

Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

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Comprehensive Statewide Jury Verdict Coverage

Civil Jury Verdicts

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

Medical Negligence - A radiologist misread a mammogram and missed breast cancer – because of the error, the plaintiff had a mastectomy instead of a lumpectomy and now suffers both a 2% diminished survival rate (from 95% to 93%) and an increased recurrence rate (from 5% to 7%)

Hardwick v. Wayne County Hospital, 02-0279

Plaintiff: Thomas E. Carroll, *Carroll & Turner*, Monticello

Defense: Robert C. Welleford and Clayton L. Robinson, *Jenkins Pisacano Robinson & Bailey*, Lexington

Verdict: \$828,520 for plaintiff

Circuit: **Wayne**, J. Miniard, 2-3-06

Linda Hardwick, then age 49 and an elementary school teacher, had regularly had mammograms done at Wayne County Hospital. Hardwick did so because of a family history of breast cancer. In August of 2000, a mammogram was performed and read by a hospital radiologist, Dr. Peeter Jakobsen. It came back clear.

A year later Hardwick was back for another mammogram. This time Jakobsen saw a suspicious mass – it turned out to be ductal breast carcinoma. The mass was 10 mm. Hardwick was given two choices, lumpectomy or mastectomy. She chose mastectomy which was performed a few days later.

Hardwick underwent a difficult recovery and later had a breast reconstruction. Despite that reconstruction and notwithstanding the difficult time before it, Hardwick continues to have self-image problems. It was her proof that it affected her marriage and emotional well-being. She has since stopped teaching.

As a part of her recovery, Hardwick obtained her medical records from the prior mammograms. They were read by her treating doctors and it became clear

the mass in her breast had existed since 1998. Her liability expert, Dr. James Spellman, Surgical Oncology, Lewes, DE, was critical of Jakobsen for failing to note the mass in his 2000 report. [While present since 1998, the only deviation according to Spellman, was related to the read in 2000.] Another expert for Hardwick was Dr. Clifford Beinart, Radiology, New York, NY.

Spellman further developed that because of Jakobsen's error, Hardwick missed the chance to have just a lumpectomy, the mass having grown from 8 mm to 10 mm. There was also proof from Spellman that because of the diagnosis delay, Hardwick's survival rate

diminished from 95% to 93% and similarly, her rate of recurrence increased from 5% to 7%.

These theories formed the basis of this lawsuit against the hospital which employed Jakobsen. If Hardwick prevailed, she sought medicals of \$52,000, plus \$2,520 for in the future. Impairment was \$50,000 and she sought an even \$1,000,000 for suffering. Her husband, Alvin, claimed \$200,000 for his consortium interest.

Wayne County defended the case and first developed that there was no deviation regarding Jakobsen's read in 2000. Even if there was, the hospital further explained, plaintiff suffered

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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."

Legal Negligence - In a legal negligence case, it is not error to permit the trial judge from the underlying case to testify at trial when he does not provide standard of care proof

Payton et al v. Clay et al

Appeal from Jefferson Circuit Court
Trial Judge: Geoffrey P. Morris
KTCR Cite: Case No. 2984, 2005 YIR
Date of Trial: 2-28-05
Appeal Decided: 1-12-07
James T. Mitchell, Louisville for Appellant
Craig C. Dilger, W. Gregory King and W. Duncan Crosby, III, Louisville for Appellee Clay
Appellee Lacey Smith, *Pro se*

The plaintiffs in this case, two sisters, Paula Payton and Mary Blakely, alleged negligence by their lawyers, Thomas Clay and Lacey Smith in representing them both at trial and then on appeal in a commercial dispute arising in Bullitt County. A defense verdict was returned at trial.

The plaintiffs appealed and alleged several errors, including permitting the trial judge in the underlying case to testify at the legal negligence trial.

Holding: Judge Johnson writing

Joined by Paisley and Miller, held it was not an abuse of discretion to permit the underlying trial judge (Waller-Bullitt) to testify at trial when he did not express standard of care opinions. Plaintiffs were also critical of the trial court's barebones instructions, rejecting their tendered instructions that listed the purported deviations more specifically. The trial court was affirmed in all regards.

Medical Negligence - In a case where the plaintiff was killed by her boyfriend, after he was released from a psychiatric hold, no liability may be attached to the treating psychiatrist when the boyfriend did not directly communicate the threat to the psychiatrist

Crady v. James

Appeal from Jefferson Circuit Court
Trial Judge: Tom McDonald
KTCR Cite: Case No. 1615, 2001 YIR
Date of Trial: 3-14-01
Appeal Decided: 1-12-07
Maury D. Kommor and Christopher A. Bates, Louisville for Appellant
W. Gregory King and J. Gregory Cornett, Louisville for Appellee

Kenneitha Crady, then age 25, was brutally murdered on 7-18-95 by her boyfriend, Rene Cissell. Cissell had just been released from a psychiatric hold by Dr. William James, Psychiatrist. Crady's estate sued James and alleged negligence by the psychiatrist in releasing the dangerous Cissell.

The case was tried to a jury in 2001. While the jury found that Cissell had communicated a threat, it further found James had not violated the standard of care. The estate appealed, James also taking a protective appeal. [The substance of the protective appeal would be the focus at the Court of Appeals.]

Holding: Judge Buckingham writing

Joined by Taylor, explained that a psychiatric provider was inoculated from liability in this instance by KRS 202A.400 unless the threat of violence was communicated directly to that provider. In this case, while Cissell made threats while in the hospital, he did not make a threat directly to Crady. Thus, Buckingham ruled, a directed verdict should have been granted for James. The merits of the plaintiff's appeal were not reached.

Judge Johnson Dissent - Johnson disagreed and held that an indirect communication was sufficient. Johnson also wrote that the trial court's instructions constituted reversible error. He would have reversed for a new trial.

Defamation/Outrage - In an outrage claim, arising from a radio host having purportedly defamed a television talk show host (his former girlfriend), it is appropriate to apply an actual malice proof standard on the outrage claim because the underlying conduct concerns public speech

Divita v. Ziegler et al

Appeal from Jefferson Circuit Court
Trial Judge: Geoffrey Morris
KTCR Cite: Case No. 3008, 2005 YIR
Date of Trial: 5-25-05
Appeal Decided: 1-5-07
Thomas E. Clay and Garry R. Adams, Louisville for Appellant
Kenneth L. Sales and D. Matthew Kennedy, Louisville for Appellee Ziegler
Sherl G. Snyder, Griffin T. Sumner and Amanda G. Main, Louisville and Richard J. Goehler, Cincinnati, OH for Clear Channel Broadcasting

John Ziegler was employed by Clear Channel as the morning radio host for WHAS 84 in Louisville. While on-air, he made purportedly defamatory remarks about his former girlfriend, Darcie Divita - Divita, his former girlfriend, had been fired from her position as a television talk show host on WDRB.

Divita sued Ziegler and Clear Channel, alleging a variety of torts arising from Ziegler's remarks. They included both defamation and outrage. Before trial, Clear Channel, sued on a negligent supervision count, was dismissed by summary judgment. Then at trial, Ziegler fully prevailed.

Divita appealed and focused on two purported errors, (1) the dismissal of Clear Channel, and (2) requiring an actual malice proof standard on the outrage claim. [She had conceded actual malice should govern her defamation count, but not outrage.]

Holding: Judge Johnson writing

Joined by Miller and Schroder, the court explained that even though it was an outrage claim, the nature of the claim arising from public speech, required that a constitutional "actual" malice standard be applied. The dismissal of the claim against Clear Channel was also affirmed, Johnson writing that the matter was moot, Ziegler having fully prevailed and the claim against Clear Channel being derivative. Alternatively, even had the claim survived, the court further held that there was no negligent supervision, Ziegler's bosses at WHAS having no way to know he intended to discuss Divita on the air that day. [In fact, he had

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