Kentucky Trial Court Review

The Most Current and Complete Summary of Kentucky Jury Verdicts

April 2012 **Published in Louisville, Kentucky Since 1997** **16 K.T.C.R. 4**

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 retired surgeon who resided at a nursing home suffered a broken leg – it was later discovered by the presence of fracture blisters – the man died six weeks later, his estate alleging the leg fracture resulted because of substandard care and was then covered up, leaving the man (who was already limited by strokes) in agony – a Louisville jury imposed punitive damages of $5,000,000

Griffin v. Treyton Oak Towers, 09-9816
Plaintiff: Matthew C. Minner, Donald P. McKenna and Brian M. Vines, *Hare Wynn Newell & Newton*, Birmingham and William P. Garmer and Jerome P. Prather, *Garmer & Prather*, Lexington
Defense: Scott P. Whonsetler and Jason E. Taylor, *Whonsetler & Johnson*, Louisville
Verdict: $8,000,000 for plaintiff
Court: **Jefferson**, J. Edwards, 2-13-12

David Griffin, age 89 and a retired surgeon, began to reside in 2002 at Treyton Oak Towers. It is a nursing home in downtown Louisville that is described as a skilled residential facility. Because of strokes and other conditions by the fall of 2008, Griffin could not ambulate on his own. He was also limited in his ability to communicate. Because of his infirmities, Griffin's care plan required that a Hoyer Lift (with two persons) be used when he was moved.

On 9-25-08 the staff at Treyton Oak discovered blisters on Griffin's right leg. Initially they were thought to be an infection. Taken to the hospital, x-rays revealed he had suffered a broken tibia and fibula in two places. Griffin's condition continued to deteriorate and he died on 11-5-08.

In this lawsuit brought by his two adult daughters, not just regular nursing home negligence (or even gross negligence) was alleged but something more sinister. The plaintiff's theory was that a caregiver at Treyton Oaks (Nurse Lupe) had been in a hurry on the night of 9-24-08. Rather than use the Hoyer Lift, she had attempted to move Griffin by herself.

In that process (no one is exactly sure how), Griffin was dropped or fell – his injuries were described as an impact fracture by the plaintiff's pathology expert, Dr. George Nichols, Louisville. Nichols thus developed this was no spontaneous fracture related to old age, but instead a painful injury that resulted because of force.

Not using the Hoyer Lift and the injury would have constituted a negligence claim alone, but the estate alleged that the staff engaged in a cover-up. The effect of the cover-up was to deny Griffin care until the fracture blisters developed the next day. And because of his infirm condition, Griffin was made to suffer in agony with no way to call out for help.

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From this version of the facts, the estate advanced two theories to trial, (1) a Resident's Rights Act claim alleging the deprivation of his right to be free from abuse and have his family informed of his condition, and (2) nursing home negligence. If prevailing on the Resident's Rights Act, the estate could take $1,000,000 for the deprivation.

Evidence was presented that the Treyton Oak staff did not understand the resident care plans and routinely failed to follow the resident care plans for transferring Griffin. Further, the CNAs were required to certify by signature that they had followed the resident care plans – the jury was presented with evidence that the CNAs fraudulently signed off as having provided care to Griffin on numerous occasions at times when he was actually at Jewish Hospital. The instructions limited pain and suffering to $6,000,000 if the plaintiff prevailed on negligence.

The estate also sought the imposition of punitive damages. They were limited in the instructions to $8,000,000. Other experts for the estate in addition to Nichols were Teresa Lowery, RN, Nashville and David Smith, RN, Alvaton. [While initially the plaintiff had presented a death claim, this was abandoned before trial.]

Treyton Oak vehemently denied there was any cover-up or injury incident on the night of 9-24-08 – the notion of a cover-up, the defense developed, was built on speculation and hearsay. Its proof developed that a spontaneous fracture (this one being minimally displaced) is a common osteoporotic complication in the very elderly as explained by a geriatrics expert, Dr. Kenneth Writesell, Grove City, OH. A second expert, Dr. Mark Gladstein, Orthopedics, Louisville, noted hospital staff promptly intervened when they saw the fracture blisters, it being impossible to say when or how the fracture was sustained. Also for the defense and minimizing the fracture was Dr. Dennis Whaley, Radiology, Lexington.

While Treyton Oak defended there was no cover-up or even negligence (noting the spontaneous injury was quickly tended when the blisters developed), it did respond to the claim for punitives. That is, while there was no competent evidence of a cover-up with Nurse Lupe, even if there was, Treyton Oak never ratified or participated in it.

This case was tried for two weeks. The jury found for the estate on both the Resident's Rights claim and nursing home negligence. It awarded $1,000,000 for the deprivations associated with the statutory claim and $2,000,000 for Griffin's pain and suffering pursuant to the negligence count. The jury continued and added $5,000,000 more in punitives. The verdict totaled $8,000,000. A consistent judgment was entered.

Treyton Oak has since filed several motions challenging the judgment. They include a motion to reduce the 12% interest rate which it thought was akin to a penalty. A motion to alter, amend or vacate has argued among other things, (1) that the verdict represented a double recovery, (2) the statutory Resident's Rights act award was a punishment and the punitives were redundant, (3) pain and suffering was excessive so as to suggest it was a penalty and (4) the punitives are excessive. Treyton Oaks also explained that it is too broke (supported by an affidavit from a company bigwig) to face the punitives, noting it owes $17.9 million in bonds and its insurer (CNA) does not cover an award of punitives. Were the verdict to stand, Treyton Oak suggested 300 residents and 167 employees would be imperiled.

At the time the record was reviewed in early April 2012, the motions were pending. Judge Edwards had just

entered an order setting a briefing schedule for the estate to respond to these motions and make its own motion for attorney fees pursuant to the Resident's Rights claim. Joining Treyton Oak's defense in the post-trial period (and presumably on appeal) are Bethany A. Breetz, Louisville and John M. Famularo and Daniel E. Danford, Lexington, all of *Stites & Harbison*.

Employment Retaliation - A women's basketball coach (a woman herself) at a Christian college was fired after her players alleged she held hands and otherwise canoodled with a female assistant on a team bus – in this lawsuit the coach (who denied canoodling or being gay) sued the college and alleged the firing represented retaliation for her years of complaining of gender discrimination

Powell v. Asbury College, 09-140
Plaintiff: Debra Ann Doss, Lexington
Defense: Debra H. Dawahare and Leila G. O'Cara, *Wyatt Tarrant & Combs*, Lexington
Verdict: $388,325 for plaintiff
Court: **Jessamine**, J. Daugherty, 2-2-12

Debi Powell graduated from Asbury College in 1994 and returned to the school as its women's basketball coach in 2002. Asbury is self-described as a Christian school. Over the next few years, Powell would regularly complain that a boy's club of sorts existed within the athletic department. She was required to take on significant additional responsibilities including being the intramural coordinator. These same burdens were not placed upon the men's basketball coach. Powell believed her vocal advocacy for gender equity was not appreciated.

The key event in this case occurred in 2-28-08 as the women's basketball team returned by bus to Asbury from a game in Berea. Players on the team believed they observed Powell holding hands and snuggling with a female assistant. The players (in their cocoon of Christianity) were mortified. The next day they approached bigwigs at the school and expressed their concern. Powell soon met with the bigwigs and was promptly relieved of her duties. For her part, she denied being gay or having engaged in any inappropriate behavior with her female assistant. [The canoodling the players thought they saw, Powell explained, was actually Powell holding hands in prayer with the assistant and consoling her.

This lawsuit followed and Powell presented two theories. The first was that Asbury had engaged in a longstanding pattern of gender discrimination in requiring her to assume more duties than her male counterparts. She also believed the firing represented retaliation for her having previously complained. If Powell prevailed she sought lost wages and damages for emotional distress.

Asbury defended to the firing first that Powell was let go solely because of the allegations by the players and their having expressed a desire not to play for her anymore after the fateful bus ride. Asbury flatly denied any retaliation, noting a gap of several years between the start of Powell's gender complaints and the firing.

Asbury also responded to the discrimination count. It explained the college had no full-time coaches, each coaching package being cobbled together in a unique way. It was argued that the fact that additional duties assigned to the male basketball coach were different than those given to Powell did not represent discrimination. Powell countered that her duties were excessive and while modifications were given for male coaches, she received none.

This case was tried for four days in Nicholasville. The jury's verdict was mixed. Asbury prevailed on the gender discrimination claim. However the verdict was for Powell on retaliation. She took lost wages of $88,325 plus $300,000 more for embarrassment and humiliation. The verdict totaled $388,325. A consistent judgment was entered.

Powell subsequently moved for an award of attorney fees. Asbury also moved for JNOV relief. It argued that there was no nexus between Powell's gender discrimination complaint in 2005 and the firing three years later. It also cited the verdict represented a quotient verdict, a juror having contacted a professor at the school to describe the deliberations. In an order entered on 3-19-12, Judge Daugherty denied the JNOV motion. He also awarded the plaintiff attorney fees of $212,500.

Nursing Home Negligence - The estate of an elderly nursing home patient advanced three counts to trial against the nursing home, (1) failure to prevent a fall, (2) failure to provide adequate pain medication when she returned to the nursing home after her fall, and (3) a Residents Rights claim predicated on the failure to keep her suitably dressed and provide adequate oral hygiene – the trial court directed a verdict on damages at the close of proof, the plaintiff failing to quantify damages in CR 8.01(2) interrogatories – thus the case advanced to the jury on liability only

King v. Rosedale Manor, 10-1684
Plaintiff: Lance Reins and Amy J. Quezon, *McHugh Fuller*, Hattiesburg, MS
Defense: William K. Oldham and Tara J. Clayton, *Middleton & Reutlinger*, Louisville
Verdict: Defense verdict on liability on two of three counts; Verdict on liability for plaintiff on one count but no damages available because of a *Fratzke* directed verdict ruling
Court: **Kenton**, J. Summe, 3-7-12

Joline King, age 80 and a retired homemaker and widow, suffered from dementia and resided for some 10 months in the intermediate care unit at Rosedale Manor. Rosedale Manor is a nursing home in Covington – it was previously owned and operated by Kenton County as the County Infirmary (until its name changed to Rosedale Manor in 1952) – in 2008 its status changed and it began to operate as a private non-profit corporation.

King suffered a fall on 1-6-10 while in a common television room. She landed hard on her shoulder and fractured it. King also suffered an intercranial bleed. A nurse at a nearby station responded within seconds – no one actually saw King fall. Thereafter she spent two days at St. Elizabeth's Hospital before returning to Rosedale Manor. For the next nine days she remained at the nursing home receiving care. King died 1-18-10.

In this lawsuit (pursued by her son both individually and in the name of the estate), negligence was alleged by the

nursing home in two ways. The first was in failing to supervise King and otherwise prevent her fall. There were also criticisms of King's footwear – she was wearing "Crocs" at the time of her fall.

A second negligence count presented by the estate concerned the care King received after she returned to the hospital. It was alleged that she was not given adequate pain medications – the plaintiff noted that King had high pain ratings (charted by the nurses) and despite that, she wasn't given all of her available pain medications.

The third claim presented by the plaintiff was a Residents Rights Act count. It was alleged in this statutory claim that the nursing home failed to treat King with consideration and dignity, including a duty that she be properly dressed and her hygiene maintained. [This count covered her ten days in hospice care after the fall.] Experts for the plaintiff were Mary Shelkey, RN, Seattle, WA and Leonard Williams, Geriatrics, Tampa, FL.

Rosedale Manor defended on the negligence count regarding the fall that in the ten months King was in the intermediate care unit, she never fell or even had a near fall – that included pointing out multiple assessments and precautions were in place to prevent a fall event.

The nursing home also noted that King ambulated freely and did not require physical assistance. Rosedale Manor also denied the second negligence count (after the return to the hospital) regarding pain medication. It explained that King received appropriate care and as pain medication was needed, it was given.

Rosedale Manor also denied a Residents Rights violation, its nurses recalling King was diligently cared for and looked after. Experts for the defense were Janeen Lehman, RN, Owensboro and Dennis O'Neill, Geriatrics, Newport News, VA.

At the close of the plaintiff's case, the court granted a directed verdict on two defense motions: (1) it excluded punitive damages, and (2) struck a Residents Rights Act claim regarding the failure to notify and communicate with the family. Rosedale Manor also moved for a directed verdict on the medical bills and funeral expenses – the plaintiff indicated it wasn't seeking those sums and the court granted the motion to exclude these damages.

Directed verdict motions again followed the close of Rosedale Manor's proof. The nursing home renewed its motion on liability. The motion was denied.

Rosedale Manor also moved for a directed verdict on damages. It cited that the estate had never submitted any CR 8.01(2) interrogatories on any element of damages and thus consistent with *Fratzke v. Murphy*, any award of damages should be excluded. The motion cited that this failure was in contravention of the court's agreed pre-trial order that directed the claimed elements be quantified.

The estate moved to reopen its case and to supplement is CR 8.01(2) interrogatories. The court denied that motion. Thus the court instructed the jury on the estate's three counts (the two state-law negligence claims and the single Residents Rights Act count) but that consideration ended after those deliberations. Damages were excluded.

[**Ed. Note** - The court's instructions were odd (and not just in that in this civil case for damages, there were no damages) but also because Judge Summe instructed the jury on two separate common law negligence counts. The first was regarding the fall, the second being the care after the fall. Almost always a judge will simply give a single negligence standard of care instruction, i.e., did the defendant violate the reasonably competent nursing home standard?]

This case went to a jury on a Wednesday afternoon. It deliberated some six hours before returning a mixed verdict at nearly ten in the evening. The nursing home prevailed on the second common law count regarding pain medications after King returned to the nursing home and the Residents Rights claim. [**Ed. Note** - The prevailing party in that statutory action (including the defendant) may be awarded fees and costs.] Both those counts were unanimous for Rosedale Manor.

Conversely the verdict was for the estate on the first negligence count regarding the fall. However as there were no damages available, the court's instructions directed the jury to return to the courtroom. A week post-trial, no judgment or other motions had been filed.

Underinsured Motorist - A

retired policeman complained of multi-level disc injuries after a rear-end crash – his treatment included discography disc decompression as performed by Dr. Norman Lewis, Orthopedics – having settled with the tortfeasor, the plaintiff's net verdict ($103,000) exceeded the UIM carrier's $100,000 limits

Farris v. State Farm, 11-3603
Plaintiff: Vincent E. Johnson, *Siebert & Johnson*, Louisville
Defense: Deborah C. Myers, *Dilbeck Myers & Harris*, Louisville
Verdict: $138,000 for plaintiff
Court: **Jefferson**, J. McDonald-Burkman, 3-28-12

Alvin Farris, age 48, traveled on Hurstbourne Lane on 1-12-10. Farris is a retired Louisville policeman. As he sat in traffic, he was rear-ended by Stephanie Cruz. It was a moderate impact, Cruz's smaller sedan riding up under Farris's SUV. Fault was not contested.

Initially Farris was not hurt, but within 45 minutes and while still at the accident scene, he complained of neck and back pain. He drove himself to the ER where he was treated and released.

Farris next treated 49 days later with a chiropractor, the well-named Bing Crosby. [Farris was then working for Crosby as the manager of his chiropractic office.] He was then referred to a neurosurgeon (Wayne Villanueva). He performed two MRIs (neck and back) and found nothing out of the ordinary.

Then several months later Farris was seen by Dr. Norman Lewis, Orthopedics. Lewis performed two discography percutaneous disc decompression procedures, one each on his neck and back. The plaintiff's neck pain fully resolved and he only reports minor back pain. His incurred medical bills were $91,470. He also sought $150,000 for pain and suffering.

Farris moved first against the tortfeasor and took her $25,000 limits. Above that threshold he sought UIM coverage from his insurer, State Farm. The policy limits were $100,000 – the floor of coverage then at the UIM trial was $35,000 (the underlying limits plus

PIP) and the ceiling was $135,000.

State Farm defended the case and noted the plaintiff's significant treatment gaps. An IME, Dr. Timir Banarjee, Orthopedics, Louisville, thought the treatment up and through Villanueva was reasonable. However he was highly critical of the discography procedure and its cost, especially as the MRIs by Villanueva did not reveal a spinal injury.

Farris countered this notion and argued that Villanueva could only offer Farris an invasive surgery – Lewis by contrast had a less invasive procedure to relieve Farris's pain. Just as importantly the argument continued, the procedures (which Banarjee discredited) actually worked and Farris has improved.

The jury deliberated damages only. Farris took his medicals as claimed plus $46,530 for pain and suffering. The verdict totaled $138,000. A consistent judgment was entered for Farris in the sum of $103,000, representing a set-off for the underlying limits and PIP. [The verdict exceeded the limits by $3,000.]

A bad faith claim against State Farm is pending. Just five days after the verdict, the matter was on motion hour to set a pre-trial on the bad faith count.

Auto Negligence - **The defendant pulled into the path of the plaintiff and a minor collision resulted – the defendant had a cold check charge waiting for him and he fled the scene – the case was later tried on damages, a Shepherdsville jury awarding some of the medical specials and nothing more**

Hester v. Gabbard, 08-1601
Plaintiff: Bixler W. Howland, Louisville
Defense: William B. Orberson and Matthew A. Piekarski, *Phillips Parker Orberson & Arnett*, Louisville
Verdict: $5,000 for plaintiff
Court: **Bullitt**, J. Burress, 12-14-11

Kevin Gabbard pulled from the parking lot of a convenience store on 4-5-06. He did so right into the path of the oncoming Carvin Hester. Hester, age 59, hit the brakes and only had time to slide into the oncoming Gabbard. A minor collision resulted.

Gabbard for his part made a decision to leave the scene immediately. Why? He had a cold check warrant out for him in Louisville. The decision to flee didn't pay off. He was later arrested and charged with leaving the scene of the accident. Fault would not be disputed in this case.

Hester wasn't hurt at the scene, but did present to the Audubon ER in Louisville the next day with soft-tissue symptoms. He later treated with his family doctor and a chiropractor. Hester has continued to complain of the aggravation of pre-existing conditions. His medical bills were $17,996 and he sought $50,000 more for pain and suffering.

Gabbard defended the case on damages and relied on an IME, Dr. Robert Baker, Orthopedics, Louisville. The expert thought that Hester had sustained only a minor injury that should have resolved quickly. The ongoing symptoms were linked by Baker to degenerative conditions. [The defendant himself (who had fled the scene) didn't show up for trial either and avoided being served with a subpoena.]

This jury considered damages only. It first answered that the plaintiff had incurred $1,000 of necessary medicals. Hester took $5,000 of his medicals but nothing for pain and suffering. As Hester had not exceeded the PIP threshold, a defense judgment was entered.

Medical Negligence - **A resident of a personal care home was murdered by a fellow resident – his estate sued a mental hospital that had released the killer (a paranoid schizophrenic) a week earlier as well as the personal care home for having taken him in the first place – the jury deliberated for four hours (and during the tornado outbreak of March 2nd) before returning a defense verdict**

Mulligan v. River Valley Behavioral Health et al, 09-3494
Plaintiff: Douglas H. Morris, Lea A. Player and Ben Carter, *Morris & Player*, Louisville
Defense: Ashley J. Butler and Beth H. McMasters, *McMasters Keith*, Louisville for River Valley
Lisa DeJaco, *Wyatt Tarrant & Combs*, Louisville for Rosedale Rest Home
Verdict: Defense verdict on liability
Court: **Jefferson**, J. Willett, 3-2-12

Chris Jackson, then age 21 and of Owensboro, is a paranoid schizophrenic and he was acting out in early October of 2008. He quarreled with his father – his father pulled a gun on him. The police were called and told Jackson's mother there was nothing they could do.

His mother then had Jackson admitted to River Valley Behavioral Health – it is a mental hospital. Six days later Jackson was discharged. The hospital concluded he was not suicidal or homicidal and there was no basis to continue to hold him involuntarily.

Jackson's mother knew that it was toxic at home and that her son could not return. She was referred to Rosedale Rest Home. It is a so-called personal care home. At a personal care home the staff does not provide any medical treatment – they do however give out medicines and help residents keep and make appointments. The staff consists not of medical staff, but instead high school graduates. Residents of personal care homes can come and go as they please.

On Jackson's first day at Rosedale he left and got drunk. He was returned by the police to Rosedale and later tried to steal an employee's car. The police returned and took Jackson to jail. He stayed there three days.

On the fourth day Jackson returned to Rosedale. His next three days were relatively quiet. He exploded on the early evening of the fourth day. Jackson brutally attacked (and stomped on the head) of a fellow resident, Tyler Mulligan, age 78. [Mulligan was a former postal worker who had lived at Rosedale for decades.] Mulligan's injuries were severe and he died two months later. There was proof he endured significant conscious pain and suffering.

Jackson for his part was initially committed involuntarily to Western State Hospital after the murder. It was concluded that he was incompetent to stand trial *and* (incredibly) not a danger to others. Western State released Jackson who later committed another crime. He has since been medicated and has been adjudged well enough to stand trial. Jackson is presently in jail awaiting a criminal jury trial. [He was never deposed and did not testify in this lawsuit.]

In this lawsuit Mulligan's estate (representing his adult daughter) sued both Rosedale and River Valley. They

were critical first of River Valley for not keeping him in spite of purported suicidal and homicidal ideations. It was argued River Valley had to either keep him or send him to Western State. Alternatively if it did release Jackson, it had a duty to make sure he was properly placed.

In light of his mental condition and a history of violence, a personal care home was certainly inappropriate. That history of violence included fighting with his father, quarreling with police when they would be called and other mischief.

Rosedale was also targeted, the estate focusing that it had a poor screening process and inadequate staff. Had Rosedale followed its own procedures, it would have noted on the intake that Jackson had a history of violence and refused him a bed. The liability expert for the estate was William Burnett, Psychiatry, Vanderbilt.

If the plaintiff prevailed against either defendant, it could be awarded destruction damages of some $78,000 (representing Mulligan's social security benefits) as well as pain and suffering – this was capped at $5,000,000. The deviations against the defendants were also characterized as gross negligence, the jury having the option to impose punitive damages. [Punitives were limited to $10,000,000 in the court's instructions.]

River Valley defended the case that it asked Jackson every day if he was homicidal or suicidal. He always denied it. That, the mental hospital explained, represented the standard of care. It also noted that a very high bar exists to involuntarily commit someone and clearly Jackson's conduct did not rise to that level. [That the bar is high, it noted that even after this murder, Western State released Jackson.] The expert for River Valley was Paul Applebaum, Psychiatry, New York, NY.

Rosedale too defended and agreed (to a degree) that it shouldn't have taken in Jackson if only River Valley had fully informed it of his history. Rosedale did not rely on expert proof.

It was interesting that this case was even tried in Louisville as the key events occurred in Owensboro. The parent of Rosedale is MDH Management, which is owned by Drew Haynes who lives in Louisville. The estate originally sued MDH Management (and Haynes too individually) in Jefferson County. [Haynes was dismissed at trial by the court.] River Valley was later added as a third-party defendant by Rosedale – the plaintiff amended their complaint as well to directly target River Valley. [**Ed. Note** - River Valley was piggybacked into venue in a sense – as a third-party defendant, where venue was proper as to the primary defendant (which it was in this case), River Valley (of Owensboro) then had no basis to object to venue in Louisville.]

A second interesting sidenote in this litigation is that personal care homes in Kentucky are not required to have insurance. Rosedale was not insured.

The jury liability instructions were different as to each defendant. River Valley was held to the mental health provider and psychiatry standard. [It was a medical standard.] By contrast the instruction regarding Rosedale was simply the reasonable person standard. The jury could also apportion fault to the killer.

The jury deliberated the case for four hours and as the events of the tornadoes of March 2nd were happening. Through the tornado warnings they deliberated without interruption. Their verdict was for the defendants on both counts and the estate took nothing. A defense judgment has been entered.

Medical Negligence - **It was alleged that a difficult patient with a history of ER visits was dumped by a hospital , it having rolled him outside in a wheelchair with taxi fare – hours later the man was dead of an untreated duodenal ulcer – his estate prevailed at a first jury trial in 2005 and took $1.525 million including $1.5 million in punitives – the punitives award was reversed on appeal – the case came back for a second trial seven years later (and 13 years after the events) on punitive damages only**

Gray v. St. Joseph Hospital, 00-1364
Plaintiff: Darryl L. Lewis, *Searcy Denny Scarola Barnhart & Shipley*, West Palm Beach, FL and Elizabeth R. Seif, *DeCamp & Talbott*, Lexington
Defense: Robert F. Duncan and Jay E. Engle, *Jackson & Kelly*, Lexington
Verdict: $1,450,000 for plaintiff
Court: **Fayette**, J. Goodwine, 2-29-12

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

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

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

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

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

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

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

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

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

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

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

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

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

The jury continued to the second count against the hospital which alleged an EMTALA violation. Again the verdict was for the estate, and continuing the jury assessed punitive damages of $1.5 million. A consistent judgment was entered. **See** Case No. 3040 for the original verdict report from 2005. Special Judge Robert Overstreet tried the first case.

The hospital appealed and challenged the entirety of the verdict. The Court of Appeals affirmed everything but the punitive damages in a 12-5-08 opinion authored by Judge Wine. The court cited instruction error, there being no "clear and convincing" language in the trial court's charge.

Discretionary review was sought, the Supreme Court instead remanding the case in November of 2009 to the Court of Appeals to reconsider the EMTALA ruling in light of the then recently decided *Shreve v. Ohio County Hospital*. The Court of Appeals reconsidered and the result was the same in a July 2010 opinion. The hospital again sought discretionary review. That motion was denied in April of 2011 and the case returned to trial.

In the interim the organization of the plaintiff's lawyers had been rearranged. William Gallion of *Gallion & Associates* and Shirley Cunningham of *Cunningham & Grundy* who participated in the first trial with Lewis and Seif (noted above) were not available. Gallion and Cunningham became embroiled in the Fen Phen scandal and are both in federal prison.

The second trial started in the first week of February in 2012. It lasted three weeks. The court's instructions described the prior trial and its finding for the plaintiff as well as mentioning the $25,000 in compensatory damages. [Nothing was said of the $1.5 million punitive award.]

The prefatory charge out of the way, Judge Goodwine instructed the jury to consider punitive damages – the instruction included clear and convincing language. The jury awarded the estate $1.4 million in punitives following lengthy deliberations over two days. As it deliberated, the jury asked: Do we consider the doctors as well? Judge Goodwine told the jury to read the instructions (which indicated they were agents of the hospital). A consistent judgment was entered following the verdict.

St. Joseph has since sought JNOV relief and argued among other things that, (1) the punitive award was improper because it was based on the conduct of agents (the treating doctors) whose actions it did not ratify, (2) a juror (Corey Blackburn) slept through most of the trial, and (3) the award of punitives was excessive. The motion was pending when the record was reviewed.

Truck Negligence - A tractor-trailer pulled into the path of a motorcyclist – the motorcyclist had no choice but to set his bike down to avoid a head-on collision – in that process (while avoiding the tractor-trailer), the plaintiff sustained an open comminuted fracture of his leg

Smith v. Nallia Truck Service, 10-5380
Plaintiff: Chadwick N. Gardner, Louisville
Defense: Rod D. Payne and Charles H. Stopher, *Boehl Stopher & Graves*, Louisville
Verdict: $515,039 for plaintiff less 60% comparative fault
Court: **Jefferson**, J. Perry, 12-2-12

Orlando "Not Tubby" Smith, then age 49, had finished his shift as a garbage man and was leaving work on his motorcycle. He traveled on Meriwether Avenue. At the same time, Charles Nallia of Nallia Transportation Service was operating a tractor-trailer. Nallia had just made a wide turn onto Meriwether, his lane being blocked in part by an illegally parked garbage truck.

As Smith proceeded the tractor-trailer was suddenly in front of him. He hit the brakes. But there was still no time. Smith had two choices and neither was good. He could hit the tractor-trailer head-on or set his bike down.

He chose to set it down and he avoided the truck. However in the process of setting down his bike, Smith sustained an open comminuted right tibia fracture. He also sustained a rotator cuff tear and severe road rash. The broken leg was surgically set with an IM nail – there was a second revision surgery.

Smith incurred medical bills of $196,726 – his future medicals were claimed at $500,000. Lost wages were $19,213, Smith claiming $741,198 more for impairment. It is now painful for him to walk and he ambulates with a limp. His garbage man days are over. The plaintiff's vocational expert was Sharon Lane. Smith sought $2,000,000 more for his pain and suffering – the jury could award his wife damages as well for her consortium interest.

In this lawsuit Smith blamed Nallia for pulling onto Meriwether and being on the wrong side of the road. The plaintiff's accident expert, Sonny Cease, Prospect, explained the wreck occurred because Nallia failed to yield, Smith having no time to do anything else.

Nallia Trucking defended with its own accident expert, Lou Inendino, Indianapolis. Inendino thought that but for Smith's excessive speed (34 to 39 mph), he should have been able to apply the brakes and avoid the collision. [Smith denied he was speeding.] Inendino also thought it was foolish to set the motorcycle down as at the moment Smith did so, he was already almost stopped. Finally the expert defended Nallia for making a wide turn, the garbage truck blocking his access to Meriwether.

This case was tried for a week before Judge Perry. The jury was mixed on fault. It was assessed 60% to the plaintiff, the remainder to the trucker. Then to damages Smith took his medicals and lost wages as claimed.

The jury awarded $100,000 of his future medicals and $26,100 more in impairment. Pain and suffering was valued at $175,000. His wife's consortium interest was rejected. The raw verdict totaled $515,039. A judgment less comparative fault for $206,015 was entered.

Smith moved for JNOV relief and argued that (1) the award was inadequate, (2) the fault assessment was improper, Nallia being on the wrong side of the road, and (3) the verdict on fault was the result of a quotient. In fact, the foreperson who described the quotient process explained he didn't even put in a slip of paper with a number on it because he was charged with counting up the totals and doing the math. In a barebones order, Judge Perry denied the motion on 3-22-12.

Auto Negligence - In a disputed red light case, the verdict was for the defendant on liability

Lawson v. Howard, 09-518
Plaintiff: Jack S. Gatlin, *Freund Freeze & Arnold*, Cincinnati, OH and Dennis C. Mahoney, *O'Connor Acciani & Levy*, Cincinnati, OH
Defense: Robert B. Cetrulo, *Cetrulo & Mowery*, Edgewood
Verdict: Defense verdict on liability
Court: **Grant**, J. Bates, 2-29-12

It was 9-28-08 and Shirley Howard (a male) had exited I-75 at the Dry Ridge exit and was attempting a turn onto Ky 22. At the end of the exit ramp, Howard believed he had a green light and started his turn. Just as he did, Howard was struck by the oncoming Micah Lawson – Lawson's van broadsided the Howard vehicle.

Lawson for his part claimed he had a green light. His daughter (Emma, age 10 and in the front seat) also saw a green light. In resolving this fact dispute, there were two other witnesses.

One independent witness who was facing the Lawson vehicle was positive that Lawson had run the light. A second witness (who had just entered the other entrance ramp and was several hundred yards away) took an opposite position – she said Howard's light was red. [This witness was less independent than the first as she and Lawson's wife are good friends – this witness also didn't stop at the scene.]

However it happened, there certainly was a serious collision. Lawson has since complained of assorted injuries. He died at age 38 of other causes during the pendency of this lawsuit. His estate continued to advance his injury claim to trial. The court bifurcated the matter and it was heard on liability only.

There was proof at trial regarding the wreck as described above and also from a state transportation official. The DOT representative described the sequence of the light and that it could not be green for both drivers at the same time.

This led to an interesting legal question. The defense had argued for an all or nothing instruction with no apportionment. That is, one of the drivers (Lawson or Howard) was solely at fault – a motorist can't run 50% of a light. The court disagreed and the court's instructions included an apportionment instruction.

This jury in Williamstown exonerated Howard on liability and the estate took nothing. A consistent judgment was entered.

Medical Negligence - An ER doctor and his physician's assistant were blamed for not diagnosing a foreign body (a piece of wood) in the plaintiff's eye after the plaintiff presented following an ATV into a tree limb crash – the theory implicated the failure of the defendants to use a slit lamp to identify the injury and/or make a prompt ophthalmological referral – because of the treatment delay, the plaintiff, age 26 and a factory worker, ultimately lost vision in the eye

Cromer v. Marshall Emergency Services Associates, 10-402
Plaintiff: Richard Hay and Sarah Hay Knight, *Law Office of Richard Hay*, Somerset and James T. Gilbert, *Coy Gilbert & Gilbert*, Richmond
Defense: Kenneth W. Smith and Johann F. Herklotz, *Wellman Nichols & Smith*, Lexington
Verdict: $640,022 for plaintiff assessed 60% to the defendant
Court: **Madison**, J. Clouse, 3-12-12

Jeffrey Cromer, then age 26 and a factory worker, was riding his ATV on 5-11-09. He ran off the road and crashed into a fence. The collision left him with cuts to his leg and face, as well as an abrasion to his eye. He presented to the ER at Pattie Clay Hospital where he was evaluated by an ER doctor, Dan Sotingeau and his physician's assistant, Rich White. [Both work for Marshall Emergency Services Associates which contracts to provide ER coverage at the hospital.]

Cromer was diagnosed at Pattie Clay with an abrasion to his eye. He was given an eye patch. The next day Cromer appeared at the ER at St. Joseph Berea. There he was seen by another physician's assistant, Sarah Abbott. [Abbott works for Southeastern Emergency which contracted with the hospital.] Abbott saw nothing and made a referral to an ophthalmologist.

Two days later Cromer was seen at Wal-Mart Wellness Vision. A foreign body (a piece of wood) was identified in his eye. He was promptly sent to UK. His globe was ruptured and there was infection. Despite an immediate surgery at UK, Cromer lost his vision in the eye. He can now only perceive light.

Cromer sued Marshall Emergency and Southeastern Emergency and alleged negligence by them in failing to make a timely diagnosis of the foreign body. He settled before trial with Southeastern Emergency, the case advancing against Marshall Emergency only. The duties of the settling party remained in issue at trial.

The liability theory alleged that Marshall Emergency should have (1) used a slit lamp to identify the foreign body, and (2) referred Cromer promptly to an ophthalmologist. The plaintiff's liability expert was Dr. Andrew Dahl, Ophthalmology, Telluride, CO.

If Cromer prevailed he sought his medicals of $25,022 plus $100,000 more for future prosthetic care. Lost wages were $74,412, Cromer seeking $658,521 for impairment. His vocational expert was Ralph Crystal, Lexington. The jury could also award $500,000 for both past and future suffering.

Marshall Emergency defended that their diagnosis of a corneal abrasion at the ER was reasonable, there being no reason to suspect a rupture or infection. The reason a slit lamp was not used, the defense further explained, was that Cromer could not sit still for it to be used because of pain from his other injuries. In any event, the defense further postured, (1) the foreign body would have been difficult to see, and (2) more likely than not, the result would have been the same. Experts for the defense were Dr. Edmond Hooker, ER, Cincinnati, OH and DR. David Milstein, Ophthalmology, UCLA. [The defense also sought to apportion fault to the since-settled Southeastern Emergency.]

As the jury deliberated it had four questions for the court that all presaged a plaintiff's verdict. They were, (1) Is this a lump sum payment?, (2) Is it tax free?, (3) Can we have a calculator, and (4) If there are future medicals, are they set aside? The court didn't answer.

Back with a verdict, it was mixed on fault. The jury found against both defendants as well as against the since-settled Southeastern Emergency. That fault was assessed 40% to the defendants, the remainder to the non-party.

Then to damages Cromer took his medicals and future medicals as claimed. Lost wages were $35,000, the jury adding $250,000 for impairment. His past and future suffering (in separate categories) were each valued at $120,000. The raw verdict totaled $640,022. A judgment less comparative fault was entered for $384,013. The case has since been dismissed by agreed order.

A Notable Indiana Verdict
(Involving Kentucky Attorneys)

Medical Negligence - A man suffering from obesity and diabetes underwent surgery to remove his gallbladder; when the man later died of peritonitis, his estate criticized the surgeon for operating prematurely and failing to diagnose and treat a bowel injury that occurred during the surgery

Talbot v. Welborn, 82C01-1004-CT-200
Plaintiff: Terry Noffsinger, *NoffsingerLAW, P.C.*, Evansville, IN and Spencer F. Goodson, Bloomington, IN
Defense: Clay A. Edwards and Joshua W. Davis, *O'Bryan Brown & Toner, PLLC.*, Louisville
Verdict: Defense verdict on liability
County: **Evansville, Indiana Vanderburgh**, Circuit
Court: J. Heldt, 10-7-11

In 2004, Mark Talbot underwent a gastric bypass surgery in an effort to deal with his morbid obesity and diabetes. Although Talbot had previously worked as a truck driver in Princeton, he did not work after 2004 and subsisted instead on monthly disability payments of $1,360.

Following his gastric bypass surgery, Talbot complained of ongoing pain that would manifest each time he would eat. He eventually consulted on the matter with Dr. Mell Welborn, Jr, a surgeon in Evansville. Dr. Welborn diagnosed cholecystitis and recommended surgery to remove Talbot's gallbladder and to repair an abdominal incisional hernia.

Talbot accepted this recommendation, and Dr. Welborn performed the surgery on 1-27-06. During the procedure Dr. Welborn noted a potential problem with the blood supply to a segment of Talbot's bowel. Despite that notation, however, Dr. Welborn did not diagnose or treat the bowel injury.

Over the next few days, the segment of Talbot's bowel died, perforated, and led him to develop peritonitis. He was taken back to surgery on 1-30-06 in an attempt

to repair the damage. Tragically, it was too late, and Talbot died on 1-31-06. He was 48 years old.

Talbot's widow, Barbara Talbot, presented the case to a medical review panel comprised of three surgeons. They were Dr. Timothy Pohlman of Indianapolis, Dr. Larry Micon of Indianapolis, and Dr. Inder Keekri of Kokomo. The panel issued the unanimous opinion that Dr. Welborn's treatment of Talbot had not fallen below the applicable standard of care.

Both on her own behalf, and on behalf of her minor daughter, Julie Talbot, Barbara filed suit against Dr. Welborn and criticized his treatment of her late husband. According to plaintiffs, the kind of pain of which Talbot had complained is common among patients who have undergone gastric surgeries.

It was plaintiffs' position that Dr. Welborn had failed to confirm his pre-operative diagnosis of cholecystitis and failed to rule out several other important potential sources of Talbot's abdominal pain. Thus, according to plaintiffs, the surgery was premature. Furthermore, plaintiffs criticized Dr. Welborn for failing to diagnose and treat Talbot's bowel injury during the surgery.

Plaintiffs identified several experts. They included Dr. Hobart Harris, Surgery, San Francisco, CA; and Lane Hudgins, Forensic Economics, Murphysboro, IL. Hudgins calculated the present value of Talbot's lost income – i.e., his monthly disability payments – at $165,197. In addition to this figure, plaintiffs claimed $87,554 in medical and hospital expenses, plus $12,870 in funeral expenses.

Plaintiffs also identified Dr. Pohlman, one of the medical review panel members, as an expert witness. Dr. Pohlman, who has since relocated to Vancouver, WA, explained that he based his original opinion upon a misunderstanding of the rules governing the operation of medical review panels.

In particular, it was Dr. Pohlman's original understanding that the panel was bound to take Dr. Welborn's testimony as true because there was no one to contradict him. Dr. Pohlman has since learned that the panel was empowered to disbelieve Dr. Welborn if the panel saw fit to do so.

Based upon this new understanding, Dr. Pohlman changed his original opinion. It is now Dr. Pohlman's belief that Dr. Welborn did breach the applicable standard of care by operating prematurely and failing to rule out other possible causes of Talbot's symptoms.

Dr. Welborn defended the case and denied having breached the standard of care. The identified defense experts included Dr. William Schirmer, Gastrointestinal Surgery, Dublin, OH; and Dr. Jonathan Mandelbaum, Surgery, Indianapolis.

The case was tried for five days in Evansville. The jury deliberated for one and a half hours before returning a verdict for Dr. Welborn. The court entered a judgment for the defense.

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The Kentucky Trial Court Review is published at 9462 Brownsboro Road, No. 133 Louisville, Kentucky 40241; Denise Miller, Publisher; Shannon Ragland, Editor and Aaron Spurling, Assistant Editor. Annual subscriptions are $275.00 per year. [Including sales tax, $291.50 for Kentucky residents.]
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