Kentucky Trial Court Review
December 2013
Table of Contents

disputed Judy's diagnosis of vertigo and post-traumatic stress. The heart of the defense was simple – this wreck was too minor to have caused a compensable injury. It also diminished Judy's vertigo diagnosis, noting she had treated for this vertigo for many years before this collision.

This case was tried in Owingsville for two days. As Scanlon's fault was no issue, the jury first considered causation. It answered for both plaintiffs that the complained of injuries were not caused by the wreck. That ended the deliberations and the plaintiff took nothing. A defense judgment was entered and it is now final.

Medical Negligence - A surgeon was blamed for both his choice of a colon surgery to treat a stricture and then later in his takedown of the colostomy when the rectum and bladder were connected to the colon

McAbee v. Chapman, 11-387
Plaintiff: Charles S. Wible, *Wible Law Offices*, Owensboro
Defense: Charles G. Franklin, *Franklin Gordon & Hobgood*, Madisonville
Verdict: Defense verdict on liability
Court: **Hopkins**, J. Brantley, 8-23-13

Kathy McAbee, then age 62 and a hairstylist, was treated on 1-14-10 by Dr. Darren Chapman, Surgery, for a colon stricture. He performed a surgical repair and installed a colostomy. Some five months later on 5-13-10, Chapman took the colostomy down.

In the course of that surgery, Chapman stapled the bladder to the rectum. Thus when reconnected the colon was connected not just to the rectum but also the bladder. Nine days later McAbee was released from the hospital.

Three days later she reported to the ER complaining that she had stool in her urine. She treated for a time with Chapman – losing faith with him she sought care at Vanderbilt. Her surgeons there performed a complex eight-hour repair. She later endured other repair surgeries, her recovery being lengthy and incomplete. Chapman's bladder remains weak and she reports near constant diarrhea.

In this lawsuit McAbee alleged negligence by Chapman in two ways, (1) performing the surgery in the first place as it was not an emergency and the stricture could be treated without a colostomy being placed, and (2) stapling the bladder to the rectum during the takedown. Her liability expert was Dr. Ira Kodner, Colo-Rectal Surgery, St. Louis, MO.

If McAbee prevailed at trial she sought her medicals of $206,971. Lost wages were $45,514. Having hoped to work for many more years, her impairment was $203,065. The court limited her pain and suffering to $95,400.

Chapman defended the case that the first surgery was indicated and regardless of the timing of it, a colostomy would have been needed. His expert, Dr. William Cheadle, Surgery, Louisville, described the bladder-rectum snafu as a complication that can and does occur in the best of hands. A second identified defense expert was Dr. Edward Shuttleworth, Surgery, Greenville, SC.

As the jury deliberated the case it had a question: We cannot agree on a total of nine. We have an 8-4 vote. Apparently the jury found another vote and a verdict was returned.

Chapman prevailed by a 9-3 count on liability and McAbee took nothing. A defense judgment was entered. McAbee has since appealed.

Hospital Negligence - An elderly woman fell from a recumbent bicycle as a part of cardiac rehabilitation program and suffered a broken hip – in this lawsuit the woman (and then her estate after she died) alleged negligence in permitting her to exercise on the bicycle without supervision because she was suffering from dementia

Manz v. Pattie Clay Hospital, 08-834
Plaintiff: R. Scott Wilder, *Gambrel & Wilder*, London
Defense: James P. Grohmann and Benjamin J. Weigel, *O'Bryan Brown & Toner*, Louisville
Verdict: Defense verdict on liability
Court: **Madison**, J. Clouse, 11-6-13

Virginia Manz, in her 70s, treated on 5-31-07 at Pattie Clay Hospital as a part of a cardiac rehabilitation program. That program involved riding on a recumbent bicycle. Manz had ridden the bike many times and enjoyed it. On this day Manz had advanced in the program from Phase III to Phase II. The key difference in Phase II was that Manz would ride the bike (in place) without supervision.

There would be disputes about Manz's mental capacity at the time. She would later allege that she was suffering from early-onset dementia and had a gait disturbance. The hospital described her as a bit forgetful, but otherwise active. She attended church and regularly ate out at Red Lobster and other fine dining locations.

Whether feeble and suffering from dementia, or an active senior, Manz fell from the bicycle and broke her hip. [A nearby therapist heard a "thump" and rushed to aide Manz.] Manz remained bedridden until her death two years later on 9-1-09.

Before Manz passed away, she filed this lawsuit against the hospital. She alleged negligence by the cardiac rehabilitation unit in permitting her to ride the recumbent bicycle

jury continued and awarded Price her medicals as claimed. It rejected any award to Price for her future care and suffering damages. A consistent judgment less PIP and comparative fault was entered for Price in the sum of $10,514. The record indicates Price had demanded $20,000 – Sushon last offered $2,000.

Medical Negligence - In removing a morphine pain pump, a neurosurgeon was blamed (via a res ipsa loquitur theory) for leaving behind a piece of plastic tubing in the plaintiff's spine

Bellofatto v. Periyanayagam, 10-1436
Plaintiff: Fred G. Greene, Russellville and Jeffrey B. Traughber, Elkton
Defense: David F. Broderick, *Broderick & Davenport*, Bowling Green
Verdict: Defense verdict on liability
Court: **Christian**, J. Atkins, 5-14-13

Christine Bellofatto, then age 36, had a morphine pain pump (A Synchro Med model) inserted in her spine. The pump was removed in a surgery on 12-3-08 by Dr. Srinivasan Periyanayagam, Neurosurgery (Dr. Peri). At the same time Dr. Peri inserted a new pump on the opposite side of Bellofatto's back.

Following the surgery and over the next ten months, Bellofatto reported low-back pain. She was assured by Dr. Peri that this was normal. Dr. Peri performed a second surgery to investigate on 10-24-09.

In that surgery he identified a so-called foreign body granuloma that was characterized by infection, swelling and pain. What was the foreign body? A piece of plastic tubing had apparently come off the pain pump when Dr. Peri removed it ten months earlier.

In this lawsuit Bellofatto alleged error by Dr. Peri in leaving the plastic tubing in his spine. She did not rely on an expert at trial. Instead Bellofatto presented a res ipsa loquitur theory, such that the thing (leaving a piece of the foreign body in Bellofatto's spine) spoke for itself. If she prevailed at trial the jury could award her $250,000 for pain and suffering.

Dr. Peri defended the case and denied that he had violated the standard of care. His expert, Dr. Leon Ravvin, Neurosurgery, Lexington, called this result a common complication. The plaintiff's own comparative fault was also implicated.

The court's instructions asked if Dr. Peri had violated the reasonably competent physician standard. The answer was no after 75 minutes of deliberation and Bellofatto took nothing. A defense judgment closed this case.

Race Discrimination - A black roofer for a contracting firm alleged both that he suffered a hostile racial environment and that he was fired because of his race

Harris v. Preferred Construction, 12-312
Plaintiff: Amanda R. Walker, *The Zoppoth Law Firm*, Louisville
Defense: Harry L. Mathison, *King Deep & Branaman*, Louisville
Verdict: Defense verdict on liability
Court: **Henderson**, J. Wilson, 8-14-13

Antonio Harris, who is black, was employed as a roofer for a contracting firm known as Preferred Construction. Harris would allege he endured a racially hostile work environment. That included his boss referring to him as "blackie" and suggesting Harris was a slave.

Harris complained and nothing was done. He finally quite in April of 2012. Two weeks later he filed this lawsuit. In it he alleged two counts, (1) that he had endured a racially hostile environment, and (2) he was constructively discharged because of his race. If he prevailed the jury could award lost wages and damages for emotional suffering. Preferred Construction defended and denied it all.

This jury deliberated thirty minutes (taking just enough time to order lunch) and rejected both the termination and hostile environment counts. That ended the deliberations and Harris took nothing. A defense judgment was entered.

Auto Negligence - The plaintiff complained of soft-tissue symptoms after a right of way crash – her pain and suffering award was six-tenths of her medical bills

Treat v. Mehmadovic, 10-6385
Plaintiff: Brian D. Cook and Aaron J. Bentley, *Bahe Cook Cantley & Nefzger*, Louisville
Defense: Frederick M. Reinecke, *Quintairos Prieto Wood & Boyer*, Louisville
Verdict: $19,663 for plaintiff
Court: **Jefferson**, J. McDonald-Burkman, 9-25-13

There was a right of way collision in Louisville on 1-28-10. The plaintiff, Anita Treat, then age 45 and working as a CNA, alleged that Bekir Mehmadovic turned left in front of her. The collision resulted in minor vehicle damage. Mehmadovic for her part blamed Treat for failing to keep a proper look-out.

Treat has since treated with a chiropractor for a soft-tissue injury. Her medical bills were $10,096. She claimed lost wages of $7,134. The instructions limited her pain and suffering to $50,000. In this lawsuit she sought damages from Mehmadovic.

Mehmadovic defended on fault as noted above. She also diminished damages with an IME, Dr. Martin Schiller, Orthopedics, Louisville. The expert concluded that Treat suffered just a temporary and minor soft-tissue injury. Schiller was not impressed with Treat's chiropractic care and believed it was excessive.

This jury found Mehmadovic 100% at fault for the crash. Then to damages Treat took her medicals as