

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2006-SC-000018

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SUPREME COURT
APPELLANT

DAVID KAPLAN

vs.

GARY WADE PUCKETT

APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 96-CI-06279
Hon. F. Kenneth Conliffe, Judge, Presiding

BRIEF FOR APPELLANT

Submitted by:


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CERTIFICATE

It is hereby certified that a copy of the foregoing Brief for Appellant was served via U.S. Mail this 16th day of October 2005 upon Hon. Bill V. Seiller, Counsel for Plaintiff, Meidinger Tower, 22nd Floor, 462 South Fourth Avenue, Louisville, Kentucky 40202, Hon. F. Kenneth Conliffe, Judge, Jefferson Circuit Court, Division 15, 9th Floor, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 and Clerk, KY Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601.

It is further certified that the record on appeal was not withdrawn or checked out by Counsel for the Appellant from the Office of the Jefferson Circuit Court Clerk.


George R. Carter

INTRODUCTION

This legal malpractice action comes before this Court pursuant to the grant of Appellant's Motion for Discretionary Review on August 17, 2006. The opinion from the Court of Appeals affirmed a jury verdict for the Appellee. It is the position of the Appellant that the matter should not have been submitted to the jury and that a directed verdict should have been entered for the Appellant.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant desires oral argument. Appellant believes that oral argument may be of benefit to this Court.

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May it please the Court:

STATEMENT OF THE CASE

This legal malpractice case originally came before this Court on issues of apportionment and prosecutorial immunity.¹ The underlying matter started with the criminal prosecution of Gary Wade Puckett for the death of his mother, Peggy L. Puckett, who died of asphyxiation on October 20, 1993, following a fire at her home. The police believed that Mr. Puckett started the fire, and to establish their case, they hoped to prove that Mr. Puckett's clothing contained the same accelerant as that found on the floor where the fire started.

Samples of the floor, clothing worn by the deceased, and clothing worn by Mr. Puckett were sent to the State Police Forensic Laboratory in Frankfort. Mr. Kenneth Rider ("Rider"), a chemist employed by the Laboratory, analyzed the samples and prepared a written report. This report only stated that medium petroleum distillate was found in the debris and on Mr. Puckett's clothing.

There was no indication that the distillates contained different properties or were of different formulations, despite certain chromatogram charts generated by Rider that clearly indicated two separate and distinct formulations. The chromatogram charts and any reference to the different formulations were omitted by Rider from his report.²

¹ Jefferson County Com. Attorney's Office v. Kaplan, Ky., 65 S.W.3d 916 (2001).

² Trial Tape 30-15-04-VCR-027 (B-2): 15:23:30 - 15:25:00.

After the case was submitted to the Grand Jury and before the arraignment, Ms. Anne Leitsch Haynie ("Haynie"), one of two (2) prosecutors assigned to the case, recalled meeting with several officers at the County Police station. They spoke with Rider via telephone conference call about the results of his analysis. During the call, Haynie did not recall Rider or anyone else indicating that the distillates found on Puckett's clothing had a different formulation than the distillates found on the floor.³

After his indictment, Mr. Puckett retained Mr. David Kaplan ("Kaplan"), to represent him and at the arraignment, the Trial Court entered an Order of Arraignment and Discovery directing the Commonwealth to disclose all exculpatory evidence.⁴ In response to that Order, the Commonwealth produced Rider's report which failed to indicate that the debris contained a different accelerant than that found on Puckett's clothing. The Commonwealth did not produce the chromatogram charts generated by Rider in his analysis nor indicate that the debris contained a different accelerant than that found in the floor debris.

In the initial criminal trial that commenced on June 15, 1994, the Commonwealth's central theme was that the accelerant found on the floor at the

³ Trial Tape 30-15-04-VCR-027 (B-2): 15:25:00 - 15:27:50 In fact, her recollection is that the first time she was aware of the different formulations was when she met with Rider in Frankfort in connection with her preparation of a response to Puckett's motion for new trial. Trial Tape 30-15-04-VCR-027 (B-2): 15:27:50 - 15:28:20.

⁴ Trial Tape 30-15-04-VCR-027 (B-1): 10:59:38 - 11:00:30.

scene was also found on Puckett's clothing.⁵ To establish this as a fact, Rider took the stand and explained how gas chromatography worked and that he performed gas chromatography on the various samples, including the debris and clothing. He explained that he tested for the broad array of accelerants in six classes established by the National Bureau of Standards. He outlined the six classes noting examples in several classes. Class one is the lightest group containing such items as fingernail polish, remover and thinner. Class two contains gasoline, class three is the medium petroleum distillates which are charcoal lighter fluid, paint thinner and mineral spirits. Class four is kerosenes and aviation fluid while class six contains diesel fuels.⁶

When Ryder described the results of his examination of the debris and Mr. Puckett's clothing, he said that each item contained medium petroleum distillate, implying that all accelerants in the debris and on the clothing were the same. He failed to disclose the different formulations, which he knew were present.⁷

Nonetheless, Kaplan asked Rider relevant questions which should have elicited the information of the different formulations had Rider been forthright in his answers. Instead, Rider falsely testified about the ability to determine different formulations by evasively saying that the petroleum industry does not have universal standards and that companies buy distillates on the spot market.

⁵ Trial Tape 30-15-04-VCR-027 (B-2): 15:57:30 - 15:59:00.

⁶ Trial Tape 30-6-94-VCR-027 (B-2): 16:11:50 - 16:19:57.

⁷ Trial Tape 30-6-94-VCR-027 (B-2): 16:11:50 - 16:25:03.

- Q. Sir, I don't want to belabor this thing, but I have asked, please give me a yes or a no answer, and then an explanation, is what we are talking about lighter fluid? Yes or no, and then explain.
- A. That cannot be answered with a yes or no question.
- Q. Well, with a maybe?
- A. It is definitely a medium petroleum distillate; however, it cannot be labeled directly charcoal lighter fluid, again, because there are no universal standards for charcoal lighter fluid, except for the volatility range set by the American Bureau of Standards.⁸

And Kaplan pressed Ryder about his analysis and whether the substances were the same.

- Q. Okay. Now, we have got lighter fluid. Tell me something else. What else have we got?
- A. What
- Q. In the category three
- A. Paint thinner.
- Q. Paint thinner. Is that only two? We have lighter fluid and paint thinner, and that is it?
- A. And mineral spirits.
- Q. And mineral spirits, what else?
- A. Well, I can't – those are the main three. There are some lamp oils that are included, but then, again, you will see the label lamp oil, but then can turn around and see below the label mineral spirits.
- Q. All right, sir. Now, you think carefully. I want you to look at your Exhibit 1, 2 and 3, and tell me isn't it a fact the same item?
- A. They are three separate exhibits.
- Q. Sir, is it the same substance in each one that we have been talking about or is there a difference, medium petroleum distillate?
- A. They, Exhibits 1, 2 and 3, were found to contain a medium petroleum distillate.
- Q. What?
- A. A medium petroleum distillate.
- Q. Is it the same in each one or are they different?
- A. They bear similarities.
- Q. So they might be the same, they may not be the same?

⁸ Trial Tape 30-6-94-VCR-027 (B-2): 16:43:38 - 16:44:22.

- A. They have been involved in a fire, so there is some alteration, but the general characteristics still remain.
- Q. You know, either you are misconceiving or misconstruing my questions or I may not be coming across, but I am having difficulty in trying to comprehend what you are saying, other than the fact that you have given me a classification of a generality. I am looking for whether or not you can tell me, in fact, what that was in either one of these documents.

MR. DYKE: Your Honor, I believe that has been asked and answered.

THE COURT: Mr. Kaplan, come on up here a second.

MR. KAPLAN: All right. I will withdraw the question.⁹

** ** *

- Q. Can you now, sir, tell me whether or not there is a testing company so that I could find out whether or not whatever is in those time cans is, in fact, the same?
- A. Testing in what way?
- Q. To find you out exactly what it is, not some generalization.
- A. There is no generalization. There is a medium petroleum distillate. It is a medium distillate from a petroleum source. That is definite and that is specific. You can go to different testing laboratories and have them test it, but the testing procedures that we use are the ones that are sanctioned by the Alcohol, Tobacco & Firearms and the FBI.
- Q. Tell me about these other testings that you could have done.
- A. Nuclear magnetic resonance is one possibility.
- Q. Stop, stop. Let's talk about this particular item.
- A. It was not necessary since it was - nuclear magnetic resonance is generally used for compounds that have just one specific compound.
- Q. Would that test tell me what it was in particularity or would I still come up with the same answer?
- A. You would still come up with the same answer.
- Q. What other tests are there?
- A. There are no other tests that you can do that is accepted by the law enforcement community.¹⁰

** ** *

⁹ Trial Tape 30-6-94-VCR-027 (B-2): 16:44:23 - 16:46:16.

¹⁰ Trial Tape 30-6-94-VCR-027 (B-2): 16:49:02 - 16:50:30.

Q. Now, we are talking about this particular fire. Can you tell me what this particular fuel was?

A. On Exhibits 1,2,3,7,8,9,10 they were found to contain a medium petroleum distillate.

Q. Are you saying, sir, that just because you found on that particular item that is what the accelerant was?

A. Those are the accelerants that I identified on those exhibits.¹¹

After all the evidence (with the exception of the different formulations which had been improperly withheld), Haynie forcibly argued to the jury that Puckett got the accelerant on himself when he sprayed it on the floor.

The jury found Puckett guilty of murder and arson, and after the trial, Puckett obtained new counsel, Donald Heavrin ("Heavrin"), who filed a motion for a new trial principally on the ground that the Commonwealth violated the discovery order in failing to disclose all exculpatory evidence regarding the different accelerant formulations. The Commonwealth vigorously resisted the motion, but in the end, Mr. Nick King, the Jefferson County Commonwealth Attorney, after personally reviewing the matter joined in Puckett's motion. Mr. King determined that information possessed by Rider prior to trial about the different formulations was not disclosed to defense counsel and that the failure to disclose this information warranted a Judgment NOV.

The second trial commenced on September 24, 1996. And during that trial Rider testified that the formulation on Puckett's clothing was different from the formulation that was on the floor. This difference was significant since, at the conclusion of the second trial, Puckett was acquitted on all charges.

¹¹ Trial Tape 30-6-94-VCR-027 (B-2): 16:51:44 - 16:52:10.

On October 25, 1996, Heavrin filed this malpractice action against Kaplan, claiming, inter alia, that Kaplan rendered ineffective assistance of counsel because he did not have Rider's report reviewed by an expert or in some manner failed to learn that the accelerant found on the clothing was of a different formulation than the accelerant found in the debris.

The case presented to the jury was limited to two (2) issues:¹² Whether Kaplan committed malpractice because he failed to give an opening statement and whether Kaplan committed malpractice because he did not ask the Commonwealth to produce the raw data upon which Rider relied to prepare his report. The jury, after hearing the evidence, found that Kaplan committed malpractice and awarded Puckett compensatory damages.

ISSUES

Whether there was sufficient evidence to submit the case to the jury on the issue of negligence in Appellant's representation of Puckett.

Whether the Trial Court committed reversible error when it failed to grant a directed verdict for Appellant at the conclusion of Puckett's evidence and at the conclusion of all the proof.

ARGUMENT

There was not sufficient evidence to submit the case to the jury on the issue of negligence in Appellant's representation of Puckett because the Appellee failed to establish the requisite standard of care.

¹² Trial Tape 30-15-04-VCR-027 (B-1): 10:02:30.

This Court reviews the trial court's findings of fact under a clearly erroneous standard and its conclusions of law *de novo*. And the questions presented in this case appear to be mixed, as certain findings of fact lead inevitably to legal conclusions.

Everyone agrees that a claim for professional malpractice against an attorney must satisfy four (4) elements:

- 1) The duty of the attorney to use such skill, prudence, and diligence as other attorneys commonly possess and exercise;
- 2) A breach of that duty;
- 3) A proximate causal connection between the negligent conduct and resulting injury; and
- 4) Actual loss or damage resulting from the breach.¹³

In this context, an attorney is not bound to exercise his best judgment in representing his client, *i.e.*, an attorney is held to that degree of knowledge, skill and judgment ordinarily possessed by members of the legal profession at the time the task is undertaken; not the best criminal lawyer in the world, blessed with unlimited time and resources and with the inestimable benefit of hindsight.¹⁴

To establish that Kaplan fell below the standard of care, Puckett presented the testimony of Heavrin and Mr. James Earhart ("Earhart"), a local attorney used

¹³ Stephens v. Denison, Ky. App., 64 S.W.3d 297, 298-99(2001); Marrs v. Kelly, Ky., 95 S.W.3d 856, 860 (2003) and Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 Ky. L.J. 1 - 4.

¹⁴ *Id.* and Sanders v. Com., Ky., 89 S.W.3d 380, 386 (2002).

as an expert. It is that testimony which Kaplan maintains does not meet the standard of admissibility of evidence governed by Rule 702 of the Kentucky Rules of Evidence and the principles of Daubert v. Merrell Dow Pharmaceuticals, Inc., and Goodyear Tire and Rubber Co. v. Thompson.¹⁵

In analyzing the Trial Court's ruling on this issue, the first step is to determine whether the Trial Court properly followed the Daubert analytical framework for assessing the reliability of the proffered testimony.¹⁶ This task requires the trial court to consider whether the testimony has been subjected to the scientific method and is not based upon subjective belief or unsupported speculation.¹⁷ That is, whether the proffered expert testimony is grounded in the methods and procedures of science and is more than "subjective belief or unsupported speculation."¹⁸ And although the Daubert standard is flexible, the focus is on principles and methodology, not on the conclusions they generate.¹⁹

The principle of Daubert is recognized by Rule 702 of Kentucky Rules of Evidence which is designed to ensure that expert witness testimony adheres to

¹⁵ Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) Kumho Tire Co., Ltd. v. Carmichael, 119 S.Ct. 1167 (1999); and Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000).

¹⁶ Miller v. Eldridge, Ky., 146 S.W.2d 909, 913-14 (2004) and Toyota Motor Corp v. Gregory, Ky., 136 S.W.3d 35 (2004).

¹⁷ Daubert, supra, 113 S. Ct. at 2795 - 2795; and Toyota Motor Corp., supra, 136 S.W.3d at 39 - 41.

¹⁸ Id.

¹⁹ Id.

standards of intellectual rigor demanded in professional work. This objective can be accomplished in a number of different ways, including through the review of experimental, statistical, or other scientific data generated by others in the field. And while there are situations in which personal experience observations meet the requirements of Daubert and Goodyear Tire and Rubber, supra, expert evidence must meet the objective requirement of reliability and relevance.²⁰ That is, despite the confusing wording from the Court of Appeals about the applicability of the Daubert in legal malpractice cases, the legal expert must employ the same level of intellectual rigor that “characterizes the practice of an expert in the relevant field.”²¹

Heavrin’s and Earhart’s testimony fails to satisfy Daubert and Goodyear Tire and Rubber. Their testimony is not based upon the standard of care skill, prudence, and diligence that other attorneys commonly possess and exercise. Instead, their testimony is basically a conclusion. And a conclusion reiterated is not a factually based argument defended with reasons.

Mr. Heavrin’s direct examination presents a pretentious detective story reciting what he did after watching the first trial tape.²² When asked specifically what Kaplan failed to do in preparing for trial, Mr. Heavrin responded in terms of

²⁰ Daubert, supra and Toyota Motor Corp., supra.

²¹ Id.

²² Trial Tape 30-15-04-VCR-027 (B-1): 10:41:27 - 10:50:54.

what he (Heavrin) did; not what was the standard of care for the reasonably competent attorney and that Kaplan failed to meet that standard.²³

Earhart's opinions were weaker than Heavrin's. He lacked the requisite qualifications and his review of the record was not sufficient to qualify him to render an expert opinion. He has only practiced criminal defense law in Jefferson County for approximately two (2) years following his years in the United States Attorney's Office. He has not received any training in what constitutes effective legal counsel nor has he any substantial experience in arson cases.²⁴ And with this limited background, he did not even review the actual trial tapes. Instead, he relied primarily upon a review of Puckett's motion for a new trial, the Commonwealth's response in opposition to the motion for a new trial, and upon speaking with Heavrin.²⁵

And, as with Heavrin, Earhart did not establish the requisite standard of care. His conclusions are nothing more than a recapitalization of Heavrin's limited account.²⁶

Kaplan was not negligent when he relied upon the Commonwealth to produce all exculpatory evidence, including evidence of the different formulations.

²³ Trial Tape 30-15-04-VCR-027 (B-1): 10:38:20 - 10:39:50.

²⁴ Trial Tape 30-15-04-VCR-027 (B-1): 13:57:00 - 13:58:30 and 14:06:24 - 14:12:21.

²⁵ Trial Tape 30-15-04-VCR-027 (B-1): 14:13:12 - 14:21:30.

²⁶ Trial Tape 30-15-04-VCR-027 (B-1): 14:19:00 - 14:22:00.

Heavrin's rationale for his opinion that Kaplan was negligent when he (Kaplan) relied upon the Commonwealth to produce all exculpatory evidence was his opinion that a defense attorney cannot trust the Commonwealth to disclose all exculpatory evidence. That is, the paranoia of defense attorneys.

Q. Mr. Heavrin, in your opinion can a criminal defense lawyer depend on defending the case just by what the Commonwealth provides him?

A: Probably the most important thing that I know about criminal law is that it's up to the defense to defend. And you can't sit in your office and say, "I'm just going to wait for the Commonwealth to come over and tell me how to defend this case, and what I should do and how I should handle it. I'm just going to sit here and do absolutely nothing and wait for them to arrive with this information and tell me how to defend the case." It's an adversary proceeding and lawyers are a suspicious and paranoid group and in this particular instance that's a very iffy question because one of the prosecutors said, "Had I known about this I would have given that information to the defense." And the other prosecutor said -- I think the other prosecutor knew about it and said, "I didn't think it was material to the defense." But, again, it's up to the defense to defend, so you've got to go in and ask for these things and you've got to get the "intelligence greater than mine" on the case -- working on the case, so that you have a clear understanding about what's happening and, therefore, end up preventing someone who is innocent from going to prison.²⁷

Nowhere in Heavrin's monologue is there evidence of what a reasonable prudent attorney would do in a similar case where the Commonwealth failed to comply with a Brady disclosure order. That every lawyer Mr. Heavrin knows is suspicious, paranoid, and believes that the Commonwealth Attorney's office will

²⁷

Trial Tape 30-15-04-VCR-027 (B-1): 10:50:10 - 10:53:10.

violate constitutional mandated exculpatory disclosure is nothing but hyperbole directed to appeal to the jury's emotion. And that paranoia is not the norm according to the United States Supreme Court.

As we observed in *Strickler*, defense counsel has no preceudural obligation to assert constitutional error on the basis of mere suspicion that some proscutorial misstep may have occurred.²⁸

Heavrin's testimony is not based upon a study of the applicable standard nor is his testimony reliable under Daubert. Instead, Heavrin fell into the temptation of second-guessing Kaplan's representation and performance after the conviction, to conclude that Kaplan's failure to obtain the gas chromatographic charts was below the standard of care. But these protestations fail to show that Kaplan's acts or omissions were outside the range of professionally competent attorneys. In other words, Hearvin, despite his personal opinions, failed to show that Kaplan's representation was below an objective standard of reasonableness under prevailing professional norms.

Compare Heavrin's testimony with the evidence given by Judge Richard Revell, Judge Daniel Schneider, and Haynie. Their evidence established the requisite standard of care supported factually with their experience that no attorney practicing in Jefferson County had ever asked the crime lab to produce the underlying raw test data from scientific examination. And they give a fair assessment of Kaplan's performance without the distorting effects of hindsight, particularly by a witness who is extolling his own performance with the benefit of this

²⁸ Banks v. Dretke, 540 U.S. 668, 695-696, 157 L.Ed.2d 1166, 124 S.Ct. 1256 (2004)

hindsight. And unlike Heavrin, they did not minimized the fact that Rider, in his six (6) years with the Kentucky State Police Laboratory has been involved in between 1800 to 2000 cases and in no case has he been asked to produce his chromatograms.²⁹

And for the Court of Appeals to say that Kaplan's argument in this context is a "red herring" because he did not ask for the raw data depreciates the fact that the Commonwealth and Ryder had been ordered to disclose that data and the fact that the formulations were different. One does not have to ask for the production of evidence that the Commonwealth is ordered and constitutionally required to produce.³⁰ And to hold Kaplan to Heavrin's proposed standard would be to hold him to a higher standard than that of a practicing attorney. This fact was elegantly acknowledged by Judge Revell when he said no attorney in an arson case ever went as far as suggested by Mr. Heavrin and that to hold Kaplan to that standard would be to hold him to a higher standard.³¹

Kaplan is entitled to assume, unless he has good evidence to the contrary, that the Commonwealth will adhere to its constitutional and ethical duties.³²

A rule thus declaring "prosecution may hide, defendant must seek, " is not tenable in a system constitutionally bound to accord defendants

²⁹ Trial Tape 30-15-04-VCR-027 (B-1): 11:07:35 - 11:09:00.

³⁰ Brady v. Maryland, 373 U.S. 83; 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963).

³¹ Trial Tape 30-15-04-VCR-(B-2): 16:06:45 - 16:07:50.

³² Banks v. Dretke, 540 U.S. 668, 157 L.Ed.2d 1166, 124 S.Ct. 1256 (2004).

due process. "Ordinarily, we presume that public officials have properly discharged their duties."³³

The evidence supports the conclusion that the Commonwealth and Rider would properly discharge their duties. The State Crime Laboratory had a reputation for reliability, and Kaplan had no reason from his dealings with the Jefferson County Commonwealth Attorney's office to believe that prosecuting attorneys would violate an individual's due process rights. The very fact that Mr. King personally accepted responsibility for the error when it was brought to his attention supports the conclusion that the Jefferson County Commonwealth Attorney's office takes its ethical and constitutional duties seriously.

The Court of Appeal's opinion ignores this fundamental principle and sharply conflicts with Brady v. Maryland, its progeny, and with Carter v. Commonwealth,³⁴ which was reaffirmed in Funk v. Commonwealth,³⁵ a case strongly analogous with the present matter. And the duty to disclose all exculpatory evidence is applicable even though there has been no request by the accused.³⁶

This Brady disclosure requirement encompasses evidence "known only to police investigators and not to the prosecutor."³⁷ And in order to comply with Brady

³³ Banks v. Dretke, 540 U.S. at 696, 157 L.Ed.2d at 1193.

³⁴ Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1990).

³⁵ Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1993).

³⁶ United States v. Agurs, 427 U.S. 97, 107 (1976); Kyles v. Whitney, 514 U.S. 419, 433, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995); Strickler v. Greene, 527 U.S. at 263, 284, 144 L.Ed.2d 286, 119 S.Ct. 1936 (1999).

³⁷ Kyles v. Whitney, 514 U.S. 419, 437, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995)

"the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."³⁸

The Brady requirement that prosecutors have an affirmative duty to disclose evidence favorable to a defendant illustrates the special role played by prosecutors that the Supreme Court relied upon in Strickler to conclude that "if it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor will fully perform his duty to disclose all exculpatory material, but also the implicit representation that such material would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel ... in state habeas proceedings was equally reasonable."³⁹

The same conclusion was again restated in Banks v. Dretke⁴⁰ where the Supreme Court concluded that it was reasonable for trial counsel to rely upon representations by the prosecution that all discoverable material would be provided without the need for a discovery motion. The Court said "As Strickler instructs, Banks cannot be faulted for relying on that representation."⁴¹

Given the trial court had entered an order requiring the Commonwealth to produce all exculpatory evidence and the undisputed conclusion that the chromatographic studies were clearly exculpatory, Strickler and Banks teach that

³⁸ Kyles, 514 U. S., at 437.

³⁹ Strickler v. Greene, 527 U.S. at 263, 284, 144 L.Ed.2d 286, 119 S.Ct. 1936 (1999)..

⁴⁰ Banks v. Dretke, 540 U.S. 668, 157 L.Ed.2d 1166, 124 S.Ct. 1256 (2004).

⁴¹ Banks v. Dretke, 540 U.S. at 693, 157 L.Ed.2d 1191.

Kaplan could reasonably conclude that the Commonwealth would have disclosed that information. This is especially true where the key element in the Commonwealth's case was the argument that Puckett got the accelerant on his clothes when he sprayed it on the floor.

Besides failing to consider the actions of the ordinary prudent attorneys who have not requested this raw data when there has been a Brady disclosure order entered by the trial court, Hearvin failed to give proper weight to Kaplan's cross-examination of Rider during the first trial. Had Rider been candid and forthright, the Commonwealth would have been, to say the least, embarrassed and its case fatally weakened. But because the Commonwealth withheld this exculpatory evidence, its case was much stronger and Puckett's case was much weaker.⁴²

But Puckett's argument and the Court of Appeal's rationale that Ryder's failure to disclose exculpatory evidence did not impeded Kaplan's defense because Kaplan withdrew his question about the different substances found in the kitchen and on the clothing in the face of the Commonwealth's objection exhibits a gross failure to review the entirety of Ryder's examination and Kaplan's cross-examination. Not once, but on at least four occasions Ryder gave misleading evidence. That evidence was so misleading that the Jefferson County Commonwealth Attorney felt compelled to agree that Mr. Puckett was denied a fair trial. And contrary to current decision by the Court of Appeals, an earlier panel described Ryder's conduct as at best negligent and at worst, as exercising bad faith

⁴² See Kyles v. Whitney, 514 U.S. 419, 429, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995).

in performing his duties and that his responses to questions on cross-examination about his findings as deceptive, citing a portion of the passage quoted above on page 5. (See opinion by Judge Schroder of July 23, 1999, that was withdrawn by opinion of October 1, 1999.)

The second aspect of Heavrin's and Earhart's opinion centers on Kaplan's failure to give an opening statement. As with their opinion relating to the scientific data, the opinion that Kaplan's failure to give an opening statement fell below accepted standards is likewise flawed because they did not produce any study or other documentary evidence that would justify their conclusion.

Their evidence failed to acknowledge that an attorney does not commit malpractice in making a strategic decision in presenting his case. This is generally acknowledged by all courts that have considered this issue.⁴³

The Trial Court committed reversible error when it failed to grant a directed verdict for Kaplan at the conclusion of Puckett's evidence and at the conclusion of all the proof because Puckett failed to show that any acts by Kaplan were the proximate cause of his damages.

Puckett has the burden to prove legal causation. And to find causation, there must be reasonable inferences from the evidence that indicate the probable, as distinguished from the possible cause.⁴⁴ In other words, there must be sufficient

⁴³ Furnish v. Com., Ky., 95 S.W.3d 34 (2002) and Sanders v. Com., Ky., 89 S.W.3d 380 (2002).

⁴⁴ Briner v. General Motors Corporation, Ky., 461 S.W.2d 99, 101 (1970) and Bartley v. Childers, Ky., 433 S.W.2d 130 (1968).

proof to tilt the balance from possibility to probability.⁴⁵ And in order to show causation, Puckett is required to show that there was a reasonable probability that, but for any unprofessional conduct by Kaplan, the result of the initial trial would have been different.⁴⁶

In this case, there is no doubt that Rider's conduct impeded Kaplan's ability to defend Puckett. He violated Puckett's constitutional right to a fair trial by failing to disclose not only his complete scientific results but also crucial exculpatory evidence. His conduct so upset the adversarial balance between defense and prosecution that the first trial was rendered unfair. And for this very reason, Nick King joined with Puckett in his motion for a new trial.

Puckett's malpractice claim against Kaplan focuses solely on mere outcome of his first trial without acknowledging that the unfair outcome resulted from the evasive and untruthful testimony from Rider and from the Commonwealth to make the required Brady disclosure of exculpatory evidence. And Puckett has failed to produce sufficient evidence to show that this impediment for a fair trial was due to Kaplan's failure to meet the standard of care for an attorney. And as Strickler and Banks establish, Kaplan could reasonably conclude that the Commonwealth would have disclosed all exculpatory evidence. Therefore, simply stated, Puckett's claim

⁴⁵ Id. and Sanders v. Com., Ky., 89 S.W.3d 380 (2002).

⁴⁶ Sanders v. Com., Ky., 89 S.W.3d 380, 386 (2002) and Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 692, 104 S.Ct. 2052, 2064 (1984).

against Kaplan fails for a second reason: Any actions or non-actions by Kaplan were not the proximate cause of Puckett's damages.

Causation in this case is very relevant to his appeal and it is Puckett who must establish, in fact, that Kaplan's conduct was both the cause in fact and the proximate or legal cause of Puckett's injuries.⁴⁷ Puckett failed to establish legal cause either factually or legally.

When the Jefferson County Commonwealth's attorney joined Puckett in his motion for a new trial, it was on the very limited ground that Puckett had been denied a fair trial because of the handling of the evidence pertaining to the medium petroleum distillates. Lloyd Vest viewed the trial tapes and concluded that evidence of the different substances had been concealed.⁴⁸

Q. With regard to exculpatory evidence, what is the obligation of the Commonwealth's Attorney's office?

A. If we're aware of exculpatory evidence, then it's our obligation to turn it over to the attorney for the defendant.⁴⁹

** ** **

Q. What was that new evidence?

A. This was an arson case that involved an accelerant. The evidence at trial had been that there had been an accelerant on different pieces of evidence. The new evidence that we were presented was that the accelerant that was on the floor of the house was in fact different than the accelerant that was found on Mr. Puckett's clothing and on the victim's clothing.⁵⁰

⁴⁷ Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 Ky. L.J 1 - 4. See also *Sanders v. Com.*, Ky., 89 S.W.3d 380 (2002).

⁴⁸ Trial Tape 30-15-04-VCR-027 (B-2): 10:20:00 - 10:21:00.

⁴⁹ Trial Tape 30-15-04-VCR-027 (B-2): 10:19:33 - 10:19:48.

⁵⁰ *Id* at 10:20:35 - 10:21:05.

Mr. Vest had reviewed Kaplan's examination of Rider and noted that Kaplan had asked two (2) key questions during his cross-examination of Rider, and concluded that Kaplan had tried to find out about the differences in the substances that were examined.⁵¹ But Rider sidestepped Kaplan's questions.⁵²

Q. In essence, Mr. Rider was successful in sidestepping the question and not directly answering the question that was asking. Is that a fair characterization?

A. That's the way I characterized it and in my report I noted that Mr. Rider sidestepped each of these lines of inquiry. Mr. Kaplan made the point more than once and Mr. Rider was doing just that and Mr. Rider continued to do it.⁵³

In addition to Kaplan's effective cross-examination, the Commonwealth's closing statement contained erroneous use of facts about the substances being the same. The argument that the substance on Puckett's clothing was the same as the substance on the floor was very effective. And Mr Vest believed that the outcome of the case would likely have been different had Kaplan been given the correct information about the different formulations.

Q. What was the ultimate outcome of your review?

A. The ultimate outcome of my review was that the information that we now had available to us would have likely caused a different result in the trial. And that Mr. Kaplan had done each thing he could through his questioning to try to bring that out.

Q. Based upon that, what did the Commonwealth's Attorney's office do?

⁵¹ Id. at 10:21:50 - 10:22:50.

⁵² Id. at 10:30:40 - 10:33:00.

⁵³ Id. at 10:30:00 - 10:30:40.

A. We agreed that Mr. Puckett should have a new trial so that a new jury could hear all the evidence including the new evidence about the difference between the evidence on the floor and the evidence on the clothing.⁵⁴

Nick King's testimony reflects the seriousness that he gave to Puckett's motion for a new trial. Not only did he assign this matter to a senior staff attorney, he also personally reviewed the trial tapes. And he concluded "[W]e didn't do the job we were supposed to."

I read the [Mr. Vest's] report, and then I asked for the videotapes, I asked for all the written documentation, and then I spent the better part of the next 5 or 6 days reviewing this matter. It sticks out in my mind very, very clearly. During the time that I was Commonwealth's Attorney, our office handled approximately 10,000 cases. And this one sticks out in my mind as being that we didn't do the job we were supposed to.⁵⁵

He described Rider's responses to Kaplan's cross-examination as evasive. Simply stated, Rider's responses gave erroneous information, which "doomed the trial for an unfair result."⁵⁶

Q. What was the reason that you filed that motion [for a new trial]?
A. Because I thought that there was a procedural irregularity in the trial of Mr. Puckett's case.

Q. What was that irregularity?

A. The irregularity consists of two parts. First, a witness gave -- what words you choose are very important. In the best setting, the witness gave ambiguous responses. If you wanted to be more harsh, the witness gave evasive responses. But, no matter which way they were, they were wrong. And so, he gave erroneous information. And

⁵⁴ Id. at 10:32:30 -10:33:30.

⁵⁵ Id at 10:40:10 - 10:41:40.

⁵⁶ Id. at 10:43:00 - 10:44:00.

that erroneous information, in my mind, doomed the trial to have an unfair result.

Q. What witness are we talking about?

A. Mr. Rider.⁵⁷

Because of Rider's erroneous responses, the way the case "shaped up" gave the prosecution an unfair advantage. And in Mr. King's opinion, this advantage was driven very effectively by the Commonwealth's closing that made it "almost impossible for a defendant to have a fair shake."⁵⁸

Mr. Kaplan, during his cross examination of Mr. Rider, asked for very detailed, specific information and he was given erroneous information. And so, as a result, the way the case shaped up, and the way the prosecutor presented it, it really put the prosecutor at a significantly unfair advantage.

That was the first part of the irregularity. The second part of the irregularity is the Assistant Commonwealth's Attorney who was capable but still inexperienced, did not understand what a medium petroleum distillate was. Before the trial of the case and during the trial of the case, she thought it was a specific substance as opposed to being a classification, and during her closing argument, she made, based on that mis-information, a very effective closing argument that made it almost impossible for a defendant to receive a fair shake.⁵⁹

If this evidence is not sufficient to establish that Rider's circumvention of the truth was not the proximate cause of the outcome of the first trial, Mr. Heavrin's testimony leaves little doubt that Rider was the culprit that denied Puckett a fair trial. On direct examination, he said that if Kaplan had employed an expert, he would

⁵⁷ Id. at 10:43:00 - 10:44:00.

⁵⁸ Id. at 10:45:40 - 10:46:40.

⁵⁹ Id. at 10:45:12 - 10:46:40.

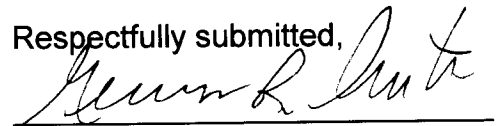
have expected Kaplan to have won the case. This would be true because he would have known that the substance on the floor was different than the substance on Puckett's clothing.⁶⁰ He said that the Commonwealth's case was crushed when he had evidence that Puckett did not get Medium Petroleum Distillate on his clothing when he was pouring the stuff on the floor as argued by the Commonwealth.⁶¹

CONCLUSION

The critical factor in this matter was the evidence pertaining to the different formulations. Non-disclosure of that evidence determined the initial trial's result. And the responsibility for the failure to disclose that evidence rested with the Commonwealth, as candidly acknowledged by Mr. King. Accordingly, the Trial Court's failure to direct a verdict for Kaplan and again its failure to grant Kaplan a Judgment Notwithstanding the Verdict constituted reversible error.

WHEREFORE, Appellant respectfully submits that the decision of the Jefferson Circuit Court should be reversed and that this case be remanded to the Trial Court for entry of a Judgment Notwithstanding the Verdict.

Respectfully submitted,



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⁶⁰ Trial Tape 30-15-04-VCR-027 (B-1): 10:39:31 - 10:40:12 and 10:41:27 - 10:44:00.

⁶¹ Trial Tape 30-15-04-VCR-027 (B-1): 10:39:48 - 10:40:12 and 10:41:27 - 10:44:00.