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## The Louisville Accident Lawyer Journal

MARCH 2021 • VOLUME 3

OVER 30 YEARS EXPERIENCE

We gladly accept  
and appreciate  
your referrals

- We are counselors, not just attorneys
- We meet with our clients personally - not caseworkers
- We want you to understand how the legal system works as it applies to your case
- We will keep you informed and guide you every step of the way

### Why a Newsletter?

You are receiving this newsletter because you are an existing or past client of our firm, or have contacted us about representation. For this reason, this newsletter is not an "advertisement" under Ky. Supreme Court Rule 3.130-7.02(1)(h). It is our way of staying in touch with people who have had a relationship with our firm. We care about the people we have helped and want you to know your relationship is valuable to us, even after your case is over. We hope you find it entertaining and informative, and would love to hear from you if you enjoy it!

Our best,  
Brad Harville  
Dana Skaggs

# What were you doing a year ago?

Without a doubt, the year 2020 was a game-changer. It was a year ago - Friday, March 13, 2020 - that the COVID-19 pandemic got real, and we all had to figure out how we were going to deal with it.

I remember very well what I was doing a week before that day. On Friday night, March 6, Mary and I attended a fundraiser downtown at the Muhammad Ali museum, along with two other couples, longtime friends, whom we invited to join us. The fundraiser was for Summit Academy, a school for children with learning differences in Middletown, where my youngest son, Clay, went to school through the 8th grade. Mary serves on the Board of Directors. The fundraiser was called "Bluegrass, BBQ and Bourbon," featuring a bluegrass band, free food from various restaurants around town, and, yes, free bourbon tastings (designated driver required). There was also a silent auction where you could bid on various items to raise money for the school. Imagine that! No masks and people standing in line exchanging handshakes and hugging each other! And I remember my good friend from Lexington talking about the fact that 2 cases of coronavirus had been reported in Lexington that day - the first confirmed cases in the state. Well, we all had a few good laughs over that, like, oh, we're all going to get it, we're doomed, etc. Nobody's laughing now.

The following Monday, March 9, I traveled to Somerset, Kentucky for depositions. I spent the night at a

MARCH 2020		
Thursday 12	Friday 13	Saturday 14
8:00		
9		
10		
11		

Hampton Inn because we were going to get an early start the next day. I stopped at a gas station, went inside and saw a basket of hand sanitizer bottles, and I thought it might be a good idea to pick one up. That was the last time I saw hand sanitizer for sale for a long time.

That Tuesday, March 10, I spent most of the day in a conference room with two other lawyers, a witness, and a court reporter. Again, none of us were wearing masks, and during breaks we were making small talk about the coronavirus and not taking it very seriously. None of us had heard of Zoom, even though in-person hearings and depositions where all of the lawyers gather in one place were about to become a thing of the past.

And then the world changed on that infamous Friday the 13th. The schools closed, the courtrooms closed, restaurants closed, doctors' offices closed, it seemed like everything closed except for grocery stores, which were ransacked. It was just so ... weird. It still is.

There was also a story that came out that weekend about a police shooting on March 13 in south Louisville, involving a young woman named Breonna Taylor. However, that tragic event would not

boil over until several weeks later, when the 911 call was released on May 28, after the death of George Floyd three days earlier. As if things weren't already bad enough. As I reflect back on these events, one year later, I realize it is too soon to fully realize the impact of these events on our lives and what lessons we can learn from them. We're still in the midst of it, and historians will be discussing these topics for years to come.

However, I think it's fair to say that if it wasn't for the pandemic, Donald Trump would probably still be in the White House. Any president would have been caught off guard, but I think his failure to show strong leadership and make a genuine effort to take control of the situation cost him the election. Also, the pandemic has reshaped our economy. Everybody thought the stock market would tank. It did, on March 23, when the Dow closed at 18,591.93. But then the markets bounced back with a "V" shaped recovery, which nobody saw coming, skyrocketing all the way to a new high of 31,961.86 last month. The NASDAQ roared from 6,860.67 on March 23 to 14,095.47 last month, fueled by the accelerated growth of technology stocks such as Zoom.

Oh yeah, I also turned 60 last year. I weigh about 25 pounds more than I did a year ago, so I've put on my "COVID-19." I've lived a lot of years, but there is no doubt that 2020 is one we won't forget for the rest of our days. • BDH

# THE DECLINE OF NURSING HOME AND BAD FAITH CASES IN KY. - PART 1

There are two types of cases that Kentucky personal injury lawyers are no longer willing to take on nearly as much as they used to be, if at all: nursing home negligence cases and insurance bad faith cases. The reason for this is because recent decisions by our higher courts have made both types of cases much more difficult, if not impossible, for lawyers to achieve any successful or meaningful results for their clients, especially in comparison to just a few years ago.

I am going to tackle this topic in two separate articles, one this month and one next month, because there's too much to unpack about both types of cases in one article. I will also examine the reasons why our higher courts have made these two types of cases much more difficult for lawyers and their clients, and the negative effects of these decisions upon the general public. This month's article will focus on nursing home cases.

## Nursing Home Cases - Not What They Used To Be.

The high degree of difficulty lawyers now face in successfully litigating a nursing home negligence case can be summed up in one word: Arbitration. And believe me, that is an ugly word.



Here is how this works. When you and your family make the painful decision to place a loved one in a nursing home, usually an elderly parent, someone has to sit down with the nursing home administrator to fill out all of the paperwork. Usually the nursing home will also require that person to have a power of attorney. Then the nice administrator will slip in another piece of paper which says something like "Arbitration Agreement." Of course, the person signing the paperwork feels like they should sign that, too. No big deal, right?

Well, once you sign that innocent-looking "Arbitration Agreement," you can kiss your rights goodbye as far as taking the nursing home to court - and keeping them there - if they negligently injure your loved one. If Grandma develops bedsores because they don't rotate her in bed like they're supposed to, or if she falls and breaks her hip because she isn't receiving proper assistance, I can practically guarantee that your case will never end up in front of a jury. As soon as a lawyer files that lawsuit, the nursing home's lawyers will immediately file a motion to dismiss to refer the case to arbitration. And they will win that motion. If they don't, they will file an immediate appeal. And, after a year or so, they will win in the Court of Appeals.

So now you find your case in arbitration. That means a lawyer in private practice will be appointed as the arbitrator who will serve as judge and jury in your case. Why is that a problem? Because you and the nursing home *have to each pay half of the arbitrator's fees to decide your case!* At a minimum, these guys get paid \$275 an hour. It's not like court where you don't have to pay the judge. It isn't any problem for the nursing home to pay half the arbitrator's fees, they have tons of money. But, under the normal contingency fee agreement, your lawyer has to front these costs until you win or settle your case. That means your lawyer is writing a check each month to pay the arbitrator,

and you will have to pay your lawyer back for those fees out of any recovery. We're talking thousands and thousands of dollars.

Thus, by the end of the case, after paying your lawyer's contingency fee, and reimbursing him for his costs from your recovery, including the arbitrator's fees, your net recovery could be a small fraction of the total, unlike a settlement in court where you have the right to a jury trial, which scares nursing homes to death.

What has gone wrong? Just a few years ago, large settlements and jury awards in nursing home cases were numerous. Lawyer TV ads were clamoring for nursing home cases. Entire firms did nothing but nursing home cases. Not anymore.

The reason is simple: Kentucky courts have flip-flopped on whether arbitration agreements are enforceable. Previous decisions from the Ky. Supreme Court and Court of Appeals narrowly construed powers of attorney in order to deny the nursing homes' attempts to enforce arbitration. In [Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 \(Ky. 2015\)](#), the Ky. Supreme Court determined that a power of attorney did not authorize the holder to agree to arbitration on behalf of a patient, unless that authority was clearly stated in the power of attorney, which was dubbed the "clear-statement rule." However, that decision was appealed to the U. S. Supreme Court, which, in 2017, invalidated the "clear-statement rule," holding that under the Federal Arbitration Act, courts are supposed to broadly interpret a power of attorney document in favor of arbitration. This was a huge victory for the nursing homes, and nursing home cases have not been the same since then. Last year, the Ky. Supreme Court decided the case of [LP Louisville East v. Patton](#), which left no doubt that just about any power of attorney document is now going to be interpreted in favor of enforcing a nursing home arbitration agreement, the exact opposite of the position that the Court took just 6 years ago.

The negative effect of this turnabout in the law on nursing home patients and their families is not difficult to see. Nursing homes no longer have the same fear of liability claims, which means they no longer have to be as concerned about maintaining a high level of care for their patients to prevent injury. They have no motivation to settle a case, either, because they know they can get the case into arbitration and wear down their opposition in arbitration costs in order to dim the prospects of any meaningful recovery. At that point it becomes a game of attrition, and they have a lot more money to spend on litigating a case in arbitration than most plaintiffs' lawyers are willing to finance. Of course, if nursing homes succeed in their goal to reduce or eliminate these cases, those same defense lawyers aren't going to have any more cases, either.

Finally, I wouldn't hold my breath hoping the legislature might do something about this sorry state of affairs. Again, nursing homes have plenty of money, and they are no strangers to politics. In fact, their lobbying group, the Kentucky Association of Health Care Facilities, happens to be one of Frankfort's largest campaign donors.

## Current Trends in Personal Injury Law

On February 26 the Ky. Supreme Court came out with two Amended Orders updating the status of court proceedings. The highlights are that jury trials may resume after May 1, in the discretion of the presiding judge. Courtrooms must be configured to allow social distancing. Facial coverings must be worn. Courts must also hold a final pretrial conference no more than 3 days before the trial date, apparently to make sure the case will be tried as scheduled.

All other proceedings will continue to be held remotely, unless the judge determines that an individual case requires in-person attendance.

Access to the courthouse is restricted to attorneys, parties, witnesses, domestic violence advocates, jurors, and other persons required or authorized to attend in-person hearings, as determined by the court.

Thus, it looks as though jury trials may finally get under way again come May 1, a year after the courts closed down for two months before they opened back up remotely. The timing is tied to the hope that most people will have received a COVID vaccine by then. Of course, no one knows right now how effective the vaccines will prove to be in eradicating the coronavirus from our lives. Even

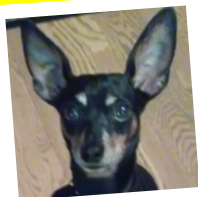
under a best case scenario, civil cases have to take a back seat to criminal cases, since criminal defendants have a constitutional right to a speedy trial.

I have one case set for trial on June 15, which was supposed to go to trial this time last year. Recently I asked the Judge about our chances were of getting the case tried that week, and she said "I don't know, there's a year's worth of criminal trials ahead of you." So I doubt things will get back to normal anytime soon. Like everything else, we just have to wait and see how it plays out.

BRADLEY D. HARVILLE LAW OFFICES PLLC

### 20 Questions about Kentucky No-Fault

The key to understanding how the legal and medical system works in personal injury cases resulting from motor vehicle accidents in Kentucky.



Casey's Ky. Trivia Question: Which team has the most NCAA basketball tournament appearances?

- A. Kentucky
- B. North Carolina
- C. Kansas
- D. UCLA

Be the first person to answer correctly by sending an e-mail to [bdh@harvillelaw.com](mailto:bdh@harvillelaw.com) and we'll mail you a \$5 Starbucks gift card!

## Stupid-Easy Recipe of the Month

*The easiest Bolognese sauce ever!*

### Easy Bolognese Sauce

Here's a great dish to serve over your favorite pasta, Zucchini noodles or spaghetti squash:

#### Ingredients:

- 1 lb. ground beef
- 9 oz. Mirepoix mix, thawed (in the frozen vegetables section at Kroger)
- 1 16 oz. can Italian diced tomatoes
- 6 oz. can tomato paste
- 1/2 teaspoon salt

#### Directions:

Brown the ground beef with the thawed Mirepoix mix. Add the diced tomatoes, tomato paste, and salt. Simmer for 15 minutes. Serve with parmesan cheese.

Couldn't be easier.

Enjoy!



## Favorite Pet of the Month

Sawyer is one of the rescue's longest residents and a volunteer favorite. He is approximately 7 years old and once he knows and trusts you, he loves you.

He is a Great Dane/Boxer mix and is rather large, but he has so much love to give. Sawyer needs a patient and loving family with room in their home, yard, and hearts.

Visit [www.barktownrescue.org](http://www.barktownrescue.org) to fill out an application!

Dana serves on the Board of Directors at Barktown Rescue. Brad and his family love pets, too!

If you want to tell us about your pet(s), send an e-mail to [bdh@harvillelaw.com](mailto:bdh@harvillelaw.com) with a photo and we'll try to put this in a future



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**We want to help you secure the best possible outcome out of a difficult situation that you wish had never happened. If you have been injured, our goal is to obtain maximum recovery in the shortest amount of time it takes to get your case resolved.**



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