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The Chronicle

A Newsletter by Landrum & Shouse LLP

Volume 3, Issue 1 April 2013

Special Points of Interest

- Offices in Lexington and Louisville
- Statewide coverage
- 30 Attorneys
- 16 Partners
- 18 AV-rated lawyers

Inside this issue:

Recent Sixth Circuit Interpretations of Kentucky Bad Faith Law

By: J. Lacey Fiorella

"Evil motive." "Malice." "Outrageous conduct." "Fraud." "Deception." These terms have all been used to describe the standard of behavior considered to be bad faith settlement negotiation by an insurance carrier under the Kentucky Unfair Claims Settlement Practices Act. Whether the insurance company's conduct meets that standard is a threshold determination frequently made by the Court at either the summary judgment or directed verdict stage.

In Wittmer v. Jones, *864 S.W.2d 885* (Ky. 1993), the Supreme Court of Kentucky held that bad faith requires "evidence sufficient to warrant punitive damages," that is, evidence which is "sufficient for the jury to conclude that there was conduct that is outrageous, because of the defendant's evil motive or [its] reckless indifference to the rights of others." Id. at 890. (Internal citations and quotations omitted). Thus, under Wittmer, if a plaintiff fails to produce affirmative evidence sufficient to support an award of punitive damages, directed verdict is appropriate.

In the recent case of Phelps v. State Farm, *680 F.3d 725* (6th Cir. 2012), the Sixth Circuit Court of Appeals applied Kentucky law and seemed to interpret the threshold for a bad faith claim to reach a jury to be less than affirmative evidence of actual malice or reckless indifference. In Phelps, the District Court had granted summary judgment to State Farm, on the grounds that Phelps had not presented any affirmative evidence to warrant punitive damages. The Sixth Circuit Court of Appeals reversed, holding that the District Court had erred in construing the facts in favor of State Farm, rather than Phelps. The Sixth Circuit Court of Appeals noted that the record contained evidence of "troubling" claims-handling practices, including:

...switching claims adjustors four times without explanation, habitually making offers at the low end of valuation ranges, refusing to increase an offer without documentation of additional damages, failing to ask Phelps to submit to an independent medical examination, and failing to include facts in the claim file that would support a jury verdict in Phelps's favor.

Id. at 735. Despite the apparent lack of affirmative evidence of malice or reckless indifference, as required for submission to a jury under Wittmer, the Court of Appeals held that whether the claims practices constituted bad faith was a question of fact for the jury.

After the less stringent holding in Phelps, the Sixth Circuit Court of Appeals ruled on another bad faith case in National Surety Corp. v. Hartford Casualty Insurance Co., *2012 WL 4839767* (6th Cir. 2012). In Hartford, the Court did not even mention the Phelps decision, instead relying upon established Kentucky law to find that National Surety had not met its burden to proceed to a jury. The Hartford Court stated:

The Kentucky Court of Appeals reaffirmed the high evidentiary threshold in bad faith actions against insurers in United Servs. Automobile Ass'n v. Bult....Bult identified Wittmer as the definitive case governing bad faith actions, and noted that for a bad faith claim to proceed to a jury, evidence sufficient to support an award of punitive damages against the insurer must exist. The "evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. Furthermore, the conduct must be driven by evil motives or by an indifference to its insureds' rights." Unless a plaintiff demonstrates this two-part standard, the claim fails. "Absent such evidence of egregious behavior, the tort claim predicated on bad faith may not proceed to a jury." Insurer errors fail to meet this exacting standard. "Evidence of mere negligence or failure to pay a claim in a timely fashion will not suffice to support a claim for bad faith. Inadvertence, sloppiness, or tardiness will not suffice; instead, the element of malice or flagrant malfeasance must be shown." In Bult, the court concluded that despite the insurer's failure to follow a "better" claims handling process, the insurer's actions did not "give rise to any reasonable inference that the [insurer] was motivated by evil design or reckless disregard for the rights of the [insureds].

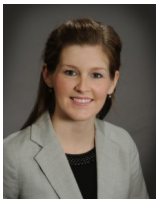
Hartford, at *3, citing United States Auto Association v. Bult, *183 S.W.3d 181, 187-188* (Ky.App. 2003).

Hartford suggests that even after Phelps, federal courts in Kentucky should follow Wittmer, and require evidence of conscious wrongdoing, reckless disregard, or malice to allow a bad faith case to go to a jury. However, this decision remains unpublished and therefore can only serve as persuasive authority.

Despite the opinion in Hartford, the Phelps case does emphasize the possibility that mere "inferences" may be sufficient to send a bad faith case to a jury. The case is a good reminder that trial, rather than summary judgment, may hinge on a single inference in Plaintiff's favor.

The Impact of "No Impact"

By Ashley Smith Lant



The Supreme Court of Kentucky recently abolished long-standing precedent regarding the "no impact" rule in emotional distress tort claims. In Osborne v. Keeney, Ms. Osborne had maintained a legal malpractice claim against her attorney for failing to file her claim against a pilot within the applicable statutory time period. Osborne v. Keeney, *2010-SC-000397-DG, 2012 WL 6634129*, at *1* (Ky. Dec. 20, 2012). Ms. Osborne's underlying claims stemmed from an accident that occurred in October of 2002 when an airplane crashed into her home while she was inside. *Id. at *2*. Of note, "[n]o debris from the airplane or the house struck Osborne in any manner, and she suffered no physical injury as a result of the crash." *Id.* Notwithstanding the lack of physical impact, Ms. Osborne suffered shock and certain preexisting aliments were found to be exacerbated as a result of the incident. *Id.* In the malpractice trial against her attorney, the jury found in favor of Ms. Osborne on all claims, including pain and suffering from the plane crash. *Id. at *3*. On appeal, inter alia, the damages for pain and suffering awarded as a result of the emotion distress claim were vacated due to the lack of physical impact sustained by Osborne in the crash. Id.

In Osborne, the Court outlined its previous rationale for enforcing the "impact rule" as follows:

[T]he damages resulting from the fright are too remote; that fright caused by negligence not being itself a cause of action, none of its consequences can give a cause of action; and that to open the courts to this character of case would tend to promote fraud and the presentation of claims for injuries beyond the capacity of juries properly to assess. Moreover, there has been concern that allowing such claims will result in a flood of new litigation.

*Id. at *8 (internal citations omitted).*

In sum, many jurisdictions including Kentucky crafted and followed what was, in theory, meant to be a bright line test: some impact was needed to recover for emotional distress. Later, cases involving x-rays, for example, raised questions about the extent of impact needed for an emotional distress claim to exist. See generally Deutsch v. Shein, *597 S.W.2d 141* (Ky. 1980). Over time it became evident that, as the Court eloquently states in Osborne, "[i]n reality, the bright line test of impact establishing liability is not so bright." *2012 WL 6634129*, at *9*. Under the new rule, "[a] plaintiff claiming emotional distress must satisfy the elements of a general negligence claim, as well as show a severe or serious emotional injury, supported by expert evidence." *Id. at *13*. With Osborne, a physical touch or contact is no longer required and, like other notable tort holdings in Kentucky, this rule will be applied retroactively. *Id. at *10*.

As it relates to the "impact rule," the holding in Osborne casts off archaic concepts of legal analysis regarding mental health issues. With this holding, the Court recognized that changes in the law are sometimes needed to keep pace with changes in other fields, like the medical field here. Further, evaluating emotional distress claims under the general negligence framework and requiring expert support to substantiate same will create much clearer precedent for both Plaintiff and Defense counsel to interpret going forward.

*1 Final citation format is not available at the time of publication.

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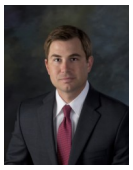
HIPPA v. Subpoena *Duces Tecum*: When documents with Latin names aren't enough.



By: Carson Smith

A New York firm applied to Abraham Lincoln some years before he became President for information as to the financial standing of one of his neighbors. Lincoln replied:

"I am well acquainted with Mr. _____, and know his circumstances… [H]e has an office in which there is a table worth $1.50, three chairs worth, say, $1, and, in one corner, a large rat-hole, which will bear looking into. Respectfully, A. Lincoln."

With the advent and proliferation of HIPPA, attorneys today may find healthcare providers little more helpful than Lincoln's remark to the New York firm when it comes to producing a patient's medical records. Worse yet, it appears that even the all-powerful subpoena *duces tecum*, with its Achilles' heel of being subject to exceptions for privileged information, may not be enough to shock and awe medical records custodians into submission. See *CR 45*.

For example, under HIPPA, before producing protected medical records pursuant to a properly served subpoena duces tecum, a medical records custodian must receive one of the following:

i.) A valid authorization for disclosure, in writing, signed by the patient or a guardian;

ii.) a Court Order specifying the purpose for which the information is being disclosed and any limitations upon the type of information sought;

iii.) a "Satisfactory Assurance of Proper Notice," which assures the custodian that the subject patient was given notice of the request (A SAPN may include documentation supporting a good faith attempt to notify the patient as to the information sought, the reason for its use, and the opportunity to object prior to the disclosure.); or

iv.) a Qualified Healthcare Protective Order from the Court in which the subpoena was issued (A QHPO should stipulate the information to be disclosed, stipulate to the Order's use solely in the legal proceeding, and provide for either return or destruction of the protected information at the conclusion of the proceeding). See *44 CFR § 164.508 – 164.512*.

Accordingly, an attorney seeking production of protected medical records should be prepared to provide one of the above-referenced assurances or orders, in addition to a properly served subpoena duces tecum, or he just may find himself looking down a rat-hole.

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Let us ring the bell for your success.

Welcome to The Chronicle, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

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Congratulations and Upcoming Events

Lexington partner Douglas Hoots will be presenting a seminar on Good Faith Claims Handling sponsored by Insurance Institute of Kentucky on June 7, 2013 (Lexington) and May 31, 2013 (Louisville). Please feel free to contact Mark Treesh of IIK at mark@iiky.org or (859) 543-9759 for registration.

Lexington partner Mark Moseley will be presenting two seminars for NBI on May 16, 2013. The seminars are "Drafting Business Contracts" and "Competition Issues".

Lexington partner Pierce Hamblin was recently inducted into the Kentucky chapter of The National Academy of Distinguished Neutrals as one of 6 charter members. Mr. Hamblin has been a member of the national organization since its inception.

Lexington partner Douglas Hoots will be participating in a mock case/trial seminar that Eastern Kentucky University is conducting with the International Association of Arson Investigators (IAAI) on Sept. 5-6, 2013.

Lexington partner Pierce W. Hamblin has been elected as President-Elect of the Fayette County Bar Association for 2013-2014. Mr. Hamblin has practiced for over 35 years and has recently completed his 6,000th mediation.