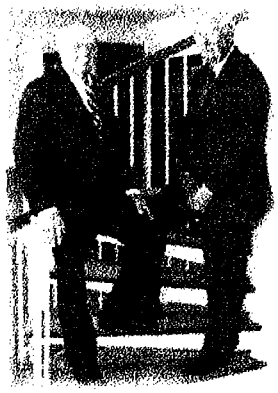
Summer 2005



The Landrum & Shouse Report

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.

Living Wills

The Terri Schiavo case has prompted many people to ask about living wills. A "living will" is not really a will. It is a document by which the person making the living will does two things: (1) names someone to act as his or her surrogate to make decisions about medical treatment and (2) states the person's wishes about life-sustaining medical treatment, artificially provided food and water (i.e., a feeding tube, the treatment in question in the Schiavo case), and organ donation after death. A living will is effective only when the person who made it is no longer able to make and express his or her own decisions, has a "terminal condition", or becomes permanently unconscious. Since it directs the person's family and doctor how to treat them in advance, it is sometimes called an "advance directive", which is more descriptive than "living will".

The Schiavo case showed the importance of having a living will. The main dispute in that case was whether Terri Schiavo would have wanted to be kept alive in those circumstances. Everyone has a legal right to refuse medical treatment. The purpose of a living will is to provide a definite expression of a person's wishes on that subject. If Terry Shiavo had a living will, her own intentions would have been clearly known and could not have been disputed by her husband or parents.

Kentucky law prescribes a particular form for a living will, although it can be modified to express a person's particular wishes. These forms are available at most hospitals, many doctors' offices, and several agencies, and can even be downloaded from the internet. However, the forms have to be executed in the correct way and the options that must be selected are unclear to many people. Anyone signing a living will should make sure they understand what they are doing and get whatever advice they need to execute the form properly, whether they get that advice from an attorney or someone else.

Finally, a living will is just one part of an estate plan. An estate plan should typically also include a will (to direct the disposition of assets, name an executor, and perhaps create a trust) and a power of attorney (naming someone to control the person's financial affairs if he or she becomes disabled). An attorney's fees for preparing these documents are very small in relation to the amount of assets in a typical estate. They are also much smaller than the legal fees that can be incurred if disputes arise from not having the right documents in place when they are needed. Mark L. Moseley is a partner in the Lexington office.

Attorneys selected for Directory

Landrum & Shouse LLP is pleased to announce that three members of the firm were recently selected by their peers for inclusion in *The Best Lawyers in America*® 2005-2006 (Copyright 2004 by Woodward/White, Inc. of Aiken, S.C.). Pierce W. Hamblin and Mark J. Hinkel, both Lexington partners, were selected in the areas of Alternate Dispute Resolution and Workers' Compensation, respectively. Louisville partner John R. Martin, Jr. was selected for Personal Injury Litigation.

Practicing Civility

During the first portion of my term as President of the Kentucky Bar Association, I have attempted to address the continued need for civility within the practice of law. Over the past few months, I have met with many groups and organizations, particularly those comprised of non-attorneys, who frequently ask if they should retain the most aggressive lawyer, who will make life difficult for the other side. There seems to be this recurring notion that unchecked and undisciplined aggressive behavior, among attorneys, is the best formula for success in a particular matter. You might be surprised that even the most sophisticated consumers of legal services, such as those men and women who are in business, still seem to think that overly aggressive tactics are more important than solid preparation, when selecting counsel. As James McElhaney wrote in the most recent edition of the ABA Litigation Journal, "Lots of clients like to think that their lawyers are the meanest dogs in town. But putting on a show to make a client happy is not how to win a lawsuit. It's expensive client entertainment that can cost you the case."[1] I firmly believe that the best qualities for an effective attorney is someone who works hard, is consistently prepared for the task at hand, and who does not needlessly offend either opposing counsel or the judge. I want to point out that I do not think that aggressive or uncivil behavior is anywhere close to the norm in our state: I think it is quite the opposite.

As I have moved around the state during the second half of my term as President, I have frequently been asked by colleagues, "What can be done to enhance the image of the profession as a whole?" This is a broad topic which is closely related to professionalism and civility, as discussed above. In an attempt to help my colleagues address problems with our image, I offered them two anecdotal examples that distinguish myth from reality. Kelly Frels, of Houston, Texas, who is currently serving as President of the Texas State Bar Association, has recently written on this subject and has provided these two examples which are useful when speaking to our non-attorney friends who have misconceptions about how our legal system works.[2]

The first example is the well known McDonald's "hot coffee" case, which occurred approximately ten years ago. Some of you may recall the basic facts: A woman, who was in the drive-through at a McDonald's restaurant, burned herself when coffee spilled. This incident resulted in a $2.9 million verdict against McDonald's. This case has frequently been used as an example of an excessive jury verdict. However, there are additional facts regarding this case that would be informational to the public when evaluating whether this verdict was reasonable: The Plaintiff suffered third degree burns requiring extensive skin grafts; the coffee was served at 185 degrees (45 degrees hotter than at most restaurants); McDonald's had apparently received some 700 similar claims, but had not taken any corrective action on how they served coffee; the $2.9 million verdict (which included $2.7 million in punitive damages – the equivalent of two days' coffee sales for McDonald's nationwide) was later reduced to $640,000.00 on appeal. Significantly, most reports of this case fail to let the public know that the Plaintiff had initially offered to settle the case for $20,000.00.[3] Regardless of whether a $2.9 million verdict was supported by the evidence, my initial impression of these facts is that an argument could be made that the case was worth somewhere at least in the neighborhood of the first settlement offer.

Another myth regarding the legal profession is the oft quoted line from Shakespeare's character, Dick the Butcher, who said, "[t]he first thing we do, let's kill all the lawyers."[4] As Kelly Frels also wrote, this line has been used so frequently that many do not realize it is almost always taken out of context. As any student of Shakespeare should know, indeed, as anyone who attempts to use this quote as a reflection on the legal system should also know, the character, Dick the Butcher, was an Anarchist who, with his friends, wanted to dethrone the King and claim the Kingdom for themselves. Dick the Butcher and his fellow revolutionaries wanted to kill all the lawyers so they could destroy the keepers of the rule of the law, thus allowing the Kingdom to fall into a state of anarchy. Therefore, the proper context of this quote clearly shows that even in the time of Shakespeare, attorneys were recognized as the embodiment of the rule of law.

In conclusion, the Kentucky Bar Association is a diverse organization whose members hold different points of view on a wide variety of topics. We are proud to be an organization that is made up of highly skilled men and women who serve their clients honorably. The next time that you hear either the "hot coffee" case or the quote from Shakespeare used as an attempt to deride the legal profession, you will be able to separate the myth from the reality.

1. James W. McElhaney, *ABA Litigation Journal*, Vol. 31, No. 2, P.55, Winter 2005.
2. Kelly Frels, "My Opinion" *Texas Bar Journal*, December 2004.
3. *Lieveck v. McDonald's Restaurants, P.T.S. Inc.*, 1995 WL 360 309 (DNM Aug. 18, 1994).
4. *King Henry VI*, Part II, Act IV, Scene II, Line 68.

(Louisville partner R. Kent Westberry is the current president of the Kentucky Bar Association and practices in the areas of White Collar Crime and Insurance Defense.)

Loss of Consortium in Kentucky

One area of Kentucky law which generates frequent questions from our clients is loss of consortium. We hope this brief synopsis will be helpful. There are essentially three types of consortium claims; spousal, parental and children. A cause of action for loss of spousal consortium is statutory in nature and gives the spouse of an injured party the right to be compensated for the loss of services, assistance, aid, society, companionship and conjugal relationship. K.R.S. § 411.145. Damages end when the spouse dies. Thus, in a wrongful death case, loss of spousal consortium is recoverable only for the time period between injury and death. Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247 (1995).

Parents may also have a claim for loss of a child's consortium during the child's minority. K.R.S. § 411.135. The courts have declined to extend this type of claim to emancipated adult children. Smith v. Vilvarajah, Ky. App., 57 S.W.3d 839 (2000). A parent's loss of consortium claim is limited to cases involving the wrongful death of a child.

The Kentucky Supreme Court recognized a new cause of action for a minor child's loss of parental consortium in Giuliani v. Guiler, Ky., 951 S.W.2d 318 (1997). A child's claim for loss of consortium is also limited to cases involving a parent's death. Lambert v. Franklin Real Estate Co., Ky. App., 37 S.W.3d 770 (2000). A child may be entitled to recover damages until the age of majority. However, a claim for loss of parental consortium may not be brought by adult children. Clements v. Moore, Ky. App., 55 S.W.3d 838 (2000).

Another issue that sometimes arises is the question of whether a consortium claim is included under the "per accident" or "per person" limits of an automobile liability policy. This issue was decided in Daley v. Reed, Ky., 87 S.W.3d 247 (2002) when the Kentucky Supreme Court held that a loss of parental consortium claim falls within the "per person" policy limits, because the claim is derivative of the wrongful death claim of the parent's estate.

Finally, an action for loss of consortium must be brought within one year of the date of injury or death. K.R.S. § 413.140(a). This is true even if the underlying injury is a result of a motor vehicle accident, as the statute of limitations for the Kentucky Motor Vehicle Reparations Acts is not applicable to loss of consortium claims.

(Jeffrey A. Taylor is an Associate in the Lexington office.)

Appellate Review

The recent Supreme Court opinion of Earle v. Cobb, 2000-SC-0818-GG, should be of great interest, as it alters the holding concerning whether an Underinsured Motorist (UIM) carrier should be identified as a party at trial. Of course, this factor is important in an insurer's decision to substitute the underlying liability limits to preserve its subrogation rights against the tortfeasor. In Earle, the UIM carrier was not identified as a party at trial, and the case was tried to the jury as plaintiff v. defendant. After the trial, judgment was entered against the UIM carrier. The Court of Appeals affirmed the Trial Court's ruling that the existence and identity of the UIM carrier should be withheld from the jury. The Supreme Court granted discretionary review and found that the UIM carrier was the real party in interest at trial. Thus, it was reversible error not to identify the insurance company to the jury as a party/defendant. The Court recognized the policy of excluding evidence of liability insurance, but found that, "...where a direct contractual relationship exists between a plaintiff and a defendant/insurance company, no such policy is warranted." Id. The case was recently finalized by the Kentucky Supreme Court.

General Assembly refuses to increase truck weight limits

On March 8, 2005, Kentucky's legislature voted to defeat a bill that would have increased the weight limits on many tractor-trailers traveling in the state from 80,000 pounds to 120,000 pounds. Currently, coal haulers can pay a fee that allows them to haul 120,000 pounds of coal on specified roads. The bill considered by the General Assembly would have expanded this system to include haulers of all "natural resources." After considerable debate and publicity, the bill was defeated.

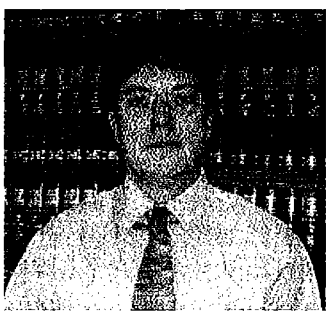
The deliberate use of an overweight truck that causes an accident could form the basis for an award of punitive damages. Kentucky's Department of Transportation began stricter enforcement procedures with respect to weight limits following an analysis of accidents occurring in eastern Kentucky that appeared in the state's two largest newspapers.

New Faces

Landrum & Shouse LLP is pleased to announce that Michael K. Nisbet and R. Sean Quigley have become associated with the firm.

Michael is a graduate of Marshall University and the Louis Brandeis School of Law at the University of Louisville. He practices in the areas of Insurance Defense and Collections.

Sean is a graduate of Transylvania University and Washington University in St. Louis, Missouri. He practices in the areas of Insurance Defense, Municipal Liability, and Civil Rights.



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 fo 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 modem 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 for additional informationabout our attorneys and the firm.

The Landrum & Shouse Report is
edited and compiled by: Michael Hammond
mhammond@landrumshouse.com

Assistant Editor: Cheryl Tingle
ctingle@landrumshouse.com

LANDRUM & SHOUSE
LAW OFFICES

P.O. Box 951
Lexington, Kentucky 40588-0951
ADVERTISEMENT