

# Should Kentucky Plaintiffs be Allowed to Recover Lost Punitive Damages in Legal Malpractice Actions?

A potential client walks into your office with a civil case in which he was injured as a result of crash with a drunk driver. Punitive damages are available against the drunk driver and possibly the facility that served him. You agree to take the case

but miss the statute of limitations. The case is dismissed with prejudice. Your former client subsequently sues you for legal malpractice. What damages is the client entitled to recover from you? Are you liable for the punitive damages he was eligible to receive in the case you malpracticed?

This hypothetical, unfortunately, is a frightening reality for many clients and attorneys. This article attempts to resolve some of the confusion surrounding the issue of damages in legal malpractice suits by addressing the narrow question of whether punitive damages lost in the underlying action are, or should be, available as damages in Kentucky legal malpractice actions.

## History

The issue of whether plaintiffs in legal malpractice actions may recover lost punitive damages has not been directly addressed by a large number of jurisdictions. The majority of jurisdictions that have addressed the issue of lost punitive damages allow plaintiffs to recover the punitive damages under the heading of compensatory damages. The minority of jurisdictions that do not allow recovery base their objections on public policy concerns. "Lost punitive damages" are punitive damages the plaintiff was

eligible to recover in the underlying case, but did not because of their attorney's negligence.<sup>1</sup>

Recovery of lost punitive damages has been addressed only once in Kentucky, despite the existence of a Kentucky statute specifically addressing an attorneys' liability for professional negligence. KY.REV.STAT.ANN. §411.165 states, "(1) If any attorney employed to attend to professional business neglects to attend to the business, after being paid anything for his services, or attends to the business negligently, he shall be liable to the client for all damages and costs sustained by reason thereof."<sup>2</sup>

The only Kentucky case to address the issue of lost punitive damages directly is *McMurtry v. Wiseman*.<sup>3</sup> In *McMurtry*, a U.S. District Court case, the plaintiff was suing his former attorney for mere negligence.<sup>4</sup> The court decided that the plaintiff should not be able to recover their lost punitive damages when the attorney committed mere negligence.<sup>5</sup> The court based its decision on what it considered the trend in surrounding jurisdictions and its interpretation of Tennessee public policy.<sup>6</sup> However, what the court did not consider was KY.REV.STAT.ANN. 411.165 and whether it permitted the plaintiff to recover the punitive damages that were lost due to their attorney's negligence. In fact, 411.165 is never mentioned in the decision, which is surprising since it deals directly with the primary issue in dispute. Even more surprising is the fact 411.165 was enacted in 1976, yet the statute has not been discussed in a single Kentucky case, even though it appears open to interpretation.

## Analysis

### Kentucky Legal Malpractice Fundamentals

In Kentucky, a plaintiff in a legal malpractice action has the burden of proving three things:<sup>7</sup>

1. that there was an employment relationship with the defendant/attorney;



By Warner Wheat



and Hans G. Poppe

Hans Poppe, Contributing Club, is the founder of the Poppe Law Firm in Louisville. He may be reached at (502) 895-3400 or [Hans@PoppeLawFirm.com](mailto:Hans@PoppeLawFirm.com). Warner Wheat is an associate at the Poppe Law Firm ([Warner@PoppeLawFirm.com](mailto:Warner@PoppeLawFirm.com)).

2. that the attorney neglected his duty to exercise ordinary care of a reasonably competent attorney acting in the same or similar circumstance; and
3. that the attorney's negligence was the proximate cause of damage to the client... To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful.<sup>8</sup>

For plaintiffs to fulfill their burden, a "suit within a suit" or "trial within a trial" is necessary.<sup>9</sup> In this trial within a trial, "all the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant."<sup>10</sup> The underlying case the attorney malpracticed is re-litigated to determine just what the outcome would have been. It is at this point that the plaintiff will prove what damages he/she suffered as a result of his or her attorney's negligence. The next step is ascertaining how much of the damages are recoverable from the negligent attorney.

#### **Ky.Rev.Stat. Ann. §411.165**

Statutory interpretation in Kentucky "is a matter of law."<sup>11</sup> The court must interpret the statute from its plain meaning and intent and must not attempt to "discover meaning not reasonably ascertainable from the language used."<sup>12</sup> In *General Motors Corp. v. Book Chevrolet, Inc.*, the Kentucky Supreme Court held, "[i]t is a rule of statutory construction that a statute should be construed so that no part of it is meaningless or ineffectual."<sup>13</sup>

There is no record of what the legislature discussed in committee or in open session during the creation or enactment of 411.165, and unfortunately, surrounding statutes do not relate to professional malpractice. As a result, in terms of statutory interpretation, we are left with the plain lan-

guage of the statute and the relevant rules on interpretation. "The first principle of statutory interpretation is to use the plain meaning of the words used in the statute."<sup>14</sup> The Kentucky statute on interpretation states, "(4)

*Continued on following page*

www.page1solutions.com



## Do YOU dominate the INTERNET?

Get more clients from the web!  
Call for a no-obligation consultation

### 800.916.3886

## Websites that Generate Business!

### Search Engine Positioning

We guarantee 1st-page search engine results.  
If you don't appear on Page 1 of the search engines,  
you don't pay.

### Website Design

We offer sales-driven, custom legal websites.  
Our websites include custom video, Flash animation,  
custom copywriting, and more!

Visit us online at  
www.page1solutions.com  
Call for a free consultation  
800.916.3886



## Legal Malpractice

*Continued from previous page*

All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.<sup>15</sup>

There are two different phrases within 411.165 that appear open to interpretation. The first states negligent attorneys are liable for, "all damages and costs."<sup>16</sup> The literal meaning of the word "all" is "the whole number or sum of."<sup>17</sup> There are two ways of interpreting this phrase. First, we might assume that the legislature intended for the word "all" to be defined by its plain meaning. If so, then attorneys are seemingly liable for every category of damages available to plaintiffs in Kentucky, including the punitive damages lost in the underlying case. However, the question arises as to whether the necessary elements for these damages must be present or whether damages previously unavailable to legal malpractice plaintiffs are now available because they fall under the definition of "all." For example, in order for a Kentucky plaintiff to be entitled to recover damages for mental or emotional distress there must be some sort of touching or physical injury.<sup>18</sup> Does the statute's use of "all" mean that emotional distress damages are available without the requisite physical contact? In terms of punitive damages, the test is whether the evidence reflects that "the defendant acted with oppression, fraud, malice, or was grossly negligent by acting with wanton or reckless disregard for the lives, safety, or property of others."<sup>19</sup> Are these elements required under KRS 411.165?

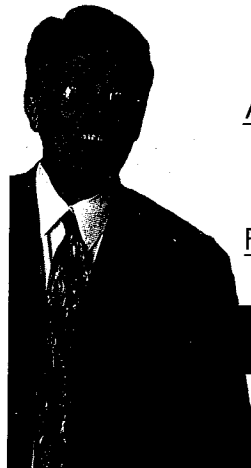
The second way to interpret the phrase is by reading it to mean that in

order for a certain category of damages to be recoverable, its requisite elements must be present. This would seem to be a more logical solution; however, to read the phrase in this way would contradict what has been described as a "universal rule" of statutory interpretation in Kentucky.<sup>20</sup> When interpreting a statute, one must assume that the legislature intended to accomplish something with the act; it was not intended to be meaningless.<sup>21</sup> Using this guideline, KRS 411.165 only has meaning if interpreted to hold defendants in legal malpractice actions liable for more damages than they would be liable for under case or common law. It would be pointless for the legislature to enact a statute giving a plaintiff the same remedies as are already available to them. To read the statute in such a way would render it meaningless.

**CRAFT, NOBLE & COMPANY** —The CPA firm that offers so much more.

PLLC

Certified Public Accountants  
Post Office Box 827  
Richmond, KY 40476  
www.craftnoble.com



### Business Valuation

- Business Sale
- Professional Practice Sale
- Marital Dissolution
- Insurance Claims
- Estate and Gift Tax
- Family Limited Partnerships
- ESOPS
- Damage Suits

### Expert Witness Testimony

- Business Sale
- Merger or Acquisition
- Marital Dissolution
- Bankruptcy
- Estate Planning
- Commercial Damage Suits
- Lost Profit and Earning Insurance Claims

### Arbitration and Mediation

- Insurance Claims
- Marital Dissolution
- Estate and Gift Tax
- ESOPS
- Damage Suits
- Family Limited Partnerships

### Forensic Accounting

- Identify theft, fraud or illegal accounting practices

Call or visit our website to subscribe to our free Quarterly Newsletter with tax and business planning tips.

Contact John Craft • (859)623-4027 • www.craftnoble.com

Certified Public Accountants • Accredited Business Valuator

plary, the plaintiff suffered as a result of his attorney's negligence. Once these damages are determined and the second portion of the trial within a trial begins, these should no longer be labeled as compensatory or punitive, but simply compensatory, because they are what the jury has decided the plaintiff should have received but for the attorney's negligence. The plaintiff must receive all of these damages if he is to be made whole, which is the purpose of compensatory damages. As a result, awarding lost punitive damages furthers the purpose behind compensatory damages.

Between the innocent client and the negligent attorney, it is only appropriate that the negligent attorney bear the burden of liability.

#### Public Policy Reasons for Permitting Recovery

There are logical public policy arguments behind courts permitting the recovery of lost punitive damages. First, permitting their recovery protects Kentucky clients by providing an additional incentive for attorneys to handle their cases competently. Attorneys have an incentive to take on cases in which punitive damages are available to a plaintiff. Typically, attorneys representing plaintiffs in civil matters will operate on a contingency fee basis. The higher the damage award they secure for their client, the higher their attorney fee will be. Under this model, the attorney garners the benefit of securing the punitive damages, but suffers no harm if he does not secure a fair punitive damage value. Other than his potential fee (and applicable ethics rules), he has no reason to work as hard as possible to secure the most money possible for his client. By allowing plaintiffs in legal malpractice actions to recover lost punitive damages, attorneys will be forced to competently and effectively

pursue punitive damage awards for their clients, not only for the money, but also to ensure they may not be sued for negligently executing their duties. It does the state of Kentucky little service to allow attorneys to do the bare minimum of services for their

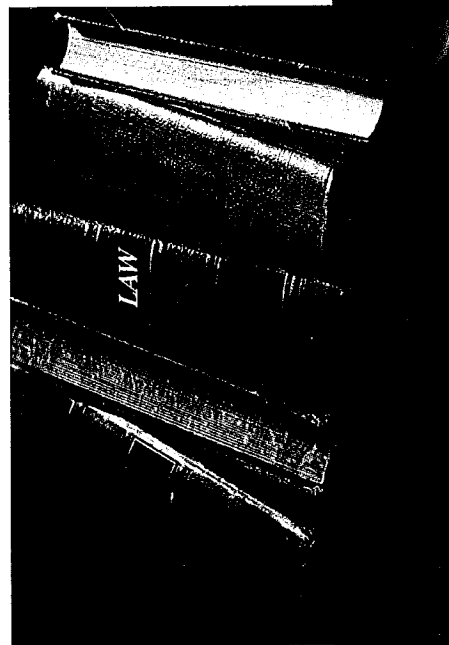
client, and only then out of greed. Attorneys should be held to the highest standard and should be fully accountable if they fall short and negligently represent their client's interests.

*Continued on following page*

## Best Benefits, Bar None.

When the **Kentucky Justice Association** needed a great benefits package, they called on **Winston & Company Benefits, Inc.** Winston & Company works closely with each member to fully understand his or her needs and to provide quality health insurance tailored specifically to those needs. Best of all, the premium savings on these volume-based plans often more than justify the payment of association dues.

Use your best judgment when choosing your benefits program. Turn to **Winston & Company Benefits, Inc.**, for quality, affordable benefits plans. Give us a call, or visit us on the internet at [www.LLHins.com](http://www.LLHins.com).



LOGAN LAVELLE HUNT  
WINSTON & COMPANY  
BENEFITS

*We're here for your benefit.*

114 20 Bluegrass Parkway  
Louisville, KY 40299-2348

(502) 245-1516

Fax (502) 245-1547

## Legal Malpractice

*Continued from previous page*

The second public policy reason for allowing recovery of lost punitive damages is to protect clients who suffer serious injury, but whose underlying case did not merit sufficient compensatory damages. One example of such a case is that of *Commonwealth Department of Agriculture v. Vinson*.<sup>24</sup> In *Vinson*, two employees of the Department of Agriculture filed suit against the Department for violations of the Whistleblower Act after they were demoted but maintained the same level of pay and benefits.<sup>25</sup> The plaintiffs sought injunctive relief under the Act and also sought punitive damages.<sup>26</sup> The plaintiffs were successful and punitive damages were awarded but compensatory damages were not.<sup>27</sup> The Department appealed and the Kentucky Supreme Court held that

punitive damages may be awarded despite a lack of compensatory damages.<sup>28</sup> The Court stated, "The fact that the jury returned a verdict for punitive damages only, furnishes no just reason why the verdict should not be allowed to stand, since, under the rule in force in this State, punitive damages, when allowed, are given as compensation to the plaintiff and not solely as punishment of the defendant."<sup>29</sup> If the plaintiffs in *Vinson* had attorneys who handled their case negligently, causing it to be dismissed, they would have had no recourse in a legal malpractice suit if lost punitive damages were not recoverable in the legal malpractice action. The Court in *Vinson* recognized that, in some instances, punitive damages are compensatory in nature and serve to make the plaintiff whole. The recovery of lost punitive damages in legal malpractice actions is such

an instance and Kentucky citizens deserve protection from the actions of negligent attorneys who, without any repercussions in certain circumstances, can cause their clients great harm.

Plaintiffs in legal malpractice suits in Kentucky deserve to be fully compensated when their attorney's negligence causes them to suffer injury. As the innocent party, the client should not be forced to absorb a portion of the damages when it was the negligent attorney who caused the harm. Allowing plaintiffs in legal malpractice actions to recover lost punitive damages adheres to the language of KY.REV.STAT.ANN. 411.165, fulfills the purpose of both compensatory and punitive damages, furthers public policy interests, and protects Kentucky plaintiffs to the fullest.

# Disability Insurance Claims and Appeals

**Disability insurance claim denied?**

Call an attorney with experience handling disability claims and appeals, both employer-sponsored and individual policies.

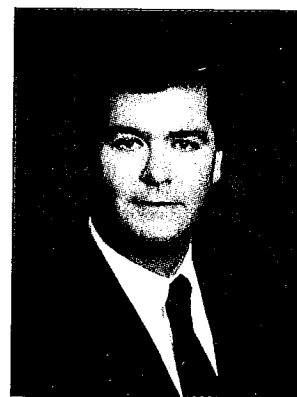
**Driscoll &  
Associates**

**LAW OFFICES**

325 W. Main Street • Louisville, KY 40202

**502.587.1983 • 1.877.587.1983**

[www.driscollandassociates.com](http://www.driscollandassociates.com)



**Will Driscoll**

*Admitted to practice in all  
Kentucky state and federal  
courts and U.S. Court of  
Appeals, Sixth Circuit.*

- 1 *Haberer v. Rice*, 511 N.W.2d 279 (S.D.1994)
- 2 KY.REV.STAT.ANN §411.165(1) (1976)
- 3 *McMurtry v. Wiseman*, 2006 WL 2375579 (W.D.Ky. 2006)
- 4 *Id.* at 3
- 5 *Id.*
- 6 *Id.*
- 7 *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003), citing *Stephens v. Denison*, 64 S.W.3D 297, 298-99 (Ky. App. 2001)
- 8 See *Id.* at 860
- 9 *Id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 (2000)
- 10 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §53 (2000)
- 11 *Commonwealth v. Garnett*, 8 S.W.3d 573, 575 (Ky.App.1999)
- 12 *Id.* at 575,576
- 13 *Gen. Motors Corp. v. Book Chevrolet, Inc.*, 979 S.W.2d 918, 919 (Ky. 1998).
- 14 *Georgetown Municipal Water and Sewer Service v. Bur-Wal Inc.*, 2007 WL 1714572 (Ky.App.2007)p. 5
- 15 Ky.Rev.Stat.Ann §446.080(4) (1942)
- 16 Ky.Rev.Stat.Ann §411.165(1) (1976) (*emphasis added*)
- 17 *Blacks Legal Dictionary* 68 (5<sup>th</sup> ed. 1979)
- 18 *Hetrick v. Williams*, 439 S.W.2d 942 (Ky. 1969)
- 19 *Thomas v. Greenview Hosp., Inc.*, 127 S.W.3d 663, 673 (Ky. App. 2004)
- 20 *Grieb v. National Bond & Inv. Co.*, 94 S.W.2d 612, 617 (Ky. App. 1936)
- 21 *Id.*
- 22 *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)
- 23 *Evergreen Land Co. v. Gatti*, 554 S.W.2d 862, 866 (Ky. Ct. App. 1977)
- 24 *Commonwealth Dept. of Agric. v. Vinson*, 30 S.W.3d 162 (Ky. 2000)
- 25 *Id.* at 163
- 26 *Id.*
- 27 *Id.*
- 28 *Id.* at 166
- 29 *Id.* citing *Louisville & N.R. Co. v. Ritchel*, 148 Ky. 701 (Ky. App. 1912)



### Tax Deduction Notice to KJA Members

KJA dues may be tax deductible as ordinary and necessary business expenses, but not deductible as charitable contributions for federal income tax purposes. Because KJA lobbies strongly for the protection of your clients' rights, a portion of your membership dues are considered nondeductible under the Federal Tax Revenue Reconciliation Act of 1993. KJA estimates the nondeductible portion of your 2008 dues (the portion which is allocated to lobbying) is 24 percent and 20 percent for 2009. As always, please check with your accountant or tax adviser as to the deductibility of any dues.

# Mediation Matters Made Simple.

Our Alternative Dispute Resolution Group has decades of experience finding effective, expedient and equitable solutions to business and personal legal matters. Using critical listening skills, our certified mediators define the issues, ascertain the concerns of each party and foster effective communication. And, our state-of-the-art Mediation Center with LCD screen, projector and wireless connection facilitates professional presentations. Fowler finds solutions.

John E. Hinkel, Jr. • Tiffany Lauderdale Phillips • Robert S. Ryan



**FOWLER**  
FIND SOLUTIONS

Fowler Measle & Bell PLLC  
Attorneys at Law  
859.252.6700  
www.FowlerLaw.com  
300 West Vine Street, Suite 600  
Lexington, KY 40507-1660

THIS IS AN ADVERTISEMENT