SPRING/SUMMER 2023

common DEFENSE

A member publication of Kentucky Defense Counsel, Inc.

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About the cover...
Scenic nighttime image of an old farm barn and a Kentucky country road in moonlight

KentuckyDefenseCounsel

PRESIDENT'S REPORT

Kristen H. Fowler
Napier Gault Schupbach & Stevens, PLC
Louisville

"I'll purge your dead files, but I will never go to law school." That's what I told my Uncle Bob in June 2000. He had called a few days after my high school graduation to offer me a summer job at his law office. He was going to pay me $8.50 an hour – which I saw as an astronomical increase from the $5-something I had been making as a gift wrapper and Precious Moments guide at Teresa's Hallmark – so of course I said yes. My Uncle Bob was a solo general practitioner working out of a small house in a small county seat outside Indianapolis. He died this Spring after a long illness. As you can probably infer from the fact that I'm writing this column in a lawyer magazine, I did in fact go to law school, and he was a big reason why. This column is my tribute to the things my Uncle Bob taught me about being a lawyer.

My Uncle Bob passed the bar exam the same year I was born, and over the years, his basement had accumulated banker's boxes of dead files stacked 5 boxes high, each box labeled with the range of file numbers it contained, and each file labeled with a number that corresponded to an index card in the closed file rolodex. The basement was nearly full, and several rooms of boxes were past the retention period. My job was to follow some rules about what needed to be saved, and then haul the rest up to a giant confidential shred crate in the back. I was allowed to do this for 8 hours a day, 5 days a week, and I had never seen so much money in my bank account or enjoyed a job so much.

It didn't take too long before I ran out of work in the basement. Uncle Bob was happy to let me learn more. I moved on to drafting some basic form pleadings, answering the phones, making appointments with clients, sending faxes, updating the library with the new pocket parts that came in, making copies of correspondence, running the daily deposit to the bank, getting the orders from the courthouse, picking up the mail from the post office box, and filing all the paper where it was supposed to go. This all seemed to go well, so I graduated to setting up spreadsheets to do the calculations for the collections files, witnessing wills, assisting with the weekly court docket, analyzing records and bills for the small personal injury claims, and drafting demand letters. Uncle Bob let me learn all of it, and he took me around to everything. So many breakfasts and lunches were purchased. He listened to what I was dreaming about and offered feedback. When I made mistakes, he let me propose solutions. I loved all of it. So when my first semester of pre-med chemistry ended with a lot of spilled Erlenmeyer flasks and abysmal percent yields, I realized that I was pretty good at writing and analyzing and speaking and organizing, and maybe I would go to law school after all.

Uncle Bob didn't give me a hard time or a "told-you-so." He just kept on supporting me. Uncle Bob helped me get my first legal jobs in college, and he helped me when I applied for law school and for clerkships. He encouraged my studies and practice when my husband and I had our children. He showed me how to be kind to folks at the courthouse and gracious to opposing counsel, and he showed me how to have conversations with all kinds of people about all kinds of things. He explained why you need a retention letter, why you should get a retainer, and why you should stay current on your billing. He asked about what I was doing professionally and made sure I was doing things outside the law, too. He practiced what he preached – he wrote music and played guitar, and he recorded over five albums'-worth of music that can be streamed from anywhere. I try to honor this legacy every Tuesday night playing French horn with the Oldham County Community Band. Some of the lessons he taught are things I'm still trying to unlearn – he was perpetually running late, his mind was often preoccupied with case details, and he lugged around huge, disorganized stacks of files, scribbled-on legal pads, and brain dumps of all the things he needed to get done. But these shortcomings were minor compared to his care for his clients, others in the legal community, and his family. I'm thankful for my Uncle Bob and for all he meant to me and my family, and I hope to honor his memory in my own practice.

FROM THE EXECUTIVE DIRECTOR

Jennifer Cocanougher
Executive Director

Summer will be here soon and that means it is time to renew your membership dues in KDC! Dues have remained the same for 2023-2024 at $150.00. Invest in your career by investing in the Kentucky Defense Counsel! As a reminder, active members in good standing upon reaching age 70 can receive emeritus status and dues are waived.

As was announced earlier, membership renewal invoices will only be distributed via email. On or about June 1 you will receive an email from WildApricot (our membership and website platform) with a link to your dues invoice. You will be able to pay your dues directly from that link with a credit card or you can print a copy of the invoice and send payment via check (made payable to Kentucky Defense Counsel) and mail to the KDC office. You will receive friendly email reminders to renew your dues until the system logs that payment has been received.

This is a good time to double check that your contact information is correct in our database. To check your information, you will need to visit the KDC website (www.ky-def.org) and click on the Members Only tab. You will need to log in and then you can view your membership status and update any contact information as needed (email address, office address, phone etc). If you have any questions, please reach out to me at the KDC office (859) 338-4761 or email me at admin@ky-def.org.

This is also the time to nominate a colleague for recognition of outstanding contributions to the defense bar. During the 2023 Fall Seminar and Awards Luncheon the following awards will be presented: Defense Lawyer of the Year, Young Lawyer of the Year and Diplomat. Nomination forms have been sent out in an email blast and can also be found on the KDC website (www.ky-def.org). Join us on September 21-22 at the Origin Hotel in Lexington for an outstanding program and to celebrate the accomplishments of our members!

COMMITTEE REPORTS

CLE Committee
Karen Keith
Stoll Keenon Ogden PLLC
Louisville

Many thanks to ***Beth Winchell***, Landrum & Shouse, LLP, for her years of leadership to the CLE Committee. Karen Keith has agreed to serve as incoming chair and will be appointed by the KDC board of directors at the next board meeting. Welcome to our new committee member, ***Katie Bouvier***, Sturgill, Turner, Barker & Moloney, PLLC. Four CLE webinars are planned for June, August, and October. Please look for details in the Calendar of Events section of this issue.

Publications Committee
Sarah Clark
Napier Gault Schupbach & Stevens, PLC

I want to extend my genuine thanks to everyone who has contributed to this issue of *Common Defense*. We are lucky to have the contributions of the member-authors who volunteered their considerable time to the articles included in this issue. A sincere thanks, as well, to our regular contributors, including Olivia Keller for her thoughtful analysis of Kentucky appellate law and Kathleen Watson for her help gathering defense victories from around the state. This issue would not be possible without the hardworking members of our editorial team, Scott Burroughs, Grant Grissom, Danielle Lewis, Abbie O'Brien, Leah Scharff, Leigh Schell, Darren Smith, Mitch Hall, and Jason Coltharp, who contributed their limited free time for which I am grateful.

DRI REPORT

KY DRI State Representative
Ashley K. Brown
Ward, Hocker & Thornton, PLLC
Lexington, KY

DRI Lawyers Representing Business is the new official name of the Defense Research Institute. KDC will again be participating in DRI's membership offer for state legal defense organizations. Current KDC members are eligible to receive one year's free membership to DRI. Please contact ***Ashley Brown***, DRI Representative, ABrown@whtlaw.com or visit www.dri.org for more information.

MEMBER & KDC BOARD NEWS

New Members

Terri Boroughs, of Barnes Maloney PLLC, is a 1995 graduate of the University of Louisville Brandeis Law School. She focuses on the areas of medical malpractice, nursing home, premises liability, and professional liability. Terri was nominated to KDC by KDC President Kristen Fowler.

Thomas Bowers, of Piper & Bowers, P.S.C., is a 2016 graduate of the University of Illinois at Chicago John Marshall Law School. He focuses on the area of medical malpractice. Thomas was nominated by KDC member Barbara Bowers.

Mary Katherine Brashear, of Goldberg Simpson, LLC, is a graduate of the University of Kentucky Rosenberg College of Law. Mary Katherine was nominated by KDC member Christina Norris.

Rebekah Cotton, of the Legal Aid Society, is a 2012 graduate of the University of Louisville Brandeis Law School. She focuses on the areas of civil rights, property, real estate transaction liability, and eviction defense. Rebekah was nominated by KDC Publications Chair Sarah Clark.

Sharon Farmer, of King, Deep & Branaman, is a 2013 graduate of the University of Louisville Brandeis Law School. She focuses on the areas of appellate, auto, bad faith, business litigation, contract, general liability, governmental entity, insurance coverage, medical malpractice, municipal, premises liability, property, tort and utilities. Sharon was nominated by KDC member Randall Redding.

Maureen Malles, of Sturgill, Turner, Barker & Moloney PLLC, is a 2019 graduate of the University of Florida Levin College of Law. She focuses on the areas of business litigation, civil rights, employment, government entity, medical malpractice, municipal, and utilities. Maureen was nominated by KDC Vice-President Andrew DeSimone.

Tyler Rucker, of Goldberg Simpson, LLC, is a 2022 graduate of the University of Louisville Brandeis Law School. He focuses on the areas of business litigation, commercial, general liability, insurance coverage, premises liability, and tort. Tyler was nominated by KDC member Anthony Johnson.

Brian Stempien, of Travis Herbert & Stempien, PLLC, is a 2010 graduate of the University of Louisville Brandeis Law School. He focuses on the areas of appellate, auto, business litigation, construction, and insurance. Brian was nominated by KDC member Valerie Herbert.

Mike Van Sickle of Ward, Hocker & Thornton, PLLC (Louisville Office), is a 2015 graduate of the University of Louisville Brandeis Law School. He focuses on the areas of appellate, auto, construction, general liability, premises liability, property, tort, and trucking. Mike was nominated by KDC member Gene Zipperle.

KDC Board News

MARCH 16, 2023 BOARD MEETING

During the March 16 meeting of the Kentucky Defense Counsel Board of Directors, ***Katie Embry***, Bell, Orr, Ayers & Moore, P.S.C. Bowling Green was appointed as chair of the Social Media committee. This committee has also been tasked to seek input from members regarding the format and design of the KDC Website. It was also announced that ***Langdon Worley*** will no longer be able to serve as chair of the CLE committee. Board members were asked to recruit members for any vacant board position.

The ***Spring Seminar***, held on March 17, was attended by over 60 persons, including sponsors and speakers.

Action items from the February 4 Board Retreat included the request to establish a philanthropy committee. This committee will identify charitable organizations to support during the Fall and Spring Seminars and at other times during the year. The board allocated $200 for committee expenses. ***March of Dimes*** was the featured charity for the Spring Seminar and plans are being developed to include a philanthropic event during the Fall Seminar.

Total membership is 432 members with 51 pending renewals. Those members with pending renewals were contacted and asked to renew by March 15. Those who did not renew their membership by March 15 will be removed from the current membership roster, SimpleLists listserve, and current mailing lists (used for distribution of *Common Defense*).

The board accepted a proposal from the Tennessee Defense Lawyers Association to host a joint seminar in 2024. ***Kristen Worak, Jared Key*** and ***Christine Stanley*** are representing KDC on the joint planning committee. The seminar will be held October 2024 in Lexington. Two special events include a speaker and awards dinner at a local distillery and luncheon at Keeneland followed by a day at the races.

The next Board of Directors meeting will be held via ZOOM on ***Friday, July 21 at 4:00 pm EST.***

A Look Back...
2023 Spring Seminar

Over 60 members and sponsors attended the ***2023 Spring Seminar*** held on March 17 at the Seelbach Hilton Hotel in downtown Louisville. Special thanks to Jarad Key and the planning committee for organizing this great day of education and networking.

The seminar kicked off with a great presentation from Leah B. Waterman, University of Louisville on ***Realistic Expectations for Today's Associates.***

Chad Hardin & Chris Schaefer, of Stoll Keenon Ogden PLLC gave insights on ***Defending Manufacturers and Distributors in Breach of Warranty and Product Liability Actions.***

Jason Coltharp, Immediate Past-President of the Kentucky Defense Counsel was recognized for his years of service to the organization.

KDC APPELLATE CASE SUMMARY

Olivia C. Keller, Esq.
DBL Law
Crestview Hills

The Kentucky Supreme Court Declines to Extend Liability based on Third-Party Criminal Acts

In *Walmart, Inc. v. Reeves,* --S.W.3d--, 2021-SC-0288-DG (Ky. 2023) the plaintiff was attacked by two unknown men attempting to rob her in a Walmart parking lot after midnight. She was struck twice before a bystander intervened and the assailants fled. She filed suit against Walmart, alleging that it was negligent by not having a security presence outside to protect patrons from third-party criminal acts.

After some discovery was completed, Walmart moved for summary judgment. The trial court granted the motion due to a lack of evidence indicating similar crimes close in time to the plaintiff's attack. Therefore, the trial court found that the plaintiff failed to prove that other alleged criminal acts at or near the store were of sufficient character and number to make the attack reasonably foreseeable to Walmart.

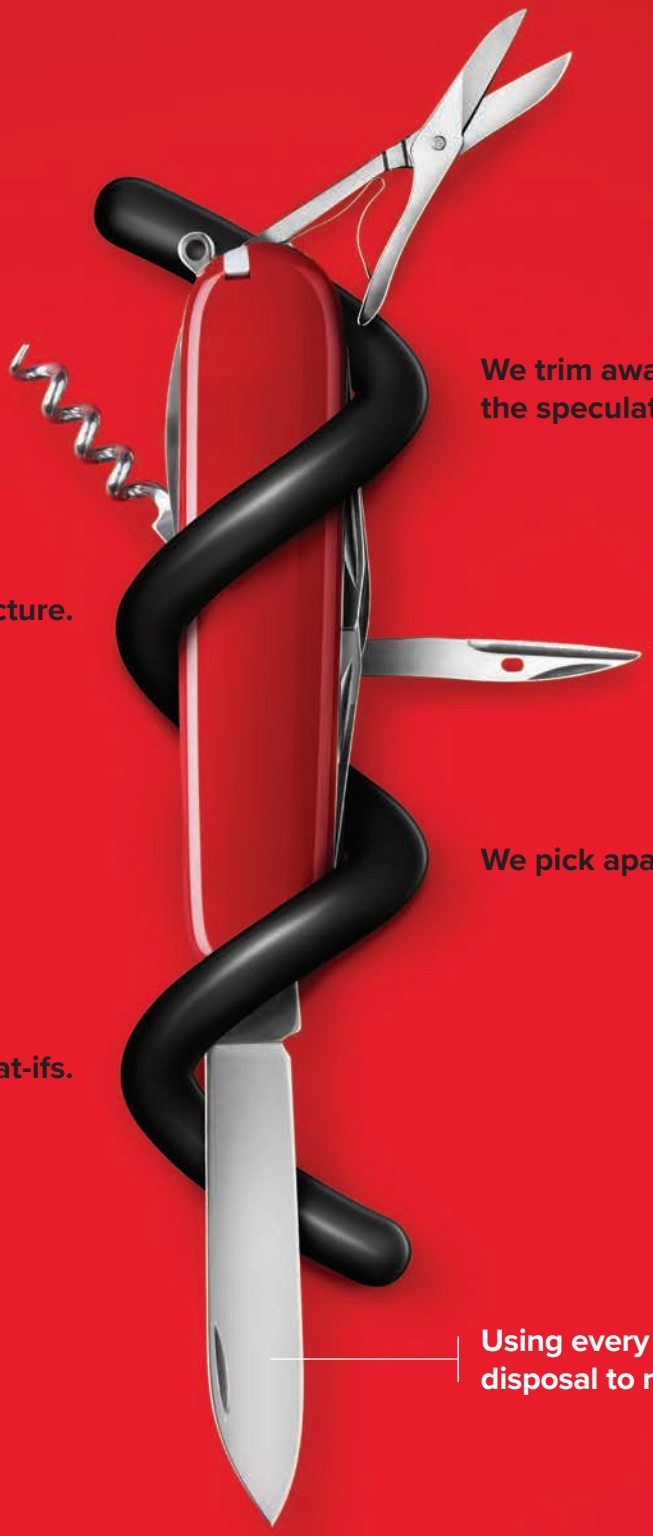
The plaintiff appealed to the Court of Appeals. In reversing the trial court's grant of summary judgment, the Court of Appeals extended the holding in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky.2013) beyond open-and-obvious conditions. *Shelton* held that in open-and-obvious premises liability cases, the foreseeability analysis applied only to the breach element, as premises owners always had a legal duty to invitees. While the Court of Appeals noted that the Supreme Court had yet to extend *Shelton's* holding in this way, it determined that the Court intended for *Shelton* to apply to all negligence cases. Through its extension of *Shelton*, the Court of Appeals reasoned that Walmart always has a duty to safeguard invitees from harm on its property regardless of the foreseeability of the danger, and, thus, reversed the trial court.

On appeal to the Supreme Court, Walmart argued that the Court of Appeals improperly extended *Shelton* and incorrectly reversed the trial court. The Court agreed, finding that *Shelton*'s foreseeability analysis was limited to open-and-obvious cases. The Court held that a landowner has a duty to protect individuals from third-party acts only if the injury is reasonably foreseeable and if the landowner can reasonably safeguard against the acts.

The Court further explained that, even if *Shelton* were extended beyond the open-and-obvious context, it would not extend to cases involving third-party criminal actions. The Court noted that landowners cannot control third parties' actions on their property, unlike property defects that are capable of maintenance or curative measures. Additionally, the Court warned that extending *Shelton* to third-party criminal activity "would create an economically untenable reality for business owners and, ultimately, their customers."

Turning to the evidence at issue, the Court found that Walmart could not have anticipated the third-party criminal act. The plaintiff provided only two examples of crimes of a similar nature on the property, one from 2001 and one from 2012. The Court found this evidence was insufficient for two reasons: (1) both instances involved purse snatchings on the property but not assaultive behavior; and (2) both instances occurred so distantly in time they failed to establish a pattern that could lead Walmart to anticipate a similar crime. An internal crime report likewise did not establish that Walmart should have anticipated the criminal act, as it provided no statistical information specific to Walmart's actual premises. Due to the lack of evidence that this crime was foreseeable to Walmart, the Court confirmed that Walmart had no duty to protect the plaintiff.

This case is important to defense practitioners for two major reasons. First, it outlines what type of evidence is insufficient to support a negligence claim based on a third-party criminal act, paving the path towards summary judgment. Second, and more broadly, it confirms that the *Shelton* analysis is only relevant in open-and-obvious premises liability cases, and that the Kentucky Supreme Court is declining to extend it further at this time.



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THE KENTUCKY RULES OF EVIDENCE A PRIMER

By Andrew DeSimone and Joshua Owen of Sturgill, Turner, Barker & Moloney, PLLC

Most of us remember evidence from our second year of law school. This was the course that brought "law" home to many of us and where courses like contracts, torts, and criminal law began to come into perspective. Evidence taught us how to prove damages in an assault case or how to prove a criminal defendant committed burglary.

In many ways, this article is an homage to Professor Robert G. Lawson at the University of Kentucky, who authored *The Kentucky Evidence Law Handbook* for almost 50 years. *See* Robert G. Lawson, The Kentucky Evidence Law Handbook (LexisNexis Matthew Bender eds., 2022 ed.). Professor Lawson has retired, but his handbook remains the premier discussion of the rules of evidence in Kentucky. If there is one bound book to take to trial, it is *The Kentucky Evidence Law Handbook*. Almost every trial and appellate judge will recognize it as authoritative on the Kentucky Rules of Evidence.

This primer is in no way intended to be a substitute to Professor Lawson's seminal work. Instead, the primer is designed to better understand the rules of evidence and how the rules work together. This is helpful for formulating motions *in limine* prior to trial and for making objections in the heat of battle. Essentially, the rules of evidence can be best understood as follows: All evidence is admissible unless an exception applies to prevent the introduction of that evidence. The major exceptions on the admissibility of evidence are (1) undue prejudice (or confusion of issues, etc.); (2) character evidence; (3) privileged evidence; (4) opinion evidence; (5) hearsay; and (6) the requirement of authentication. *See* KRE 403-04, 406, 408-409, 501, 701, 801A, 803, 804, 804A, and 901. What makes the practice of law challenging, particularly the rules of evidence, is that exceptions to the exceptions exist. Therefore, in law school, we struggled through the hearsay exceptions and the exceptions on the use of character evidence. However, these exceptions are best understood as reverting evidence back to its original state: admissible.

KRE 402 – GENERAL RULE OF RELEVANCY

KRE 402 states the overarching rule that evidence should be admissible at trial: "All relevant evidence is admissible, except as otherwise provided by . . . these rules . . . . Evidence

which is not relevant is not admissible." Of course, KRE 401 defines "relevant evidence" very broadly as any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As Professor Lawson points out in *The Kentucky Evidence Law Handbook*, "[E]vidence is relevant . . . if it tends to prove the point of fact for which it is offered (probative worth) and the point of fact counts in the case (materiality)." Lawson, *supra*, § 2.05[2][a] (quoting Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, 545 (3d ed. 2007)).

Professor Lawson has a quote that is used often in trial briefs throughout the Commonwealth of Kentucky to discuss the rule of relevance: "The inclusionary thrust of the law of evidence is powerful, unmistakable, and undeniable, one that strongly tilts outcomes towards admission of evidence rather than exclusion." Lawson, *supra*, § 2.05[2][b]. In other words, in all close calls, relevant evidence should be admitted since the showing of relevance is minimal at best.

The best example of this is background evidence. For instance, while only the medical negligence of a physician may be at issue in a case (*i.e.,* whether or not the physician breached the standard of care), relevant evidence may include a whole slew of other facts that bear minimally upon that one question: conversations between plaintiff and nurses; conversations between family members; and information from records custodians. As the Advisory Committee to the Federal Rule of Evidence 401 noted, "the fact to which the evidence is directed need not be in dispute . . . evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding." Any other rule would be too limiting.

There are a few other points to note regarding relevancy. The first is that credibility of witnesses is always relevant. As the Kentucky Supreme Court said in *Baker v. Kammerer*, 187 S.W.3d 292, 295 (Ky. 2006), "[A] wide array of evidence is admissible only because it renders testimonial credibility more probable or less probable than it would be without the evidence." Finally, relevant evidence includes evidence that bears upon other evidence that has been admitted. *See* Lawson, *supra*, § 2.05[3][c]. The example used by Professor Lawson is the admission of guilt and the underlying facts surrounding the admission of guilt.

KRE 403 – EXCLUSION FOR UNDUE PREJUDICE

The first major rule of exclusion to the admissibility doctrine is KRE 403, which excludes relevant evidence that is unduly prejudicial, cumulative, confuses the issues or creates an unnecessary delay. However, this is the most misunderstood exception to the rule of general relevance. Most likely, practitioners fail to appreciate how strong the rule of admissibility is under the Kentucky Rules of Evidence. Under KRE 403, only evidence that is significantly more prejudicial than its relevant worth should be excluded.

"THE INCLUSIONARY THRUST OF THE LAW OF EVIDENCE IS POWERFUL, UNMISTAKABLE, AND UNDENIABLE, ONE THAT STRONGLY TILTS OUTCOMES TOWARDS ADMISSION OF EVIDENCE RATHER THAN EXCLUSION."

As KRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice . . . ." As a commentator on the Federal Rules of Evidence has stated, "Rule 403 recognizes that relevance alone does not ensure admissibility . . . relevant evidence may be excluded if its probative value is not worth the problems that its admission may cause. The issue is whether the search for truth will be helped or hindered by the interjection of distracting, confusing, or emotionally charged evidence." Lawson, *supra*, § 2.15[2] (quoting 2 Mclaughlin, Weinstein's Federal Evidence, § 403.02[1][a] (2d ed. 2012)). Professor Lawson has a nice summary about KRE 403 that every practitioner should take to heart: "It is meant to serve as a moderating force upon the law's very liberal rule of relevance . . . it requires a balancing of probative value against dangers and considerations that can impair the fairness of a trial . . . ." Lawson, *supra*, § 2.15[6].

Again, exclusion of evidence under KRE 403 requires that the prejudicial aspect of the evidence substantially outweigh the probative value of relevant evidence. It is important to note that the prejudice required by the rule is beyond merely evidence that is bad for the opposing side: "Any evidence intended to harm a party's case could be said to be prejudicial." *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343, n. 6 (3rd Cir. 2002); *see also Webb v. Commonwealth*, 387 S.W.3d at 319, 326 (Ky. 2012) (holding that KRE 403 does not prohibit "evidence that is merely prejudicial in the sense that it is detrimental to a party's case").

CHARACTER EVIDENCE

In civil cases, character evidence is much less important than in a criminal case. The one exception is impeachment of witnesses for their truthfulness or untruthfulness. In other words, a large bar to the introduction of otherwise admissible evidence is the ban on character evidence. KRE 404 sets forth the general character evidence rule. However, many other rules of character are interspersed throughout. See KRE 406 ("Habit; routine practice"), 608 ("Evidence of character and conduct of witnesses"), 609 ("Impeachment by evidence of conviction of crime"). Under KRE 404, in civil cases, "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." In civil cases, KRE

404(b), the crime/fraud exception, applies. However, the majority of cases discussing the exception are criminal cases. This body of law is significant, ever changing, and beyond the scope of this article.

Generally, evidence of character is admissible in a civil case when the character of the party is an element of the claim being brought. This occurs infrequently; a much greater use of evidence that is really character evidence is found in KRE 406. It states: "Evidence of the habit of a person . . . whether corroborated or not . . . is relevant to prove that the conduct of the person . . . was in conformity with the habit . . . ." KRE 406. The Comment to KRE 406 illustrates the tension between character and habit: "Character and habit are close akin. Character is a generalized description of one's disposition . . . such as honesty, temperance, or peacefulness. 'Habit' . . . describes one's regular response to a repeated specific situation" KRE 406 (quoting FRE 406, Advisory Committee's Note). Therefore, testimony that the defendant is a careful driver is inadmissible; however, testimony that the driver always uses his turn signal is admissible.

In addition to habit, character is routinely used in civil cases to attack or support the credibility of witnesses. KRE 405 explains how such evidence is admitted: either through reputation or opinion, *i.e.*, the reputation or opinion of an individual for their truthfulness or untruthfulness. *See* KRE 405(a). Furthermore, specific instances of conduct can be inquired into on cross-examination if probative for truthfulness or untruthfulness. KRE 405 and KRE 608 are practically identical.

Under both rules, two forms of attack or support as to a witness' credibility are allowed: (1) through the reputation of the witness in a community; and (2) via opinion testimony by another witness. Both are equally valid forms of attack or support. However, the witness must prove their knowledge of the person's reputation being attacked. Finally, evidence to support a witness' credibility cannot be offered until it has been attacked, a recognition that the law views all witnesses equally. KRE 608(a)(2).

One of the interesting questions about opinion testimony for truthfulness is whether experts may opine as such. Professor Lawson believes that the Kentucky Supreme Court will foreclose such an opinion since he believes "KRE 608 was added to the law for the specific and narrow purpose of lifting the age-old barrier to *lay opinion* testimony about character and not at all to open the door to expert testimony." Lawson, *supra*, § 4.25[3][c]. Moreover, in most cases, the expert witness won't be able to prove personal knowledge.

Finally, both KRE 405 and 608 allow cross-examination into specific instances of conduct probative to truthfulness or untruthfulness of the witness; however, specific instances of conduct cannot be proven through extrinsic evidence. Moreover, the attorney must have a factual basis to raise the issue. In other words, specific instances of truthfulness or untruthfulness can be inquired into through cross-examination. However, the trial may not diverge into a mini-trial on the credibility of that witness.

KRE 511(C) EVEN ALLOWS THE PARTY AGAINST WHOM THE JURY MIGHT DRAW AN ADVERSE INFERENCE FROM A CLAIM OF PRIVILEGE TO REQUEST AND RECEIVE AN INSTRUCTION THAT NO SUCH INFERENCE CAN BE DRAWN.

PRIVILEGES

A very large exception to the general rule of admissibility is the law of privileges. And the largest such privilege is the attorney-client privilege, which merits its own article. However, other privileges may override the general rule of admissibility, such as KRE 504, the "husband-wife privilege," and KRE 507, the "psychotherapist-patient privilege." KRE 501 states the general rule of privilege. It provides: "No person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing." KRE 501. The rule is designed to codify the general rule of admissibility, *i.e.*, evidence should be admitted unless there is a good reason not to admit it. Therefore, all privileges are strictly construed. *See Trammel v. U.S.*, 445 U.S. 40, 50 (1980). Generally, evidentiary privileges protect conversations that occur in relationships that the law deems sacrosanct, such as husband-wife, attorney-client, and psychotherapist-patient.

For instance, KRE 504 protects conversations between spouses because the law deems that those conversations should generally remain private. This privilege has two basic components. The first is more of a criminal component under KRE 504(a) that allows the spouse to refuse to testify against the other spouse for any event occurring after the date of their marriage. This privilege can also be exercised by the testifying spouse. KRE 504(b) is the marital communications privilege, which allows free flow of information between spouses during the marriage. This privilege may also come up in a deposition related to discussions between spouses related to the lawsuit.

A final important caveat to be remembered is KRE 511, which prevents any comment or inference from a claimed privilege. KRE 511(c) even allows the party against whom the jury might draw an adverse inference from a claim of privilege to request and receive an instruction that no such inference can be drawn.

OPINION TESTIMONY

Under the Rules of Evidence, opinion testimony is limited to a few areas and witnesses. In other words, opinions are generally barred. For instance, under KRE 405 and 608, opinion testimony on the credibility of a witness is allowed. KRE 701 is the general lay opinion testimony rule. It prohibits lay opinion unless the opinion is "rationally based on the perception of the witness," "is helpful to clear understanding of the testimony," and not "based on

scientific, technical or otherwise specialized knowledge."

Lay opinion testimony is best illustrated through examples: lay opinions on speed at the time of collision; intoxication; and pain and suffering of another are all appropriate. *See, e.g., Clement Brothers Constr. Co. v. Moore*, 314 S.W.2d 526 (Ky. 1958); *Motorists Mut. Ins. Co v. Glass*, 996 S.W.2d 437 (Ky. 1997); *Zogg v. O'Bryan*, 237 S.W.2d 511 (Ky. 1951).

An important part of lay testimony is that it cannot masquerade as expert opinion testimony. KRE 701(c) is designed to prevent "smuggling" expert testimony under KRE 701, when it must be admitted under KRE 702. This essentially codifies the United States Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). In other words, expert testimony is inadmissible unless (1) the witness is qualified by knowledge, skill or training as an expert; (2) the opinion is based upon "sufficient facts and data"; (3) the testimony is "the product of reliable principles and methods"; and (4) which were applied reliably. *Daubert*, 509 U.S. at 589-96. If the expert opinion does not meet these four criteria, it is properly excluded.

HEARSAY

A very large exception to the rule of admissibility is the hearsay rule. Under KRE 802: "Hearsay is not admissible except as provided in the Kentucky Rules of Evidence or by rules of the Kentucky Supreme Court." KRE 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In essence, hearsay evidence is "an out-of-court statement offered for the truth of the matter asserted." *See Anderson v. United States,* 417 U.S. 211, 219 (1974). Taken literally, almost any document written outside of court is hearsay and should be excluded unless an exception exists. For instance, the CV of an expert is hearsay because it is (1) an out of court statement (2) offered for the truth of the matter asserted (for example, an expert's credentials).

To better understand the exceptions to the hearsay rule, the rationale behind the rule must be examined. According to Professor Lawson, allowing hearsay circumvents the rationale for the rule in that it prevents cross-examination of the declarant "in the presence of the decision makers." Lawson, *supra*, § 8.00[1][b]. Therefore, to be admissible as an exception to the hearsay rule, the out-of-court statement generally must meet two different rationales: (1) allowing the evidence is necessary because it will be lost without it; and (2) the statement is trustworthy enough to allow it into evidence without cross-examination. *Id.*

The exceptions to the exception are set forth in KRE 801A, 803, 804, and 804A. This includes non-hearsay, *i.e.,* a statement that is not hearsay and offered for some other purpose besides the truth. Most often, the claim is that the statement is being offered for the effect upon the listener. *See Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky. 2006) (allowing the statement "I . . . blackballed you from the fraternity," as proof of motive of the accused).

A VERY LARGE EXCEPTION TO THE RULE OF ADMISSIBILITY IS THE HEARSAY RULE. UNDER KRE 802: "HEARSAY IS NOT ADMISSIBLE EXCEPT AS PROVIDED IN THE KENTUCKY RULES OF EVIDENCE OR BY RULES OF THE KENTUCKY SUPREME COURT."

KRE 801A contains two of the most important exceptions to the hearsay rule: prior statements of witnesses and admissions by a party opponent. Under KRE 801A(a), a prior statement is not excluded by the hearsay rule if the declarant testifies and is examined concerning the statement, with proper foundation laid under KRE 613, and the statement is either (1) a prior inconsistent statement; (2) a prior consistent statement offered to rebut a charge of recent fabrication/improper influence or motive; or (3) a prior statement of identification. A prior consistent statement is most likely to be admissible following cross-examination of a witness, and the attorney can rehabilitate the witness by showing the witness testified similarly by a prior deposition.

Prior inconsistent statements have two potential uses as evidence: (1) to impeach credibility; and (2) to prove truth of the assertions contained in the statement. Lawson, *supra*, § 8.10[1][a]. Kentucky's prior inconsistent statement exception is not as limited in reach as FRE 801(d)(1)(A), which extends only to prior inconsistent statements given under oath in a trial or proceeding. The KRE 801(a)(1) exception applies to prior inconsistent statements offered into evidence in civil cases, to prior inconsistent statements in depositions, and to prior inconsistent statements in written form. Lawson, *supra*, § 8.10[1][c].

Admissions by a party opponent are generally self-explanatory and not excluded under KRE 802. See KRE 801A(b)(1). An admission by a party opponent is: (1) a statement made by the party, (2) an adoptive admission, (3) a statement made by an authorized individual, (4) an admission by agents and employees, or (5) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Lastly, there are admissions by privity as set forth under KRE 801A(c), consisting of wrongful death, predecessors in interest, and predecessors in litigation.

KRE 803 contains the most exceptions to the general bar upon hearsay evidence (twenty-three). Availability of the declarant is immaterial for KRE 803 exceptions. The most commonly used KRE 803 exceptions include: KRE 803(1) present sense impressions; KRE 803(2) excited utterances; KRE 803(3) statements regarding the declarant's then existing mental, emotional, or physical condition; KRE 803(4) statements for purposes of medical treatment (but not the statements of the health care provider); KRE 803(5) recorded recollections (the written document can only be read into evidence and not admitted); KRE 803(6) business records (medical records if properly authenticated); and KRE 803(18) learned treatises (only read into evidence and not admitted).

The basis of these exceptions is the belief that the statements possess significant reliability to allow them into evidence. Therefore, a present sense impression is admissible, despite the hearsay bar, because it is a statement describing an event and made while the event is occurring (or immediately thereafter), *i.e.*, "that car is driving too fast and will wreck." KRE 803(1). KRE 803(2), the excited utterance, is similar but broader. It is a statement about a startling event made while the witness is under the stress or excitement of the event. These statements are admissible because they are "the product of [the startling event] and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate." *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky. 2002). Similarly, KRE 803(3), statements of physical pain, are considered trustworthy because the statements describe a then-existing malady.

Under KRE 804, there are five exceptions to the hearsay rule when the declarant is unavailable to testify. These include: (1) former testimony; (2) statements made under belief of impending death about the cause of death; (3) statements against interest; (4) statements of family history; and (5) forfeiture by wrongdoing. KRE 804.

The statement against interest exception, KRE 804(3), is most likely to occur in a civil case. There are three categories of statements against interest: (1) statements against a declarant's pecuniary or proprietary interest; (2) statements against declarant's interest in civil litigation; and (3) statements that may subject a declarant to criminal liability. Lawson, supra, § 8.45[2][a]. Generally speaking, the evidence is admitted because of the trustworthiness inherent in a statement against interest, *i.e.,* the declarant would not have made it unless it was true.

Under KRE 805, hearsay within hearsay, commonly referred to as "double hearsay," is not admissible as evidence unless each part of the combined statement meets an exception to the hearsay rule.

A final important rule to remember is KRE 806. When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked. All methods of impeachment are available to attack the declarant's credibility. Lawson, *supra*, § 8.90[2][a].

AUTHENTICATION AND BEST EVIDENCE

The final large exception to the rule of admissibility is authentication and the best evidence rule. If evidence is not properly authenticated then it should be excluded. However, authentication is not onerous, which is made clear under KRE 901(a): "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." The burden of showing authentication is minimal, and KRE 901(b) provides a non-exhaustive list of ways to authenticate evidence. These include: by testimony, by comparison, by distinctive characteristics, and by voice identification. In preparation for trial, the identification of the individual in the best position to authenticate or identify evidence is key under KRE 901(b).

As an example, to properly authenticate a photograph, the photograph must be verified by testimony indicating it is a fair and accurate portrayal of what it is supposed to represent. However, it can be authenticated by anyone with knowledge of what the photo depicts, not necessarily the individual who took the photograph. The same would be true with a voice recording—the recording can be authenticated by someone with knowledge of the voices, not necessarily by the people speaking. *See Campbell v. Commonwealth*, 788 S.W.2d 260, 264 (Ky. 1990) (allowing third party to authenticate the voice of a criminal defendant).

Some extrinsic evidence is self-authenticating because the "authenticity is so highly probable that nothing but a waste of time and money would result from insisting upon a strict adherence to the authentication requirement." Lawson, *supra*, § 7.15[1]. Under KRE 902, self-authenticated evidence consists of: (1) domestic public documents under seal; (2) domestic public documents not under seal; (3) foreign public documents; (4) official records; (5) official publications; (6) books, newspapers, and periodicals; (7) trade inscriptions; (8) acknowledged documents; (9) commercial paper; (10) documents which self-authenticate by statute or other rules of evidence; and (11) business records. An example of documents self-authenticated by statute include medical records from Kentucky hospitals that have elected to proceed under the provisions of KRS 422.300, *et seq*. To self-authenticate a business record under KRE 902(11), the proponent of the evidence (1) must have the records certified and (2) provide notice to the opponent of the intent to use the records. This is best accomplished through a Notice of Filing directly into the court record.

A final important caveat is the "best evidence rule," reflected in KRE 1001-1003. Under the "best evidence rule," a practitioner who wants to prove the contents of writings, recordings, and photographs must produce the original. KRE 1002. However, pursuant to KRE 1003, "a duplicate is admissible to the same extent as an original unless: (1) a genuine question is raised as to the authenticity of the original; or (2) in the circumstances, it would be unfair to admit the duplicate in lieu of the original." This is a recognition that duplication of the original is easily accomplished without transcription errors. Therefore, the requirement of the original is less important for authentication purposes.

CONCLUSION

The best way to understand the Kentucky Rules of Evidence is to realize that they represent a rule of inclusion. Evidence should generally be admitted unless one of the exceptions applies to prevent admission into evidence. Moreover, for the most part, exceptions to the exceptions exist, which reinforces the general rule of admissibility.

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FALL 2023 KDC AWARDS NOMINATION FORM

To recognize and honor its members, the Kentucky Defense Counsel, Inc. created three awards to be given annually during the Fall Seminar. The awards are:

A. **DIPLOMAT** – This award shall be given to a senior member of the Kentucky Defense Counsel, Inc. who has made significant contributions to KDC or to the defense bar. To be eligible for this award, the recipient must be a member of KDC and sixty-five (65) years of age or older.

B. **DEFENSE LAWYER OF THE YEAR** – This award shall be given to a member of KDC who has set him or herself apart by achievements and contributions to the defense bar and KDC. To be eligible for this award, the recipient must be a member of KDC.

C. **YOUNG LAWYER OF THE YEAR** – This award shall be given to a member of KDC who has made significant contributions to KDC and the practice of law. To be eligible for this award, the recipient must be a member of KDC and forty (40) years of age or younger or any member who has been practicing law for ten (10) years or less.

NAME OF INDIVIDUAL TO BE NOMINATED **NOMINATED FOR:** ☐ **DIPLOMAT** ☐ **DEFENSE LAWYER OF THE YEAR** ☐ **YOUNG LAWYER OF THE YEAR**

ADDRESS OF INDIVIDUAL TO BE NOMINATED

EMAIL OF INDIVIDUAL TO BE NOMINATED **TELEPHONE NUMBER OF INDIVIDUAL TO BE NOMINATED**

PLEASE STATE BASIS FOR NOMINATION

1

NAME OF INDIVIDUAL TO BE NOMINATED **NOMINATED FOR:** ☐ **DIPLOMAT** ☐ **DEFENSE LAWYER OF THE YEAR** ☐ **YOUNG LAWYER OF THE YEAR**

ADDRESS OF INDIVIDUAL TO BE NOMINATED

EMAIL OF INDIVIDUAL TO BE NOMINATED **TELEPHONE NUMBER OF INDIVIDUAL TO BE NOMINATED**

PLEASE STATE BASIS FOR NOMINATION

2

NAME OF INDIVIDUAL TO BE NOMINATED **NOMINATED FOR:** ☐ **DIPLOMAT** ☐ **DEFENSE LAWYER OF THE YEAR** ☐ **YOUNG LAWYER OF THE YEAR**

ADDRESS OF INDIVIDUAL TO BE NOMINATED

EMAIL OF INDIVIDUAL TO BE NOMINATED **TELEPHONE NUMBER OF INDIVIDUAL TO BE NOMINATED**

PLEASE STATE BASIS FOR NOMINATION

3

ABOUT THE NOMINATOR

NAME OF NOMINATOR **SIGNATURE OF NOMINATOR** **DATE**

ADDRESS OF NOMINATOR

EMAIL OF NOMINATOR **TELEPHONE NUMBER OF NOMINATOR**

Complete and return nominating form no later than July 15, 2023, to:

KDC Executive Director Jennifer Cocanougher at admin@ky-def.org

Forms may also be sent via USPS to: KDC Office, P.O. Box 1412 Versailles, KY 40383

Thank you for your participation!

JUDICIAL STATEMENTS PRIVILEGE IN KENTUCKY

By David Latherow,
Williams, Hall & Latherow, LLP

As litigators, we are fortunate to be able to zealously assist clients in times of need. My wife is an attorney and a good one at that. We have had many late-night talks involving the scope of representation, the pitfalls that exist for our clients, and those that exist for us as attorneys in advocating for our clients. Zealous representation and the conflicts inherent in adversarial legal proceedings can, at times, result in causes of action, defenses, testimony, and allegations that understandably provoke strong feelings and even animosity from opposing litigants and litigators alike. Consequentially, it is not uncommon for suits and claims to arise asserting causes of action for libel, slander, malicious prosecution, abuse of process, misrepresentation, or some other general wrong, where the allegedly aggrieved party believes he or she have been deprived of some right, or been injured, based upon the words used by opposing parties or counsel.

The prospect of civil liability based on choice of words or advocating for a position based upon reliance on the information provided by a client is a real concern for the practitioner. For example, a colleague was forced defend such a claim based simply on their filing of a lawsuit and description of alleged facts and claims in the body of the Complaint. How do we, as attorneys, advocate for our clients while protecting our clients and ourselves from suits based on the words we use and the allegations we assert in litigation? While we must let our ethical responsibilities pursuant to the Kentucky Rules of Civil Procedure and Rules of Professional Conduct be our guide, one doctrine that provides partial solace and peace of mind is the judicial statements privilege or litigation privilege. While the subject is worthy of a more in-depth analysis than space herein provides, let us take a brief look at this absolute privilege in Kentucky and its scope.

WHAT IS THE JUDICIAL STATEMENTS PRIVILEGE?

The judicial statements privilege or litigation privilege is a legal concept that allows judges, attorneys, litigants, and witnesses to speak freely and candidly about their cases without fear of being sued for defamation or various other intentional torts. The privilege is grounded in the idea that the legal system depends on full and frank discussion between lawyers, judges, and parties involved in legal proceedings, and that without such discussions, the administration of justice would suffer. Because the doctrine looks to the free and unfettered administration of justice, an incidental result of the doctrine's application may occasionally afford immunity to the evil disposed and malignant slanderer by precluding the use of privileged communications to sustain a cause of action. Even if the offending words were used with actual malice, the absolute privilege renders the motives and intent

irrelevant in light of the public policy favoring freedom to speak freely and without fear of civil suit and financial hazard (although such conduct may not be without consequence as discussed later herein).

HISTORY OF THE PRIVILEGE

The absolute immunity afforded to certain statements made in the course of a judicial proceeding has a long history in Kentucky and an even longer history in the common law of England. *See Smith v Hodges*, 199 S.W.3d 185 (Ky. App. 2005); *Morgan v. Booth*, 76 Ky. 480 (Ky. 1877). In England, the privilege can be reliably traced back to the mid-1500s. In the United States, some courts follow the English Rule, and some follow the American Rule. The English Rule provides that any statement contained in a pleading is absolutely privileged irrespective of its relevancy to the issues therein. The prevailing rule in Kentucky, as in many other states, is the American Rule, which is that "statements in pleadings filed in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice." *Schmitt v. Mann*, 163 S.W.2d 281, 283 (Ky. 1942). The doctrine precludes the use of these privileged communications to sustain a cause of action. (For a good discussion of the history and evolution of the English and American Rules, please review *Smith v. Hodges,* cited above.)

WHEN DOES THE PRIVILEGE APPLY?

1. PRELIMINARY TO A PROPOSED JUDICIAL PROCEEDING

In order for a communication to fall within the purview of the judicial statements privilege, the communication must fulfill two requirements. First, the communication must have been made "preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding." *Morgan v. Botts*, 348 S.W.3d 599, 602 (Ky. 2011) (overruled on other grounds). This includes affidavits, testimony, witness statements, depositions, discovery answers, and the complaint itself. Kentucky courts have even expanded the scope to include "any statement made preliminary to, in the institution of, or during the course of an attorney disciplinary proceeding," including an ethics complaint. *Id.*

2. MATERIAL, PERTINENT, AND RELEVANT TO THE PROCEEDING

Second, "the communication must be material, pertinent, and relevant to the judicial proceeding." *Smith*, 199 S.W.3d at 193. Attorneys cannot simply solicit a malicious or false statement, stick it in an affidavit unrelated to an actual suit, and be protected from suit by claiming privilege. "The bare possibility that proceeding may be instituted is not to be used as a cloak to provide immunity from defamation when the possibility of suit is not seriously considered." *Aces High Coal Sales, Inc. v. Cmty. Bank & Trust of W. Ga.*, No. 6:15-CV-161-DLB-HAI,2017 U.S. Dist. LEXIS 115412, at *14 (E.D. Ky. Apr. 24, 2017) (internal citations omitted). The privilege is not limited to pending litigation, but also applies to statements where litigation may be anticipated. The statement must have some relation to a proceeding that is contemplated in good faith and under serious consideration. *See Rogers v. Luttrell*, 144 S.W.3d 841, 843-44 (Ky. App. 2004).

While what constitutes "material, pertinent, and relevant" is a matter of law

to be decided by the court, Kentucky courts generally apply the privilege liberally. In determining what is pertinent or relevant to the proceeding, much latitude must be allowed to the judgment and discretion of those who maintain a cause in court. The Restatement (Second) of Torts addresses the relationship of the statement to the proceedings:

> Testimony to be privileged need not be material or relevant to the issues before ethe court, nor does the fact that the testimony is offered voluntarily and not in response to a question prevent it from being privileged if it has some reference to the subject of the litigation. If the defamatory matter is published in response to a question put to the witness by either counsel or by the judge, that fact is sufficient to bring it within the protection of the privilege . . . .

Restatement (Second) of Torts § 488 cmt. c (1979).

TO WHOM DOES THE PRIVILEGE APPLY?

The privilege protects a variety of actors in the litigation context. As originally established, the privilege protected attorneys from civil liability for statements that offended opposing parties during litigation. Over time, the category of individuals protected by the privilege expanded. Kentucky case law provides that the privilege is applicable to parties, witnesses, and attorneys alike. *See Halle v. Banner Indus. of N.E.*, 453 S.W.3d 179 (Ky. App. 2014). The privilege extends to attorneys making demand letters, trustees in bankruptcy proceedings, disciplinary complainants, court-appointed therapists, court-designated workers, and police officers lying to a grand jury. Kentucky courts have even extended the privilege to protect a licensed clinical psychologist appointed to supervise visitation who sent a letter to the family court. *See Rogers*, 144 S.W.3d at 844.

TO WHAT ACTIONS DOES THE PRIVILEGE APPLY?

DEFAMATION

Recognizing that litigation may result in claims, arguments, and allegations that later prove to be incorrect, the privilege developed as a consequence of the need to freely prosecute claims and pursue justice without fear of being sued for defamation. Defamation consists of four elements: (1) a defamatory statement, (2) about the plaintiff, (3) that is published, and (4) that causes injury to reputation. However, if the defamatory statement is made preliminary to, in the institution of, or during the course of a judicial proceeding and is pertinent, material, or relevant to the proceeding, then the statement is afforded absolute privilege even if it was uttered with malice. See Schmitt, 163 S.W.2d. at 283.

While the judicial statements privilege is most often invoked as a defense to claims of defamation, its application is not limited to that context. As new torts derivative of defamation have emerged, many jurisdictions have expanded the privilege. Because the privilege protects the communication, the nature of the theory on which the challenge is based should be irrelevant.

OTHER CLAIMS

While the judicial statements privilege is most often invoked as a defense to claims of defamation, its application is not limited to that context. As new torts derivative of defamation have emerged, many jurisdictions have expanded the privilege. Because the privilege protects the communication, the nature of the theory on which the challenge is based should be irrelevant. In *Halle*, 453 S.W.3d 179, the Court of Appeals discussed the rationale for extending the privilege beyond just defamation cases. If the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and quasi-judicial proceedings is really to mean anything, then courts must not permit its circumvention by affording an almost equally unrestricted action under a different label. *Id.* In other words, extension of the privilege beyond defamation actions prevents the circumvention of the privilege by creative pleading.

FRAUD

As the court indicated in *Halle*, Kentucky courts and federal courts interpreting Kentucky law have applied the privilege in claims for fraud. Defamation and fraud contemplate allegations that a party suffered harm because of a falsehood communicated by the defendant. Because the communication of a falsehood is an essential element of both defamation and fraud, the litigation privilege provides a complete defense to both causes of action.

INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS

Other Kentucky courts have applied the privilege to claims involving intentional interference with business relations. *See Gray v. Central Bank & Trust Co.*, 562 S.W.2d 656 (Ky. App. 1978). In Gray, the Court pointed to William L. Prosser, Law of Torts, § 130 (4th ed. 1971), for the proposition that defamation, interference with contract, injurious falsehood, and the broader tort of interference with prospective economic relations are all different phases of the same general wrong of depriving the plaintiff of beneficial relations with others, the greatest protection being given to personal reputation. *Gray*, 562 S.W.2d at 657-58.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Nave v. Feinberg*, 539 S.W.3d 685, 686 (Ky. App. 2017), Nave filed multiple causes of action against multiple defendants, including an attorney for claims arising out of a custodial evaluation in a dissolution proceeding. Nave alleged defamation, conspiracy to defame, fraud based upon defendent's material misrepresentations, conspiracy to commit fraud, intentional infliction of emotional distress, conspiracy to intentionally inflict emo-

tional distress, obstruction of a child abuse investigation, and conspiracy to obstruct a child abuse investigation. The court held the judicial statements privilege applied to all such claims and dismissed the action against the attorney. *Id.*

MALICIOUS PROSECUTION

Kentucky has also extended the privilege to apply in cases where malicious prosecution is alleged. In *Reed v. Isaacs*, 62 S.W.3d 398 (Ky. App. 2000), the Court applied the privilege where a witness lied to a grand jury to secure an indictment. The court pointed to the strong public policy for encouraging witnesses to come forward without fear of retaliation in the form of a civil lawsuit. *Id.*

WHEN DOES THE PRIVILEGE NOT APPLY?

A growing number of jurisdictions in the United States have extended the litigation privilege to apply with equal force to communications AND conduct. The rationale is that there is no compelling reason to distinguish between conduct and communications occurring in the context of litigation. However, while this may be the emerging position in other jurisdictions, Kentucky case law concludes that the privilege does not apply to conduct. This discussion has taken place in the context of abuse of process claims.

In *Morgan*, 348 S.W.3d at 602, the Kentucky Supreme Court held that the judicial statement privilege applies to the act of filing a disciplinary complaint against an attorney as well as the statements contained therein. The immunity applied to complainants was premised upon the idea that one who elects to enjoy the status and benefits of the legal profession must give up certain rights as causes of action. However, in advancing the position that the judicial statements privilege does not apply to conduct, the Court of Appeals in *Halle* concluded that the Kentucky Supreme Court did not intend to extend the privilege to acts other than disciplinary complaints filed by the KBA. 453 S.W.3d at 179.

Abuse of process claims differ from malicious prosecution claims in that the tort is not premised upon commencing an action or causing process to issue without justification, but upon misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. This usually takes the form of some sort of coercion. As such, the motive for using the process is the core of the claim, not the statements made in the proceeding. As discussed in *Halle*, Kentucky courts advance the position that "[a]n abuse of process claim is inherently inimical to a litigation privilege and [if] taken to its logical extreme could emasculate the tort entirely." *Id.* at 187 (internal citations omitted).Thus, when allegations of misconduct put the individual's intent at issue in a civil action, the statements made in the judicial proceeding may be used for evidentiary purposes to determine whether the individual acted with the requisite intent.

CAN ATTORNEYS ACT WITHOUT FEAR OF CONSEQUENCE?

Attorneys must be able to represent their clients freely and zealously without fear of facing civil liability for choice of words or unfettered reliance on information provided by a client. As it pertains to attorneys, the basis of the privilege is to permit a free adversarial atmosphere in which we can employ our skills for our clients. In fulfilling our obligations to our clients and to the court, it is essential that we should be able to act freely based upon our own best judgment without fear of later having to defend ourselves in a civil claim for defamation because of something we have said or written during litigation. Absent the privilege, attorneys would be unjustly divided between advocating for their clients and protecting themselves from suit by their adversaries. A system that does not afford this type of protection could have a chilling effect on what we choose to argue, and could hamper the cause of justice in very real and meaningful ways.

While the judicial statements privilege may insulate an actor from civil liability, attorneys are certainly not free to brazenly ignore their responsibilities as officers of the court and the obligations imposed upon them pursuant to the Kentucky Rules of Civil Procedure and the Rules of Professional Conduct. As such, while an absolute privilege may attach, attorneys and their clients are not permitted to act without consequences during the course of a case. The inherent authority bestowed upon the court as well as the obligations imposed by the Kentucky Rules of Civil Procedure, including Rule 11, and the Rules of Professional Conduct all provide avenues for the court and opposing parties to guard and protect against abusive litigation tactics. Appropriate sanctions exist to curb and punish such behavior. Sanctions can take various forms and may include but not be limited to attorney fees, contempt, exclusion of proof or witnesses, spoliation instructions, disciplinary action, and even dismissal of the underlying suit.

Additionally, attorneys should be mindful that the scope of the privilege extends only to statements made preliminary to, in the institution of, or during a judicial proceeding. In the ever competitive world of attorney advertising, some attorneys may feel emboldened to make fantastical allegations or statements in advertising or in the press as part of a public relations strategy to attract clients. Attorneys should be cautioned that such statements are not likely to fall within the protection of the privilege, as those statements are made outside the confines of any particular case and not material, pertinent, or relevant to the proceeding. For good reason, the shield should not extend its protection that far.

Finally, attorneys and clients may also be criminally liable for perjury, attempting to influence witnesses, false swearing, or various nefarious derivatives thereof. In *Reed*, 62 S.W.3d 398, it was alleged that Isaacs lied before the grand jury to secure an indictment. The Court of Appeals held that Isaacs' testimony was absolutely privileged and would not support a cause of action against him. However, the Court of Appeals concluded that while no civil action will lie, when a witness willfully and maliciously gives false testimony, he is liable to prosecution for perjury or false swearing.

CONCLUSION

Lawyers need to be able to freely and zealously represent clients without fear of being civilly liable every time our claims, allegations, or defenses offend opposing parties or counsel. As such, the public policy supporting the judicial statements privilege is a sound one. The privilege protects communications but not conduct. As such, attorneys should diligently investigate the allegations of their respective clients and use their best judgment in determining what claims to assert, what defenses to raise, and what information to share, while simultaneously weighing their duties to their clients and complying with their duties and obligations as officers of the court.

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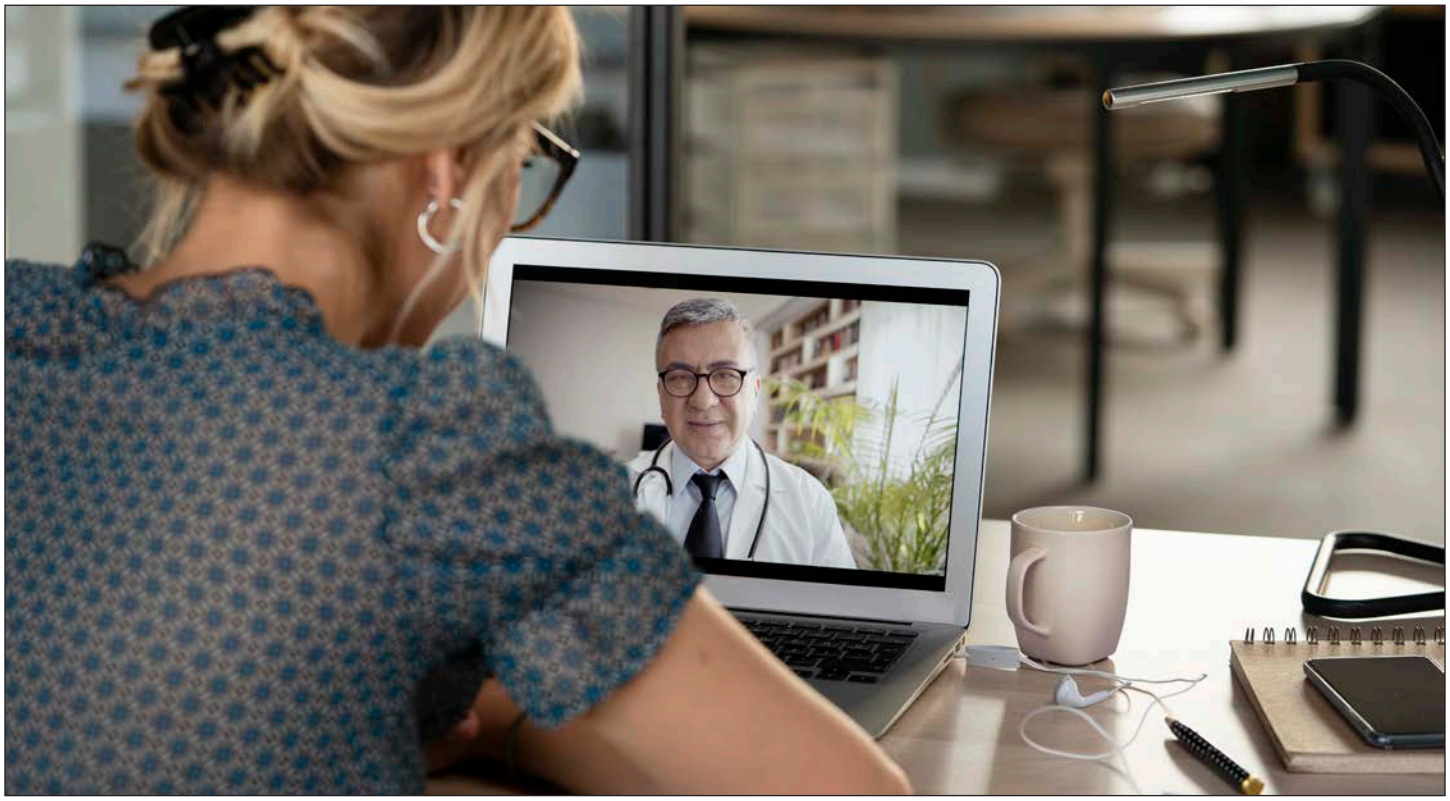


THE CURRENT STATE OF TELEHEALTH IN KENTUCKY AND ITS POTENTIAL IMPACT ON LITIGATION

By Miranda D. Click

Telehealth surged in popularity and necessity during the COVID-19 pandemic. At its peak in April 2020, telemedicine accounted for 69% of all doctor-patient visits in the United States.[1] This dramatic increase of remote health services was initially made possible by the modification of several federal and state restrictions. This occurred as our nation looked for ways to provide health care that was safe for both the patient and the healthcare provider while navigating a pandemic-induced shutdown. While COVID-19 is still a serious concern, many of the initial precautions taken are no longer necessary, permitting healthcare providers to resume somewhat normal practice. However, that does not mean that the healthcare community should forget what it learned about the use of technology during the pandemic. Telehealth was vital during the rise of COVID-19, but its patient benefits and potential should not be ignored as the pandemic ends. Based on new legislation, regulation, and its continued use by practitioners, it appears that telehealth is here to stay.

As defense counsel, we need to be aware of the potential impact of this developing area of medicine on litigation. This article will briefly define telehealth and telemedicine, detail the history of telemedicine regulation in Kentucky to present, and address potential litigation concerns for healthcare professionals as they adapt to telemedicine.

WHAT IS TELEHEALTH? WHAT IS TELEMEDICINE?

Nearly everyone has heard the terms 'telehealth' and 'telemedicine,' but what do they mean and is there a difference between the two? While the terms 'telemedicine' and 'telehealth' are often used interchangeably, there is a distinction that is worth considering before diving into the pertinent regulations.

Telehealth is a broad term intended to include a range of technologies that provide healthcare services and patient care. Telehealth includes telemedicine, but also includes remote non-clinical services such as provider education, electronic medical record access, and other healthcare administration functions. The World Health Organization states that telehealth includes "surveillance, health promotion, and public health functions."[2]

Telemedicine is a subset of telehealth that refers only to the provision of healthcare services at a distance through technological means. In other words, telemedicine is what allows healthcare professionals to evaluate, diagnose, and treat patients remotely using telecommunication technology. Telemedicine allows a patient to talk to a healthcare provider live through technology, communicate with a healthcare provider through secure messag-

ing or email, and even use remote monitoring in some instances. The Kentucky Board of Medical Licensure (KBML) defines telemedicine as "the practice of medicine using electronic communications, information technology or other means between a licensee in one location and a patient in another location with or without an intervening healthcare provider."[3] In short, all telemedicine is telehealth, but not all telehealth is telemedicine.

Generally speaking, telemedicine in Kentucky does not include audio-only telephone conversation, email/instant messaging conversation, or fax.[4] However, telemedicine may include audio-only communication if a patient is unable to access "live-interactive modalities" or when "audio interactions are considered the standard of care for the corresponding health care service being delivered."[5]

While we think of telemedicine as a relatively new idea, it actually began in the 1950s when physicians started using the telephone to call specialists for advice with particular patients.[6] This allowed patients in rural or remote areas to access specialists that they would otherwise have had to travel hours to visit in person. Fast forward to the internet age, and telemedicine changed the way physicians cared for patients forever.

Today, telemedicine is most known as an alternative to an in-person visit with a medical provider. It can be used easily for follow-up visits, remote chronic disease management, and preventative care support (such as educational classes). It can also be used to provide additional clinical support in settings such as assisted living centers and schools. Telemedicine offers the following benefits to patients and providers if done properly:

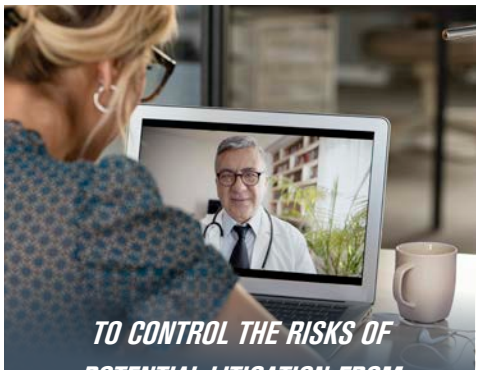
Benefits to Patients:

- No exposure to other patients who may be contagious;
- No travel expenses;
- No time spent traveling to the provider;
- Access to providers who may be too far away to see in-person;
- Less time away from work;
- Less need to find childcare while attending doctor's appointment;
- Less interference with elder care responsibilities.

Benefits to Providers:

- Improves office efficiency;
- Fewer missed appointments and cancellations;
- Less exposure to contagious patients;
- Ability to compete in larger provider markets;
- Promotes patient satisfaction. [7]

While the benefits of telemedicine are obvious, it also has limitations. Telemedicine is not appropriate in all fields or for all patients. In addition, the services must be provided in accordance with both federal and state regulations to ensure certain safeguards are met and providers will be paid or reimbursed. These regulations are in place to protect both patients and providers by creating ground rules for the delivery of appropriate healthcare, to protect patient rights and privacy, and to promote continuity of care.



TO CONTROL THE RISKS OF POTENTIAL LITIGATION FROM TELEMEDICINE, HEALTHCARE PROVIDERS ARE ENCOURAGED TO EDUCATE THEMSELVES ABOUT THE CHANGING LANDSCAPE OF TELEMEDICINE AND TO STAY UP TO DATE ON RECOMMENDATIONS FOR BEST TELEMEDICINE PRACTICES BY THEIR MEDICAL LICENSING BOARDS AND PRACTICE AREA GROUPS.

IS KENTUCKY LAW EMBRACING TELEMEDICINE?

Kentucky is ahead of the curve in terms of telemedicine. In 2018, Kentucky was one of the first states to authorize physician use of telehealth and to prohibit health plans from excluding telehealth services.[8] That was before COVID-19 brought the issue to the national stage. Then, Governor Andy Beshear declared a state of emergency on March 6, 2020, when the first patient was diagnosed with COVID-19 in the Commonwealth. This began the process toward telehealth expansion. Kentucky took steps to make telemedicine services more widely available by implementing emergency administrative regulations. 907 KAR 3:300.[9] These changes broadened access so that patients could receive a wider range of services from their doctors without traveling to a healthcare facility for an in-person visit. These changes also allowed the use of a variety of private electronic devices and applications to be used to facilitate telemedicine visits, such as Zoom. The Commonwealth also created a "Telehealth Program" which was implemented in 2020 through the Office of Health Data and Analytics dedicated to assisting telehealth providers and supporting telehealth adoption across the state.[10] While the state of emergency has ended, the telehealth program is still active.

Now that the pandemic is over, Kentucky continues to embrace telemedicine. Most recently, House Bill 188 was signed into law on March 31, 2022, which clarified issues concerning the location of the patient involved in a telehealth visit and made telehealth more accessible to Kentuckians.[11] This legislation amended KRS 211.336 and barred professional licensing boards from prohibiting the delivery of telehealth services by Kentucky providers to Kentuckians who are temporarily outside the state. *Id*. It also barred professional licensing boards from prohibiting delivery of telehealth services to non-residents temporarily located in Kentucky. *Id*.

POTENTIAL MALPRACTICE CONCERNS FOR PRACTITIONERS

The good news is that historically, telemedicine only made up a fraction of most medical malpractice claims and was generally considered low risk from a claims perspective. Unfortunately, many risk managers and claims analysts fear that the increased use of telemedicine during the pandemic may result in an uptick in claims related to remote health care in the future. The standard of care is the same for a healthcare provider whether the patient is seen via telemedicine or in-person. However, telemedicine opens the door to some unique situations that could lead to malpractice suits. Some of the areas where healthcare providers using telemedicine may be vulnerable to litigation are:

Missed Diagnoses

Remote exams are inherently limited. The healthcare provider is not able to physically palpate an affected area or listen to a patient's lungs from a distance. This means that providers are more dependent on their patients to provide honest and complete medical histories and

to respond fully and appropriately to questions about their present condition. They must also recognize when they are not receiving the full clinical picture whether that be due to a poor patient historian or limitations in the patient's ability to articulate the problem. Failure to obtain key information can lead to missed diagnoses. A study performed by Controlled Risk Insurance Company (CRICO), a leader in medical professional liability, determined that 66% of telemedicine-related claims received from 2014-2018 were related to misdiagnosis or failure to diagnose. [12]

Physician-Patient Communication

Telemedicine may be a successful alternative to in-person care in an existing physician-patient relationship, but it is more complicated when a new patient is seeking care by telemedicine. Telemedicine communications have been affectionately called "webside manner" by some. [13] It is more important than ever that the physician and patient interact in a way that fosters trust and confidence. The patient should understand their role in the dynamic and the steps they must take to effectuate the care, whether that be seeing a specialist by way of a referral, taking specific medication, or restricting their daily activities to promote healing.

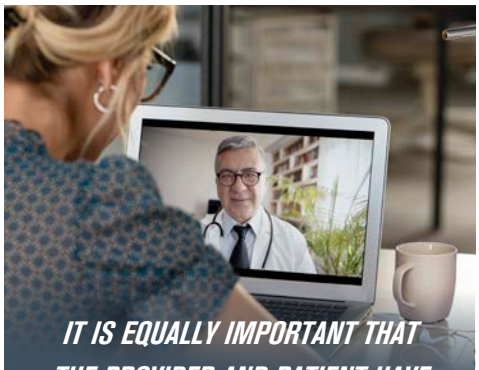
It is equally important that the provider and patient have adequate internet connection that limits glitches or delays in sound or video, which could impede the flow of conversation or worse, cause the patient to miss important instructions leading to injury. Failure to confirm communication and understanding may lead to a negligence claim.

Cyber/Privacy Risks

Patient privacy is a concern in all forms of health care including telemedicine. Privacy is harder to manage when care is provided remotely. For instance, a single patient privacy breach can occur if a physician cannot confirm that no one else is in the room with the patient or that someone cannot hear their confidential communications. On a larger scale, cyberattacks can shut down an entire practice or hospital network leading to business interruption, compromised information, or delays in care. While these problems also exist in in-person healthcare, they are exacerbated by the inability to reach the patient without technology.

TIPS FOR REDUCING TELEMEDICINE MALPRACTICE LITIGATION RISK

To control the risks of potential litigation from telemedicine, healthcare providers are encouraged to educate themselves about the changing landscape of telemedicine and to stay up to date on recommendations for best telemedicine practices by their medical licensing boards and practice area groups. It is likewise important for their defense counsel to stay vigilant of developments in telemedicine and provide tips or resources to mitigate the risks of litigation. Some helpful suggestions are:



IT IS EQUALLY IMPORTANT THAT THE PROVIDER AND PATIENT HAVE ADEQUATE INTERNET CONNECTION THAT LIMITS GLITCHES OR DELAYS IN SOUND OR VIDEO, WHICH COULD IMPEDE THE FLOW OF CONVERSATION OR WORSE, CAUSE THE PATIENT TO MISS IMPORTANT INSTRUCTIONS LEADING TO INJURY. FAILURE TO CONFIRM COMMUNICATION AND UNDERSTANDING MAY LEAD TO A NEGLIGENCE CLAIM.

1. Know When to Avoid Telemedicine

Arguably the most important tip concerning telemedicine is that a provider must know when virtual visits are not an appropriate method of patient care. As mentioned above, one of the inherent limitations of telemedicine is the inability to physically examine the patient. Therefore, providers must recognize when it is appropriate to ask a patient to come into the clinic or hospital to avoid misdiagnosis. [14] Some conditions obviously require in-person treatment such as a potential broken bone or heart attack. Other illnesses fall into a gray area concerning telemedicine, and those are the most dangerous in terms of malpractice. A condition may initially seem like one that can be treated with remote examination such as cold-like symptoms or chronic conditions. However, if information is relayed during the virtual visit that suggests the need for an in-person examination, then it is imperative that the physician inform the patient of the need to be seen in-person for additional examination or treatment. Continuing with the virtual exam simply because it is already underway leaves the provider open to potential failure to diagnose or misdiagnosis claims if a symptom is missed that may have been more fully examined and explored in person.

Further, the provider should have a plan established for handling the need to terminate telemedicine for treatment of a specific ailment in a patient. Terminating medical care without adequate notice could be considered patient abandonment. As such, providers should be prepared to see the patient in-person in a timely manner or to refer the patient to a specialist or other appropriate provider who can likewise see the patient within a reasonable time frame.

2. Confirm the Physician-Patient Relationship

The physician-patient relationship is a cornerstone of the practice of medicine whether that practice is in-person or remote. Physician obligations and responsibilities as well as a patient's rights are fundamental to the provision of acceptable medical care and must be considered when providing telemedicine. For instance, in today's virtual world, not everything is as it seems, and physicians must stay vigilant to make sure they are providing care to the correct person and that the patient is comfortable receiving care from them in this manner. According to a recent guidance opinion by the Kentucky Board of Medical Licensure, "a physician is discouraged from rendering medical advice and/or care using telemedicine without (1) fully verifying and authenticating the location and, to the extent possible, identifying the requesting patient; (2) disclosing and validating the provider's identity and applicable credential(s); and (3) obtaining appropriate consents from requesting patients after disclosures regarding the delivery models and treatment methods or limitations, including any special informed consent regarding the use of telemedicine

technologies."[15] To put it simply, the physician should confirm the patient's identity as well as their own and make sure the patient understands and consents to the telemedicine process before care is initiated.

3. Obtain Informed Consent

As mentioned above, obtaining adequate informed consent will help a physician providing telemedicine protect against malpractice claims. More than that, informed consent is required in telemedicine settings under KRS 311.5975. According to the KBML guidance, the following items should be included in an informed consent form for telemedicine:

- Identification of the patient including the patient's location;
- Identification of the physician including location, credentials, and license in the Commonwealth of Kentucky;
- Identification of the patient's normal primary care physician, if possible;
- Explanation regarding the types of transmissions permitted and/or available through telemedicine (examples include prescription refills, appointment scheduling, and patient education);
- Clear language indicating that the patient agrees that the physician determines whether the condition being diagnosed or treated is appropriate for telemedicine;
- Explanation regarding security measures taken to protect patient privacy via telemedicine;
- Details regarding potential risks to patient safety through telemedicine regardless of protective measures taken;
- A hold harmless clause for information lost due to any technical failure; and
- Requirements for express patient consent to forward any patient-identifiable information to a third party. [16]

Obviously, this list is not exhaustive and other patient-specific information may need to be included. Further, it is not enough to simply have these items in an informed consent form. It is imperative that the physician, or someone working with him or her, discuss these matters with the patient and permit the patient to ask questions to ensure the consent was informed.

4. Document the Medical Record Thoroughly

All patient encounters with a physician, in-person or remote, should be appropriately documented in the medical record. A thorough medical record may be a healthcare provider's best defense against a medical malpractice claim, especially in a telemedicine situation. Typically, telemedicine is a one-on-one conversation between the provider and the patient with very few witnesses, if any. Therefore, a clear record of the visit is key to memorialize the event. It is particularly essential to document the patient's history and complaints thoroughly as those are more heavily relied upon in telemedicine. It is also important to memorialize what instructions were provided to the patient. For instance, it is especially necessary to memorialize that the patient was instructed to seek in-person care if their condition progressed or changed in any way.

5. Use Caution When Prescribing

Treatment, specifically including prescribing medications in a

telemedicine setting, must be provided consistent with KRS 311.597(1)(e) which states:

> …"dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public or any member thereof" shall include but not be limited to the following acts by a licensee …
> Prescribes or dispenses any medication … In response to any communication transmitted or received by computer or other electronic means, when the licensee fails to take the following actions to establish and maintain a proper physician-patient relationship:
> 1. Verification that the person requesting medication is in fact who the patient claims to be;
> 2. Establishment of a documented diagnosis through the use of accepted medical practices; and
> 3. Maintenance of a current medical record.

Therefore, it is important that the medical provider always confirm the patient's identity before prescribing a medication and create and maintain an appropriate medical record, including a diagnosis. Medical providers are held to the same standard of care during remote visits as when prescriptions are delivered during an in-person encounter, regardless of any defenses of mistake or fraud by the patient. The KBML suggests that providers use e-prescription systems when prescribing via telemedicine.[17]

6. Take All Necessary Steps to Protect a Patient's Privacy and Access to Medical Records

While some federal guidelines regarding patient health information in the telemedicine setting were relaxed during the pandemic, it is vitally important that patient information be protected. Providers are still expected to comply with the Health Insurance Portability and Accountability Act (HIPAA). Healthcare providers must take the necessary steps to both protect patient privacy and provide patients with adequate access to their telemedicine records. Policies and procedures should be in place to address issues such as privacy, what types of information will be kept electronically, archival and retrieval methods, who has access to patient records, and timing of fulfillment of requests for access to medical records.

Further, while physicians and patients may be tempted to use text messaging or other messaging apps, it is important to transmit protected health information in ways that involve added layers of protection such as encryption, password protection, or other reliable authentication techniques.

CONCLUSION

In summary, telemedicine is the future of health care because it offers considerable benefits to patients if used correctly and judiciously. Hopefully, this article has provided some basic information on telemedicine and how it is used in Kentucky. In an ever-changing technical world, many of us have the urge to resist incorporating new technology into our work and healthcare professionals are no exception. However, sharing the potential litigation concerns and tips for mitigating those risks with your healthcare clients may alleviate some of the resistance. Even if you don't represent healthcare providers, telemedicine will change the way all injured parties involved in litigation receive healthcare and obtain healthcare records. Keeping up with these changes will help you defend your clients in the future.

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Miranda is one of the 7th District Bar Governors for the Kentucky Bar Association Board of Governors. She is also a Member of the Board of Directors for the Kentucky Bar Foundation (7th District Representative), of which she is also a Life Fellow. Ms. Click is also a member of the Kentucky Defense Counsel, the Kentucky Academy of Hospital Attorneys, the Defense Research Institute, and the Pike and Floyd County Bar Associations.

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KDC members ***Licha Farah*** and ***Whitney Williams (Ward, Hocker & Thornton)*** obtained a favorable ruling from the Kentucky Supreme Court in a negligence/premises liability action that originated in Knox Circuit Court. In the Complaint, the plaintiff claimed that the Defendant City was liable to her for injuries she sustained while walking on concrete at an outdoor water park in the summer of 2016.

In 2019, the Knox Circuit Court granted the City's Motion for Summary Judgment on the premises liability claim, holding that the City did not breach any duty owed to the plaintiff to prevent foreseeable injury. On appeal, the Kentucky Court of Appeals reversed the trial court's Order in favor of the City, holding that the issue of foreseeability and duty were issues of fact that should have gone to the jury.

The City moved the Kentucky Supreme Court for discretionary review on the issue and after hearing oral arguments in August of 2022, the Court reversed the Court of Appeals' reversal and affirmed the Knox Circuit Court's 2019 Order in favor of the City. In its October 20, 2022, Order, the Court held that the facts in the record were such that a reasonable jury could not find liability against the City for Plaintiff's claimed damages and thus summary judgment in favor of the City was appropriate.

KDC member ***Kristen N. Worak (Keuler, Kelly, Hutchins, Blankenship & Sigler, LLP)*** successfully defended the City of Murray in a personal injury case. David Troutman from Edwards & Kautz in Paducah tried the case for the plaintiff.

Plaintiff sued the City of Murray for injuries she sustained when she stepped on a water meter lid that flipped open, causing her to fall. City employees responded to the scene while plaintiff remained on the ground. Employees testified, and photos taken at the time showed, that the water meter lid was not broken or damaged. Plaintiff asserted the lid was left in a dangerous and unsecure condition by the previous water meter reader, who had opened the lid and manually read the water meter just 21 days prior. Further, she asserted that the meter reader had failed to clean grass and debris from the rim of the meter jar, preventing the lid from securing tightly. The City of Murray denied knowledge of the meter lid's allegedly unsafe condition, arguing it may have been opened and left unsecured by anyone in the 21 days between the last meter reading and plaintiff's fall. Plaintiff claimed she suffered two torn ligaments from her fall which caused her to suffer from Complex Regional Pain Syndrome resulting in pain over various parts of her body. She claimed $26,642.60 in past medical expenses and sought an additional $3.5 million for future medical expenses, pain and suffering, and inconvenience. At trial, she was unable to reconcile her claim that she was thriving and walking several miles a week before her fall on the water meter with her sworn testimony 14 months prior to the fall regarding injuries from a motor vehicle accident which prevented her from walking just three blocks. The jury returned a defense verdict on liability. Plaintiff appealed.

KDC member ***Charles Walker (Sewell & Neal)*** obtained a damages verdict in Jefferson County against Sam Aguiar in September 2022. Fault was conceded in this low-speed rear end accident case, and plaintiff claimed nearly $500,000 in total damages. Plaintiff claimed to have been totally disabled in an accident which left no discernable damage to either vehicle. Social media discovery from plaintiff revealed that she had lied extensively in her deposition, and photographs showed her hiking, riding horses, and participating in axe throwing competitions in the months after the accident. Plaintiff treated for the first time six days after the accident (which was not reported by her to the police), and during that time, her phone records confirmed that she contacted an attorney, obtained medical referrals, and completed a suggestively written civilian accident report. She underwent chiropractic treatment for months and eventually stopped working allegedly due to her injuries. Her medical proof came from Dr. Jules Barefoot who testified that she was in debilitating pain during his IME, and a person with her level of devastating injuries would be completely unable to hike, ride a horse, or compete in an axe-throwing competition. The defense called Dr. David Porta to explain to the jury how unlikely it was for any type of meaningful injury to have resulted from this minor accident. The jury returned a verdict of medical expenses and lost wages with no award for pain and suffering. Because those special damages were less than the available No-Fault, a defense judgment was entered.

Also, in October 2022, Walker obtained a verdict on a complicated UIM case in Kenton County. Plaintiff had been involved in three car accidents within 18 months, and she filed suit against all tortfeasors and her UIM carrier in one action. Before trial, she dropped the UIM claim for the first accident and proceeded with the direct actions against the UIM carrier for the second two. In order to prevail on the first, her UIM floor was $200,000, and she would need over $350,000 to collect on the second. Her medical history was quite complicated; the first accident started a chain of medical treatment that eventually included a cervical fusion, treatment for PTSD, and injection therapy. She did not claim her medical expenses in order to avoid evidence of collateral source payments, but she did claim $300,000 in lost wages after having to quit her job as an accountant after the accidents. Her proof included her chiropractor who admitted that Plaintiff assured her she did not quit her job because of her injuries but instead because of the work environment. She also called Dr. Michael Grefer, who attributed her condition 20%/40%/40% to the three accidents. He admitted on cross-examination that he was merely guessing at those

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figures, and that no scientific, medical, or mathematical formula allowed him to accurately do that. The defense's expert, Dr. Michael Moskal, testified that no doctor could discern which accident caused which injuries because plaintiff's history was too complicated. He did, however, note that her objective findings did not change after the first accident, and they seemed in keeping with degenerative changes caused by remote trauma from a 2011 car accident. That same remote trauma caused her to sustain objective findings in her spine which necessitated the neck surgery she underwent after the accidents in this case. Plaintiff's PTSD claim was rebuffed by her own counselor who admitted that plaintiff had a traumatic childhood with a specific event in question which was so inflammatory, even mentioning it in front of her would cause permanent and immediate psychological harm. The jury was asked by plaintiff's counsel to award $2 million in pain and suffering, and the jury awarded a sum for each accident under the UIM floors instead.

KDC members ***Bradford Breeding and Megan Jordan (Brown & Breeding)*** successfully defended a loss of consortium claim on behalf of State Farm in Scott Circuit Court in September 2022. Richard Rawdon, Jr. represented the plaintiff with Judge Jeremy Mattox presiding.

The plaintiff's husband was injured in a motor vehicle accident with an uninsured motorist on September 22, 2018. The husband asked for a divorce on April 12, 2019, and moved out of the marital home/separated from the plaintiff on April 18, 2019. During this time, the Plaintiff found out that her husband had been having an extramarital affair. The husband's claims against State Farm were settled out of court shortly thereafter. At no time did the plaintiff's husband inform State Farm that he was married because to him, his marriage ended in April 2019. Plaintiff then filed for divorce in May 2019, which was finalized on July 10, 2020.

The jury determined that based on the evidence, the uninsured driver's failure to exercise ordinary care in driving his vehicle was not a substantial factor in causing the plaintiff's damages.

Breeding and Jordan also successfully defended a matter in Fayette Circuit Court in October 2022. Kendra Rimbert and Megan Ziegman represented the Plaintiffs, with Judge Lucy VanMeter presiding.

The case arose from a motor vehicle accident on May 17, 2018. The plaintiff sustained a sternum fracture and a rib fracture. He also complained of neck pain and shoulder pain at the emergency room. Evidence showed that all of these injuries healed as expected within months of the accident. Shortly after the accident, the plaintiff began to complain of right knee pain. He had been diagnosed with end stage osteoarthritis prior to the accident; however, he was not actively treating for symptoms leading up to the accident. At trial, it was argued that the accident worsened the plaintiff's right knee osteoarthritis. Dr. David Waespe, who conducted an IME of the plaintiff at the plaintiff's request, ended up testifying for the defense. Dr. Waespe assigned a 4% whole body impairment to the plaintiff but could not link it to the accident. Dr. Gary Bray conducted a records review and IME of the plaintiff at the Defendant's request. Originally, Dr. Bray assessed a 6% full body impairment to Mr. Combs; however, after conducting the IME, Dr. Bray changed his opinion and stated that Mr. Combs had a 7% full body impairment and that the impairment was related to the accident. Dr. Bray testified on behalf of the plaintiff at trial. Neither physician testified that the plaintiff needed any future treatment.

Additionally, the plaintiff was off work from May 17, 2018, to July 11, 2018. When he returned to work, he was not under any work restrictions and remained a full-time custodian at an elementary school. He then retired on August 1, 2020. It was argued at trial that the plaintiff retired early due to his injuries from the accident. If not for the accident, then he would have retired on January 1, 2023. It was also argued that he received a penalty due to retiring early. However, retirement records showed that the plaintiff had considered retiring prior to the subject accident. At trial, the plaintiff sought compensation for past medical expenses, pain and suffering, and lost wages (which included future impairment). The plaintiff's wife, who was not involved in the accident, brought a loss of consortium claim. The jury awarded the plaintiff a verdict totaling $126,956.86. This was well under plaintiff's last demand of $190,000.00.

KDC member ***Liam Felsen (Frost Brown Todd)*** and Kentucky Kingdom General Counsel Gaylee Gillim successfully defended Kentucky Kingdom in a premises liability trial in Jefferson Circuit Court before Judge Susan Schultz Gibson. Brandon Smith and Jason Swinney (Morgan & Morgan) represented the plaintiff.

On August 25, 2018, Shelby Rodgers visited Kentucky Kingdom and rode T3, which is a high-speed, suspended roller-coaster that reaches speeds up to 50 mph with several steep inclines, sharp turns, and loops. Towards the end of the ride, Rodgers heard a noise and immediately something flew past and struck her head, causing a laceration. Rodgers described the object as a round, shiny, metal object approximately 4" in diameter. After the incident, Kentucky Kingdom employees inspected T3 and found nothing wrong with it. They also searched the grounds and found several objects which could have struck Rodgers, all of which would have been items brought onto T3 by other riders, despite conspicuous signs and verbal warnings that riders should not bring loose objects onto the ride, and lockers and storage bins available for riders to store such objects. Kentucky Kingdom notified the Kentucky Department of Agriculture, which also inspected T3 the next morning and found nothing wrong with it.

On August 8, 2019, Rodgers filed suit against Kentucky Kingdom, alleging neg-

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ligence as to Kentucky Kingdom's maintenance and operation of T3. Rodgers' theory was that the object which struck her must have been either something left on the track by a Kentucky Kingdom employee, or else a piece of the ride itself which detached and struck her. Kentucky Kingdom's position was that whatever struck Rodgers could only have been a loose object brought onto T3 by another rider.

The case proceeded to trial on February 7, 2023. In trying to prove that there was some defect in T3, Rodgers pointed to her memory of the "clank" sound and seeing sparks just before being struck in the head. Rodgers also argued through her lawyer that there was a cover-up by Kentucky Kingdom to sweep the safety issue under the rug; Kentucky Kingdom denied this and noted that there was no evidence of this at all and that "lawyer argument" was not evidence. Kentucky Kingdom otherwise denied fault or that there was any defect in T3. It called its former Vice President of Facilities and Development, in charge of maintaining the roller coaster, who cited the inspections, safety, and maintenance protocols of T3. Kentucky Kingdom also called its Director of Operations, in charge of ride operations, to testify about signs, audio warnings, the lockers, storage bins, operator training, and enforcement of the instructions not to bring loose articles onto the rides.

If Rodgers prevailed at trial, she sought recovery of her medical expenses plus $250,000 more for her pain and suffering. Ultimately, the jury returned a defense verdict on liability in favor of Kentucky Kingdom, which also was awarded its bill of costs. No appeal was taken.

A note from Kentucky Kingdom General Counsel Gaylee Gillim: "We worked hard to defend Kentucky Kingdom from a baseless claim, something that many parties would settle. However, as the former owner of and general counsel to our park, it has always been important to me and the other partners to fight plaintiffs who target Kentucky Kingdom simply because an incident occurred on its premises."

KDC members ***James Sigler and Jared Sigler (Keuler Kelly Hutchins Blankenship & Sigler)*** successfully defended D.A. Gibson and Gibson Funeral Home in a premises liability trial in Hancock Circuit Court before Judge Tim Coleman. Travis Holtrey and Davin Shaw (Foreman Watson Holtrey) represented the plaintiffs.

Plaintiffs were three siblings who filed suit after their infant sister's remains were disinterred during the digging of their mother's grave at the Lewisport Cemetery. Their mother was set to be buried in the middle plot, between her husband and her infant daughter.

Gibson owned the Lewisport Funeral Home and continued the longstanding tradition of "managing" the Lewisport Cemetery that sits next to the funeral home. Gibson was tasked with locating and marking the correct plot for the mother's gravesite. He reviewed cemetery maps, used a 42" metal probe to confirm there were no foreign objects or unmarked caskets within the plot, and checked the headstone to make sure it matched the name of the deceased. He then instructed Michael Martin, an employee of Brackett Backhoe Services, Inc., where to dig the grave.

While digging the six-foot-deep grave, Martin struck a small casket near the bottom. He removed the casket and placed it in the back of the ATV he was using to haul excess dirt. He was unable to communicate with his boss due to bad cell service, so he left the infant's casket in the back of the ATV and parked it behind the dirt pile. He then left to complete his next job at another cemetery across town. His intent was to return to Lewisport after he completed the job and communicate with the Funeral Director to develop a plan on what to do with the disinterred casket. The plaintiffs arrived at the cemetery before Martin returned and discovered their infant sister's damaged casket in the back of the ATV. They elected to remove the infant's remains from the broken casket and place them with their mother inside of her casket.

At trial, the family alleged that Gibson incorrectly marked the location for their mother's grave. Gibson maintained that the grave was correctly marked, and that the mother was ultimately buried exactly where she was intended to be buried. His testimony was that the infant casket was in the wrong plot according to the maps he inherited in 2015 and there was no way he could have known about the casket because it was buried more than four feet below the surface. The family also alleged that Mr. Martin recklessly disrespected the remains of their infant sister.

The plaintiffs sought $1.5 million ($500k per sibling) for emotional distress and $1.5 million in punitive damages. The judge dismissed the punitive damages claim on directed verdict and the jury returned a defense verdict on liability in favor of both Gibson and Martin.

KDC members ***Jeremiah Byrne and Andrew Palmer (Frost Brown Todd)*** successfully defended Kentucky Utilities in a wrongful death trial in Fayette Circuit Court before Judge Julie Goodman. Lisa Circeo and Tom Herren represented the plaintiff.

In June 2018, William Everman was hired by RML Construction, a division of Ball Homes, to demolish 14 apartment buildings so the site could be redeveloped into new, luxury apartments and condos. After the apartment buildings were successful demolished and the materials were removed from the site, Everman and his crew began crushing the remaining concrete to be stored on site and used as fill in the future development. With approximately one week left on the job, Everman and his employees began stockpiling the crushed rock under 7,200-volt distribution lines that ran through the property. There

DEFENSE VICTORIES

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was no dispute the Everman was aware of the lines, knew they were energized, and had rejected RML's suggestion to fence under the lines to prevent work from occurring directly underneath them.

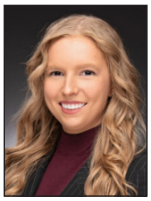
On the date of the incident, Everman backed his dump truck up to the pile, raised the bed to dump the load of gravel, and contacted the powerline. Exactly what happened is unclear, but he tried to exit the dump truck and was electrocuted. Everman's estate sued Kentucky Utilities and RML/Ball Homes. RML/Ball settled just before trial, and only the claims against KU went to the jury. The plaintiff sought $5 million in pain and suffering and preimpact fright, $2.025 million for destruction of income, $10 million in loss or consortium, $14,000 for funeral expenses, and $90 million in punitive damages.

Plaintiff's expert in the National Electrical Safety Code ("NESC") suggested that KU was required to "reasonably anticipate" what was going to occur under its powerlines, including the dumping of crushed concrete underneath them, and proactively go to the site and investigate what equipment plaintiff would be using. Plaintiff further contended that KU had notice of the activity occurring on site because of a series of emails and conversations with Ball Homes discussing the possibility that the powerlines would eventually need to be moved depending on the location of the buildings, and thus should have investigated. Plaintiff also suggested that, even if the lines met code requirements, KU should have placed the lines even higher to give a greater "safety margin" for the construction. Plaintiff also put on a human factors expert, Joellen Gill, to explain Everman's actions and suggest that he shouldn't be to blame for his violations of OSHA, workplace safety, and violations of the OSHA 10 foot rule that requires workers stay 10 feet away from live power lines.

KU's expert testified that the powerlines far exceeded the height requirements set out by the NESC for the permanent use of the property and that the temporary construction did not change the requirements. The lines were measured immediately after the incident and found to be nearly 5 feet higher than required. Additionally, per OSHA guidelines, workplace safety is controlled by the contractor and subcontractors doing the work, not by KU. KU called plaintiff's own construction industry expert to testify on this defense. Plaintiff's expert testified that Everman violated the standard of care, didn't follow "very basic construction" rules, shouldn't have piled crushed concrete under the power lines, didn't follow the OSHA regulations, and ultimately should have stopped work on the site instead of working around the powerlines.

The jury returned a defense verdict on liability in favor of KU. In four years of litigation, plaintiffs never made a settlement demand to KU.

Judge Goodman subsequently granted plaintiff's motion for a new trial.



KDC members, ***David Gazak and Courtney Justice (Gazak Brown)*** successfully defended Pikeville Medical Center and Mark Swofford, D.O., in a medical malpractice case in Pike Circuit Court before Judge Howard Keith Hall. Miller Kent Carter and Phillip Wheeler represented the plaintiff.

Jimmy Abshire was referred to urologist, Dr. Mark Swofford, by his primary care physician for treatment of hypogonadism. The diagnosis had been based on low total testosterone levels. Dr. Swofford's treatment plan included at-home weekly intramuscular testosterone injections. Abshire administered the injections every two weeks for a 21-month period and Dr. Swofford monitored Abshire's total testosterone, hemoglobin, and hematocrit levels every six months.

On January 17, 2017, Abshire's lab work revealed polycythemia (an elevated hematocrit level) and Dr. Swofford's office directed Abshire to give blood. Abshire gave blood the next day, on January 18, 2017. A week later, on January 24, 2017, Plaintiff presented to the Pikeville Emergency Department with complaints of pain in his right knee and pain in his right forearm where he had given blood. He was treated for a peripheral clot at the donation site but returned to the ED with perceived visual disturbances and shortness of breath. Further workup resulted in diagnosis of a small pulmonary embolism. Plaintiff was admitted and underwent intravenous heparin treatment, followed by oral coumadin. He was discharged eight days later and continued to receive outpatient coumadin treatments for the next six months.

At trial, plaintiff's urology expert, Dr. Michael Hallet, opined that a low total testosterone level was not sufficient evidence of hypogonadism and that testosterone injections were not medically indicated. He further testified that the testosterone injections caused Abshire's polycythemia, which resulted in the development of blood clots, including the pulmonary embolism.

The defense called male reproductive medicine expert, Dr. Edward David Kim, to testify that the diagnosis of hypogonadism was appropriate based on Abshire's consistently low testosterone levels, and that Dr. Swofford's treatment course was appropriate. He further testified that testosterone therapy does not cause polycythemia, and that Abshire had a history of heavy smoking, and diagnoses of COPD and black lung, all of which put him at risk for developing a pulmonary embolism.

Plaintiff sought $90,423.04 in past medical expenses and $2,000,000 in pain and suffering. The jury returned a complete defense verdict. No appeal was taken.

KDC members ***Ryan McLane and Olivia Keller (DBL Law)*** successfully defended St. Elizabeth Medical Center in a security negligence trial in Kenton Circuit Court before the Honorable Patricia Summe. Peter Tripp and Meagan Tate (Lawrence & Associates) represented the plaintiff.

On May 12, 2018, Serinity

Stevens was taken to St. Elizabeth Covington's Emergency Department by EMS after stating that she wanted to go to the hospital because she was hallucinating and wanting to hurt other people. The emergency medicine physician determined that she needed to be placed on a 72-hour hold.

Overnight, Stevens was verbally combative, yelled and screamed, refused to stay in her room, and threatened physical violence. Shortly before 7:45 a.m., she began knocking on the door of her room and demanding to speak with a nurse. Based on Stevens' prior behavior and mental state, the nurse asked a hospital security officer to accompany her to speak with Stevens. During this encounter, Stevens was argumentative and declared she was leaving the hospital. The nurse and the security officer repeatedly advised Stevens that she was on a 72-hour hold and could not leave. Stevens continued threatening and aggressive behavior and began moving towards the external doors. After attempts by both the nurse and the security officer to direct Stevens back to her room, a physical altercation occurred, and the security officer took Stevens to the floor. The encounter was captured on the hospital's security cameras, but the footage did not have sound. After the encounter, Stevens complained of ankle pain. X-rays of the ankle revealed a fracture and she underwent surgical repair.

Stevens sued St. Elizabeth, alleging that it's security officer's actions were negligent, and that the hospital was negligent in its hiring, retention, and training. She sought $37,117 in past medical expenses and $50,000 in future medical expenses related to ongoing instability in her ankle since the incident. She sought $400,000 in pain and suffering.

St. Elizabeth's hospital security expert, Bonnie Michelman, testified that St. Elizabeth's policies and procedures, training, and supervision were reasonable and in accordance with leading industry standards. Michelman also testified that the security officer followed St. Elizabeth's policies and took reasonable and appropriate actions while dealing with the plaintiff.

St. Elizabeth moved for directed verdict, arguing that plaintiff's case required specialized expert proof on the standard of care for hospital security, of which they had none. The motion was denied but the court did instruct the jury on the standard for a reasonably competent hospital security officer, rather than the standard for a reasonably competent person. The court granted St. Elizabeth's motion for directed verdict on the claims of negligent hiring and retention due to lack of evidence but allowed the negligent training claim to proceed.

The jury's deliberations lasted ninety minutes, resulting in an 11-0 verdict for St. Elizabeth on liability. (On the last day of the trial, a juror became ill and the parties agreed to have the case decided by eleven jurors, with the understanding that there still needed a majority of nine jurors to decide the matter.) A subsequent motion for new trial was denied by the court. No appeal was taken.

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CALENDAR OF EVENTS 2023

Please visit the KDC website (www.ky-def.org) to register for these upcoming events:

June 28, 2023
CLE Webinar: "Back to the Basics: Identifying Conflicts and Managing Them through Effective Engagement Letters and Conflict Waivers"
Presented by A.J. Singleton, Stoll Keenon Ogden, PLLC.
$15 for KDC Members.
11:30 a.m. CT / 12:30 p.m. ET

August 9, 2023
CLE Webinar: "Digital Forensics for Electronic Medical Records"
Presented by KDC Sponsor Archer Hall.
Free to KDC Members!
11:30 a.m. CT / 12:30 p.m. ET

August 23, 2023
CLE Webinar: "Oh No He Di-int!" Shocking Stories of Lawyer Misconduct?"
Presented by Courtney Risk, Lawyers Mutual of Kentucky – a KDC Sponsor.
Free to KDC Members!
11:30 a.m. CT / 12:30 p.m. ET.

September 21-22, 2023
Fall Seminar & Awards Luncheon
The Origin Hotel, Lexington

October 11, 2023
CLE Webinar & Trivia: "Construction Material Defects & Failures"
Presented by KDC Sponsor CTL Group.
Free to KDC Members. After the CLE presentation stay for a fun Trivia Contest and great prizes!
Time: TBD

October 25-27, 2003
DRI Annual Meeting
San Antonio, Texas
To register visit: 2023 DRI Annual Meeting Conference for Civil Defense Lawyers (https://www.dri.org/annual-meeting/2023)

Additional CLE programs are currently in progress. Please check the KDC website (www.ky-def.org) for scheduling updates.

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Please mark your calendar and register for the conference by visiting the link below. Registration deadline is September 1, 2023.

Register for the conference by visiting http://www.ky-def.org
Hotel reservations may be made directly with the hotel .