,000 as claimed. A consistent judgment was entered.

Pending is a motion for sanctions (set sua sponte for 12-21-10) related to OVACO having warranted in discovery that a certain employee had warranted in an affidavit that he had searched for documents. In fact, no such search had been conducted. OVACO has also moved to seal the entire court record.

Auto Negligence/UIM - In a rear-end crash, the plaintiff's knee was jammed into the steering wheel – a Lexington jury awarded medical bills and nothing more

Turner v. Stone et al, 09-1055
Plaintiff: Sam Aguiar, *Aguiar Law Office*, Louisville
Defense: Clayton O. Oswald, *Taylor Keller & Oswald*, London for Stone
M. Jane Brannon, *Taylor Thompson & Brannon*, Lexington for Shelter Mutual
Verdict: $25,855 for plaintiff
Circuit: **Fayette**, J. Bunnell, 11-18-10

Victoria Turner, then age 51, was traveling on Tates Creek Road on 11-27-07. An instant later she was rear-ended by Amber Stone. Fault for the wreck was conceded.

Turner has since treated for persistent knee pain. She linked the injury mechanism to her knee having been jammed into the steering column during the crash. She followed with Dr. William Moss, Orthopedics, Lexington, who linked the injury to the crash.

Turner's medical bills were $25,855 and her suffering damages were limited to $200,000. In this lawsuit, Turner sought damages from both Stone (the tortfeasors) and her UIM carrier, Shelter Mutual. The defendants minimized the claimed injury at trial.

This case was tried on damages only. Turner took her medicals as claimed, but nothing for pain and suffering. Two weeks post-trial no judgment had been entered, but presumably (less PIP) it will be for the defendants.

Even though there is no judgment (in the court record at least), Turner has since moved for a new trial. She has argued the verdict was inadequate, the defendants conceding there was some injury. The motion is pending.

Medical Negligence - The plaintiff (age 20) died after an emergency doctor attempted to transfuse blood (the plaintiff's blood levels being at panic levels) through a subclavian central line – he struck the aorta instead, that injury purportedly leading to the plaintiff's death

Turner v. Fawcett, 07-191
Plaintiff: Martin H. Kinney, Jr., *Dolt Thompson Shepherd Kinney & Wilt*, Louisville and David Robinson, Evansville, IN
Defense: Scott P. Whonsetler and Jeffrey D. Thompson, *Whonsetler & Johnson*, Louisville
Verdict: Defense verdict on liability
Circuit: **Henderson**, J. Wilson, 11-9-10

On 5-25-06, Chastity Turner, age 20 and a petite black woman, was listless and lacked energy. She was found later in the day, having passed out in her apartment. Her roommate saw that her face was "really, really really fat," and that her eyes were black and dilated. Despite demands by her roommate and aunt that she go to the hospital, Chastity took some Excedrin migraine pills and claimed she felt better.

The next day, on May 26, Chastity was without energy the whole day, and at about 4:00, fainted once again and threw up outside of her apartment. The roommate drove her to the hospital, where she again fell to the ground outside of her car. The roommate ran inside the ER and found a wheelchair she could use to bring Chastity into the hospital.

The triage nurse noted the vital signs to be relatively normal, except for a racing heart rate. Blood was drawn, and the lab results came back with panic levels noted in her hemoglobin at 2.2, as well as her hematocrit and platelets. The results were so extreme, the lab was ordered to redraw and recheck the blood values. They came back the same.

Dr. Robert Fawcett was the ER doctor on duty. He made a decision that the patient needed emergency blood transfusion of 4 units. He wanted to transfuse the blood through a peripheral line in the patient's arm, but she was so small and her veins were collapsing because of her blood volume, the nurses could not get a big enough needle into her arm to transfuse blood. Fawcett made the decision to give platelets though the small gauge peripheral line the nurses were able to establish, and prep the patient for the insertion of a subclavian central line for blood transfusion.

The nurses took a time-out from this and moved the patient into their trauma room inside the ER to prep her right upper chest for the central line procedure. Fawcett made one or two attempts to insert a needle into the patient's subclavian vein, but with no success. He ordered the nurses to prep the left chest and alert a surgeon for assistance.

Before the surgeon arrived, Fawcett was successful in getting a central line placed on the right side. However, before he finally got the central line established, the patient, Chastity Turner, seized, crashed and went into a full code. A respiratory tube was placed and CPR was started on the patient. Her heart would not pump on its own, and the outlook for the patient's survival was grim.

Fawcett decided that the only way the patient would survive was if he could get more blood into her. He went to the left side of the patient and tried to get a central line placed while she was undergoing CPR. He could not get another line into her left side after sticking her approximately 30 times on the left side. He tried 4 sticks to the internal jugular vein on the left side of her neck with no success. Almost an hour into the code, Fawcett tried an unconventional procedure of sticking a needle into the confluence of veins and arteries near the patient's sternum on the right side of her chest to get more blood in her. He made approximately 10 needle sticks in that medial area. After one hour and 6 minutes under full code with CPR and defibrillation shocks, the patient was declared dead.

An autopsy was performed by Assistant Kentucky Medical Examiner, Deidra Schluckebier. She concluded the cause of death to be "Medical Therapy incident to Profound Anemia," because she found two needle sticks to Chastity Turner's aorta. It was her opinion that the needle sticks caused "about" 100ccs of blood and fluid and a large blood clot to form within the pericardial sac, causing a pericardial tamponade interfering with the ability of the heart to beat. The medical examiner noted cause of death to be "Medical Therapy," because she stated she could find no other disease within the body to explain death.

However, it was discovered the Medical Examiner either forgot to take a

bone marrow sample, or lost it, which would likely be diagnostic of disease and a cause for the patient's extreme anemia. She also noted in the autopsy report that the 10 needle sticks to the right chest near the sternum were "surrounding the insertion site" of the central line. She then admitted in trial that she forgot to photograph the insertion site of the central line, and admitted that the actual insertion site was much further away laterally from the 10 medial sticks she did photograph. Fawcett testified that he called the Medical Examiner after her autopsy to explain to her that all of his excess needle sticks were made after the patient coded, but she wouldn't listen to him.

In this lawsuit, Turner's estate sued Fawcett and linked the death to error by him in injuring the aorta. In addition to Schluckebier, the plaintiff called three other expert witnesses. Dr. Rodney Kosfield a hematologist in Louisville, testified that the patient's condition was not urgent, and that he would not have necessarily ordered a blood transfusion. He believed that the patient suffered from heavy menstrual periods and that all she needed was iron supplements.

Plaintiff's other two experts were emergency room physicians who testified as to the standard of care. Dr. David Seidler from Charleston, WV, and Dr. C.T. Fletcher from Indianapolis, IN, both agreed that it was reasonable to conclude that the patient needed blood and that she needed a central line. Both of Plaintiff's ER experts testified that it was gross negligence for Dr. Fawcett to make needle sticks too close to the mid-line of the body, putting the aorta in jeopardy. However, both experts agreed that their opinion was based on the Medical Examiner's photos and the assumption that Dr. Fawcett made the medial sticks on the right as his first attempt at a central line.

Plaintiff's vocational expert, David Gibson, calculated loss of future earnings to be $925,961. Additionally, the estate claimed pain and suffering of $1,500,000. The plaintiff also sought the imposition of punitive damages, limited in the court's instructions to $1,000,000.

Fawcett defended and called ER experts Dr. Kenneth Boniface from Cincinnati, OH and Dr. Richard Braen from Buffalo, NY. Both ER experts testified that they would be critical of Fawcett if his initial attempt at the central line was near the mid-line of the body over the aorta, but under the circumstances of the likely death, it was not below the standard of care to establish a central line in the proper spot, then make extraordinary and even desperate attempts to save the life of a young person who was surely going to die without drastic measures.

Dr. Joseph Tisone, a Pathologist from Louisville, testified that the Medical Examiner's autopsy was awful, and did not support the conclusion that "medical therapy" caused death. He testified that it was inexcusable that the Medical Examiner lost the bone marrow sample, as it could have explained the death or the cause of the anemia. He was critical of her lack of photographs of the heart, lack of photos of the pericardial sac and exact measurements of the fluid within that sac.

The defense also called Dr. Donald Miler, Director of U of L's Brown Cancer Center. Miller testified that Turner had an acute condition when she arrived at the ER, that her anemia was extremely severe and that she needed blood. However, he testified that even a blood transfusion may not have saved her because of the severity of the emergency.

A Henderson jury resolved this complex case with a 9-3 verdict for Fawcett on liability, the estate taking nothing. A defense judgment was entered.

Marina Negligence - The plaintiff tripped on a metal strip on a mobile boat dock and sustained a ruptured quadriceps

Pullen v. Green Turtle Bay et al, 06-198
Plaintiff: Craig Housman, *Housman & Associates*, Paducah
Defense: Bradley D. Harville, Louisville for Green Turtle Bay
Edward K. Box, *Gault & Box*, Paducah for Engineered Dock System
Verdict: Defense verdict on liability
Circuit: **Livingston**, J. Woodall, 6-15-10

J.D. Pullen, then age 63, came to the Green Turtle Bay Marina near Grand Rivers on Lake Barkley on 4-21-06 to load supplies onto his boat. To reach his boat, Pullen descended a mobile floating dock. The dock has metal tread plates that separate portions of the dock and act as a hinge, permitting the dock to move.

As Pullen walked on the dock (he was pushing a cart with supplies), he slipped on the metal plate and fell. In that resulting fall, he sustained a ruptured quadriceps injury. His medical bills were $21,591 and he sought lost wages of $3,500. An electrician by trade, his impairment was capped at $175,000. He also sought $300,000 for pain and suffering.

Pullen sued the marina and alleged the presence of the slick metal plate represented an unreasonably dangerous condition. He cited the metal tread was especially slick when it became wet. Pullen also sued the dock's manufacturer, Engineered Dock Systems. Pullen argued the metal tread should have been covered with a non-skid paint.

The defendants replied to the suit and explained that nothing was concealed about the dock's condition. In that regard, it was no surprise that a wet dock could and would be slippery. Engineered Dock Systems replied as well that its dock design was the state of the art.

A jury in Smithland rejected the negligence claim regarding the marina as well as the products count against Engineered Dock Systems. The jury having so found, Pullen took nothing. A defense judgment followed this two-day trial. As the jury had deliberated it asked a question: Have there been other falls at this location?

Pullen moved for a new trial and argued it was error to exclude proof of two similar falls at the same location. The motion was withdrawn, the plaintiff agreeing not to appeal if the defendants did not seek their costs. The case is closed.

Underinsured Motorist - A waitress complained of a cervical disc injury following a rear-end crash – her UIM verdict exceeded the floor of coverage by $75,000

Addison v. State Farm, 09-1555
Plaintiff: Penny Unkraut Hendy and Timothy J. Byland, *Schachter Hendy & Johnson*, Ft. Wright
Defense: Robert B. Cetrulo, *Cetrulo & Mowery*, Edgewood
Verdict: $155,000 for plaintiff
Circuit: **Kenton**, J. Sheehan, 10-27-10

Tonette Addison, then age 42, was involved in a rear-end collision on 6-5-08. She was struck by Kenneth Lawrence while stopped at a red light in Independence. Fault was not disputed.

Addison, a waitress at Bob Evans, has since treated for radiating neck pain. That care included seeing her family

doctor, a chiropractor and a pain management specialist. She was ultimately seen by Dr. Michael Rohmiller, Spine Surgeon, Cincinnati, OH. He performed a spinal surgery, but there was evidence Addison suffered a non-union.

Addison's medicals were $56,187. [At trial she sought medicals and future medicals in a single category.] She also claimed lost wages, impairment and suffering. Her husband presented a derivative consortium count.

Addison moved first against Lawrence and took his $50,000 policy limits. Above that sum and her PIP of $30,000, Addison additionally sought UIM benefits from her insurer, State Farm. Thus to trigger State Farm's floor of coverage, Addison had to exceed $80,000 – the policy limits were $300,000.

State Farm defended the case and minimized the claimed injury. An IME expert, Dr. Arthur Lee, Orthopedics, Cincinnati, OH, thought this wreck led to just a temporary strain. He linked Addison's ongoing symptoms to pre-existing conditions.

Addison survived the threshold, the jury answering that she had incurred $1,000 of reasonably necessary medicals. [It further answered there was no permanent injury.] then to damages, she took medicals of $114,000 plus lost wages of $6,000. Her impairment was $25,000, the jury adding $10,000 for suffering. Her husband's consortiumclaim was rejected. The raw verdict totaled $155,000 – the judgment (less the underlying limits and PIP) was for Addison in the sum of $75,000.

Medical Negligence - A victim of auto trauma was transferred to the UK Medical Center – she was released after testing was mostly normal – 36 hours later she was dead of an undiagnosed aortic rupture

Branham v. Rock et al, 08-1856
Plaintiff: Stephen M. O'Brien, III and William J. George, Lexington and Cory M. Erdmann, *Erdmann & Stumbo*, Richmond
Defense: Bradley A. Case and Emily Wang Zahn, *Dinsmore & Shohl*, Lexington
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Goodwine, 11-17-10

Peggy Branham, then age 59, was a passenger on 4-24-07 in a vehicle driven by her husband, Ira. Ira fell asleep and crashed. Branham was shaken in the wreck, having suffered apparent chest wall trauma. She was taken to Mary Chiles Hospital in Mt. Sterling and then transferred to the UK Medical Center.

Upon arrival in Lexington, she was evaluated by two ER doctors, Troy Rock and Larry Britt. They ordered a chest wall x-ray. It was normal. The x-ray was evaluated by radiologists, Dr. Calixto Pulmano and Dr. Jason Keszler.

While Branham was anemic and had an elevated heart rate, she was otherwise normal. She was released from the hospital. Branham died 36 hours later of a ruptured aorta.

Her estate sued the four doctors named above and alleged negligence by them in failing to diagnose and treat the aortic rupture. Particularly in light of her presentation, a full work-up should have been done, including the performance of a chest CT scan. Had it been performed, the theory went, the aortic injury would have been identified.

Experts for the plaintiff were Dr. Richard Freeman, Trauma Surgery, Dr. Eric Larsen, Emergency, Mt. Pleasant, SC and Dr. Peter Julien, Radiology, Los Angeles, CA. If the estate prevailed, it sought destruction of $967,564 plus the funeral bill of $7,650. Plaintiff's suffering was limited to $1,000,000 – her husband sought $3,000,000 more for his consortium interest.

The defendants replied that upon her admission to UK, Branham was mostly asymptomatic – while her color was not good, upon inquiry, they were told she was typically pale. Similarly, while hemocrit levels were low, they were in fact stable. Thus in light of that presentation, a CT scan was not required.

A radiology expert, Dr. Michael Foley, St. Petersburg, FL, reviewed the chest x-ray blindly and upon learning of the real condition, was very surprised. He explained Branham's presentation was very unusual and there was no deviation from the standard of care in failing to make the diagnosis. Other defense experts were Dr. John Ma, Emergency, Portland, OR, Dr. Bruce Janiak, ER, Augusta, GA and Dr. Addison May, Trauma Surgery, Vanderbilt.

The defendants had also sought to apportion fault to the plaintiff's husband. They cited his having crashed was the first alleged tort. The court rejected this argument. [The husband had paid the estate his policy limits of $50,000.]

The jury's verdict exonerated all four defendants and the estate took nothing. Two weeks post-trial no judgment had been entered.

Products Liability - As the plaintiff heated a can of corn in her nearly new oven, the oven suddenly erupted in fire and she was injured – the trial court directed a verdict for the manufacturer, finding that plaintiff's proof of defect was inadequate

Siegel v. Dynamic Cooking Services, 3-08-429
Plaintiff: Alfred A. Olinda, Jr., *Reasonover & Olinda*, New Orleans, LA and John R. Shelton, *Sales Tillman Wallbaum Catlett & Satterley*, Louisville
Defense: Robert E. Stopher and David E. Crittenden, *Boehl Stopher & Graves*, Louisville
Verdict: Directed verdict
Federal: **Louisville**, J. Moyer, 11-10-10

It was 2-19-08 and Nancy Siegel of Breckinridge County was using a gas oven range manufactured by Dynamic Cooking Services. It was relatively new. As she heated a can of corn, she heard a noise and opened the oven door. Fire escaped and she suffered painful 1st and 2nd degree burns to her hands, feet and face. Siegel was bedridden for months.

It would later be agreed by all that the range failed because of a malfunctioning gas regulator. In this lawsuit, Siegel sued Dynamic Cooking and alleged a defect in the oven caused her injury. She relied on proof from two experts from Donan Engineering, David Riggs, Engineer and Miranda Hewlett, Fire Investigator. [The experts had originally been hired by an intervening insurer, Farm Bureau.]

Dynamic Cooking defended and filed a third-party lawsuit against Burner Systems, the manufacturer of the regulator. It prevailed by summary judgment, explaining it had tested the regulator for leaks. [The regulator itself was badly damaged in the fire.]

To the merits of the surviving claim presented by Siegel, Dynamic Cooking denied there was a defect in its range. It also postured that plaintiff's proof of defect was merely circumstantial. [Siegel had not sued Burner Systems.] A defense expert was Marc Mulcahy.

On the third day of proof, Judge Moyer granted a directed verdict for Dynamic Cooking. Several weeks later

he entered an order explaining his decision. Moyer wrote that while it was odd that the plaintiff would lose her case when she was painfully injured by a relatively new oven. However she explained that was because of plaintiff's litigation choices.

Namely, the plaintiff abandoned a breach of warranty claim and proceeded in tort. That products theory then required her to prove not just a malfunction, but also a defect. Moyer believed her proof of a design defect was circumstantial at best and the litigation was terminated.

Premises Liability - A gas station patron stumbled on broken concrete and broke her elbow

Rhodes v. Mayfield BP, 09-241
Plaintiff: Jackie M. Matheny, Jr., *Denton & Keuler*, Paducah
Defense: Ronald M. Sullivan, *Sullivan Mountjoy Stainback & Miller*, Owensboro
Verdict: Defense verdict on liability
Circuit: **Graves**, J. Starks, 5-20-10

Peggy Rhodes, then age 60, shopped on 1-28-08 at the Mayfield BP convenience store. She parked her car that morning and walked inside. She stumbled as she did so, tripping on the area where there is a change of elevation at the handicap ramp. Rhodes landed hard and broke her elbow.

Rhodes sued Mayfield BP and blamed her fall on broken, cracked and dilapidated concrete. Her medical bills were $39,481 and she sought impairment of $20,000. The instructions limited pain and suffering to $150,000. Mayfield BP defended the case that whatever the condition of the parking lot, it was open and obvious to Rhodes.

The court's instructions required Rhodes to prove all of the following, each being presented in a separate interrogatory, (1) that the condition of the parking lot entrance was not open and obvious, (2) that the defendant should have anticipated this trip and fall, and (3) that the parking lot was not in a reasonably safe condition, (4) that the defendant failed to provide safeguards, and (5) that this failure was a substantial factor in causing the fall. The answer was for Mayfield BP on the first question (open and obvious), Rhodes taking nothing. A defense judgment followed.
Ed. Note - The instructions were unusual in the context of Kentucky law in that they required the plaintiff, as a part of her proof burden, to prove by a more likely than not standard that the hazard was not open and obvious. Whenever such a convoluted instruction regime is presented, a defense verdict is nearly certain.

Medical Negligence - During an excisional biopsy, the plaintiff's left accessory nerve was severed – the surgeon defended that the injury was just a complication

Williams v. Tyrell, 02-1063
Plaintiff: Warren K. Hopkins, Murray
Defense: E. Frederick Straub, Jr., *Whitlow Roberts Houston & Straub*, Paducah
Verdict: Defense verdict on liability
Circuit: **McCracken**, J. Kaltenbach, 11-16-10

Brenda Williams, then age 50 and a home health nurse, had a knot in her neck in the fall of 2001. A surgeon, Dr. Dana Tyrell, performed an excisional biopsy on her lymph node on 10-1-01. Williams was advised the surgery would be simple. It only lasted four minutes.

Within 72 hours, Williams reported pain and numbness that radiated to her left arm. She was later referred to a neurologist who made the diagnosis – during the biopsy, Tyrell had severed the plaintiff's left accessory nerve.

Williams continues to complain of constant and crippling pain. She is now fearful of any repair surgery. In this lawsuit, Williams sued Tyrell and alleged negligence in performing the surgery.

Her expert, Dr. James Shamblin, Cottondale, AL, was critical of Tyrell for failing to identify and protect the left accessory nerve. That he had not done so, Shambling noted there was no time to do so in just a four minute surgery. As well, it was argued Tyrell should have considered less invasive methods, including either a needle biopsy or a fine needle aspiration. If Williams prevailed, she sought medicals of $81,402 plus lost wages of $262,035. A vocational expert for Williams was Gilbert Mathis, Murray. Pain and suffering was limited to $1.5 million in the court's instructions.

Tyrell defended the case that the injury was a surgical complication and did not represent negligence. He also explained that Williams had made her condition worse by failing to follow recommendations and to have a surgical repair. The defense expert, Dr. Gary Vitale, Surgery, Louisville, also explained the left accessory nerve can sometimes be difficult to identify.

The jury's verdict was for Tyrell, it unanimously finding he had not violated the standard of care. Several weeks post-trial, no judgment had been entered.

Auto Negligence - While the court directed a verdict on liability in a case involving radiating back pain, a Lexington jury rejected the claim on causation

Wilson v. Bishop, 09-6968
Plaintiff: Joseph L. Rosenbaum and Jason D. Thompson, *Rosenbaum & Rosenbaum*, Lexington
Defense: R. Craig Reinhardt, *Reinhardt & Associates*, Lexington
Verdict: Defense verdict on causation
Circuit: **Fayette**, J. Ishmael, 10-27-10

Cynthia Wilson, then age 51, was stopped at a red light on New Circle Road at Harrodsburg Road on 7-27-09. An instant later she was rear-ended by Danny Bishop. Bishop's fault was no issue.

Wilson has since treated for chronic radiating low-back pain that has left her disabled from her position as a dental hygienist. She has treated with Clay Elswick, Chiropractor and Dr. George Privett. Her vocational expert was David Roebker, William Baldwin, Economist, Lexington, quantifying her vocational loss.

Wilson incurred medicals of $24,158 and she sought $17,460 for future care. Lost wages were $96,858, Wilson claiming $1,058,975 for impairment. Her past suffering was $50,000, the instructions limiting that in the future to $150,000. In this lawsuit, Wilson sought damages from Bishop.

Bishop defended on damages and looked to evidence from a neurosurgeon IME, Dr. Henry Tutt, Lexington. The expert could find no structural injury and concluded that Wilson's complaints could not be explained. The defense did look to an on-the-job spinal injury in 2003 that left Wilson with a 7% impairment.

The court directed a verdict on liability for the plaintiff, but before reaching damages, Wilson still had to hurdle a causation instruction that asked if the MVA was a substantial factor in causing her injury. The answer was no and that ended the deliberations, Wilson taking nothing. A defense judgment was entered.

Wilson has since moved for a new trial and argued the causation instruction was unnecessary and improper, it preventing

the jury from considering if she had sustained an aggravation injury. The motion was pending when the KTCR reviewed the record.

State Trooper Negligence - While making an emergency run to the scene of an accident, a state trooper ran through an intersection near the Murray State campus with his lights illuminated and his siren blaring – a Murray co-ed didn't see him and pulled into his path

Eli v. Bowman, 08-80
Plaintiff: Tod D. Megibow, Paducah
Defense: L. Lansden King, *Stout Farmer & King*, Paducah
Verdict: Defense verdict on liability
Circuit: **Calloway**, J. Foust, 6-16-10

It was 11-11-06 and Donald Bowman, a Kentucky State Trooper, was responding to a call of a car wreck near the Murray State campus. He proceeded on Hwy 121 with his blue lights illuminated and his siren blaring.

At the same time, Morgan Eli, age 18 and a co-ed from Dawson Springs, came to Hwy 121 from Waldrep Drive. With a green light, she pulled out into the intersection. She never saw Bowman. He t-boned her vehicle at some 45 mph.

Eli was knocked unconscious by the wreck and woke up in a hospital. She would remember nothing of it. She has since treated for soft-tissue symptoms with a chiropractor. Her medical bills were $13,895 and she sought future care of $23,775. Her pain and suffering was limited to $195,000.

In this lawsuit, Eli sued Bowman and suggested that she had not seen him and pulled out because his lights and siren were not on. Bowman defended as above that they were. This version was corroborated by a Murray student who just happened to be on a nearby balcony and witnessed the crash.

The jury's verdict exonerated Bowman on liability and Eli took nothing. A defense judgment closed the case.

Auto Negligence - While the jury found the plaintiff was not at fault, because of the court's clumsy instructions, the jury was able to and did continue on and apportioned fault to the plaintiff

Foster v. Robertson, 09-3222
Plaintiff: J. Douglas Mory, *Whaley & Mory*, Louisville
Defense: Valerie W. Herbert, *Travis & Herbert*, Louisville
Verdict: $21,910 for plaintiff less 25% comparative fault
Circuit: **Jefferson**, J. Perry, 9-9-10

V'Aires Foster, then age 24, traveled on I-64 near downtown Louisville. He suddenly ran out of gas and pulled to the far right lane of three lanes. His vehicle was under the Belvedere. An instant later Ernest Robinson came upon the scene.

Robinson never saw Foster's parked vehicle and rear-ended it at some 45 mph. Foster was treated and released from University Hospital. He has since complained of radiating pain related to a disc bulge.

In this lawsuit, Foster sued Robertson and blamed this wreck on Robertson's improper look-out. If prevailing, Foster sought medicals of $16,910 plus $100,000 more for future care. His pain and suffering was similarly limited to $100,000.

Robertson defended that he acted reasonably, noting there were no blinkers to notify motorists the car was disabled. To Robertson, it looked a bit like a shadow. The defense also diminished damages with an IME, Dr. Martin Schiller, Orthopedics, Louisville.

As the jury deliberated, it asked an odd question: Can we answer the liability question differently than the apportionment question? [As asked, it was No. 4 and No. 5.] Judge Perry didn't answer.

Back with a verdict, the jury did just what it had asked. That is, it found Robertson solely at fault, answering no as to Foster's fault. Despite that finding, it further apportioned fault 75% to Robertson, the remainder to Foster. [The court's clumsy instructions permitted this.]

Then to damages, Foster took his medicals as claimed plus $5,000 more for pain and suffering. Future care was rejected. The raw verdict totaled $21,910 less the odd comparative fault finding. Rather than enter a judgment and confront the jury's handiwork, Judge Perry punted and directed the parties to mediation.

Excessive Force - While sitting against a tree on a farm and having removed his prosthetic leg to contemplate life's big issues, the plaintiff was shot by a deputy sheriff

Brewer v. Bourbon County Sheriff, 5:08-23
Plaintiff: Edward L. Cooley, John D. Hafner and Kimberly L. Dawahare, Lexington
Defense: Shelby C. Kinkead, Jr. and Adrian M. Mendiondo, *Kinkead & Stilz*, Lexington
Verdict: Defense verdict on liability
Federal: **Lexington**, J. Coffman, 11-10-10

Robert Brewer had a difficult day on 9-21-07. To collect this thoughts and contemplate larger questions, he settled down by a tree on a farm near Paris. [A friend owned the farm.] To increase his comfort, Brewer took off his prosthetic leg and leaned it against the tree.

A neighbor saw the one-legged man sitting under the tree and was concerned he was up to no good. The man called the police. A Bourbon County Deputy Sheriff, Ed Rodgers, was dispatched to the scene.

Rodgers knew Brewer and that he was short a leg. Rodgers found this funny and on the drive to the farm, he ridiculed Brewer to a 911 dispatcher that he probably works at IHOP. Arriving at the farm, Rodgers drove through the field to the tree.

Brewer would recall that Rodgers came at him suddenly. Brewer was concerned and raised his hands. Rodgers fired his weapon, striking Brewer in the neck and arm. Then there was a delay in treating Brewer – in fact until paramedics arrived, he was virtually ignored.

In this lawsuit, Brewer sued Rodgers and alleged the use of excessive force by him in shooting. The plaintiff argued he had no weapon and there was no reason to fire. He also sued a second deputy that came to the scene for deliberate indifference in failing to render aid. If prevailing, Brewer sought medicals, suffering damages and mental anguish. Brewer died of other causes before the case could come to trial, his estate advancing it to trial.

Rodgers defended the case and raised fact disputes. Namely, when he drove into the field, Brewer was darting back and forth behind the tree, apparently

holding a gun. As he darted, the one-legged man shouted "Leave me alone, I've got guns." Rodgers only fired to protect himself. A police expert for the defense, Michael Bosse, opined that it was a case of suicide by cop. Turner too denied deliberate indifference.

This case came to trial twice, first in August of 2009 and again this February. Both resulted in mistrials. This third trial resulted in a verdict.

Rodgers prevailed on the excessive force count, the verdict too being for Turner on deliberate indifference. A defense judgment was entered, Brewer taking nothing.

Real Estate Agent Negligence - **California investors bought nine brand-new condos in 2006 just before the real estate crash – after it crashed and the investment tanked, the investors sued their real estate agents and alleged negligence by them in steering them to an improper investment – the agents defended that the investors simply took a risk and lost**

Bhatia v. Huff Realty, 09-970
Plaintiff: Todd V. McMurtry, *Dressman Benzinger LaVelle*, Cincinnati, OH
Defense: Beverly R. Storm and E. Douglas Baldridge, *Arnzen Molloy & Storm*, Covington
Verdict: Defense verdict on liability
Circuit: **Campbell**, J. Ward, 10-14-10

Two brothers from Northern California, Actam and Perry Bhatia, were successful amateur real estate investors. Having made a bundle on a California deal, the men (and their wives) were looking for a new investment that would qualify as a so-called like-kind exchange. [The men would thus save taxes on their already realized gain of nearly $100,000.]

The Bhatias visited Northern Kentucky and considered an investment in condos within a property known as the Hannaford. They were represented by real estate agents from Huff Realty. The Bhatias pulled the trigger and bought nine condos for $2.2 million dollars – the deal closed in January of 2007.

The Bhatias had bad timing. The real estate market soon tanked and they were unable to lease the condos as they had expected. They ultimately defaulted on the loan. Their lender forgave the loan, but the Bhatias were still out their down payment and interest. That totaled $530,471.

In this lawsuit, the Bhatias sued Huff Realty and alleged its agents had represented them poorly. Namely, instead of providing independent advice, the agents had promoted and puffed a bad deal all in search of a big commission pay-off. That included representing The Hannaford was comparable to the more toney Mt. Adams, the suggestion being it was not.

There was also a criticism that the agents (1) were paid twice, acting also as a representative of the developer, and (2) were too inexperienced. If the Bhatias prevailed, they sought both compensatory and punitive damages.

Huff Realty defended that the sophisticated plaintiffs took a risk and lost. It also noted they didn't do so blindly, the Bhatias relying on several experts to advise them on the deal. In fact, they did enjoy nearly $100,000 in tax savings because of the deal. An expert, Jay Rosenberg, a Cincinnati, OH real estate lawyer, defended the agency's conduct.

The agency prevailed on the negligence, fiduciary duty and misrepresentation counts, the plaintiffs taking nothing. A defense judgment was entered.

Auto Negligence - **The plaintiff complained of a disabling brain injury following a rear-end crash, the plaintiff having struck her head on the window – a jury in Hartford (relying on IME proof from Shraberg) returned a threshold verdict**

Garner v. Howard, 06-0211
Plaintiff: Leigh A. Jackson, Owensboro
Defense: R. Christion Hutson, *Whitlow Roberts Houston & Straub*, Paducah
Verdict: Threshold verdict
Circuit: **Ohio**, J. Dortch, 7-16-10

Cathy Garner, then age 42, was a passenger in a car driven by her husband. They were stopped on Hwy 62 in Beaver Dam. An instant later the Garner pick-up was rear-ended by Larry Howard. [Howard was in a pick-up too.]

In the impact, Garner struck her head on the side window. Her husband drove her to the local ER where she was treated and released for an apparent soft-tissue injury. Garner has since suffered seizures that her treating doctor, Darby Cole, Neurology, Beaver Dam, linked to a closed head injury.

There was also proof that Garner has suffered a personality change. Garner's medical bills were $3,461 and she sought suffering damages in an uncapped category.

Howard defended the case and relied on an IME, Dr. David Shraberg, Neuropsychiatry, Lexington. The expert noted that Garner had a long history of poly-symptomatic physical pain. Shraberg also identified a history of chronic mental illness, suggesting her seizures were in fact pseudo-seizures that are related to prior emotional traumas in her life. Howard presented a threshold defense.

While fault was no issue, the jury considered the threshold. It answered for Howard on both counts that there was no permanent injury nor had Garner incurred $1,000 in reasonably necessary medicals. That ended the deliberations and Garner took nothing. A defense judgment was entered. The record indicates Howard had made an offer of judgment in the sum of $11,000.

Garner moved for a new trial and argued that the verdict was contrary to the evidence. Particularly, within weeks of the crash, she was suffering from seizures. The court denied the motion in a barebones order and there was no appeal.

Medical Negligence - **An oral surgeon was criticized for harvesting too much bone from the plaintiff's leg as a part of a facial surgery – just weeks after the surgery, the plaintiff sustained a tibial stress fracture**

Trapp v. Cunningham, 08-4063
Plaintiff: R. Scott Wilder, *Gambrel & Wilder*, Richmond
Defense: Philip M. Longmeyer, *Dinsmore & Shohl*, Lexington
Verdict: Defense verdict on liability
Circuit: **Fayette**, J. Ishmael, 10-20-10

Sharon Trapp underwent an oral maxillo-facial surgery on 8-2-07. It was performed at UK Hospital by an oral maxillo-facial surgeon, Dr. Larry Cunningham. It was designed to relieve jaw pain. A complex procedure, it required Cunningham to harvest bone from Trapp's tibia and then pack the site of the jaw bone where scar tissue was removed with that bone. Cunningham took 3 cc of bone from the leg.

This initial surgery was uneventful and there was no criticism of the neuroplasty portion of the procedure. However two weeks later Trapp sustained a stress fracture in her leg. In this lawsuit, Trapp alleged negligence by Cunningham in

harvesting too much bone, that purported error leading to the fracture.

Plaintiff's liability expert was Dr. William Daniels, Orthopedics, Johns Island, SC. Her medical bills were $47,312 and she sought $150,000 more for suffering. Her husband sought $50,000 for his consortium interest.

Cunningham defended that the procedure was properly performed. He called the fracture a rare complication. There was also a suggestion that Trapp simply fell and broke her leg during the fall – that is, she didn't fall because her leg was broke, but rather she broke it when she fell.

A Lexington jury resolved this case for Cunningham and Trapp took nothing. A defense judgment was entered.

Auto Negligence - Although the defendant rear-ended the plaintiff, she successfully defended at trial that her brakes had suddenly failed

Wells v. Ho, 09-7413
Plaintiff: Vincent E. Johnson, *Siebert & Johnson*, Louisville
Defense: Kenneth J. Henry, *Henry & Associates*, Louisville
Verdict: Defense verdict on liability
Circuit: **Jefferson**, J. Maze, 10-28-10

Robert Wells, age 46, was a passenger in a van on 12-20-02 that traveled on Crittenden Drive. While stopped at a red light, the vehicle was rear-ended by a medical student, Alison Ho. It was a moderate collision.

Wells was treated at the ER and subsequently with his family doctor (he is from Cave City) that referred him to a course of physical therapy for radiating neck pain. He incurred medical bills of $18,636 plus $250,000 more for future care. A neurosurgeon, Dr. Todd Vitas, opined that a dormant condition was aggravated, Wells requiring a C-4 repair surgery. Pain and suffering was limited to $90,000.

Ho defended on damages and cited the sudden emergency that her brakes had failed. She also looked to proof from an IME, Dr. Robert Sexton, Neurosurgery, Louisville. He thought Wells had suffered just a temporary injury, linking his ongoing symptoms to obesity and degenerative conditions.

Ho prevailed at trial on the sudden emergency defense and Wells took nothing. A defense judgment was entered.

The plaintiff has since moved for a new trial. He has argued the proof of a sudden brake failure was inadequate. Namely, they never failed before and haven't failed since – in fact, Ho even drove home. It was the plaintiff's argument that Ho couldn't create a sudden emergency defense from thin air. The motion is pending.

Insurance Contract - The plaintiff sought to enforce coverage for credit life insurance – the insurer prevailed at trial by directed verdict, there being proof the plaintiff had misrepresented her prior medical condition, that same medical condition disabling her and necessitating the need to utilize the credit insurance

Renfrow v. Southern Financial Life, 07-137
Plaintiff: *Pro se*
Defense: Daniel E. Linneman, *Adams Stepner Woltermann & Dusing*, Covington
Verdict: Directed verdict
Circuit: **Ohio**, J. Dortch, 8-3-10

Deborah Renfrow of Horse Branch took a loan in December of 2002. To secure its payment, Renfrow was issued credit life insurance by Southern Financial Life. As a part of her application, Renfrow warranted that she had no significant medical history.

Soon thereafter Renfrow was stricken with fibromylagia and defaulted on the loan. She sought to utilize her life insurance coverage. The insurer denied the claim.

Renfrow sued Southern Financial to enforce coverage. She was originally represented by Gregory Hill, the local county attorney. However he withdrew after Renfrow was indicted on an unrelated felony. She continued her prosecution of the case thereafter as a *pro se* plaintiff.

Southern Financial defended the case that it appropriately declined coverage. It cited a misrepresentation on her original application. Namely, while she denied any prior medical history, Renfrow in fact had treated for fibromylagia for many years. In fact, she had treated just one month before making the application.

At the close of the proof, the trial court granted Southern Financial's motion for a directed verdict. A defense judgment closed the case.

Auto Negligence - Husband and wife plaintiffs were injured in a right of way collision

Terry v. Deskins Motor et al, 09-0446
Plaintiff: William J. Johnson, *Johnson Law Firm*, Pikeville
Defense: Timothy C. Feld and Justin S. Peterson, *Golden & Walters*, Lexington
Verdict: $57,947 for Duane
$26,295 for Rebecca
Circuit: **Pike**, J. Combs, 11-4-10

Husband and wife plaintiffs, Duane and Rebecca Terry, pulled from a bank on U.S. 23 in Pikeville on 3-2-09. They came to a red light. It turned green and they started forward. An instant later, they were broadsided by Shawn Robinette who had run the light. [Robinette was then taking a customer back to the Deskins Motor Company after a test drive.] Fault was no issue.

The crash was serious and both Duane and Rebecca were taken by ambulance to a local emergency room. Duane, then age 36, suffered four broken ribs, among other soft-tissue injuries. A supervisor at a coal mine, he missed two weeks of work. His medical bills were $12,429. He also sought his lost wages of $2,318 plus pain and suffering.

Duane also sought property damage of $2,500. Interestingly, since the time of the crash, his vehicle has been stored at a junkyard. It incurred nearly $15,000 in fees at $25 a day. Duane sought that sum at trial. The junk yard owner testified at trial that despite the incurred sum, he'd take $7,500 for the storage.

Rebecca, age 25, was also hurt in the wreck. He has complained of soft-tissue symptoms. Her medical bills were $8,295. She also sought pain and suffering damages. Robinette and his employer defended the case and minimized the claimed injuries.

This case was resolved by a Pikeville jury on damages only. The medicals as noted above were directed by the court. Duane took his lost wages as claimed plus $40,000 for his suffering. She was additionally awarded $700 in towing and storage fees plus $2,500 more for property damage. His verdict totaled $57,947. Rebecca took $18,000 for her suffering (her only claimed element) – her verdict totaled $26,295. A consistent judgment less PIP was entered for the plaintiffs.

A Notable Verdict from Southern Indiana

Medical Negligence - Following surgery, a woman twice went into cardiopulmonary arrest that caused her to suffer brain damage and eventual death; the woman's estate blamed her death on the treatment she received at the hands of her surgeon and anesthesiologist

Estate of Moore, et al. v. Weare, et al., 82D03-0706-CT-2818
Plaintiff: Michael R. Hance, *Hance & Srinivasan, PLLC.*, Louisville, KY; and H. Philip Grossman, *Grossman & Moore, PLLC.*, Louisville, KY
Defense: Thomas H. Bryan, *Fine & Hatfield, P.C.*, Evansville, for Weare; Edward J. Liptak, *Carson Boxberger, LLP.*, Bloomington, for Vo
Verdict: $1,300,000 for plaintiffs
County: **Vanderburgh**, Superior Court: J. Lloyd, 8-24-10

On 8-22-03, Rebecca Moore was admitted to St. Mary's Medical Center of Evansville with complaints of acute abdominal pain. She underwent surgery that included an appendectomy and a total hysterectomy.

Although that initial surgery was uneventful, Moore complained of post-operative abdominal pain. A surgeon, Dr. Nghia Vo, suspected a bowel obstruction and recommended exploratory surgery.

Dr. Vo performed the second surgery on 8-26-03, four days after the initial surgery. The anesthesiologist for the second surgery was Dr. Chad Weare. It would later be alleged that Moore's chart indicated pre-operatively that she had significant respiratory compromise but that this condition was not recorded on Dr. Weare's pre-operative evaluation.

At the conclusion of the procedure, Dr. Weare extubated Moore. Immediately after being extubated, Moore slipped into a cardiopulmonary crisis and showed no pulse. According to the medical records, there was a delay of approximately fifteen minutes before Moore was re-intubated. Her condition then stabilized, and she was taken to a recovery room.

Almost as soon as Moore arrived in the recovery room, Drs. Weare and Vo left to work on another case. Moore was thus placed in the care of the recovery room nurses. Shortly thereafter, Moore had a second cardiopulmonary event.

The nurses immediately recognized the urgency of the situation. However, Drs. Weare and Vo were unavailable, and for some reason the nurses delayed calling in another doctor. When medical help finally arrived, it was too late. Moore had suffered brain damage and remained in a coma until her death nearly two months later on 10-23-03.

Moore's husband, Michael Moore, presented the matter to a medical review panel both on his own behalf and on behalf of Moore's estate. The panel members were Dr. Allan Arkush, Surgery, Indianapolis; Dr. Robert Jeffrey, Anesthesia, Columbus; and Dr. Stephen O'Neil, Surgery, Greenwood.

According to plaintiffs, Dr. Weare had failed to do a proper pre-operative evaluation and then later extubated Moore too soon. Plaintiffs were also critical of the delay in re-intubating Moore following her first cardiopulmonary event and of the decision of Drs. Weare and Vo to abandon Moore to the recovery room nurses following the surgery.

The panel concluded unanimously that the evidence did not indicate a breach of the standard of care. Plaintiffs filed suit against Drs. Weare and Vo, as well as against St. Mary's Medical Center of Evansville, Inc., Anesthesiology Group Associates, P.C., and the Wellborn Clinic.

Plaintiffs' identified experts included Dr. Elizabeth Frost, Anesthesiology, New York, NY; Dr. Sidney Steinberg, Surgery, Union, KY; and Dr. George Nichols, Pathology, Louisville, KY. It was the opinion of Dr. Steinberg that Moore had been suffering from an ileus that could have been managed non-surgically. Furthermore, it was her premature extubation by Dr. Weare that led to her first cardiopulmonary event.

Dr. Frost noted that Moore had only marginal respiratory function and that Dr. Weare should have realized that the drugs and dosages he used would not allow Moore to maintain her airway by herself post-op. In addition, Moore should have been re-intubated more quickly following her initial cardiopulmonary event.

Plaintiffs ultimately dismissed St. Mary's Medical Center of Evansville, Anesthesiology Group Associates, and the Wellborn Clinic on the eve of trial. That left Drs. Weare and Vo as the only remaining defendants.

Drs. Weare and Vo called their treatment of Moore appropriate and denied any breach of the standard of care. Among other things, defendants insisted that the re-intubation of Moore following her first cardiopulmonary event was handled promptly.

Dr. Weare's identified expert was Dr. Jerry Young, Anesthesiology, Indianapolis. Experts on surgery for Dr. Vo included Dr. Jon Jansen of Indianapolis, Dr. Stephen Bodney of Corydon, and Dr. Gary Vitale of Louisville, KY.

The case was tried in Evansville for a week. The jury returned a verdict for plaintiffs and awarded them damages of $1,300,000. The court entered a judgment for that amount but later entered an amended judgment reducing the award to the statutory maximum of $1,250,000.

Dr. Weare has satisfied his portion of the judgment in the amount of his statutory obligation of $250,000. It is anticipated that Dr. Vo will similarly satisfy his portion and that the remainder will be recovered from the Indiana Patient Compensation Fund.

Settlements, Opinions, News and Views

This section of the KTCR will supplement our regular jury verdict reports with settlement reports and specialized news regarding tort litigation. We encourage readers to submit information, complaints, motions, orders or otherwise (in a PDF format) that are noteworthy.

Discretionary Review - Dogbite - At the November rendition date in *Benningfield v. Zinmeister*, 2009-SC-000660-DG, the Supreme Court granted review. In this case, the plaintiff, Brandon Benningfield, a minor, suffered injuries when he was bitten by a Rottweiler dog. In this lawsuit, Benningfield sued both the dog's owner and the owner's landlord.

The landlord (Zinmeister) moved for summary judgment and it was granted by Judge McDonald-Burkman in Jefferson County. Benningfield appealed.

The Court of Appeals reversed (Judge Clayton writing in a non-published opinion) that strict dogbite liability does not extend to landlords. She wrote that to change the law and permit an extension would lead to a society where landlords would prohibit lessees from having dogs.

Benningfield sought discretionary

review and it was granted. The Supreme Court will now address this question.

Verdicts Revisited - Court of Appeals - Medical Negligence - Causation where Negligence Found - Betty Wethington, age 57, was a patient at Taylor Regional Hospital. She suffered from multiple co-morbidities. While at the hospital, Wethington fell twice and sustained a broken leg. This led to a downward spiral leading to her death five months later.

Her estate sued the hospital and alleged negligence by hospital nurses in failing to prevent her falls. A Campbellsville jury found for the estate on liability, but rejected that this error had caused any injury to the decedent.

The estate appealed and called the result illogical and inconsistent. The Court of Appeals (Judge Stumbo) cited proof that the leg became fractured because of osteoporosis, that fracture then leading to her fall. There was also evidence her death was caused by respiratory distress. Thus Stumbo wrote, the test was not whether the jury could have reached a different result, but rather whether the evidence supported the result that was reached. The appellate court concluded it did and the trial court was affirmed.

Wethington v. Taylor Regional Hospital, 2009-CA-2001-MR
Verdict Case No. 4178
Danny Butler, Greensburg for appellant
Thomas N. Kerrick, Bowling Green and Craig Cox, Campbellsville for appellee

Discretionary Review - Premises Liability - Snowy Slip and Fall - The plaintiff, Tonya Stapleton slipped in a snowy parking lot at Citizens National Bank in Paintsville. She sustained injuries. In this lawsuit, she alleged negligence by the bank in maintaining the parking lot.

The bank moved for summary judgment and argued the condition was open and obvious. Judge Preston (Johnson County) agreed and granted the motion.

Stapleton appealed. The Court of Appeals affirmed (Judge Wine) and held that there was no duty to invitees regarding a naturally occurring outdoor condition that is not hidden from view.

Stapleton moved for discretionary review and the motion was granted at the November 2010 rendition date.

Stapleton v. Citizens National Bank, 2010-SC-000098-DG.

Verdicts Revisited - Auto Negligence - Snowy Crash/Sudden Emergency - The defendant (Wurfel) lost control on a snowy night and slid across the centerline into the path of the oncoming plaintiff (Owens). Owens suffered a broken leg.

She sought damages from Wurfel and her UIM carrier. The defendant denied fault and blamed the crash on the sudden emergency of falling snow. A Louisville jury was persuaded and a defense verdict was returned.

Owens appealed. The Court of Appeal affirmed (Judge Clayton) and held there was proof (from the defendant himself) that the roads appeared normal to him until he suddenly struck an icy patch.

Owens v. Wurfel, 2009-CA-743-MR
Verdict Case No. 4023
Guy J. Hibbs and John T. Hester, Louisville for appellant
Donald K. Brown and Jeri B. Poppe, Louisville for appellee Wurfel
Marvin L. Coan, Louisville for appellee West American Insurance

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