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The Court reasoned that claims for pre-impact fear are often trivial, speculative and provide no sufficient means to gauge or value the alleged emotional distress when the distress is not directly linked to the physical harm. The Court found that the evidence presented in the case was indicative of the speculative nature of the emotional distress. The Court was reluctant to alter or to dispose of the impact rule because fashioning a new rule that must provide all the safeguards against fraud and the speculation as to emotional harm was too formidable a task absent the appropriate set of facts. The opinion indicated that formulating this new rule in a wrongful death case (such as Congleton) would be very difficult as those cases do not produce the sort of proof that supports altering or crafting a new rule.

However, the debate as to pre-impact fear may not be over. In dicta, Judge Noble left her audience with a teaser suggesting that there may be a scenario whereby pre-impact fear damages are available in Kentucky. The Court stated that a "strong challenge to the impact rule" could present itself if a victim lives to give her first hand account of the pre-impact fear she actually suffered or if a witness is present with the victim who can give first hand testimony as to the victim's pre-impact fear and if demonstrable evidence of the pre-impact fear resulting in medical injury was proven through expert testimony.

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THE LANDRUM & SHOUSE REPORT

Fall 2007

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.

Abney v. Nationwide: Be Sure To Review Your Release

By Tyler Griffin Smith

The Supreme Court of Kentucky recently held in the case of Abney v. Nationwide Mutual Insurance Co., 215 S.W. 3d 699 (Ky. 2006), that a release negotiated with one joint tortfeasor discharging "all other persons, firms, or corporations liable, or who might be claimed to be liable" effectively releases all other joint tortfeasors regardless as to whether the other joint tortfeasors paid any consideration or negotiated the release.

In Abney v. Nationwide, Ernest Abney was a passenger in a vehicle driven by Arthur Brake. Mr. Brake rear-ended a vehicle that was driven by Tonya Wright. Ms. Wright had stopped suddenly in front of the Brake vehicle due to an altercation with her passenger. Mr. Abney sustained serious injuries and subsequently presented a claim against Ms. Wright's liability carrier, Kentucky Farm Bureau. Thereafter, Mr. Abney executed a release at a local KFB office. The General Release included the subject language releasing all other persons who might be claimed liable. The Release also included an acknowledgment that Mr. Abney had carefully read and understood the document. At the time, Mr. Abney was not represented by counsel. Mr. Abney subsequently filed a claim against Mr. Brake and Nationwide for bad faith. Mr. Brake and Nationwide then filed a Motion for Summary Judgment based on the Release. The Trial Court dismissed the action, and the Court of Appeals affirmed.

The Supreme Court, in large part, based its holding on KRS 411.182(4) which states that a release shall not discharge other persons liable "unless it so provides." It was of no consequence to the Court that neither Mr. Brake nor Nationwide were identified in the Release, so long as the Release satisfied the requirements of KRS 411.182(4). Furthermore, the Court was bound by the language of the Release when it sought to determine the intent of the parties. Because no ambiguity existed in the Release, the Court could look no further than the four corners of the document. Based on this, the Court found that the intent of the parties was to put an end to Mr. Abney's claims. Additionally, the Court found no evidence to support the claim of mutual mistake, insofar as any alleged mistake was one of law, not of fact.

It is apparent from the Court's decision that perhaps now more than ever parties need to be mindful of the language contained in the standard release that is used every day. In his Concurring Opinion, Justice Scott writes "this case should be held up as a poster child for people who desire to negotiate Releases or Agreements without an attorney. But to change the law just to save the Appellant, would undue hundreds, if not thousands, of otherwise valid General Releases that are rightfully used on a daily basis across the state."

Jackson v. Sweet & Sassy: Dram Shop Act & Punitive Damages

By John R. Martin, Jr.

The Kentucky Court of Appeals, in a published decision, **Colleen Jackson v. William Grant Tuller, Jr., Sweet & Sassy, Inc. d/b/a Ginger & Pickles & Justin Duncan**, 2005-CA-001006-MR, has held that under KRS 413.241, a statute enacted in 1988 and commonly referred to as the Dram Shop Act, that a plaintiff injured in a motor vehicle accident involving an intoxicated driver may not recover punitive damages against the establishment where the driver was served alcoholic beverages. In addition, the Court of Appeals ruled that an instruction given at the trial of the case regarding apportionment of fault was improper under the Dram Shop Act, and reversed a jury verdict of over $1,600,000.00 in compensatory damages and $500,000.00 in punitive damages assessed against one of the two bars and its owner.

On the evening of May 24, 2001, Justin Duncan and his date, Colleen Jackson, began their evening by having dinner and several beers at the Kountry Kastle. After leaving that establishment, the two then stopped at the Big Kahuna night club where they consumed more alcohol. Their last stop of the evening was at a bar named Ginger & Pickles where the two apparently shared a concoction referred to as a "pickle bowl" where they were served a drink made from grain alcohol and Kool Aid.

As Duncan drove the truck down a roadway a short distance from the bar, he veered off the road and struck a tree, injuring both himself and Colleen Jackson.

Ms. Jackson filed suit against Justin Duncan, the Big Kahuna, and Ginger & Pickles and its owner. Prior to trial, she settled with the Big Kahuna and proceed to trial against Duncan and Ginger & Pickles. Ginger & Pickles and its owner were defended at trial and on appeal by John R. Martin, of the Louisville Office of Landrum & Shouse, LLP.

At the trial of the case, the plaintiff submitted an apportionment instruction which the trial judge eventually gave. The instruction allowed the jury to apportion fault among four parties: the plaintiff, Colleen Jackson, her intoxicated driver, Justin Duncan, the Big Kahuna, the settling defendant, and Ginger & Pickles and its owner. The defense objected and argued that KRS 413.241, the Kentucky Dram Shop Act, required a two step apportionment of fault first between the intoxicated passenger and driver, and secondly between the two drinking establishments, assuming they could be shown to have served alcohol to an obviously intoxicated driver, Mr. Duncan.

The jury apportioned fault 10% to the plaintiff, Ms. Jackson, 20% to the intoxicated driver, Justin Duncan, and 35% each to the two bars, the Big Kahuna and Ginger & Pickles.

In addition, the jury found Justin Duncan and Ginger & Pickles and its owner grossly negligent, but only assessed punitive damages against Ginger & Pickles in the amount of $350,000.00 and its owner, William Tullar, in the amount of $150,000.00. The jury did not impose punitive damages on Duncan.

The Opinion of the Court of Appeals was written by Judge Donna L. Dixon on a panel also including judge Lisabeth Abramson and Special Judge James Howard. The Court began its consideration of the case by examining KRS 413.241, enacted in 1988 and commonly referred to as the Dram Shop Act. Among its provisions, the Act states that the General Assembly declares that it is the consumption of intoxicating beverages rather than the sale of such beverages that is the proximate cause of any injury inflicted by an intoxicated person on himself or another person. A Dram Shop is liable only where there is a showing that a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving. The Act also goes on to provide that the intoxicated person shall be primarily liable with respect to injuries suffered by third parties.

The Court of Appeals held that the apportionment instruction should have required the jury to apportion fault first between Justin Duncan and Colleen Jackson. Then, only if the jury found Duncan to have some percentage of fault, should the jury have determined whether the elements of KRS 413.241 were satisfied such that either or both Dram Shops could be held secondarily liable. Since it was impossible to determine at this point how the jury might have apportioned fault between Duncan and Jackson, the Court concluded the only remedy was reversal and remand for a new trial.

The Court went further to determine whether punitive damages could be recovered under KRS 413.241. The Court reviewed the statute itself and case law which had construed the statute, including the express statement that a Dram Shop's sale or service of intoxicating beverages cannot be the proximate cause of any injury caused by the intoxicated tort feasor. The Court found that since there could be no punitive damages absent proximate cause, and the legislature had removed proximate cause in this context, that punitive damages against the Dram Shop are unavailable as a matter of law.

The Kentucky Supreme Court has never addressed the issue of whether punitive damages could be recovered under KRS 413.241. A motion for discretionary review has been filed with the Supreme Court. The motion is currently pending.

Identification of UIM Carrier at Trial?

by Jeff Taylor

The landscape of the identification of UIM carriers at trial has changed in recent years. Prior to 2004, a UIM carrier was not identified or disclosed at trial to the jury as long as the insurer did not participate at trial or in proof depositions. This was true even if the UIM carrier fronted or substituted the liability limits of the alleged tortfeasor. As such, the UIM carrier would substitute the alleged tortfeasor's liability insurance thereby preserving its subrogation claim and not participate at trial or be identified to the jury. The case was tried as though it was one driver against the other, with no mention of insurance or the UIM carrier.

In 2004, the Kentucky Supreme Court decision of Earle v. Cobb , 156 S.W. 257 (KY 2004) significantly impacted this practice and procedure. The issue in Earle v. Cobb was whether a UIM carrier must be identified at trial when it chooses to preserve its subrogation rights and substitute the tortfeasor's liability limits. The court answered "yes." As such, a UIM carrier is now identified at trial when it fronts or substitutes the settlement amount agreed upon between the plaintiff and alleged tortfeasor. The court reasoned that juries and the public should be made aware of a named party defendant.

The court in Earle v. Cobb did not directly address the identification of the UIM carrier at trial when there is no settlement between the underlying parties and substitution by the UIM carrier. Consequently, Kentucky courts are handling this issue differently. Specifically, some courts identify the UIM carrier while others do not when there has been no settlement between the plaintiff and defendant and substitution by the UIM carrier.

However, this issue will soon be resolved. Presently before the Kentucky Supreme Court is the case of Stinson v. Mattingly. In Stinson, the court of appeals held that a UIM carrier will be identified to the jury not only when the substitution procedure is used by the UIM carrier but also even when there has been no settlement between the plaintiff insured and the alleged tortfeasor and substitution by the UIM carrier. Additionally, the appeal's court ruled that the UIM carrier should be identified regardless of whether it participates at trial. Stinson is not yet final.

Should the Kentucky Supreme Court uphold the Stinson decision, insurers can expect the filing of UIM claims in most automobile negligence cases including low speed, minor property damage accidents with soft tissue-type injuries. In some of the more plaintiff-friendly jurisdictions in Kentucky, the handling of UIM claims may be significantly impacted in light of Stinson.

In light of Earle v. Cobb and potentially Stinson v. Mattingly, trials may soon turn into mini insurance seminars. For example, will courts disclose the insurance limits? Will courts allow the UIM carrier and alleged tortfeasor to tell the jury that any amounts paid under the UIM coverage will be paid out of the defendant's pockets? Moreover, will Courts allow the plaintiff to talk about premium payments made for many years? These are questions that will have to be addressed before trial as the answers to the questions will undoubtedly play a part in the overall evaluation of the claim.

Steel Technologies, Inc. v. Congleton: Providing Guidance in Kentucky's Pre-Impact Fear Debate

By Stephanie Chadwell

The Kentucky Supreme Court recently rendered its decision in Steel Technologies, Inc. v. Congleton, 2007 WL1790599. Arguably, the most significant holding in the decision was that a motorist's pre-impact fear and shock could not serve as a basis for recovery of damages for negligent infliction of emotional distress. Melissa Congleton, wife and mother of two, was running errands for her employer while Ralph Arnold, a driver for Steel Technologies, was transporting a 37,000 pound steel coil from Ghent, Kentucky to Eminence, Kentucky. While driving, an unknown motorist unexpectedly stopped in Arnold's path causing him to slam on his brakes. Suddenly, two of the chains securing the steel coil broke, the coil rolled through the side of the flat-bed trailer into the path of Congleton's oncoming truck, Congleton struck the coil, bounced off the side of the road and struck a stone wall. Congleton died at the scene from the impact.

Melissa Congleton's husband sued Steel Technologies individually for loss of spousal consortium, on behalf of Melissa's Estate for wrongful death, intentional infliction of emotional distress, pain and suffering and punitive damages and as next friend of his children for loss of parental consortium. After motions, the trial court dismissed some of the plaintiff's claims, but determined that Steel Technologies was vicariously liable for its driver's actions as a matter of law. Thus, the only issue to be resolved at trial was damages for the remaining claims.

In support of the pre-impact fear claim, the plaintiff presented two pieces of evidence as proof that the victim anticipated the impact: (1) there were skid marks on the road attributable to her vehicle, and (2) a first-responding EMT testified that the victim's face was fixed in an expression of a scream. The trial court determined that the evidence was sufficient to instruct the jury as to the emotional distress the victim allegedly suffered in anticipation of the impact or "pre-impact fright." Of the total $3,767,267.00 award, $100,000.00 was awarded in pre-impact fright damages. Steel Technologies partially satisfied the judgment but appealed the pre-impact fear, punitive and loss of parental consortium damages. The Court of Appeals upheld the award and the Supreme Court granted discretionary review.

The Supreme Court accepted the trial court's characterization of Kentucky law and *Deutsh v. Shein*, 597 S.W.2d 141, (Ky. 1980) as "partly accurate," and stated that the Court of Appeals' interpretation of *Deutsh* was "incomplete" adding that *Deutsch* also requires that the damages sought be related to and the direct consequence of the actual contact or injury sustained. Therefore, it was not enough that the contact accompany the emotional distress, the contact must be the cause of the emotional distress. The Court confirmed that any contact must come before the emotional distress before recovery is available under a negligence theory.

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