The Advocate

KENTUCKY JUSTICE ASSOCIATION

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March/April 2021 • Volume 49, Number 2

The Advocate

Volume 49, Number 2
March/April 2021
10602 Timberwood Circle, Suite 8
Louisville, Ky. 40223-5358
(502) 339-8890 Fax: (502) 339-1780
www.KentuckyJusticeAssociation.org

Publisher
Kentucky Justice Association

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The members of the Kentucky Justice Association work to ensure that any person who is injured by the misconduct and negligence of others can get justice in the courtroom, even when taking on the most powerful interests.

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Protect the Seventh Amendment:

"In suits at common law, where the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Advocate (USPS 017-946) is published bi-monthly by the Kentucky Justice Association, 10602 Timberwood Circle, Suite 8, Louisville, Ky. 40223-5358. The subscription rate of $125 is included in KJA membership dues. Periodical postage is paid at Louisville, KY. POSTMASTER: send address changes to The Advocate, 10602 Timberwood Circle, Suite 8, Louisville, Ky. 40223-5358.

By Rhonda Hatfield-Jeffers, KJA President

Session is Ending Soon and Hoping for Civil Jury Trials to Get Back on Schedule

Well, it has been an interesting past few weeks! The session is almost over, and I am hopeful we can soon say this about the pandemic. When the session began, we were not sure whether we would be in Frankfort daily in a location near the Capitol or be working from a Zoom platform each day. It has been pretty smooth sailing thus far using a Zoom platform. I believe this is not in small part due to Griffin Gillis' mad Zoom skills. When issues have arisen, we have been able to speak with legislators frequently via Zoom. As usual, Maresa has worked night and day during the session and has done an excellent job with recognizing issues and keeping us informed. Nathan Williams and one member of the executive committee have also been present via the Zoom platform for each day of the session. When needed, members of the executive committee have testified in committee hearings. A special thanks to Jay Vaughn for doing an excellent job testifying and explaining the issues regarding Senate Bill 5.

A total of 881 bills were introduced this session—286 Senate bills and 595 House bills. The deadline for introducing new bills has passed, but committee substitutes remain possible. A member of the executive committee or KJA staff, and often-times multiple members reviewed each bill. Our main focus this session is on Senate Bill 5, which gives broad-reaching immunity to premises owners and essential workers for negligence. The bill precludes liability of essential workers and premises owners unless the negligence is wanton, willful, reckless, or gross negligence. KJA agrees that businesses who are operating reasonably should not be sued for individuals contracting COVID at their premises, but this bill is more far reaching. KJA believes that SB 5 violates the Kentucky Constitution and the 7th Amendment, and if passed into law, is likely to be declared unconstitutional by the courts.

The Kentucky Supreme Court recently issued new orders that allow for in-person hearings on individual cases, effective May 1, 2021. These orders also end 50/50 staffing and special leave on May 1, 2021, and extend the date for jury trials to begin on May 1, 2021. As individuals in category 1C, which includes legal, were eligible for the vaccine beginning March 1, 2021, I am hopeful the courts soon open up even more, and jury trials will resume on a normal schedule. There is a large backlog of criminal cases that have priority over civil cases, so it is not known yet when our civil jury trial schedules will be back to normal. I think we should all be hopeful and positive about this.

Over the past two months, KJA has participated in a group of statewide associations that have come together to share resources and provide assistance and training in the areas of suicide prevention, mental health, and addiction. Free training and seminars have already been made available to members of each of these associations, and we anticipate more on the horizon. KJA has formed a new Wellness Committee with David Gray, Esq. as the committee chair. I am so pleased with member participation in this committee. Plans are underway to provide support and assistance to our members and colleagues who are suffering from mental health and addiction issues. We all need to be more vocal about the struggles we have as lawyers and strive to decrease the stigma associated with seeking treatment for and help with mental health and addiction problems. I expect great things from both the statewide group and KJA's Wellness Committee.

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By Maresa Taylor Fawns, Chief Executive Officer

Session Wrap-up and What's Coming Up

Legislative Session

The legislature is in its last days with last week being the last full week of meetings for the session. After this week, there are six days left, spread out through the month of March. The focus of your leadership and staff has been on COVID immunity. The stated goal of the bill is to make sure businesses who are operating reasonably shouldn't be sued. We agree!

SB 5 goes further, and here is how: SB 5 changes the standard of care from simple negligence to the higher standard of wanton, willful, reckless, or gross negligence for all premises owners and essential workers. And that standard applies to negligence DURING COVID not FOR COVID exposure. The proposal is clearly unconstitutional, however, now is the time to join us in defending the 7th Amendment. Please contact your legislators right away to oppose or amend SB 5 because it expands immunity against the constitution and has unintended consequences. The Chamber of Commerce has been making hundreds of calls to legislators. Please continue to call (800) 372-7181 to oppose SB 5. You may also email your Senator and Representative.

We are working on many other bills as well, however, the main focus is on the above. We are not allowed in the Capitol unless we have a meeting scheduled with a legislator. That is very difficult when issues come up with little notice. We are usually there the entire time the legislators are there.

Because we can't be there, it is even more important that you call your legislators when we ask. It was difficult being in the same building with them to talk to 138 on issues—it is impossible now. We are relying on a lot of texting and phone calls to get our message to legislators. Thank you for the calls you've made so far. They have helped!

COVID Vaccinations for Essential Workers

As you are probably aware, as an essential service provider, you now qualify to get a vaccination for COVID-19. Although we will continue to wear masks for the foreseeable future, it is a relief to know that a new normal is on the horizon and you can get back to the courtroom to advocate for your clients.

KJA Wellness Committee

KJA has begun a Wellness Committee to focus on the mental health of attorneys (see KYLAP Director, Yvette Hourigan's article in this issue). David Gray has graciously agreed to chair the committee, and it has begun work already with two meetings in the last month. We will begin the task of destigmatizing mental health and substance abuse by having our members talk openly about their struggles and their successes. We will also have programming addressing these issues. The legal community has come together—bar associations across the commonwealth as well as the Administrative Office of the Courts and the Supreme Court, and of course, KYLAP—and is committed to understanding the rise in lawyers' death by suicide and do something to help those suffering.

Continuing Education

Don't forget to check out our CLE calendar this year on the page at right. We hope we can have an in-person convention in Nashville in September. Other programming is by webinar for the spring CLEs. Don't forget you can get all of your CLE by this method and your requirement for last year and this year is a total of 24 hours.

KJA Welcomes New Members as of February 24, 2021

Attorneys

Cherry Henault
Isaacs & Isaacs
Louisville, Ky.

Omer Iqbal
Stein Whatley Attorneys PLLC
Louisville, Ky.

Evelyn Latta
Garmer & Prather, PLLC
Lexington, Ky.

Megan Ziegman
Law Office of Kendra Rimbert
Louisville, Ky.

Law Students

Rhys Cundiff
Louis D. Brandeis School of Law, University of Louisville
Louisville, Ky.

Sophia K. Steere
Louis D. Brandeis School of Law, University of Louisville
Louisville, Ky.

Legal Support

Lindsey Perkins
Oakes Law Firm
Paducah, Ky.

Makensie Reed
Oakes Law Firm
Paducah, Ky.

Professional Affiliate

C. Mitchell Page
Page Medical-Legal Consulting
Louisville, Ky.

Date	Chair	Subject of Seminar
Friday, April 16	Wilson Greene	Expert Litigation
Wednesday, April 21	Jay Prather	All-in-One Ethics
Friday, April 23	Abby Green	Litigation Skills and Civil Rules
Friday, May 7	Jay Vaughn	Invisible Injuries: How to Identify and Prove Them
Friday, June 4	Hans Poppe	Trucking
Thursday, June 10 and Friday, June 11	Jon Hollan	Auto
Thursday, June 24	Richard Hay	Insurance Claims Handling
Wednesday, June 30	Lindsay Cordes	Technology
Wednesday, September 22 to Friday, September 24	Rhonda Hatfield-Jeffers	Annual Convention

By Yvette Hourigan, JD, CEAP, APSS

Pandemic Fatigue, Despair, and How to Offer Help

"Nothing that is expressed is obscene. What is obscene is what is hidden." **— Nagisa Oshima**

Filmmaker Nagisa Oshima was referring to pornography when he declared that what is obscene is what is hidden, but the same can be said of our secrecy surrounding mental health. "We're as sick as our secrets" the saying goes. Until we're willing to lift the shroud of secrecy surrounding mental health, we'll continue to lose colleagues unnecessarily. The death of several Kentucky lawyers to suicide in recent months has alarmed our legal community and broken our collective hearts. In response, more than 20 Kentucky lawyer organizations partnered as the Kentucky Mental Health Collaboration Group to offer free CLE opportunities on mental health issues confronting our profession. These educational programs help us recognize severe depression, a possible suicide crisis, and what steps to take in response. And while there aren't always recognizable clues that someone is in crisis, when there are, we can help save a life by our words and our conduct. The key is to be bold, and be willing to ask hard questions like "are you thinking about taking your life or hurting yourself?" "Do you wish some days you just wouldn't wake up?" "Do you feel like you're in a hole you can't get out of?" Tough questions? Yes. But we ask hard questions for a living. Uncomfortable? Yes. Avoidable? No. Not if we want to help our struggling comrades. And we do want to help them.

The COVID-19 pandemic has negatively impacted mental health worldwide. (See Figure 1 at right.)

Elevated levels of adverse mental health conditions, substance use, and suicidal ideation were reported by adults in the United States in June 2020. The prevalence of symptoms of anxiety disorder was three times higher than those reported in the second quarter of 2019 (25.5 percent versus 8.1 percent), and prevalence of depressive disorder was four times higher than reported in the second quarter of 2019 (24.3 percent versus 6.5 percent).[1] Symptoms of anxiety disorder and depressive disorder increased considerably in the United States during April–June of 2020, compared with the same period in 2019.[2] Lawyers—who already have anxiety and depression levels 3-4 times greater than the general population—are suffering extraordinarily with this added stress and anxiety.

If there is an upside to the COVID-19 pandemic, it's that mental health is finally being openly discussed everywhere—in the news, by celebrities on Twitter, in commercials, and among professional athletes. Speaking bluntly and unapologetically about our own mental health issues like anxiety, addiction, and suicidal thoughts saves lives. Normalizing depression through frank discussions reduces the stigma and eliminates the shame of seeking medical care. It encourages others to seek help. Conversely, an unwillingness or inability to candidly discuss mental health issues and their treatment exacerbates the problem. Will you be part of the problem or part of the solution?

It's time to stop pretending we're not suffering. We're not magically mentally superior to the rest of the population because we think for a living. As R.E.M. reminded us, "everybody hurts." Get comfortable talking about the things you're uncomfortable talking about. As a lawyer with a history of depression and substance use disorder, I can unequivocally say that pretending my life wasn't in a downward spiral did not make it so. But truthfully, I couldn't see it or solve it on my own. Some hard truths, spoken with love, from people close to me saved my life. I'm thankful. I often wonder what would have happened if they hadn't been bold. You have the same power to help your suffering colleagues. All it takes is some insight and a little willingness.

Not all mental health issues are obvious or even discernible. Many who die by suicide showed no signs, gave no signals, and offered no clues about their mental health status. They fooled their families, their friends, and even their therapists. Lawyers are trained to mask our true feelings in court and with our clients. We're good at it. It carries over into our personal lives, with families and friends. So, we mustn't take responsibility for what was impossible to know. But about 75 percent of people *do* show signs or give clues, and the more familiar we are with these, the more effective we become at helping.

Figure 1

Suicide Statistics in the United States

Suicide rates in the United States increased by about 33 percent between 1999 and 2019.[3]

Lawyers are *at least* five and one-half (5 1/2) times more likely to die by suicide than the general population—at a rate of 66 deaths per 100,000. And if the general population's suicide rate has increased by 33 percent, we should assume the statistic of 66 lawyer deaths by suicide per 100,000 deaths is probably low.

Elevated Suicide Risks Among Lawyers

Risk factors for suicide include depression, anxiety, substance abuse, divorce, and stress. Lawyers experience ALL of these risk factors at a higher rate than the general population. Lawyers are more likely to be perfectionists and competitive—personality traits which make a person considering suicide *less likely* to seek help. As stated by Robin Frazer Clark, Georgia Bar President, in her President's Page of the *Georgia Bar Journal,* December 2012, "[F]ailure is not an option in a high-stakes profession such as ours."

If chronic stress is, or seems to be insurmountable, it gives rise to helplessness. This helplessness may be so generalized that the person is unable to accomplish tasks he or she could actually master (returning phone calls or filing routine motions). Helplessness is a pillar of a depressive disorder. Lawyers don't do "helpless." We're perfectionists, and we're paid to solve problems. It doesn't register when we can't do it for ourselves. Our depression rate is at almost 30 percent *pre-pandemic.* If the general population's rate of depression is up four-fold during the pandemic, then ours is too.

Symptoms of Depression

The most common symptoms of major depression are a "down" or depressed mood most of the day or a loss of interest or pleasure in activities previously enjoyed for at least two weeks, as well as:

- Changes in sleeping patterns (more sleep or less sleep)

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Pandemic Fatigue

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- Change in appetite or weight (more food or less food)
- Intense anxiety, agitation, restlessness, or being slowed down
- Fatigue or loss of energy
- Decreased concentration, indecisiveness, or compromised memory
- Feelings of hopelessness, worthlessness, self-reproach, or excessive or inappropriate guilt
- Recurrent thoughts of death or suicide

Risk Factors for Suicide

A combination of situations could lead someone to consider suicide. Risk factors increase the possibility of suicide, but they might not be direct causes.

Risk Factors / Individuals:
- Previous suicide attempt
- Mental illness, such as depression
- Social isolation
- Criminal problems
- Financial problems
- Impulsive or aggressive tendencies
- Job problems or loss
- Legal problems
- Serious illness
- Substance use disorder

Risk Factors / Relationships:
- Adverse childhood experiences such as child abuse and neglect[4]
- Bullying
- Family history of suicide
- Relationship problems such as a break-up, violence, or loss
- Sexual violence

Risk Factors / Community:
- Barriers to health care
- Suicide cluster in the community or profession

NATIONAL SUICIDE PREVENTION LIFELINE™
1-800-273-TALK (8255)
suicidepreventionlifeline.org

Risk Factors / Societal:
- Stigma associated with mental illness or help seeking
- Easy access to lethal means such as firearms or medications
- Unsafe media portrayals of suicide[5]

General Warning Signs of Suicide

- **Observable signs of serious depression:** Unrelenting low mood, pessimism, hopelessness, desperation, signs of anxiety (including panic, insomnia, and agitation), withdrawal from usual activities or loved ones, sleep problems
- **Increased alcohol and/or other drug use**
- **Recent impulsiveness and taking unnecessary risks, reckless behavior**
- **Threatening suicide or expressing a strong wish to die**
- **Making a plan:** Giving away prized possessions, sudden or impulsive purchase of a firearm, obtaining other means of killing oneself such as poisons or medications
- **Unexpected rage or anger or any other dramatic mood change**

The emotional crisis usually preceding suicide is often recognizable and treatable. Although most depressed people are not suicidal, most suicidal people are depressed. Serious depression can be manifested in obvious sadness, but more often, it is expressed as a loss of pleasure or withdrawal from previously enjoyable activities.

If You're Concerned Someone May be Contemplating Suicide:

Take it Seriously
- Fifty to 75 percent of all suicides give some warning of their intentions to a friend or family member.
- Imminent signs must be taken seriously.

Be Willing to Listen
- Start by telling the person you are concerned and give him/her examples of why.
- If s/he is depressed, don't be afraid to ask whether s/he is considering suicide, or if s/he has a particular plan or method in mind.
- If the answer to the direct question is in the negative, but you sense s/he is holding back, ask more general questions, such as "Has the pain ever gotten so bad that you would rather end things than go on?" or "Do you sometimes wish you wouldn't wake up?" or "Do you sometimes feel like you're in a deep hole you can't get out of?"
- Ask if s/he has a therapist and/or are taking medication.
- Do not attempt to argue someone out of suicide. Rather, let the person know you care, that s/he is not alone, that suicidal feelings are temporary, and that depression is treatable. Avoid the temptation to say, "You have so much to live for," or "Your suicide will hurt your family." Suicidal ideations are formulated in a brain that is not responding well to reason and is ignoring its core survival instinct. It's like trying to talk

someone sober: it's a waste of effort, and it's insulting to the person in pain.

Encourage Professional Help

- Be actively involved in encouraging the person to see a physician or mental health professional immediately.
- Individuals contemplating suicide often don't believe they can be helped, so you may have to do a lot of encouraging. If you're not capable, involve someone who is.
- Help the person find a knowledgeable mental health professional or a reputable treatment facility, and take s/he to the treatment.

If you aren't sure who to call, call KYLAP. All contact is confidential under SCR 3.990, and we're prohibited from sharing information with other

Continued on following page

What To Do If You Think a Person Is Having Suicidal Thoughts

You cannot predict death by suicide, but you can identify people who are at increased risk for suicidal behavior, take precautions, and refer them for effective treatment.

- **Ask** the person directly if he or she (1) is having suicidal thoughts/ideas, (2) has a plan to do so, and (3) has access to lethal means:
  - "Are you thinking about killing yourself?"
  - "Have you ever tried to hurt yourself before?"
  - "Do you think you might try to hurt yourself today?"
  - "Have you thought of ways that you might hurt yourself?"
  - "Do you have pills/weapons in the house?"
    - ➤ This *won't* increase the person's suicidal thoughts. It *will* give you information that indicates how strongly the person has thought about killing him- or herself.
    - ➤ Take seriously all suicide threats and all suicide attempts. A past history of suicide attempts is one of the strongest risk factors for death by suicide.
    - ➤ There is no evidence that "no-suicide contracts" prevent suicide. In fact, they may give counselors a false sense of reassurance.
- **Listen and look** for red flags for suicidal behavior, indicated by the mnemonic:

IS PATH WARM?

Ideation—Threatened or communicated
Substance abuse—Excessive or increased

Purposeless—No reasons for living
Anxiety—Agitation/Insomnia
Trapped—Feeling there is no way out
Hopelessness

Withdrawing—From friends, family, society
Anger (uncontrolled)—Rage, seeking revenge
Recklessness—Risky acts, unthinking
Mood changes (dramatic)

Pandemic Fatigue

Continued from previous page

bar agencies including discipline or the judiciary. In fact, 90 percent of our cases are peer-to-peer confidential assistance that don't involve monitoring or discipline. We are neither mental health professionals, nor clinicians, but we can refer you to a provider or other resources to help you help the person who is struggling. Many of our volunteers across Kentucky experienced severe depression and made suicide attempts but went on to fully recover. Knowing that someone else has walked through this seemingly unending pain, and has survived, can give a lot of hope.

If these options are unavailable, call 911 or the National Suicide Prevention Lifeline at 1-800-273-TALK (8255) or 1-800-SUICIDE. Stay with the person until help is available.

This has been a hard year for everyone. Harder than we anticipated. We need help and we need to help one another. Become familiar with the signs and symptoms of someone in crisis and be bold in your efforts to help. And don't be ashamed to get your own help. The other upside to this dreadful pandemic is that we've all been introduced to telehealth and it's so much easier to get completely confidential help for mental health problems. You don't even have to leave your house. Or wear pants. Try it. You may save a life—yours or someone else's.[6]

— Yvette Hourigan is the director of the Kentucky Lawyer Assistance Program (KYLAP). KYLAP provides assistance to all Kentucky law students, lawyers, and judges with mental health issues and impairments including depression, substance or alcohol addictions, process addictions and chronic anxiety disorders. Ms. Hourigan graduated from Murray State University and the University of Kentucky College of Law. She is a Certified Employee Assistance Professional and an Adult Peer Support Specialist. She is a member of the ABA Commission on Lawyer Assistance Programs, Chair of the ABA/COLAP Diversity, Equity & Inclusion Committee, and a member of the National Task Force on Lawyer Well-Being.

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1 CDC, National Center for Health Statistics. Indicators of anxiety or depression based on reported frequency of symptoms during the last seven days. Household Pulse Survey. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Health Statistics; 2020. https://www.cdc.gov/nchs/covid19/pulse/mental-health.htm.

2 CDC, National Center for Health Statistics. Early release of selected mental health estimates based on data from the January—June 2019 National Health Interview Survey. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Health Statistics; 2020. https://www.cdc.gov/nchs/data/nhis/earlyrelease/ERmentalhealth-508.pdfpdf icon.

3 https://www.cdc.gov/suicide/?CDC_AA_refVal=https percent3A percent2F percent2Fwww.cdc.gov percent2Fviolenceprevention percent2Fsuicide percent2Findex.htm.l

4 https://www.cdc.gov/violenceprevention/aces/index.htm.l

5 https://www.cdc.gov/suicide/factors/index.htm.l

6 Suicide prevention resources: https://www.cdc.gov/suicide/resources/index.htm.l

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By Kate Dunnington

Overcoming Unsupported 'Burden' Objections for Electronically Stored Information

Increasingly, parties are failing to produce relevant discovery due to boilerplate objections that the production would be "unduly burdensome." Objections based on burden are not new; but when dealing with electronically stored information, (ESI), versus paper, the complexity of technology introduces a complication that parties exploit to hide relevant information. This article addresses how to overcome these baseless objections used as smokescreens to obstruct discovery.

The Burden of Proving Burden

Litigation always involves burdens and costs. Thus, a party raising a burden objection has the responsibility to show why the discovery should not be answered. "The objecting party '…must meet its burden of explaining how costly or time-consuming responding to a set of discovery requests will be, because that information is ordinarily better known to the responder than the requester.'"[1]

Specific information about the responding party's burden can be demonstrated to the court via an expert with specialized knowledge of the sources of ESI and associated costs of discovery. Additionally, the responding party should provide supportive information, such as the number of documents subject to review, custodial sources, systems, data sources, data volume and data types, and whether specific documents or document collections would potentially have privileged information under a protective order entered in the case.

A responding party cannot simply make a boilerplate objection and withhold discovery. It "must show specifically how each discovery request is burdensome and oppressive by submitting affidavits or offering evidence revealing the nature of the burden."[2] "The mere statement by a party that an interrogatory or request for production is overly broad, burdensome, oppressive and irrelevant" is inadequate.[3] A protective order preventing discovery based on "undue burden or expense" may be granted only "for good cause shown" under Ky. CR Rule 26.03; and the trial court is tasked with exercising discretion to "manag[e] discovery in light of the unique factors present in any particular case."[4]

Responding parties should readily provide information about potentially responsive ESI, as they have a duty to look for the information requested, identify the source and the location of the information, and show how they attempted to respond to discovery requests in good faith. These duties are set out in the classic Kentucky case of *Wal-Mart Stores v. Dickinson*[5] and are especially important in the context of ESI, when confronting a defendant hiding behind the smokescreens of technology. "Inherent in the duty created by CR 34.02 is the duty to search for and ascertain whether the requested documents exist and, if they do, where they are located…."[6] Indeed, the lawyer or his or her client signing the response to a document request "made pursuant to CR 34.01, holds himself out as having personal knowledge of the answers given and is subject to deposition…"[7] regarding the responding party's efforts to satisfy the request.

Importantly, each party has a duty to preserve evidence, which includes placing a litigation hold on relevant documents.[8] If a party has not even taken steps to determine the sources of potentially relevant information, then the logical conclusion is that it has not placed an appropriate litigation hold to preserve documents. Thus, inquiry into sources of ESI is imperative to ensure evidence has not been lost or destroyed.

Overcoming the "Loads of Data" Objection

Counsel should take heed of vague, unsupported "explanations" for undue burden, which are not connected to the facts of the case. Additionally, it is not a proper objection that a responding party has already produced "extensive" or "voluminous" discovery.

In *Wolford v. Bayer*, the Pike County Circuit Court addressed similar burden objections in the context of ESI, and its opinions are instructive.[9] Plaintiffs, who all asserted

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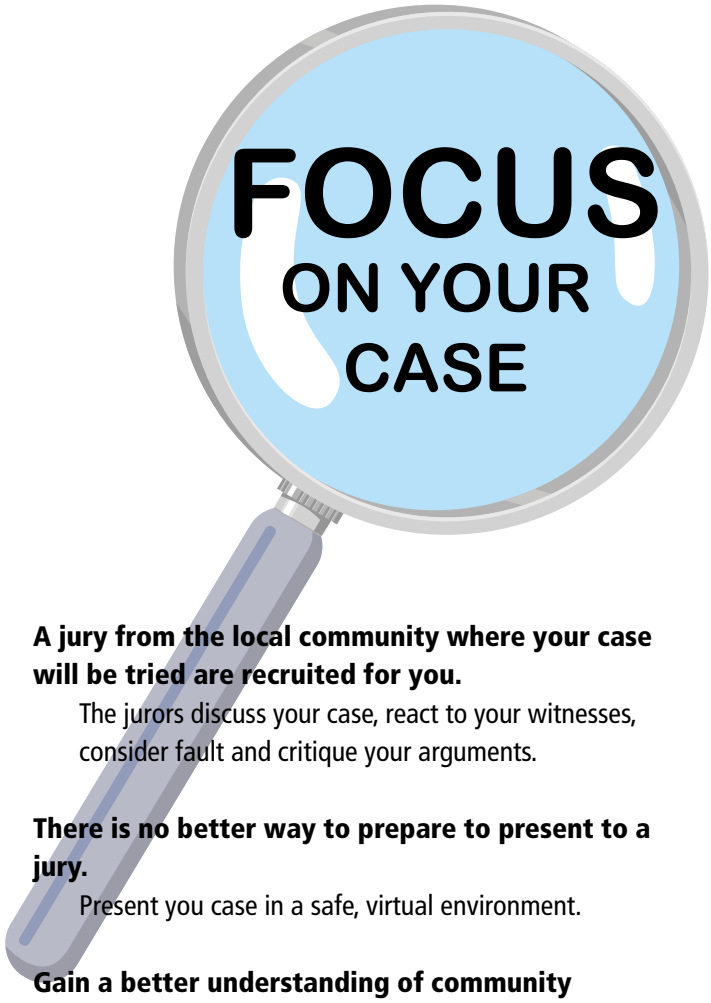

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Unsupported Objections

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products liability claims regarding their use of a medical device, brought two motions to compel based, in part, on the defendants' failure to produce a significant amount of responsive ESI. The defendants objected, claiming undue burden due to the amount of potentially responsive data, which they asserted was ten terabytes.[10] Based only on the defendants' representation of the size of the data,[11] their ESI expert opined that it would take nearly $50 million and approximately two years to complete a privilege review and produce the documents.[12]

The court entered an initial order overruling the defendants' burden objections, finding a "lack of convincing credible evidence presented by [Defendants] that production of clearly relevant information would place upon it a disproportionate burden."[13] The court further required the defendants to describe the ESI at issue, including what it is, how (in what form) it is kept, where it is, and how it is accessible.[14] Finally, the court ordered depositions of the parties' respective ESI experts, and held an evidentiary hearing to consider facts related to Defendants' burden objections.[15]

Ultimately, the court entered an order overruling the defendants' burden objections, relying on *Dickinson*.[16] Significantly, the defendants' expert was excluded on *Daubert*[17] because his opinions were based on hypothetical cost and burden assessments, and not the real data, facts, and orders of the case.[18]

This case explains that it is not enough to provide unsupported assertions that there are "loads of data" subject to production. Nor is it sufficient to rely on hypotheticals or unsupported estimates to demonstrate cost and burden, including those based on "industry accepted measures."[19] Indeed, there simply is no governing body for the electronic discovery industry that would prepare metrics for such a measure, as discovery activities can vary greatly.

Custodians and Data Systems Should Be Disclosed to Decrease Discovery Burden

A party can obstruct discovery by refusing to provide information necessary to identify and retrieve documents responsive to requests. Yet, at the most basic and fundamental level of discovery— identification of the sources of responsive information— parties are responding with evasive answers.

It is clear, under Kentucky law, a party can discover information related to the claim or defense of any party, including the "existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Ky. CR Rule 26.02(1). Therefore, counsel should first identify sources of responsive information, including custodians and data systems, that are compliant with their discovery responsibilities. It is only with this information that the parties and court can truly identify the information important to the case, based on *Dickinson*. Then, counsel can attempt to narrow the custodians and data systems to be searched, thus minimizing cost and burden.

A Search Protocol Can Decrease Burden

Discovery does not cease simply because a party demonstrates burden.

Cost-shifting[20] and targeted search strategies can be employed to lessen burden. For example, discovery review may be performed via a search protocol using key words or Technology Assisted Review (TAR). Maura Grossman, a leader on TAR, testified last year that in the more than 200 TAR reviews she "conducted or supervised, the median proportion of responsive documents (after data culling) has been less than one percent, and has seldom reached anywhere near five percent or more…"[21]

In *Wolford v. Bayer*, the Pike County Circuit Court required that the defendants propose a search protocol using technology.[22] This order was intended to address the defendants' burden objection related to its review of privileged material contained in ESI.[23] For example, search terms could be used on an email system to identify communications from lawyers that potentially could be privileged, decreasing the number of emails subject to such a privilege review. The order also encouraged transparency in forming a search protocol, requiring "that the information provided by [Defendant] regarding electronically stored information be in sufficient detail for Plaintiffs and their consultants to determine whether [Defendant] is proposing an accurate comprehensive plan for Technology Assisted Review."[24]

Structuring a key word or TAR protocol can be complex, but eDiscovery consultants can advise counsel on options that are best suited to minimize burden in their case.

Big defendants typically use the complexity of technology to obscure or bury vitally important and relevant information. However, a responsive party must provide a foundation connected to the specific facts of the case to meet its burden and sustain an "unduly burdensome" objection. Accepting these objections at face value may be a fatal mistake to ultimately proving your case. Avoid the trap of improper burden objections by first learning about the data at issue, and then offering strategic solutions.

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Endnotes on following page

Unsupported Objections

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1 *Brown v. Tax Ease Lien Servicing, LLC*, No. 3:15-CV-208-CRS, 2016 U.S. Dist. LEXIS 195843, 2016 WL 10788070 at * 30 (W.D. Ky. Oct. 11, 2016), quoting *Wilmington Trust Co. v AEP Generating Co.*, No. 2:13-cv-01213, 2016 U.S. Dist. LEXIS 28762, 2016 WL 860693 at *2 (S.D. Ohio Mar. 7, 2016). While Kentucky has not adopted the proportionality language in the 2015 amendments to the Federal Rules of Civil Procedure, the discovery process is intended to be equitable and the principles that guide courts of equity should be afforded deference in the administration of discovery rules. *See generally Proctor & Gamble Distributing Co. v. Vasseur*, 275 S.W.2d 941 (Ky. 1955).

2 *In re Heparin Prods. Liab. Litig.*, 273 F.R.D. 399, 410-411 (N.D. Ohio Jan. 24, 2011) (internal citations omitted).

3 *Id.*

4 *Commonwealth v. Wingate*, 460 S.W.3d 843, 849 (Ky. 2015).

5 *Wal-Mart Stores v. Dickinson*, 29 S.W.3d 796, 804 (Ky. 2000).

6 *Id.*

7 *Id.*

8 *See Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 791 (Ky. 2011).

9 *Wolford v. Bayer Corporation, et al.*, No. 16-CI-00907, Pike Cnty. Ky. Cir. Ct.

10 Order, *Wolford v. Bayer Corporation, et al.*, No. 16-CI-00907 (Pike Cnty. Cir. Ct. Aug. 26, 2020).

11 *Id.*

12 *Id.*

13 Order, *Wolford v. Bayer Corporation, et al.*, No. 16-CI-00907 (Pike Cnty. Cir. Ct. Oct. 16, 2019).

14 *Id.*

15 Order, *Wolford v. Bayer Corporation, et al.*, No. 16-CI-00907 (Pike Cnty. Cir. Ct. Dec. 17, 2019).

16 *Id.*, *and see Dickinson*, 29 S.W.3d at 804.

17 The Court held that the defendants failed to inform their ESI expert "of facts that would allow him to form opinions of [Defendants'] actual burden, so his opinions are based on insufficient information and therefore are not persuasive. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Since [Defendants] did not provide [their expert] with facts about their actual discovery burden in this case, his testimony is not helpful to this Court and does not meet the criteria of KRE 702(3), which requires that the expert witness applies 'principles and methods reliably to the facts of the case.'" Order, *Wolford*, No. 16-CI-00907 (Dec. 17, 2019).

18 *See generally* Order, *Wolford*, No. 16-CI-00907 (Dec. 17, 2019).

19 *Id.*

20 *Universal Del., Inc. v. Comdata Corp.*, No. 07-1078, 2010 U.S. Dist. LEXIS 32158 at *22 (E.D. Pa. Mar. 31, 2010); *see also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317-18 (S.D.N.Y. 2003) ("The Supreme Court has instructed that 'the presumption is that the responding party must bear the expense of complying with discovery requests. . . .' Any principled approach to electronic evidence must respect this presumption. Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations…Thus, cost-shifting should be considered only when electronic discovery imposes an 'undue burden or expense' on the responding party. The burden or expense of discovery is, in turn, 'undue' when it 'outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'").

21 Supplemental Grossman Declaration, *William Morris Endeavor Entertainment, LLC, et al., v. Writers Guild of America, West, Inc., et al.*, Case No. 2:19-cv-05465-AB-AFM, Doc. 108-3 (C.D. Cal, May 5, 2020).

22 Order, *Wolford*, No. 16-CI-00907 (Oct. 16, 2019).

23 *Id.*

24 Order, *Wolford*, Civil Action No. 17-CI-002299 (Aug. 26, 2020).

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By Greg Morrell

Mindful Mediation

Many years ago, on my first day of my first job as a lawyer, my boss sat me down and told me, "There is no case that is so good that you don't stand at least a ten percent chance of losing it and no case so bad that you don't stand at least a ten percent chance of winning it." I learned the truth of the first part of that sage advice the hard way more times than I care to admit. Hoping to spare others that fate, I offer the thoughts and observations I garnered through participating in countless mediations during my career as an insurance defense lawyer and during my two years as a private mediator, about how to get the most out of mediation.

Before Mediation

In order to get the most out of mediation, you must marshal facts and documents and educate your clients. The more complete the exchange of facts and evidence, the better counsel and parties will understand the relative strengths and weaknesses of each side—and the better the mediator will be able to use his time with counsel and parties to bring the case to resolution. A client who has been well-counselled as to the process will be more comfortable during the mediation, be better able to actively participate, and be more confident in making decisions.

Gather and Update Bills and Records

Insurers require their adjusters to document their files. They cannot just take the word of plaintiffs or their counsel. Adjusters' files are subject to scrutiny by auditors. If payments have been made without sufficient documentation, the adjuster gets dinged. Someone on the defense side is matching every bill to every record, and if they don't jibe, they may not give credit.

Documentation issues often arise with wage loss claims. If the plaintiff is seeking lost wages, make sure you provide employer verification and doctors' recommendations for time off from work or work restrictions. In self-employment cases, give the defense tax returns, or at least the appropriate schedules and pertinent business records. The plaintiff's testimony alone as to how much they made and how much they lost due to the accident may get the issue to the jury, but it will not get any money from an insurance company at mediation.

Nothing causes as much consternation on the defense side as having unanticipated bills and records dumped on them shortly before or, even worse, at the mediation. Before the mediation, the adjuster prepares a detailed authority request, which supervisors and managers then review. Often, there is a roundtable discussion before authority is granted. In high value cases, the authority request will be presented to regional managers and sometimes to vice presidents. The adjuster bases authority requests upon documents secured through a release or that plaintiff's counsel provided. If there are just a few updated records and bills regarding continuing treatment in a case in which the defense knows there is ongoing treatment, this is usually not much of an issue. If the newly disclosed records and bills are more than that, it is like trying to add forgotten baking powder to a cake that is half-way baked. The defense may need to cancel or terminate the mediation to allow a more thorough review of the new information. The downside of this for the plaintiff is that a carrier who was forced to deal with a last-minute document dump will be less prone to come up with more money.

Willingness to Negotiate

It should go without saying, but to have a successful negotiation both sides need to agree to mediation, and you should make your client well aware of this. There are cases when there is a rational basis for refusing to come off of a party's pre-mediation position, such as when there is significant likelihood of a judgment over policy limits; when a defendant's carrier has already exhausted its authority; or when a defendant with the contractual right to do so, refuses permission to settle.

There are other cases when the client has just dug in his or her heels, for good reason or bad. In cases such as

these, the better practice is to inform the opposing side of this well before the mediation and perhaps seek relief from a court order requiring ADR. Some courts will still require the mediation, but if everyone involved knows the lay of the land, you can abbreviate the process and save costs. Surprising the other side on the day of the mediation with news that your client is not willing to deviate from his or her pre-mediation position at the very least engenders ill will on the part of the opposing side. The opposing side may even seek sanctions from the court for failing to participate in good faith.

Extra-Contractual Damages

If you believe the carrier has been set up for refusing a demand within policy limits and are bent on extra-contractual damages, you should communicate this to defense counsel well in advance of the mediation. This is because payment of any amount in excess of policy limits requires high level approval, most often at the vice-presidential level. This is a lengthy and anxiety producing process. If you do not divulge your client's insistence on extra-contractual damages until shortly before or at the mediation, it usually leads to the cancellation or termination of the mediation. This early warning recommendation does not apply to most first-party cases, since extra-contractual damages have generally been pled, and the case is already on the radar of the home office. Similarly, if you are seriously seeking personal contribution from an insured defendant, you should communicate this well before the scheduled date for the mediation to allow for the personal participation of the defendant.

Confidentiality

You should make your clients aware of the confidentiality of the mediation. It increases their comfort level to know that what they say to or at the behest of the mediator cannot be used against them. There is both external and internal confidentiality. The first is mandated by statute and rule.[1] Counsel your clients, however, that just because a party discloses a fact at mediation does not render the fact inadmissible. The statute protects only communications made to or at the behest of the mediator.[2] However, later use of the facts as part of witness examination must not reference the mediation process.

Internal confidentiality encompasses facts, information, arguments, strategy, etc., of which the opposing party may be unaware, but which you disclose to the mediator to facilitate negotiations. Unless the exceptions under Colorado Revised Statues §13-22-307(2) (a)-(d) apply, mediators should always honor the request by one party to not disclose to the other. Many mediation statements contain general language that anything contained in the mediation statement should not be disclosed without permission. Generally, when asked by the mediator, most counsel will state that there is nothing in their statement that they would object to being discussed with the other side. With that in mind, if there are particular matters that a party wishes not to disclose, it is better to state that specifically in the mediation statement or at the mediation, rather than relying

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Mindful Mediating

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upon the generic language found in the introductory paragraph.

Unfair Realities

Many unfortunate and unfair facts of life impact case values. The value of a plaintiff's claim should be the same whether the defendant is an individual, a large corporation, or insurance company. We all know that it isn't. The value of a plaintiff's claim should be the same regardless of race, nationality, religion, or immigration status. We all know that it is not. Racism, bigotry, and xenophobia are alive and well in this country, and implicit prejudices can negatively impact verdicts. It is difficult to discuss this with those who bear the brunt of these prejudices, but it is necessary.

Power of the Carrier

Another fact of life is that the power lies with the carrier. By far the biggest advantage that carriers have is that they can easily afford to be wrong about a case while most plaintiffs cannot. Unless there is an excess verdict or one close to or above seven figures, most verdicts adverse to defendants will not even attract any home office attention. It is, therefore, easier for the defense to draw a hard line in the sand. The disparity in power also means that an insurance company will seldom pay in settlement what they would consider to be the full value of the case, absent a compelling reason.

At the Mediation

The big day has arrived. You have marked off all the boxes on the pre-mediation checklist. Most plaintiffs really want to walk away with a done deal. As counsel, you want the defense side to keep an open mind and be willing to listen to and understand the plaintiff's position, even though the defense likely disagrees with it. You do not want to do anything that may cause the carrier to retrench.

If I Have to Listen to that Mediator's Opening Remarks One More Time ….

Every mediator has an opening spiel that counsel has sat through, in one form or another, countless times. Some counsel try to move into the active negotiations immediately. But the opening remarks serve two important purposes.

The first is educational to inform the non-lawyer participants as to the rules governing the mediation, the advisability of settlement, and how the process works. This is often repetitious of what counsel has, or should have, already advised the client. Although repetitious, it is reinforcing.

Its greater purpose is to allow the mediator to establish rapport with the plaintiff. Without some comfort level between the plaintiff and the mediator, the plaintiff may tune out the mediator. The discussion can sometimes involve what appears to be idle personal chit-chat. The more points of commonality between the mediator and the plaintiff there are, the greater the chance of a successful outcome.

Increasing Pre-mediation Demands

There are occasions where one side or the other starts with a significant increase in its pre-mediation demand or decrease in its pre-mediation offer. This is almost always counterproductive. Certainly, there are instances where investigation and discovery uncover new evidence that significantly increases or decreases the value of the case. When this occurs, changes in pre-mediation positions are warranted. The mere fact that suit has been filed, discovery has

been engaged in or experts have been retained does nothing to change the value of the case. The risk to plaintiffs in suddenly increasing pre-mediation demands without significant justification is that it will anger the defense side. This likely makes the defense less amenable to coming up with more money to get the case resolved than it otherwise might have been. They may not even be willing to get to the amount of their authority.

Negotiating Above Policy Limits

Sometimes plaintiffs open the mediation with demands above policy limits, even when they have every intention of settling below policy limits. Negotiating with what the defense perceives as "play money" is counterproductive. Some carriers have a policy of not responding until there is a demand at or below policy limits. Some will sigh and continue to negotiate close to where they would have arrived anyway. But they certainly will not be inclined to push beyond that.

Reality Test Experts

Both sides tend to have a jaded view of the other side's experts, especially those who are frequent fliers. Both sides, through their respective bars, have mountains of devastating ammunition just waiting to be unleashed during cross of the opposing expert. Yet there are many cases where the "usual suspects" carry the day. Perhaps it is not so much the bias and motive of the expert, but how well or poorly the conclusions of the expert fit in with the underlying facts of the case.

If a plaintiff's IME expert lists new symptoms, makes new diagnoses, or recommends treatments that are not mentioned in the records of the treaters, the defense will ignore that expert, and you will have wasted money in securing that report.

Defense IMEs often opine that because studies show that typical soft-tissue injuries resolve within six to eight weeks, therefore, so must have the injuries of the plaintiff. This is fallacious reasoning and a misuse of statistics. If, however, the records show that plaintiff had significantly resolved in eight weeks and did not resume treatment for several months thereafter, that same defense expert's opinion stands a good chance of being accepted by the jury.

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THANK YOU
to all who give to the Kentucky Justice Association.

Mindful Mediating

Continued from page 23

Settlement Conditions Beyond the Routine

With rare exceptions, all settlement agreements contain language requiring a dismissal of any pending litigation, a full and final release, and hold harmless/indemnification language. The defense side will not usually balk at making the settlement conditional upon securing permission from a UIM carrier or probate approval. If either party requires anything beyond that, it is best to bring that up earlier rather than later. On the plaintiff's side, these may include who will pay for necessary court approval of settlements involving protected persons, or an unwillingness to execute a full and release in UM/UIM claims. On the defense side, these can include confidentiality and non-disparagement clauses or hold backs for statutory liens. Counsel should mention these requirements early in the game. Otherwise, they can become deal breakers or lead to demands for additional consideration.

But We Made a Much Bigger Move Than They Did

Parties often get hung up on the relative size of the respective offers. Keep in mind that plaintiffs are on the infinite side of the money line, but the defense side is bounded by zero. It is not important how the moves compare to each other, but how they compare to the realistic value of the case. If one side or the other starts far afield of that, that side will have to make bigger moves if the case is to be resolved.

Brackets and Mediator's Proposals

Brackets are sometimes overused. If both sides are far distant from the reasonable value of the case and are proceeding at a snail's pace, brackets are helpful to expedite the proceedings. If, however, both sides are moving along nicely, a party's proposal of a bracket does nothing more than telegraph the party's ultimate position because the other side will assume that party is aiming for the midpoint. Often, party-proposed brackets are met with counter brackets, which, because of how they are perceived, are not much different than specific dollar demands.

A mediator's proposal can be helpful as a last-ditch attempt to achieve a settlement. The mediator provides a number to both sides that the mediator believes to be a reasonable settlement number. It is not necessarily a number that reflects the mediator's opinion as to the value of the case. Each side then informs the mediator if the number is acceptable. If both sides accept the proposal, the mediator informs both sides that a settlement has been reached. If one or both sides reject the proposal, the mediator informs the parties that a settlement has not been reached but will not reveal the decision of one side to the other. This way the respective negotiating positions of the parties are preserved.

Don't Leave Until the Fat Lady Sings

It does not matter where the parties begin. What matters is where they end. Some may disagree with me on this, but I believe that no matter how unreasonable the defense's opening offer is, it is best to find out their top dollar. It might be closer to an acceptable range than you think. The only way to find out is to see the process through to the end. Even if the final offer is not acceptable, it will at least provide some information as to the best way to proceed. It might be that you have no choice but to gear up for trial. It might also be that the provision of some additional records or information could secure a higher offer.

Don't Give Up the Ship

Although the mediation is often the best time to settle the case, a mediation that does not result in a settlement at the mediation is not a failure. Sometimes it takes time to digest the results and think about the other party's arguments, which may result in a later settlement. Do not hesitate to involve the mediator in this.

The process of settlement can be akin to a root canal. You must manage your expectations and those of your client because you seldom get what you want. A mediocre settlement, however, is preferable to a bad trial. That said, you just have to try some cases. But before marching to trial, keep in mind the advice given to me by my first boss. Take it from me, it is not fun to be on the losing side of those ten percent of cases.

— Greg Morrell has close to forty years' experience as a trial lawyer. He is the owner of Morrell's Mediation Services, LLC, dedicated to providing cost effective alternative dispute services to the civil bar. You may reach him at greg@morrellsmediations.com.

This article originally appeared in the August/September 2019 issue of *TrialTalk*®. Reprinted with permission of the Colorado Trial Lawyers Association.

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1 C.R.S. §13-22-307(2) and C.R.E 408.

2 *Yaekle v. Andrews*, 195 P.3d 1101, 1109 (Colo. 2008), §13-22-307(4).

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By Scarlette Burton Kelty

Getting Sanctions for Spoliated Evidence

In one of my recent trucking cases, the federal court nearly ordered defense counsel to sit for a deposition due to spoliated evidence. However, the case settled before the court ruled.

Reliance on counsel to gather and preserve evidence and prevent rolling destruction seems like a way to protect relevant information and safeguard the preservation process. However, that approach could backfire if defense counsel argues that preservation (or lack thereof) of evidence is protected by attorney-client privilege.

We all know step one to a spoliation sanction is to send the spoliation letter as quickly as possible. Simultaneous with the filing of the lawsuit, discovery should be propounded seeking the *exact* information, data, documents, etc., set out in your spoliation letter. For ease of a court's review, I would suggest identically numbering the items in your spoliation letter and in your requests for production.

In my case, the preservation letter, sent seven days after the wreck the case was based on, required the preservation of the driver's logs for the prior six months. According to the C.F.R., the logs were required to be in the company's possession on the date of the wreck.

When counsel failed to produce the logs in discovery, lodging objections of relevance, breadth, disproportionately, etc., etc., etc., the court allowed me to file a motion to compel.

Even then, when briefing the motion and participating in a hearing with a federal magistrate, defense counsel never admitted the logs actually had not been preserved. Instead, he maintained the objections, which were ultimately overruled.

Even when the court's ordered deadline came for the production of the logs, defense counsel would not admit they no longer existed. It was only upon my continued inquiry that he fessed up and admitted they had not been preserved.

Why didn't he preserve the data? Because he was not required to comply with a "wish list from a personal injury lawyer," according to him.

District Courts in New York and Delaware have held the duty to preserve evidence, even in the absence of a spoliation letter, runs *first* to counsel, then to the client.[1] A spoliation letter is not required to trigger preservation of certain evidence, though it certainly spells it out without question. The trigger for the required preservation of evidence is the moment litigation is "reasonably anticipated."

FMCSA regulations place additional requirements on trucking companies. Chapter 379 and sections of 49 C.F.R. require trucking companies to exercise reasonable care based on their knowledge and experience of handling truck wrecks in the industry, and also require all documents related to an insurance claim be preserved for one year after settlement.

In my case, in order to get into discussions with the court about sanctions, I needed to find out *why* the logs were not preserved. The Sixth Circuit has adopted the majority position that the spoliator's mental state and/or culpability is at issue when determining the appropriate sanction.[2] So I sought a F.R.C.P. 30(b)(6) deposition of the trucking company.

Defense counsel objected, asserting attorney-client privilege since, according to him, he was the one involved in determining what should be preserved and ultimately preserving it. Neither the court nor I wanted to take his word for it.

Not surprisingly, the corporate representative testified that counsel had complete control over the preservation and destruction of the logs. Of course, then counsel claimed all information regarding the actual spoliation was protected by the attorney-client privilege and not discoverable, and the company wholly claimed advice of counsel. However, an advice of counsel assertion cannot be used as both a sword and a shield. Once a party relies on counsel's advice to defend their actions, there is an implied waiver of the attorney-client privilege.[3] I also argued that the crime-fraud exception applied.

In my motion to depose defense counsel, I argued that

in order to get a sanction for the spoliation, I had to explore the mental state of counsel in regard to the failure to preserve the evidence.

Several factors go into a court's granting a motion for sanctions, and in what sanction the court imposes. First, keep in mind the duty to preserve evidence is a duty to the court, not a duty to the adversary. Second, the court has to consider the spoliator's conduct, intent, how egregious it was, and any prejudice caused by the spoliation. All sanctions have to be proportional and, of course, sanctions serve as both a punishment and a deterrent.

While the motion was still pending when the case settled, I certainly think it was a necessary motion to get justice for my client and to deter similar conduct. In addition, it played a role in the case settling. We would all agree that taking the deposition of opposing counsel is an extreme measure, but when the conduct warrants, it can be a powerful tool and one avenue to sanctions.

It was the company and counsel who chose who would handle preservation of evidence. They chose counsel hoping to hide behind attorney-client privilege. Thanks to motions like mine, that may not be a safe bet anymore. I certainly hope it's not.

— Scarlette Burton Kelty, Contributing Club, is an associate at the Poppe Law Firm in Louisville. She concentrates her practice in catastrophic injury cases, professional negligence, nursing home neglect, and insurance bad faith. She is the treasurer of KJA.

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1 *Telecom Intn'l Am., Ltd. v. McNeil,* 189 F.R.D. 76, 81 (S.D.N.Y. 1999); *Mosel Vitelic Corp. v. Micron Technology, Inc.*, 162 F.Supp. 2d 307, 311 (D. Del. 2000).

2 *See Beaven v. U.S. Dept. of Justice*, 622 F. 3D 540 (6th Cir. 2010).

3 *See U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); *Bauer v. Saginaw,* 14-11158 2005 U.S. Dist. LEXIS 43098 (E.D. Mich. Feb. 23, 2015).

By Jeff Adamson

Kentucky Supreme Court and Court of Appeals Key Decisions for December 2020 and January 2021

Kentucky Supreme Court Decisions

Federal Quality Assurance Privilege for Nursing Home Facilities

Henderson Cty. Health Care Corp. v. Wilson
612 S.W.3d 811 (Ky. 2020)
To be Published

A defendant skilled nursing facility (Redbanks) petitioned for a writ to prohibit the enforcement of an order compelling Redbanks to produce certain consultant reports to Roland McGuire (McGuire), the real party in interest.

Jacqueline E. McGuire (Ms. McGuire) was a resident at Redbanks from 2010 to 2016. According to the complaint filed by McGuire, who is Ms. McGuire's brother, Ms. McGuire suffered multiple injuries while at Redbanks, including serious bedsores. Ms. McGuire eventually died at another facility, and McGuire filed suit against Redbanks.

During the discovery process, McGuire served Redbanks with requests for production of documents. The following three requests are at issue in the writ.

> Request for Production No. 41: Please produce all surveys, mock survey visits, documents, reports, and tools, including quarterly site visits and all focused/follow up visits, applicable to the residency of Jacqueline E. McGuire, and six months before, which memorialize Defendants' evaluation and monitoring of the facility's compliance with mandatory regulations, policies, and procedures, and care given to the residents.
>
> Request for Production No. 42: Please produce all documents reflecting and/or reviewing clinical outcomes in the facility during the residency of Jacqueline E. McGuire including Dashboard and Clinical Outcomes reports (COR) and QI/QM Reports and Flags.
>
> Request for Production No. 48: Please produce all documentation and/or reports from any consultant or management personnel hired to evaluate the adequacy of care rendered to residents at the facility anytime during residency.

The Federal Quality Assurance Privilege (FQAP), 42 U.S.C. § 1396r(b)(1)(B) and 42 U.S.C. § 1395i-3(b)(1)(B) is a subsection of the Federal Nursing Home Reform Act (FNHRA), 42 U.S.C. § 1396r et seq.; 42 U.S.C. § 1395i–3 et seq.; 42 C.F.R. 483, *et seq.*, and it requires skilled nursing facilities and nursing facilities to establish a "quality assessment and assurance committee" in an attempt to ensure nursing homes are vigilant about the quality of care their residents are receiving. However, it also protects from disclosing the records of that committee.

In compliance with the FNHRA, Redbanks had established a Quality Assurance Performance Improvement (QAPI) committee. Redbanks' QAPI committee contracted with an independent contractor, Wells Health Systems (Wells), to consult with it and, according to the trial court, "to evaluate the facility's quality of care and provide guidance where care can be improved." Wells employs nurse consultants who performed site visits at Redbanks approximately monthly. These nurse consultants examined residents' medical charts ("chart audits"), observed Redbanks' staff perform their duties ("compliance rounds"), and reviewed various statistical data. They compiled reports that were then provided to the QAPI committee. The nurse consultants were not employees of Redbanks and were not members of Redbanks' QAPI committee.

The trial court found the monthly nurse consultant reports were not records of the QAPI committee, as they were not created *by* the committee, and ordered Redbanks to produce them. Upon a writ, the Court of Appeals denied the writ petition, holding that the trial court did not err in finding the documents were

not protected by the FQAP, as they "were not generated by Redbanks' quality assurance committee, 'nor were they minutes, internal papers or conclusions of' the committee." This appeal followed.

Unlike the Court's prior consideration of the scope of FQAP in *Richmond Health Facilities-Madison, LP v. Clouse*, 473 S.W.3d 79, 84 (Ky. 2015), where it found the nursing facility failed to meet its burden because they "failed to produce the documents for an in-camera review or even produce a relatively detailed description of what the documents contained," this time Redbanks filed various nurse consultant reports under seal as part of its writ petition. Having this, the Court proceeded to reach the question it "left unanswered" in *Clouse*.

In the review of the two dominant interpretations of FQAP's scope, the "New York Rule" and the "Missouri Rule," and weighing the competing interests in favor and against the privilege, the Court declined to adopt the narrower interpretation of the "Missouri Rule" of only protecting the quality assurance committee's own documents from disclosure, such as minutes, internal working papers, or statements of conclusions. Instead, the Court adopted a case-by-case approach which permits the trial court to examine how a document was generated, why it was generated, and by whom it was generated before determining whether the privilege applies. The Court proceeded to provide trial court's guidance, stating:

1. Documents generated outside of the committee and for purposes unrelated to the committee are not protected by the FQAP merely because the committee reviews the documents during the course of its work. This is true even if those documents are used in creating privileged quality assurance documents. Documents kept in the facility's ordinary course of business or that are kept as a part of a patient's medical record are not privileged. If documents are required to be generated pursuant to other legal requirements, those documents are not privileged.
2. [I]f a document is generated for the express purpose of aiding the committee in its work, then it will likely be privileged." For instance, "documents created by or at the behest of a quality assurance committee for quality assurance purposes of the committee will likely be protected by the FQAP" or "documents that otherwise would have been generated by the committee in the course of its work but were generated instead by an outside source at the behest of the committee will also likely be protected."

Based on the record, the Court found that Redbanks' QAPI committee contracted with Wells "to evaluate the facility's quality of care and provide

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guidance where care can be improved," which the Court determined to be "exactly the activities the QAPI committee is statutorily required to perform." The reports generated by the nurse consultants employed by Wells and provided to Redbanks' QAPI committee were ultimately "used by the committee to improve care at the facility, i.e., for quality assurance purposes." On these grounds, the Court reversed the Court of Appeals and held that the subject nurse consultant reports are protected by the FQAP.

Savings Statute and Medical Review Panels

Smith v. Fletcher,
613 S.W.3d 18, 19–28 (Ky. 2020)
To Be Published

Mark and Chinena Smith filed a complaint against certain medical providers under the Kentucky Medical Review Panel Act (MRPA), Kentucky Revised Statutes (KRS) 216C.005, et seq., declared unconstitutional by *Commonwealth v. Claycomb*, 566 S.W.3d 202 (Ky. 2018). After the claims worked their way through the panel process, the Smiths filed a complaint in circuit court against these same medical providers and added entities that allegedly employed them. Subsequent to the filing of the Smiths' complaint in circuit court, the Supreme Court decision in Claycomb, wherein the Court declared the MRPA unconstitutional, was finalized. The defendants then moved the circuit court to dismiss the Smiths' complaint as violative of the statute of limitations. The trial court found the complaint to be untimely and dismissed the case. The Smiths appealed, and the Supreme Court accepted transfer of the case from the Court of Appeals.

Kentucky's Medical Review Panel Act (MRPA), Kentucky Revised Statutes (KRS) 216C.005, et seq., went into effect on June 29, 2017. It required potential litigants to file any "malpractice and malpractice-related claims against a health care provider, other than claims validly agreed for submission to a binding arbitration procedure" with a medical review panel prior to filing suit in circuit court. Once the claimant filed his or her proposed complaint with the medical review panel, the applicable statute of limitations was tolled "until ninety (90) days after the claimant has received the opinion of the medical review panel." KRS 216C.040. On November 15, 2018, this Court issued its opinion in *Commonwealth v. Claycomb*, 566 S.W.3d 202 (Ky. 2018), holding that the MRPA was unconstitutional, but did not address the statute of limitations or tolling issues.

In the interim, on February 8, 2018, while *Claycomb* was pending before the Supreme Court, Mark and Chinena Smith filed their medical negligence claims with the Medical Review Panel, as required by KRS 216C.020, asserting claims against certain medical providers. The filing of their claim with the medical review panel served to toll the applicable statute of limitations on their claims under KRS 216C.040(1), which would have otherwise expired on or about April 12, 2018.

The Smiths' case was presented to a medical review panel, which issued its opinion on October 29, 2018. Under KRS 216C.040(1), the applicable statute of limitations on the Smiths' claim continued to be tolled until ninety days after receipt of that decision. The Smiths then filed suit in Fayette Circuit Court on January 18, 2019, within the ninety-day window and prior to *Claycomb* becoming final on February 14, 2019. In circuit court, they alleged claims not only against the same medical providers, but also against their employers under a theory of vicarious liability.

After *Claycomb* became final, the defendants filed motions to dismiss alleging that the Smiths' one-year statute of limitations under KRS 413.140(1) ran on April 12, 2018, at the latest. They argued that this Court's decision in *Claycomb* declared the MRPA unconstitutional as a whole and therefore void ab initio. As such, the Smiths could not rely on the tolling provision of the MRPA to extend the deadline by which they had to file their complaint. The trial court granted dismissal and this appeal followed upon a transfer from the Court of Appeals.

The Supreme Court found KRS 413.270 to be determinative. KRS 413.270 states as follows:

> (1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.
>
> (2) As used in this section, "court" means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America.

In rejecting arguments of Appel-

lees that the medical review panel is not a "court" as defined by the statute because it is neither "quasi-judicial" nor is it a "tribunal," the Court held that "adjudication" does not alone determine whether an administrative body is "quasi-judicial." Courts must examine whether "the agency's action required use of discretion and whether the agency was 'required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for [its] official action.'" Citing its numerous duties and functions, the Court found this to be precisely what the Medical Review Panel was charged to do under the MRPA.

Having determined that KRS 413.270 applies to the Smiths' claims, the Court held the 90-day period permitted under the savings stature did not begin to run until February 14, 2019, the date on which the *Claycomb* decision became final. Thus, any litigant who timely filed with the Panel and then filed in circuit court before May 15, 2019 was saved.

[The Court affirmed dismissal of the claims against the entity defendants who were not named until the Smiths filed a complaint in circuit court.]

Ex Parte Communications with Healthcare Providers

Beck v. Scorsone
612 S.W.3d 787, 788–93 (Ky. 2020)
To Be Published

The defendant healthcare providers moved the trial court for a Qualified Protective Order (QPO) that, if granted, would authorize their counsel to request voluntary ex parte interviews of the plaintiff's non-party treating healthcare providers in compliance with state law and HIPAA regulations.

The plaintiff opposed the QPO motion with three points. First, she argued that *Caldwell v. Chauvin* merely provided a procedure for HIPAA-compliant QPOs but did not establish a right for medical-negligence defendants to ex parte communications with a plaintiff's treating healthcare professionals. Second, she argued that she had an ongoing physician-patient relationship with certain treating physicians at the Medical Center that may be jeopardized if ex parte interviews with them were authorized and conducted. Lastly, while acknowledging there is no physician-patient privilege recognized in Kentucky, she posited that confidentiality obligations are imposed on physicians by statutes and codes of medical ethics in other jurisdictions, though without the force of law in Kentucky, the violation of which could expose the medical professional to discipline or liability. The defendants' counsel responded that these interviews are voluntary, that she was not aware of any instance of a Kentucky physician subjected to professional discipline for consenting to ex parte interviews, and that ex parte interviews simply "levels the playing field" in terms of case investigation and the expense of discovery.

To the defendants' "level playing field" argument at the hearing on the QPO motion, the trial court replied, "Well, yeah, but it's [Plaintiff's] doctor." Acknowledging the physician's right to refuse an ex parte interview, the trial court continued,

> [F]or me to stamp approval on something like this–these ex parte communications–I really have a hard time doing that unless there's some unique fact situation, whether it's the behavior of the healthcare provider or the patient.... But

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> absent something unique.... I think it's not good policy to allow ex parte communications. So, I appreciate the opportunity to do this, I've had this opportunity a number of times and I've declined every time because I didn't think there was a unique fact situation that called for it. So, I appreciate your advocacy, but I'm going to deny the request."

When the defendants asked what "unique fact situation" might persuade the trial court to authorize a similar request, the trial court responded: "I haven't granted [these motions] yet because I haven't seen any unique fact situations. I'm open to it, I don't know, but it's got to be something unique, you know, that would really convince me that ex parte is appropriate."

The trial court denied the QPO and inserted into its order—apparently on the trial court's own motion—the following additional prohibition:

> Other than the Defendants whom Defense Counsel represents herein, no ex parte communications by the Defendants or their counsel shall take place with the plaintiff's treating physicians and healthcare provider regarding the facts and issues in this case.

At a later hearing prompted by the defendants' motion to clarify the meaning of the trial court's language imposing this discovery prohibition, the trial court confirmed the language in the order, stating that the language prohibits any ex parte communication about the facts and issues in the case unless counsel is personally representing the treating physician or healthcare provider as a client.

The Court of Appeals declined to issue a writ, holding the defendants had an adequate remedy by appeal regardless of whether the trial court acted erroneously by issuing the discovery prohibition. This appeal followed as a matter of right.

The Supreme Court reversed the Court of Appeals stating that, while in *Caldwell* it determined no absolute right exists to conduct ex parte communications with nonexpert treating healthcare professionals, no default restrictions, as a matter of Kentucky law and policy, limit them either. The Court found error in the trial court prohibiting all ex parte contacts with healthcare witnesses on the grounds that "it's not good policy to allow ex parte communications." The trial court identified no other reason grounded in the facts of the case before it to prohibit all ex parte interviews with potential witnesses who are physicians or healthcare workers. The only basis given for the trial court's order was its own personal policy preference rather than the application of law to facts.

The Court directed writ be issued without prejudice to either party to address the discovery matter again before the trial court. The Court further directed that, upon the Court of Appeals' issuance of the writ, the trial court may, upon appropriate motion, revisit the issue of the defendants' ex parte contacts with the plaintiff's unnamed treating physicians and other healthcare providers and, in the exercise of its discretion, issue further orders as may be legally justified by the facts of the present case.

Motions to Substitute and Revive Actions Pursuant to CR 25.01 and KRS 395.278

Estate of Benton by Marcum v. Currin
615 S.W.3d 34 (Ky. 2021)
To Be Published

In late 2012, John Benton, Jr., filed this action in the Boone Circuit Court to cancel a deed granted to Jan and Tim Currin, alleging failure of consideration and fraud in the inducement. The Currins filed an answer and counterclaim. In May 2014, Benton died. Seven months later, Marcum, Benton's daughter who had been appointed executrix of her father's will, filed a motion under CR 25.01 to

substitute the estate in the action. The following day, the Currins filed their motion to revive their counterclaim. Both motions were granted in January 2015. After several more years of litigation, and after a deadline for dispositive motions had passed, the Currins moved to dismiss the action, claiming that Marcum's motion for substitution was flawed because it did not also seek to revive the cause of action. The trial court denied the motion.

The Court of Appeals addressed only the issue of revival, holding that while Marcum had timely moved for substitution pursuant to CR 25.01, she failed to properly revive the action by a separate KRS 395.278 motion. The Supreme Court granted Marcum's motion for discretionary review.

When a party to an action dies while that action is pending, that action is abated and lies dormant until a proper successor-in-interest revives it. KRS 395.278 provides that "[a]n application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." CR 25.01, which operates in conjunction with KRS 395.278, provides, in pertinent part:

(1) If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made, the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party[.]

KRS 395.278 and CR 25.01(1), together, provide the process of revival as well as the time within which revival must be completed.

Marcum's motion to substitute herself as the Executrix of Benton's estate informed the court and the parties, well within the one-year statute of limitations, of her father's passing and her intention to continue the case. The Court declined to adopt this approach, finding that the Court of Appeals' approach of a two-step process—motions for revival plus substitution— "unnec-

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essarily complicates this process and merely creates a trap for the unwary." Instead, the Court affirmed that KRS 395.278 is a statute of limitation, and that a motion for substitution properly filed with the court in accordance with CR 25.01(1) within the one year allotted by the legislature constitutes revival. To the extent that the following Court of Appeals decisions mandate a two-step process of a motion to revive and a motion to substitute, the Court overruled them: *Lococo v. Ky. Horse Racing Comm'n*, 483 S.W.3d 848 (Ky. App. 2016); *Koenig v. Pub. Prot. Cabinet*, 474 S.W.3d 926 (Ky. App. 2015); *Frank v. Estate of Enderle*, 253 S.W.3d 570 (Ky. App. 2008); *Snyder v. Snyder*, 769 S.W.2d 70 (Ky. App. 1989).

Mandy Jo's Law

Simms v. Estate of Blake
615 S.W.3d 14 (Ky. 2021)
To Be Published

This case involves the trial court's interpretation and application of KRS 391.033 and 411.137 (together "Mandy Jo's Law). John Robert Simms (Simms) and Melanie Gosser, now Melanie Gosser Blake, (Melanie) gave birth to a son, Brandon, in 1989. Simms and Melanie were not married and never cohabitated. Simms was married to another woman when Brandon was born, and he did not take steps to establish a legal parental relationship with his son.

From his birth until 1997, Brandon lived with Melanie in Louisville. Although Simms never sought formal visitation, he did provide support to Melanie and Brandon and spent time with Brandon on occasion. The amount of time was disputed, with Simms testifying that he visited with Brandon weekly when they both lived in Louisville and Melanie claiming Simms rarely saw their son.

In 1996, Simms and Melanie entered an agreed order in Jefferson Family Court establishing Simms' paternity. This order required Simms to pay $281 per month in child support until Brandon turned eighteen, which Simms paid consistently.

The following year, Melanie and Brandon moved to Scott County to be closer to Melanie's workplace in Georgetown. After the move, Simms stopped seeing Brandon. Both parties agree that Simms only saw Brandon twice between 1997 and Brandon's death in 2015.

Melanie married Derek Blake in 2000, and Brandon took the Blake surname. On the petition for the name change, Melanie left the section requesting the name of the applicant's father blank. However, Derek never sought to legally adopt Brandon.

In 2014, Brandon was killed in an automobile collision. He was twenty-four years old and had neither a spouse nor children. Brandon did not leave a will. Shortly after his death, Melanie, and her husband, Derek Blake, filed a probate petition in Scott District Court seeking to be appointed co-administrators of Brandon's estate to pursue a wrongful death claim. On the petition, the Blakes listed Derek as Brandon's father and heir at law. The following day, Simms contacted Melanie through counsel and informed Melanie's counsel that Simms was Brandon's natural father and that Simms intended to claim his portion of any wrongful death proceeds.

Melanie and Blake settled the wrongful death claim in 2015 and advised Simms that KRS 411.137 precluded Simms from claiming any portion of the proceeds because he had not been involved in Brandon's life in nearly two decades. Melanie then filed an amended probate petition to name Simms as the natural father and herself as sole administrator and moved the district court for a hearing on Simms' claims to wrongful death proceeds.

Simms objected and moved for the court to appoint a public administrator for the estate. He also filed a separate civil action in circuit court against Brandon's estate and the Blakes, alleging that the Blakes intentionally misrepresented Simms' relationship to Brandon in an attempt to divest Simms of his portion of the wrongful death proceeds. The complaint asserted claims of breach of fiduciary duty, negligence, and fraud. Simms also moved the circuit court to remove the Blakes as co-administrators of Brandon's estate. In answer and counterclaim the Blakes and the estate argued that Mandy Jo's Law precluded Simms's recovery of any portion of the settlement proceeds.

The circuit court refused to remove the Blakes as co-administrators because the appointment had occurred in the district court. In a bench trial, the parties and the court agreed the estate bore the burden of proving that Mandy Jo's Law applied. At trial, however, the estate effectively played a passive role. The estate called various witnesses but then passed the witnesses to Melanie's counsel for questioning. Ultimately, the court concluded that Mandy Jo's Law foreclosed Simms from receiving any distribution of funds from the estate or any amount of the wrongful death proceeds.

A divided panel of the Court of Appeals affirmed the trial court's judgment.

Mandy Jo's Law, codified in both KRS 411.137 and 391.033, prevent a parent who has "willfully abandoned the care and maintenance of his or her child" from maintaining a wrongful

death action for that child, from administering the child's estate, or from inheriting any part of the child's estate through intestate succession. KRS 411.137 provides in pertinent part:

> (1) A parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to maintain a wrongful death action for that child and shall not have a right otherwise to recover for the wrongful death of that child, unless:
>
> (a) The abandoning parent had resumed the care and maintenance at least one (1) year prior to the death of the child *20 and had continued the care and maintenance until the child's death, or
>
> (b) The parent had been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent had substantially complied with all orders of the court requiring contribution to the support of the child.

KRS 391.033, in substantially similar language, limits the parent's right to administer the child's estate and right to intestate succession.

Kentucky's wrongful death statute, KRS 411.130, defines the classes of beneficiaries and sets the order of distribution. If the decedent leaves no surviving spouse or children, any damages recovered pass in equal shares to the decedent's father and mother. While wrongful death claims are prosecuted through the estate, the proceeds pass outside of the estate. Only if the decedent leaves no spouse, child, parents, or siblings does the recovery become a part of the estate.

In the Supreme Court, Simms first argued that the trial court erred when it refused to remove the Blakes as co-administrators of Brandon's estate due to their prior false statements regarding Derek Blake's relation to Brandon and their adverse legal position to Simms. The Supreme Court agreed the Blakes removal was clearly warranted in this case due to the Blakes and Simms having adverse legal positions regarding Simms' right to intestate succession. However, the Court ultimately concluded by the time Simms sought removal, it was too late. The role of the administrator regarding the wrongful death settlement proceeds effectively ends after the settlement agreements are reached. The proceeds pass outside the estate. By the time Simms challenged the appointment of the Blakes before the district court, the wrongful death proceeds were in escrow and the Blakes' role as it pertains to the wrongful death proceeds had effectively ceased.

Simms also argued allowing the estate to take a passive role during the bench trial improperly shifted the burden of proof to Melanie. The Supreme Court rejected this position, finding that the right to recover for wrongful death—guaranteed under § 241 of the Kentucky Constitution and codified in KRS 411.130—belonged to Melanie and Simms in their individual capacities. In this way, the burden of proof was properly Melanie's in the first instance anyway.

Simms next contended the trial court erred in applying a preponderance of the evidence standard of proof instead of the "clear and convincing standard" because Mandy Jo's Law implicates parental rights. Simms maintained that Mandy Jo's Law is in effect a posthumous declaration of parental rights and thus should similarly require a heightened standard of proof. The Supreme Court disagreed and found the preponderance of the evidence standard was proper. Unlike a parent's right to the care and custody in their children, the question of who shall inherit is determined by legislation. Whereas the right to the care and custody of one's child is independently protected as a fundamental right. Additionally, both the wrongful death and intestate succession statutes primarily concern the distribution of property, specifically money, which does not warrant a heightened standard of proof. Thus, the Court holds that in future cases trial courts must use the preponderance of the evidence standard when considering claims under Mandy Jo's Law.

Next Simms argued that the trial court erred in finding he willfully abandoned his son. Both KRS 391.033 and KRS 411.137 require the trial court to find that a parent "willfully abandoned" their child. The trial court found that Simms willfully abandoned Brandon, in spite of his continued child support payments, because he chose to forego significant personal contact for roughly fifteen (15) years. Kentucky defines "abandon" as "neglect and refusal to perform natural and legal obligations to care and support, withholding of parental care, presence, opportunity to display voluntary affection and neglect to lend support and maintenance ... it means also the failure to fulfill responsibility of care, training, and guidance during the child's formative years."

There is no bright-line rule for abandonment. Monetary support alone is only a factor in determining abandonment; courts must also consider the nature of the parent's involvement in their child's upbringing.

In Simms' case, it was undisputed he paid child support for nearly eleven (11) years and never fell into arrears.

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However, the Court held that support is only one factor to be considered. Both parties admit that Simms had not seen his son nor had significant interaction between 1998 and 2014. Moreover, at no time did Simms seek visitation, formally or informally, with Brandon. Based on these facts, the Supreme Court held a reasonable person could conclude, on the basis of the evidence presented, that Simms played a relatively non-existent role in Brandon's life. Thus, the trial court did not err in finding that Simms willfully abandoned Brandon.

> Lastly, Simms asserted that Melanie should be equitably estopped from raising the Mandy Jo's Law as a defense because she asked Simms to stay away from Brandon and herself when they moved away to Scott County. The Supreme Court rejected this argument. The elements of equitable estoppel in Kentucky are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, as it relates to the party claiming estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

The Court found Simms failed to meet the elements for equitable estoppel. Brandon was 24 years old and well above age of majority. Melanie had no authority to prevent Simms from being a part of his son's life. Further, assuming that Melanie did ask him to stay away, Simms knew that he was Brandon's biological father and knew that he could petition the court for visitation if he desired, even over Melanie's objection.

Kentucky Court of Appeals

Products Liability

Stiens v. Bausch & Lomb Inc.,
2020 WL 7266398
(Ky. App. Dec. 11, 2020)
To Be Published

Plaintiff brought a products liability action against manufacturer, Bausch & Lomb Inc. (B & L), and eye surgery center following her photorefractive keratectomy (PRK) procedure for nearsightedness. PRK is an alternative type of refractive eye surgery to the more common LASIK surgery. The procedure requires the ophthalmologist to remove the outer layer of the cornea and reshape the stroma layer of the cornea beneath with a laser. In a successful PRK, the subsequent epithelial regeneration results in permanent correction of the patient's vision.

In 2012, the B & L drug, Besivance, was used "off-label" as a prophylactic and post-operative antibiotic following a plaintiff's PRK procedure. Besivance is a topical drug comprised of a fluoroquinolone antibiotic and DuraSite, a viscous adhesive compound designed to increase the effectiveness of the antibacterial properties by prolonging eye surface contact. The drug is approved by the Food and Drug Administration (FDA) to treat bacterial conjunctivitis (pink eye), but it has not been approved for use as a prophylactic to prevent infection following PRK and other refractive eye surgeries. The drug ultimately caused the plaintiff to suffer irreparable damage to her left eye, permanently impairing her vision following the PRK procedure.

Doctors are permitted and even encouraged to use medications off-label in patient care, and the off-label use of antibiotics following eye surgery, including PRK, is within the standard of care. In 2011, B & L began marketing Besivance to the defendant eye surgery center and others throughout Kentucky and the greater Cincinnati area that B & L knew performed only eye surgeries, rather than routine eye care for treatment of conditions like pink eye. Besivance was promoted as having better coverage against MRSA and as a cheaper alternative to other similar prophylaxis drugs.

Under B & L company policy, as well as the Federal Food, Drug, and Cosmetic Act (FDCA), B & L is permitted only to promote Besivance for its on-label purpose, i.e., to treat pink eye, and truthfully answer questions regarding off-label use. B & L denied it directly promoted Besivance for use in eye surgery, but testimony confirmed the B & L sales representative was aware when she promoted the drug that it would likely be used "off-label" at defendant eye surgery center as a

prophylactic following PRK and other refractive eye surgeries.

Neither B & L nor the available medical literature warned that Besivance had not been tested for use in refractive surgeries or suggested that there may be risks associated with such use. At the time of the plaintiff's PRK procedure, there were no published clinical trials or articles regarding use of Besivance in any kind of refractive surgery.

Following her surgery, the plaintiff experienced delayed healing, and her vision greatly declined. She underwent a corneal transplant a few years later, which was also unsuccessful, leaving her with permanent blurred vision in her left eye. When the plaintiff's ophthalmologist expressed concerns to colleagues and in a published article about Besivance causing delayed healing in patients and damaged vision in the plaintiff's case, B & L responded with surprise to the published article, stating that "no cases of delayed re-epithelialization after PRK have been reported to the company" even though Besivance had been applied to "thousands of eyes with large epithelial defects and bandage contact lenses." In February 2013, the American Society of Cataract and Refractive Surgery issued an alert jointly with a peer-reviewed study that certain topical medications, Besivance in particular, should not be used intraoperatively during LASIK and PRK due to the adverse effects of its adhesive component, Durasite.

The plaintiff sued B & L, Insite Vision, Inc. (Insite), the manufacturer of DuraSite, and the eye surgery center, Commonwealth Eye Surgery, asserting claims of negligent testing, marketing, and distribution, strict liability, and express and implied warranty claims against B & L. Insite and B & L moved jointly for summary judgment. The trial court dismissed Insite on the grounds of personal jurisdiction and granted summary judgment to B & L on the plaintiff's claims of strict liability and breach of warranty but denied the motion with respect to the negligence claim. The court found disputed facts with regard to: (1) whether scientific articles published in 2010 warning against the injection of Besivance into the eye through refractive surgery suggested that B & L knew or should have known of the risks associated with using the drug in PRK at the time of the plaintiff's surgery and (2) whether statements by B & L's sales representative to the eye surgeon prior to the plaintiff's surgery could be seen by a jury to be a substantial factor in the decision to use Besivance.

Subsequently, the trial court granted B & L's motion *in limine* to exclude evidence concerning any alleged "off-label" promotion under the FDCA on the grounds the plaintiff did not pursue a claim under the FDCA and its motion *in limine* to exclude three articles about injecting Besivance into the eye and related testimony as irrelevant to the topical use of the drug at issue in the plaintiff's case and unduly prejudicial.

Following these evidentiary rulings and subsequent motion practice, the trial court dismissed B & L on summary judgment, finding that the plaintiff could not present any evidence of foreseeability beyond sheer speculation. The trial court also rejected the plaintiff's repeated assertion that B & L is "presumed to know the quality and characteristics of its product when it markets/sells it" as such a presumption is only applicable in strict liability, not negligence. Lastly, the trial court affirmed its previous conclusion that, having chosen to exclusively pursue state law claims, the plaintiff could not later rely upon federal law, i.e., FDCA, prohibiting certain kinds of off-label promotion to establish B & L's duty of care.

On appeal, the Court addressed the issue of foreseeability exclusively, finding all other issues raised on appeal moot. Because each of the plaintiff's claims under the Kentucky Product Liability Act (KPLA)—negligent marketing, failure to warn, and failure to test—are founded on negligence, the Court held the plaintiff must prove foreseeability. The fact that an action is classified as a products liability claim does not change its essential ele-

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ments— (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached its duty; and (3) the breach proximately caused the plaintiff's damages. The court's first inquiry always involves the legal question of the existence of duty. Applying the "universal duty of care" doctrine, the Court noted, like every other person, B & L owes a duty to every other person, including the plaintiff, to exercise ordinary care in its activities to prevent foreseeable injury.

The Court rejected the plaintiff's attempt to "shoehorn her failure to warn/failure to test/negligent marketing claim into a claim imposing the presumption of knowledge standard." The strict liability presumption only applies when a product manufacturer or seller "sells any product in a defective condition unreasonably dangerous to the user." Since the plaintiff admitted that B & L did not sell Besivance in a defective condition, she cannot rely upon any presumption that B & L knew that off-label use of Besivance could cause injury.

While manufacturers like B & L are obligated to test and warn regarding products known or suspected to be dangerous, Kentucky law does not require a manufacturer to test for hidden risks that neither it nor the medical community had a reasonable basis to suspect. Likewise, a manufacturer's liability for failure to warn follows only if it knew or should have known of the inherent dangerousness of the product and failed to adequately warn to guard against such dangers.

Given the lack of evidence suggesting B & L knew or should have known that the topical use of Besivance in PRK was associated with any adverse effects prior to or at the time of the plaintiff's surgery, the Court of Appeals found it proper for the trial court to dismiss the plaintiff's KPLA claims for negligent marketing, failure to warn, and failure to test.

The Court further rejected the plaintiff's attempt to infer that B & L's promotion of its product for an off-label use without prior testing is sufficient evidence of foreseeability of harm, stating "[g]iven that Kentucky does not prohibit the off-label promotion and marketing of drugs, we do not believe that it is appropriate to extend the law of negligence in this regard. This is an issue for the General Assembly to take up, not the courts." The Court affirmed the trial court's conclusion that, if the plaintiff "wanted to rely upon FDCA regulation of off-label promotions, [she] should have brought a claim under the FDCA."

Lastly, the Court of Appeals agreed the issue of foreseeability is a question for the jury, but found that after the trial court's evidentiary rulings, the plaintiff was left with no evidence tending to show that B & L knew or should have known that the use of Besivance following the PRK procedure might lead to medical complications.

Insurance Contract Interpretation

Stone by Next Friend Ramage v. Kentucky Farm Bureau Mut. Ins. Co.
2020 WL 7266229
(Ky. App. Dec. 11, 2020)
To Be Published

A twenty-six-year-old woman, MaKaela Franklin (Franklin) was killed in a head-on collision. Her mother, Regina Ramage (Ramage), was appointed administratrix of her estate and the co-conservator of Franklin's minor son, Cameron Stone (Cameron). The estate and Franklin's minor son, Cameron, settled for the tortfeasor's policy limits and then filed suit against Kentucky Farm Bureau Mutual Insurance Company (KFB) to recover loss of consortium damages on behalf of Ramage (for loss of her adult daughter) and Cameron (for minor's loss of parent) under the underinsured motorist (UIM) provisions of Ramage's KFB automobile insurance policy. At the time of the collision, Franklin and her son, Cameron, resided in the same household as Ramage.

The KFB policy excluded UIM coverage for bodily injury sustained "by any insured while occupying any motor vehicle owned by you or any family member for which the security required by the Kentucky Motor Vehicle Reparations Act is not in effect." Franklin was occupying an uninsured vehicle when she was killed in the subject collision.

The trial court granted KFB's motion for summary judgment on Ramage's UIM claim for loss of consortium damages for the death of an adult child because the claim is not recognized in Kentucky. Further, the Court held that claims for the estate's wrongful death arising from Franklin's injury and death in the collision is excluded under the KFB policy because she was operating an uninsured vehicle at the time. Lastly, since Cameron's loss of consortium claim is derived from Franklin's injury, it is also excluded under the same provision.

The Court of Appeals followed established precedent and affirmed the trial court's dismissal of Ramage's claim of loss of consortium for her adult daughter's death. The Court further affirmed the trial court's dismissal of Cameron's loss of consortium claim, holding that Cameron would not be able to pursue a loss of consortium claim but for his mother's claim, which is expressly excluded by the KFB policy.

Applying the doctrine of reason-

able expectations, the Court found that while the insured may reasonably expect that her claim for UIM coverage, and the derivative claim for her minor child for loss of consortium, would be excluded under KFB's policy if they were injured in an uninsured vehicle, it is unreasonable to expect that the same policy provision would not apply to exclude the minor child's loss of consortium claim if the child was not present in the vehicle. Under this interpretation, KFB would be required to compensate Cameron "for a risk which was not contemplated and for which no compensation was paid."

Worker's Compensation

Eclipse Collieries, Inc. v. Tackett,
2020 WL 7266402
(Ky. App. Dec. 11, 2020)
To Be Published

Mr. Tackett filed a workers' compensation claim on March 19, 2019, alleging he injured his right shoulder on May 23, 2017. On January 13, 2020, the ALJ found that Mr. Tackett sustained a right shoulder injury as alleged and awarded a disability award with the applicable interest rate of "12 percent on all past due amounts up to June 28, 2017 and at six percent on all past due amounts from June 29, 2017 up to the present." Eclipse Collieries, Inc. (Eclipse) appealed on the grounds that the interest rate of 6 percent should apply to all unpaid benefits pursuant to recent amendments to KRS 342.040.

Before June 29, 2017, KRS 342.040 provided for a 12 percent per annum interest rate. On June 29, 2017, a new version of the statute (House Bill 223) became effective, which provided for a 6 percent per annum interest rate. The statute was amended again in 2018 by House Bill 2, which included discussion and a note by the Legislative Research Commission that the new version of KRS 342.040 "shall apply to any claim arising from an injury or occupational disease or last exposure to the hazards of an occupational disease or cumulative trauma occurring on or after the effective date of this Act." The 2018 House Bill 2 further stated which parts of other amended statutes listed in 2018 House Bill 2 apply retroactively. KRS 342.040 was not among those listed as applying retroactively. House Bill 223 did not have a separate section that listed the amended statutes that apply retroactively.

The Court of Appeals affirmed, finding that the 2017 and 2018 versions of KRS 342.040 do not state that they apply retroactively. Under KRS 446.080(3), no statute shall be construed to be retroactive unless expressly so declared. The Court further held the right to compensation in workers' compensation cases becomes fixed on the day of injury and interest is owed from the time the payments are due until paid. KRS 342.040(1). It is the date of the injury, not the date of the workers' compensation judgment or award, that determines when benefit payments are to begin and interest begins to accrue. The language cited by Eclipse indicating the 2017 version of the statute was to apply to all orders entered on or after the effective date of the statute only applies prospectively. It does not affect interest that is already owed to an employee before the entry of a workers' compensation award order.

Qualified Immunity—Discretionary Versus Ministerial Acts

Elkins v. W. Shores Prop. Owners Ass'n, Inc.,
2021 WL 68335
(Ky. App. Jan. 8, 2021)
To Be Published

A property owners association, Western Shores Property Owners Association, Inc. (WSPOA), sued the Calloway County Fiscal Court and its employees (the county defendants), the subdivision developer, Kentucky Land Partners, LLC (KLP), and KLP's directors for negligence and breach of fiduciary duties for failing to complete construction of subdivision roads. Specifically, WSPOA claims that because KLP exited the development without completing all improvements required to be done and because the county failed to require KLP to increase the bond and properly extend the bond for road construction as mandated by County Regulations, the roads were left incomplete and the county defendants refuse to accept the roads under their jurisdiction for regular maintenance. The county defendants appealed from the trial court order denying their motion to dismiss the claims against them in their individual capacities.

The sole issue on appeal was whether the negligence claims against the county defendants in their individual capacities are barred by qualified official immunity. When an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded immunity for acts performed in the exercise of their discretionary functions. However, when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the

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scope of the employee's authority. In contrast, a public officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely the execution of a specific act arising from fixed and designated facts.

On appeal, the county defendants cited the language of Section 6.2 titled "FAILURE TO INSTALL IMPROVEMENTS" of the county regulations as establishing the discretionary nature of their actions with respect to extending the bond for road construction. Under this section, "[i]f it is determined by the Fiscal Court that improvements have not been installed as planned or that the improvements are not properly guaranteed, then the Fiscal Court *may* take action to secure installation of the improvements …." The Court of Appeals, however, rejected that this singular provision is controlling.

Under Section 6.2 titled "GUARANTEES," the "subdivider may execute and file guarantees with the Fiscal Court … in lieu of actual installation or completion of the required improvements, except sidewalks, when requesting approval of the final plat" and "the guarantee *shall* be in the form of a good and sufficient surety bond …" Once a guarantee is executed, the Fiscal Court "*shall* cause all the work to be done and improvements constructed …" and "[n]o release *shall* be made of guarantees until the Fiscal Court has received written certification from the developer's engineer and from the appropriate County official that all improvements have been constructed in accordance with the previously approved plans." Similarly, under Section 1.1.(A)(3), state proposed roads "*shall* be properly built prior to acceptance or with adequate security to insure that said roads will be built without the expenditure of public funds."

The Court of Appeals found that the use of the word "shall" in the county regulations established the ministerial nature of the county defendants' acts. KLP did, in fact, file guarantees as provided in the county regulations that triggered certain mandatory duties from the public officials. These mandatory duties constitute ministerial acts, acts that require only obedience to the orders of others, or duties which are absolute, certain, and imperative, involving merely the execution of a specific act arising from fixed and designated facts. When the county defendants failed to ensure the required language was included in the bond, returned the bond without proper certification, and failed to cause the work to be done or improvements to be constructed as mandated by county regulations, they became subject to liability for the negligent performance of such ministerial acts.

Leonhardt v. Prewitt
2021 WL 402545
(Ky. App. Feb. 5, 2021)
To Be Published

After falling in the Kentucky Horse Park's stadium, Leonhardt sued Prewitt, in her individual capacity as Executive Director of the Kentucky Horse Park, and the commonwealth of Kentucky (owner of the Horse Park) on theories of negligence and premises liability. The Commonwealth was dismissed on grounds of sovereign immunity, and Prewitt was dismissed in her official capacity. Prewitt was subsequently dismissed in her individual capacity as well. Leonhardt appealed, naming Prewitt in her individual capacity as the appellee.

On appeal, Leonhardt argued that the trial court erroneously dismissed her claim against Prewitt because, as executive director, Prewitt had a ministerial duty to comply with the applicable building code requirements (particularly those mandating safety standards such as handrails, which could have prevented Leonhardt's fall).

Leonhardt's first theory of liability was that one or more of the directors or managers at the Kentucky Horse Park had a "ministerial duty" to comply with the Kentucky Building Code. The Court found that the duty to administer the Kentucky Building Code falls upon the Kentucky Department of Housing, Buildings and Construction, or as may be delegated to a local government codes enforcement office, pursuant to KRS 198B.050(1). This is reinforced by KRS 56.491(2), which expressly requires large construction projects to be reviewed by the Department of Housing, Buildings and Construction (versus relying solely on local government codes enforcement). Hence, the Court rejected the notion that program managers at the Kentucky Horse Park who were hired to run an equine program; who may have no experience in construction or building codes; and were hired 25 years after the construction of a building, now have their personal assets at risk due to the design and construction of a building 25 years earlier, contravenes good public policy. A program manager who is placed in charge of property makes numerous policy decisions on hiring staff, supervising staff, and implementing safety programs. Those decisions are inherently discretionary, and do not subject him/her to personal liability for those decisions.

Leonardt's second theory of liability concerned compliance with the ver-

sion of the building code in force when the "covered arena" was constructed in 1991. While all property owners must comply with the version of the building code in force when a building is constructed, the duty to comply with a statute is not commensurate with the duty to administer the statute. Only those individuals under a legal obligation to administer a statute can be held to that higher level of personal liability conferred by a ministerial duty. Further, all state-owned real property, such as the Horse Park, is controlled by the Finance and Administration Cabinet, and each agency becomes a tenant to that Cabinet. Specifically, KRS 56.463(7), grants control to the Finance and Administration Cabinet over all construction and major maintenance on state property, not the program managers occupying any particular parcel of state land. Hence, the real property owner of the Kentucky Horse Park is the Commonwealth of Kentucky, and not Executive Director Laura Prewitt, nor any other employee of the Kentucky Horse Park. If Leonardt has a negligence claim against the Commonwealth of Kentucky for the condition of its premises, her remedy lies with the Board of Claims.

Finding that Prewitt had not acted in bad faith or exceeded the scope of her authority, the Court of Appeals affirmed.

[Leonhardt filed a second action in circuit court naming the Deputy Director of the Horse Park and its Branch Manager for Maintenance (the "unknown defendants" in this action), as defendants in their individual capacities. A separate panel of the Court of Appeals affirmed the dismissal of this second action on res judicata grounds in *Leonhardt v. Lang*, 2021 WL 402534 (Ky. App. Feb. 5, 2021), also to be published.].

Arbitration Agreements

Legacy Health Servs., Inc. v. Jackson
2021 WL 137772
(Ky. App. Jan. 15, 2021)
To Be Published

In December 2011, Christopher Jackson, III, was appointed by Fayette District Court as legal guardian for his mother. The order of appointment did not contain any limitations on Jackson's authority. Three years later, Jackson agreed to admit his mother to Cambridge, a long-term care facility, and Jackson signed a voluntary alternative dispute resolution agreement as his mother's guardian. The agreement required "[a]ny and all claims or controversies arising out of or in any way relating to [the] Agreement or [his mother's] stay at the [Cambridge] [f] acility ... [to] be submitted to alternative dispute resolution as described in the Agreement." Jackson remained guardian until his mother's death on January 27, 2015. He then filed a medical negligence lawsuit against Cambridge on May 18, 2015. Cambridge moved to compel arbitration and the trial court denied the motion, finding Jackson lacked authority to bind his ward to an arbitration agreement.

On appeal, the Court of Appeals applied the holding in *Kindred Nursing Centers Limited Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017), finding that the trial court did what *Kindred* prohibits by adopting "a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." The Court declined to interpret the statutes governing guardianship of disabled persons, KRS 387.500, *et seq.*, as prohibiting an attorney-in-fact from binding his or her ward to a pre-dispute arbitration agreement, as such an interpretation is "too tailor-made to arbitration agreements … singling out those contracts for disfavored treatment."

The Court further held that guardianship statutes are intended to grant broad authority to the guardian. "The authority to enter into contracts generally is within the ambit of what is reasonably inferable from the statutes."

In a concurring opinion, it was noted that "had this been a wrongful death action rather than a medical negligence case, the ruling of this Court would likely be different."

Cambridge Place Grp., LLC v. Mundy
2021 WL 219206
(Ky. App. Jan. 22, 2021)
To Be Published

The husband executed a durable power of attorney (POA), naming his wife as his attorney-in-fact. Several years later, the husband was admitted as a resident to Cambridge Place, a nursing care facility. He was incompetent at the time of admission, necessitating that his wife complete the process on his behalf. Upon admission, the wife signed a voluntary alternative dispute resolution agreement—not required for admission—wherein the resident, or the resident through their legal representative, agreed to arbitrate any disputes with Cambridge. The signature block contained three lines: the husband was named as the resident on the first line; the wife signed her name on the second line, titled "Signature of Resident/Legal Representative"; and "wife" was written on the third line, entitled "Legal Representative Capacity (i.e., guardian, spouse, child, Attorney-in-Fact, etc.)."

Following the death of her husband, the wife filed suit against Cambridge alleging multiple claims of

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negligence on behalf of her husband's estate, as well as claims of wrongful death and loss of consortium, individually. Cambridge moved to stay the proceedings on the wife's individual claims and to compel arbitration as to the estate's claims. After hearing arguments regarding whether wife signed the agreement in her capacity as her husband's attorney-in-fact and whether the POA granted the authority to bind her husband to arbitration, the trial court denied the motion, finding that Cambridge failed to sufficiently demonstrate the existence of a valid arbitration agreement between Cambridge and deceased husband where his wife, regardless of whether she had the authority to sign as attorney-in-fact, only signed in her capacity as "wife."

On appeal, the Court acknowledged Kentucky law does not require a party to explicitly state they are acting as an attorney-in-fact; however, in this case the wife affirmatively stated she was acting in a separate capacity, as wife, and as wife, she was authorized to make limited decisions on behalf of her husband. The Court found the arbitration agreement at issue unenforceable as outside this limited scope of authority.

Further, the Court held even if it were to find the wife acted as her husband's attorney-in-fact, it would nevertheless affirm the trial court as she lacked the authority under the POA to bind her husband to arbitration. Cambridge argued the POA gave the wife the authority as it permitted her to: "(1) draw, make, and sign any and all checks, contracts, deeds or agreements, and exercise all of [her husband's] voting rights over assets owned by [him]; ... (7) institute or defend legal actions concerning [her husband] or [his] property; ... [and] (15) do and perform in [his] name all that [he] might individually do." In rejecting this interpretation, the Court found, after enumerating fifteen specific grants of authority, the document then provides a summary of when those powers may be employed that prohibits the wife from making *any health care decisions on her husband's behalf*. Thus, under the POA as written, the wife possessed no power to bind her husband to an arbitration agreement related to his healthcare.

Mandy Jo's Law

Miller v. Bunch
2021 WL 402552
(Ky. App. Feb. 5, 2021)
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Miller appealed from the trial court's finding that he abandoned his stillborn infant daughter, Autumn, and was consequently not entitled to any settlement proceeds or distribution from her estate under Kentucky Revised Statutes (KRS) 411.137 and KRS 391.033, collectively known as "Mandy Jo's Law."

Brittany Bunch had a sexual relationship with Miller while they were co-workers. When Bunch informed Miller she was pregnant, he immediately left. He had no further contact with her, except for sending her a $25 Wal-Mart MoneyGram, which she used to purchase items for the baby. He did not attend doctor's appointments with her, and he did not try to contact her.

On May 27, 2014, when Bunch was 33 weeks and 4 days pregnant, she presented at the Whitesburg Appalachian Regional Healthcare (ARH) Hospital with symptoms of preeclampsia. The child, Autumn, was stillborn the next day. Miller came to the hospital after Autumn was born and held her, but according to Bunch he was high. Miller neither attended nor contributed to Autumn's funeral.

Bunch, individually and as the administratrix of Autumn's estate, and Silas Lee Walker, Bunch's boyfriend, filed suit against Appalachian Regional Healthcare Inc. d.b.a. Whitesburg ARH, alleging negligence and seeking damages for personal injury, wrongful death, and parental loss of minor's consortium. Several months later, Miller filed a complaint to intervene in the case, alleging that he, not Walker, was Autumn's natural father. A DNA test proved that Miller was the likely biological father, and Walker was voluntarily dismissed from the case. The case with ARH was settled.

After the settlement, Bunch sought to preclude Miller from receiving a share of the proceeds under Mandy Jo's Law, claiming he should not recover because he willfully abandoned Autumn. After an evidentiary hearing, the trial court barred Miller from receiving any of the settlement proceeds under Mandy Jo's Law.

Mandy Jo's Law is comprised of two statutes, KRS 391.033 and KRS 411.137, which preclude parents from recovery of damages for the wrongful death and loss of consortium of their child under certain conditions. KRS 391.033(1) provides that "[a] parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to intestate succession in any part of the estate and shall not have a right to administer the estate of the child[.]" Under KRS 411.137(1), "[a] parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to maintain a wrongful death action for that child and shall not have a right otherwise to recover for the wrongful death of that child[.]"

For purposes of Mandy Jo's Law,

abandonment is defined as "neglect and refusal to perform natural and legal obligations to care and support, withholding of parental care, presence, opportunity to display voluntary affection, and neglect to lend support and maintenance."

On appeal, Miller argued that his conduct does not meet the definition of abandonment because even Bunch did not know he was Autumn's father, as evidenced by Walker's being named as the father in the wrongful death complaint, until DNA testing was performed. However, the Court noted that if Miller did not strongly suspect he was the child's father, his actions in sending Bunch the MoneyGram and going to the hospital after the child's birth and holding her are inexplicable. The Court further noted Miller's clear intent to abandon the unborn child is evidenced by his fleeing immediately after Bunch informed him she was pregnant and thereafter ceasing contact.

Miller further argued that KRS 411.137, which precludes wrongful death recovery to a parent who has willfully abandoned the care and maintenance of his child, as a matter of law, does not apply to a situation involving a child who is stillborn. Miller maintained that he was never given the chance to give his child support or to display voluntary affection and care because she was stillborn, and Bunch had led Walker to believe he was the father. He contends that he and Bunch are identically situated in that neither was given the opportunity to have a "normal parent-child relationship" with Autumn, and it cannot be said that one parent's loss of consortium is greater than that of the other.

The Court found these arguments lacking in merit. Substantial evidence supported the trial court's determination that Miller knew he was the father of Autumn. Further, if Miller's argument were to prevail, no one would ever be precluded from recovery for the wrongful death of a viable fetus on the grounds of abandonment because no one can develop a social relationship with a child who is not yet born.

The Court held the parental relationship begins prior to birth and extends beyond a social relationship with the child. The parental relationship includes the obligation to provide nurture, care, support, and maintenance, and this obligation begins before the child is born. As the trial court stated, "a viable fetus requires nurturing, care, support, and maintenance, and Miller refused to provide any such support." Because Miller was willfully absent from Bunch's life after she informed him of her pregnancy, the trial court was correct in finding that he had effectively abandoned Autumn.

MVRA

Bell v. NLB Properties, LLC,
2021 WL 402553
(Ky. App. Feb. 5, 2021)
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On or about April 8, 2017, Bell drove her vehicle into an automatic car wash owned by NLB Properties, LLC (NLB) and FLCW Limited Liability Company (FLCW). Another vehicle, operated by Devine, entered the wash bay behind Bell. Bell alleged that "the automatic wash bay malfunctioned while Bell and Devine's vehicles were in it, causing Devine's vehicle to collide with Bell's vehicle." Bell filed suit against NLB and FLCW for negligently and recklessly allowing Devine to use the automatic car wash bay which was malfunctioning. Shortly after filing their answers and cross-claims against Devine, NLB and FLCW filed a joint motion for judgment on the pleadings. In their motion, they argued that Bell's claim against them was time barred because the one-year statute of limitations for a personal injury claim under KRS 413.140(1)(a) applied instead of the two-year MVRA statute of limitations. The trial court agreed and dismissed Bell's actions against NLB and FLCW. Bell appealed.

KRS 304.39-230(1) provides that any action under the MVRA must be commenced within "two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier." Bell filed her complaint approximately fifteen (15) months after the car wash collision. Bell argued that since she sustained injuries at the car wash while using her motor vehicle, the MVRA applies and her complaint was filed within the applicable statute of limitations.

The Court of Appeals disagreed. KRS 304.39-020(6) provides

> Use of a motor vehicle" means any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it. It does not include:
>
> (a) Conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or
>
> (b) Conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

The Court held that Bell's claim against NLB and FLCW falls under the business premises exclusion provided in KRS 304.39-020(6)(a). A car wash

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is a business to clean and maintain vehicles. KRS 304.39-020(16) defines "[m]aintaining a motor vehicle" as "having legal custody, possession or responsibility for a motor vehicle by one other than an owner or operator." Once Bell's vehicle was in the wash bay and her car was placed in neutral, NLB and FLCW were responsible for the proper functioning of the various equipment and apparatus in the car wash. Indeed, Bell's complaint against NLB and FLCW alleged negligence regarding the operation of the wash bay and did not concern use or operation of a motor vehicle.

Based on these facts, the Court held that a car wash falls under the business premises exception and Bell's claims against NLB and FLCW are subject to the one-year personal injury statute of limitations under KRS 413.140(1)(a). The trial court's dismissal for Bell's failure to file the claim within the one year was affirmed.

Requirement for Hearing on Unliquidated Damages after Default Judgment

Key v. Mariner Fin., LLC
2020 WL 7083270
(Ky. App. Dec. 4, 2020)
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The lender sued the borrowers to recover the outstanding balance on a loan plus interest and attorney's fees in accordance with KRS 411.195 and the terms of the loan agreement. The loan agreement contained a clause requiring payment of reasonable attorney's fees if borrowers defaulted, stating "[i]f we place this [Note] in the hands of an attorney, not our salaried employee, for collection, you agree to pay the reasonable fees of our attorney."

When the borrowers failed to answer or respond to the complaint, the lender moved for default judgment for payment of the balance of the loan plus interest and further stating it "has referred this claim to outside counsel, who is not a regularly salaried employee, upon a contingency fee basis of 33.3 percent and is therefore additionally entitled to the award of its reasonable attorney fee in the amount of $2,229.85 pursuant to KRS 411.195."

The trial court granted the default motion and entered the lender's tendered default judgment, which stated the borrowers owed "$6,757.12, plus attorney's fee in the amount of $2,229.85, plus interest in accordance with the terms of the agreement per annum until paid, and its court costs." Lender also obtained orders for wage garnishment.

After four months of wage garnishment, the borrowers moved to vacate the default judgment and the trial court denied the motion. The borrowers appealed.

On appeal, the borrowers only requested the Court of Appeals to vacate the attorney's fee and remand the case for a hearing on the fee because the trial court abused its discretion by awarding an unreasonable contingency fee to the lender's attorney.

Under CR 55.01, when a plaintiff moves for default judgment, the trial court may need to conduct a hearing to determine the amount of damages. The Rule provides:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings ….

While the loan agreement at issue provided for "reasonable" attorney's fees in the event of a default and KRS 411.195 allows for the recovery of attorney's fees when collecting debts, it is the trial court's responsibility to determine the "reasonableness" of the attorney's fee sought. The Court of Appeals found the trial court abused its discretion in this regard when it failed to conduct such a hearing to determine the amount of damages, including the lender's averments that its "outside attorney" was owed a one-third contingency fee.

When a party defaults, he or she only admits allegations in the complaint. In an action for unliquidated damages, like the attorney's fee in this case, a defaulting party admits liability but not a sum certain amount of damages. Here, the borrowers did not agree to a specific percentage contingency fee or a liquidated amount for attorney's fees in the event they defaulted. They agreed to pay the "reasonable" fees of the lender's attorney in the event of default.

The trial court must conduct a hearing to determine "whether the attorney fees were warranted in light of a statute, contractual provision, or equitable consideration, and, if so, what amount is reasonable."

On remand, the trial court should consider all relevant factors and require proof of reasonableness from the lender demonstrating that the one-third contingency fee was not excessive and that it accurately reflects the reasonable value of bona fide legal expenses incurred.

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