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# The Landrum & Shouse Report

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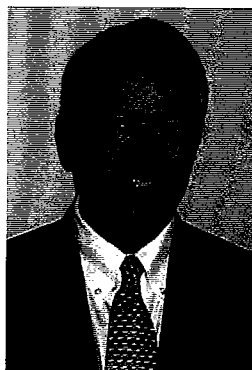
Welcome to the Landrum & Shouse Report, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together 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.

## IN THE NEWS . . .

### R. KENT WESTBERRY ELECTED KBA PRESIDENT

R. Kent Westberry, a partner in the Louisville office of Landrum & Shouse, LLP, has been elected President of the Kentucky Bar Association for 2004-05.

A graduate of Centre College and Salmon P. Chase College of Law, both in Kentucky, Westberry has a long history of service in the legal community. Prior to his election as President, Westberry served as



a member of the KBA Board of Governors, the governing body of the Kentucky Bar Association, from 1992 to 2000. He was Vice President of the Bar from 2002-2003, and President-Elect from 2003-2004. Westberry is a litigation partner with L&S, representing numerous insurance clients as well as individuals and corporations in complex criminal and civil litigation.

Formerly, Westberry served as an Assistant United States Attorney in the Western District of Kentucky from 1981-1987. He has served as Special Justice of the Kentucky Supreme Court and is a life member of the United States Court of Appeals Conference for the Sixth Circuit. Westberry also chaired the Civil Justice Reform Act Committee for U. S. District Court in the Western District of Kentucky and was Vice Chairman and Member of the Kentucky Registry of Election Finance. He is currently a member of the Board of Directors of the Federal Public Defenders Corporation in the Western District of Kentucky.

Westberry follows in a tradition of Bar service at Landrum & Shouse, LLP. The firm's founding member, Charles Landrum, Jr. served as President of the Kentucky Bar Association from 1979-80.

The Kentucky Bar Association is an arm of the Supreme Court of Kentucky with approximately 14,000 members and all attorneys in Kentucky are required to be members. The core mission of the Kentucky Bar Association is the administration of the discipline system for attorneys as well as continuing legal education.

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## DAVE WHALIN SELECTED AS UNITED STATES MAGISTRATE JUDGE

Landrum & Shouse, LLP, is proud to announce the recent selection of Dave Whalin, as United States Magistrate Judge for the United States District Court, Western District of Kentucky.

Whalin is a 1979 graduate of the University of Louisville (B.S.) and a 1985 graduate of the University of Louisville College of Law (J.D.). He has held several positions in the field of legal education, including Adjunct Assistant Professor at the University of Louisville School for Justice Administration. He is a member of the Louisville Bar Association and Kentucky Bar Association.



Whalin began his career in the law as a member of the Jefferson County Police Department, of which he was a member for 20 years. He served as Assistant Chief for five years during that time. He continues to support the local police departments, cities, and mayors through his legal work.

Whalin practiced with L&S for twelve years in the areas of Civil Rights Litigation, Municipal Liability, and Insurance Defense. He was instrumental in the structuring and building of the Civil Rights and Municipal Liability practice areas for the firm. He managed four attorneys in the process of creating this flourishing practice.

The Whalin family is very excited and supportive of his move to the bench. He and his wife, Sally, are the parents of three children and proud grandparents of one. We at L&S wish Dave the very best in his endeavors and look forward to seeing him on the bench for many years to come!

FROM THE LAW LIBRARY . . .

## COURT OF APPEALS UPHOLDS "OWNED" OR "AVAILABLE FOR REGULAR USE" EXCLUSION

On July 2, 2004, the Kentucky Court of Appeals rendered a decision validating the "owned or available for regular use" exclusion in an automobile liability insurance policy.

The Estate of Snow v. West American Ins. Co., Ky. App., \_\_\_ S.W.3d \_\_\_, 2004 W.L. 1487137 (2004), addressed a situation where a young girl was a passenger in a vehicle driven by her father, Arthur Snow. Arthur Snow was operating a vehicle that he had recently purchased. Snow had not yet obtained insurance on the vehicle. In the accident, Snow allegedly turned in front of another vehicle and his daughter, Jasmine Snow, tragically died as a result of injuries from the accident.

At the time of the accident, Arthur Snow and his family resided with Arthur's father, George Snow. George Snow had two cars insured with West American Insurance Company. The Estate of Jasmine Snow and Arthur Snow argued that they were entitled to the benefits of liability coverage under the West American Insurance Company policies.

West American denied coverage and filed a declaratory action. The denial was based on the fact that the vehicle being driven by Arthur Snow at the time of the accident was either "owned" by Arthur Snow or "available for his regular use." Therefore, he was not entitled to coverage under the insuring agreement. In affirming the trial court, the Court of Appeals stated that the exclusion was reasonable and "[e]xtending coverage in this case would provide benefits which were neither paid for nor reasonably contemplated by the named insured or members of his family."

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We believe this is the first decision since adoption of the Kentucky Motor Vehicle Reparations Act addressing the validity of the "owned or available for regular use" exclusion in an automobile liability policy. The decision was designated to be published by the Kentucky Court of Appeals. It should become the law of the state if there are no further actions by our Kentucky Supreme Court.

The case was briefed by Douglas Hoots and Jeffrey Taylor and argued by Douglas Hoots in the Court of Appeals.

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The premises liability standard in Kentucky saw a major shift in the law over this past year. In Lanier v. Wal-Mart Stores, Inc. Ky., 99 S.W.3d 431 (2003) the Supreme Court changed the standard for slip-and-fall claims in Kentucky. The plaintiff slipped and fell on a spot of clear liquid. She admitted that nothing impaired or impeded her view of the area and she simply did not see the liquid on the floor. The plaintiff admitted that she could not prove how long the substance was on the floor, that Wal-Mart's employees spilled it, or that Wal-Mart had any notice of its presence long enough that it should have been removed or addressed by an employee.

Wal-Mart was granted summary judgment by the trial court on the grounds that the plaintiff could not prove negligence because she could not show that the business, or their employees, caused the substance to be on the floor or that by the exercise of reasonable care they could have discovered the substance and removed it or warned of its presence.

The Supreme Court overturned the summary judgment by lifting the burden of proof from the "injured customer" and adopting a burden-shifting approach. Under this new approach, the customer must prove that there was a foreign substance on the floor which caused their accident and injury. The burden then shifts to the store owner to prove that their employees did not cause the substance or object to be on the floor and that it had been there for an insufficient length of time to have been discovered and removed or warned of by its employees.

Until recently, most observers interpreted the Lanier holding to only apply to foreign substances on the floor inside a business. However, in Bartley v. Educational Training Systems, Inc., Ky., 134 S.W.3d 612 (2004) the Supreme Court applied the Lanier burden shift to a case involving a loose carpet remnant at a real estate school which caused the plaintiff to fall.

Under this new approach, the customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. According to Bartley, "such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, and shifts the burden of proving the absence of negligence, i.e., the exercise of reasonable care, to the party who invited the injured customer to its business premises."

#### L&S IN THE COMMUNITY . . .

L&S has a proud history of giving back to the community. One of the ways the firm gets involved is by sponsoring an annual Christmas gift wish program and Christmas party for the young teens at the Lexington Juvenile Day Treatment Center. Under the direction of John G. McNeill, this Christmas will mark the sixteenth year of this rewarding program.

The Day Treatment Center is a program designed for middle school and high school age young people, most of whom are from environments with little parental guidance. These kids have domestic, academic, and, very often, legal problems. Because of their problems, they are unsuitable for a regular school environment.

The Day Treatment Center provides a regular middle and high school academic curriculum and family and youth counseling to hopefully help keep these kids from ending up at the Juvenile Detention Center.

According to McNeill, "While these students often have very serious problems and obstacles in their lives, once you spend time with them, you quickly realize they simply lack a support system of people who care about them." Hopefully, the Landrum & Shouse Christmas party and gifts are a small way of telling these children that people do care.

This program, along with other family related programs Landrum & Shouse supports, led to Landrum & Shouse being recognized as a Family Care Center, "Business of Promise" for 2003.

L&S has long had a link to the military. Two current partners, Lt. Col. Dan Murner and Lt. Col. Estill Banks, have been called into active duty with the United States Marine Corp. Please keep Dan, Estill, and their families in your hearts and prayers over the next year.



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## NEW FACES . . .

Landrum & Shouse, LLP, is pleased to announce that Evan B. Jones and A. Jessica Hughes have become associated with the firm. Evan, a graduate of University of Kentucky Law School, practices in the areas of Civil Litigation and Insurance Defense Law. Jessica, a graduate of University of Arkansas - Fayetteville, practices in the area of Workers' Compensation.

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The Landrum & Shouse Report is a quarterly publication and contains news and general information about the firm. It is not meant to nor should be viewed as a legal research tool or legal advice.

Landrum & Shouse, LLP, is dedicated to serving the needs of its clients. Our professional and support staff has extensive litigation experience and is able to prepare and execute top quality trial presentations in any forum in the Commonwealth of Kentucky. Our computerized systems support productivity in research and include sophisticated communications networks, while the firm's extensive use of modern accounting methods and budgetary controls maintain the most cost effective approach for our clients. We are well prepared to meet your legal needs. Give one of our legal professionals a call for an introduction to the tradition of Landrum & Shouse.

You can also visit us on the Web at [www.landrumshouse.com](http://www.landrumshouse.com) for additional information about our attorneys and the firm.

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