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**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2006-~~EA~~-000018**

SC

DAVID KAPLAN

APPELLANT

v.

**APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 96-CI-06279
HONORABLE F. KENNETH CONLIFFE, TRIAL JUDGE**

GARY WADE PUCKETT

APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of this Appellee Brief was mailed first-class, postage prepaid to Honorable George R. Carter, Counsel for Appellant, 710 Barret Avenue, Louisville, Kentucky 40204 and Honorable F. Kenneth Conliffe, Judge, Jefferson Circuit Court, Division Fifteen (15), Jefferson Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 on this the 13th day of December 2006. I further certify that the Record was not withdrawn from the Clerk of the Jefferson Circuit Court.



Bill V. Seiller

INTRODUCTION

It is up to the defense to defend.

After being incarcerated for more than two years for a crime he did not commit, Gary Puckett was granted a new trial.

There were two trials in Criminal Court. At the first trial, Gary Wade Puckett's attorney, David Kaplan, did *nothing* except collect the fee and recommend that Gary take 30 years.

In the second trial, his attorney Donald M. Heavrin (Heavrin) admitted that he knew nothing about the defense of arson cases and employed an expert on arson. (Heavrin, TAPE 1; 06/02/04; 10:46:00). After examining the photographs of the scene, the videotape made of the scene by the arson investigators, and calculating the speed of the fire, the expert believed that obvious errors had been made in the first trial, which resulted in Gary Puckett being convicted, and he told Heavrin what information should be obtained and what questions should be asked.

Puckett was acquitted in the second trial of the case and filed suit against Kaplan for Malpractice. In the Complaint, Puckett asked for \$50,000.00 for expenses incurred, \$40,000.00 for loss of income, and \$500,000.00 for physical pain and suffering, creating a total Demand of \$590,000.00. Kaplan offered every imaginable excuse for his malpractice. The jury was out less than 30 minutes and returned a verdict awarding Puckett the \$590,000.00 - - -all that he asked for in his Complaint.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee desires an Oral Argument. It is the opinion of the Appellee that it will be beneficial to the Court.

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May it please the Court:

Statement of the Case

There was a fire in the Puckett household on October 20, 1993. Peggy Puckett, Gary Puckett's Mother, died in the fire from smoke inhalation. She was not touched by the fire. The arson squad was called to investigate the origin of the fire. The squad collected Gary Puckett's (Gary Puckett, Plaintiff) clothing and his mother's nightgown. The investigators also tore up several sections of the floor in the kitchen and living room and sent those floor samples to the crime lab for testing. The crime lab determined there was a medium petroleum distillate (MPD) on the clothing and a MPD on the kitchen floor.

Gary Puckett was not the beneficiary of any insurance policies. He loved his mother and helped take care of her. (Reno Puckett [Gary's Dad], TAPE No. 1; 06-01-04; 16:02:00.) At the time of the fire, his mom had a compound fracture of her leg, was in a cast up to her hip, and she weighed 256 pounds. In contrast, Gary was a thin 125 pounds and did not have the physical strength to lift his mother out of the bed without his father's help.

From the moment he was taken downtown, Gary, who has a slight learning disability, maintained his innocence. During the interview, the arson detectives and the homicide detectives accused him point-blank of being an arsonist and a murderer. He continuously denied that he set the fire and, under intense questioning by the authorities, maintained his innocence.

In November, Gary was interviewed by the police again, and he maintained his innocence. After the second interview, they arrested him. (Puckett, TAPE 1;

06/02/04; 13:22:28). He was held on bail for six months before trial. During the time that he was in jail, Kaplan visited him one time and stayed for 20-30 minutes. (Id., 13:24:50). After he was released on Home Incarceration, 30 days before trial, Kaplan met with him one time, for 20-30 minutes. (Id., 13:31:35). While in custody, Kaplan would not take his telephone calls. (Id., 13:26:11). At trial, the only witnesses called by Kaplan were character witnesses. He interviewed these witnesses at the courthouse a few minutes before he put them on the stand. Gary took the stand and said he did not set the fire.

The Pucketts had a plastic bottle of charcoal lighter fluid (Gulf Lite) on a counter in the kitchen - - the melting temperature of the bottle was 400° F. The kitchen reached 1,600°-1,800° F. During the fire, the bottle melted, and the contents spilled out on the floor. Charcoal lighter fluid is a medium petroleum distillate (MPD). In the 24 hours preceding the fire, Gary twice washed his hands in waterless hand cleaner (True Grit) and wiped his hands on his clothes because there were no towels in the garage. Unknown to Gary, True Grit contains MPD. Ironically, Gary did not know that charcoal-lighter fluid is a medium petroleum distillate, and, further, he did not know that waterless hand cleaner contains MPD. (Puckett, TAPE 1; 06/02/04; 13:18:25). Gary's dad was not at home, and when Gary tried to lift his mother out of bed, a small amount of True Grit was transferred from Gary's clothing to his mother's nightgown.

The fire occurred in the early morning hours, after Gary had worked all night driving a cab. Kaplan never asked him about what he had done that night, before the fire, and if he had come in contact with any medium petroleum distillates. (Id.,

13:32:30). Kaplan never talked to any witnesses about how the fire started or alternative sources of accelerants. (Id., 13:35:25).

When Gary got home from work, he laid down in bed with his clothes on. About 15 minutes later, his mother said, 'Gary, get up. I smell smoke.' Gary got up, looked around the house, did not see anything, and went back to bed. Fifteen (15) minutes later, he smelled smoke. (Id., 13:18:25). This time when he got up, he found a fire burning around the refrigerator, and he took the dish-sprayer from the sink and tried to put the fire out, but he was unsuccessful. He then went to his mother's bedroom and tried to get her out of bed, but he could not lift her. (Id., 13:19:15). He then went outside and ran into Rose Cecil, who was the first person to arrive on the scene. He told her, 'My mother is in there.' (Puckett, TAPE 2; 06/02/04; 13:20:73).

Issues

- I. When a lawyer is defending a complex criminal case that involves sophisticated scientific information, is it malpractice not to hire an expert?
- II. Whether two lawyers who, combined, have tried more than 200 cases (more than half of them criminal cases) are qualified to testify about the standard of care that a competent lawyer would use in defending a complex case.
- III. Does a reasonably competent lawyer make an opening statement?
- IV. Is the performance of an attorney a question of fact for a jury to decide?

I. WHEN A LAWYER IS DEFENDING A COMPLEX CRIMINAL CASE THAT INVOLVES SOPHISTICATED SCIENTIFIC INFORMATION, IS IT MALPRACTICE NOT TO HIRE AN EXPERT?

A. What Did Kaplan Do Wrong?

Among literally dozens of omissions and commissions:

The Commonwealth provided Kaplan with the statements of the witnesses, but Kaplan either lost or failed to bring the statements to court with him. Either way, it was obvious Kaplan had not read the statements. Some of the Commonwealth's witnesses insinuated that Gary refused to admit that his mother was in the fire until it was burning out of control. However, Rose Marie Cecil was the first person to arrive at the scene. Her statement had been provided to Kaplan, but he failed to interview her, and he failed to call her as a witness. (Id., 13:21:04).

Kaplan was insulting, obnoxious, and made sexist remarks to the Assistant Commonwealth's Attorney, who is a lady. His conduct was so bizarre, two jurors said they could no longer be fair and impartial. The Trial Court advised the jurors that was not the type of bias that would excuse them from jury duty. Outside the hearing of the jury, Kaplan said, "I thought I was being very entertaining." (Criminal Trial. Kaplan, TAPE No. 1; 06-16-94; 11:58:58). While Kaplan was entertaining the Jury, Gary was on his way to prison for life.

The trial Court in the malpractice case would not allow the Jury to hear about any of Kaplan's inappropriate behavior. The trial Court limited the evidence to two issues: (1) whether a competent lawyer would confer with an expert witness in a complex case, and (2) whether a competent lawyer would make an opening statement.

B. Would a reasonably competent lawyer be expected to confer with an expert witness in a complex case?

Kaplan was retained before any repairs were made to the property. He never inspected the premises, and he never had an arson expert inspect the premises. When asked if he thought about having an arson expert inspect the premises, he answered, "The house was burned to the ground, there was nothing to see." (Kaplan, TAPE No. 2; 06-02-04; 16:21:10). That is a misstatement of fact. The house was not burned to the ground, and there was plenty to see. There were a number of still photographs that had been taken by the arson investigators. The Commonwealth provided to Kaplan a videotape that was made after the fire showing the house still standing. If Kaplan had *looked* at any of those photographs or the video, he would have known the house did not burn to the ground. However, he never looked at any of the discovery material.

The Commonwealth called an ATF agent, who was an expert on arson. He inspected the premises *five months* after the fire and prepared a computer model to explain the progression of the fire and the amount of accelerant needed to bring the house to flash-over in less than four minutes and sixteen seconds. According to the ATF expert, it was a hot, fast fire because the heat (1,600°-1,800° F) was trapped in a confined area (door closed), and flash-over would occur in a short period of time. The ATF agent gave testimony at both trials that was based on the *erroneous* assumption that the outside doors were closed. Puckett's mother had asked him to open the doors to let the smoke out so she would have breathable air coming in the house, and Puckett complied with his mother's request. He did not know that opening the doors would slow down the process of flash-over, but an expert witness would have. After he opened the doors, he tried again to get his mother out of bed.

To prove the amount of accelerant that was used, the ATF agent also proffered the formula:

$$Zf = .23q^{.4} - 1.02D$$

To make this as simple as possible, the formula means flame height equals .23 times the quantity of accelerant, raised to the .4-power, minus 1.02 times the diameter of the area. This formula was *given* to Kaplan in the discovery material to prove the amount of accelerant that was needed to start the fire. When any number, say 745, is raised to the first power, the answer is the number itself, 745. When any number is raised to the zero power, say 745 to the zero power, the number is one. Since .4 is between zero and one, an elliptic curve is created, and this equation could not be solved until the creation of electronic calculating units that can, at the speed of electricity, compare all possible answers and come up with an approximation that is closest to a correct answer. Isaac Newton could not have solved this equation. Neither could David Kaplan nor Don Heavrin. Upon the arrival of the equation, which was an integral part of the Commonwealth's theory, a reasonable lawyer would have contacted an expert witness to find out how it applied to the case.

During the malpractice case, the Exhibits from the Motion for New Trial and the Commonwealth's Response were put in the Record, but were NOT given to the Jury. In the interest of convenience, Kaplan's Affidavit in opposition to Gary's Motion for New Trial is attached to this Brief as Exhibit B.

There is a symbiotic relationship between David Kaplan and the Commonwealth. When Puckett filed a RCr 11.42 motion and later a malpractice suit, the Commonwealth raced to Kaplan's aid. Conversely, when his competence becomes an issue, Kaplan changes sides and becomes a witness for the Commonwealth.

Second Guessing

Kaplan argues that Heavrin had the benefit of hindsight. However, Heavrin started in the same place that Kaplan started, *id est*, with a client who said, 'I didn't

do it,' and the file. When Heavrin was approached by Gary's dad, Reno Puckett, he refused to take the case until he had an opportunity to look through the file and watch the trial. (Heavrin, TAPE 1; 06/02/04; 54:20). On January 9, 1995, Heavrin filed a Motion that *included the raw data* on which the Commonwealth's expert's conclusions were based. Not knowing what the raw data meant, Heavrin hired an expert to examine the data and to review the case. (Examples of the raw data can be found in Exhibits C and D).

After the RCr 11.42 Motion was filed and a new trial requested, Kaplan changed sides. The Commonwealth provided him a copy of the Motion for a New Trial, and he responded with an Affidavit on March 16, 1995 (Exhibit B).

With a copy of the underlying scientific data and the report from Heavrin's expert in hand, Kaplan *dismisses the need for an expert witness*. Kaplan states:

I did not consult an independent arson expert or chemist in connection with my preparation for the trial of this case. I did not do so because, in my professional opinion, the case did not hinge on the scientific evidence; rather, I believed it hinged on the defendant's credibility and whether the jury believed his denial that he set the fire. In fact, I thought that testimony from an additional expert *would simply confuse the jury*, and detract from what I believed to be the crucial issue. (Emphasis added. Exhibit B. Kaplan Affidavit, March 16, 1995).

Apparently, Kaplan realized that someone might think an expert was appropriate, and he attempted to cover his sloth by shifting the blame to Gary and his dad. Kaplan next states:

Neither Gary Puckett nor [sic] his father ever requested that I consult an independent expert (Exhibit B).

Gary's dad, Reno Puckett, who has no formal education, knew that Kaplan needed the help of someone who understood the dynamics of fire and told Kaplan that he would pay to hire the necessary experts. Kaplan replied, "I don't need nothing." (Reno Puckett, Tape No. 1;06-01-04;16:00:21-16:10:52).

In the Appellant's Brief, Pages 23-24, Kaplan states on direct examination of Heavrin:

. . . he (Heavrin) said that if Kaplan had employed an expert, he would have expected Kaplan to have won the case.

Kaplan disingenuously ignores the follow-up questions in which Heavrin described, in detail, why Kaplan had to have an expert witness to assist him in preparing the defense and to testify at trial, and why it is incumbent upon the defense to make an opening statement. (Heavrin, TAPE 1; 06/02/04; 10:41, *et sec.*).

It is also noteworthy that, in Kaplan's malpractice case, he was able to find experts. When Kaplan's is the Defendant, he needs experts. When a man's life is at stake, experts would only confuse the Jury.

At this juncture, with all of the scientific information in-hand, and with full knowledge that there were two different medium petroleum distillates, Kaplan had a golden opportunity to say that, if he had been provided this information, he would have won the case. The idea that Kaplan would have won the case if he had been given the underlying science arose much later, after his other excuses for malpractice had failed.

After a new trial was granted and Gary was acquitted, he sued Kaplan for malpractice. Kaplan presented former Circuit Judge Richard A. Revell as an expert

witness. On Deposition, Revell testified that Heavrin's standards were above the standards expected of an ordinary practicing attorney. He stated, "... that only Don Heavrin's actions rise above the standard expected of an ordinary practicing attorney." (Revell Deposition, Page 12).

In trial, he said the same thing. (Revell, TAPE No. 2; 06/02/04; 16:08:04).

Revell also testified that defense lawyers do not hire experts in Arson cases.

He stated:

... the defense bar was not hiring experts to challenge, because, it was not common knowledge that medium petroleum distillates could be broken down. (Revell, TAPE No. 1; 06/02/04; 16:06:45).

That is exactly what Puckett has been saying. You have to have an expert to testify about matters that *are not common knowledge*.

Moreover, Judge Revell's testimony is revealing. He is a former Circuit Judge who remembered handling one arson trial in 16 years, and the lawyer did not ask for the underlying data. Did he mean that lawyers never ask for ballistics, DNA, forensics, substance identification, fingerprints, hair samples, carpet samples, *et cetera*? Is it only in arson cases that lawyers never ask for the underlying data?

Of greater significance, Revell is not a chemist, and his statement that it is not common knowledge that medium petroleum distillates could be broken down is incorrect. A high school chemistry student knows that compounds can be broken down. Medium petroleum distillates are compounds, not elements.

Sommers

Is Heavrin the Only Lawyer to Think of Using an Expert in an Arson Case?

In *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky., 1992), David Sommers was charged with Arson and Murder. He was indigent. The Public Defender, in order to adequately represent him, moved the Circuit Court to allow the employment of an arson expert. The Department of Public Advocacy (Appellant) argued:

... different experts might observe the facts differently or might reach different conclusions even given identical facts. Counsel maintained that without expert assistance he could not effectively investigate the circumstances, choose a course of defense, cross-examine the state's witnesses, or challenge the validity of their opinions (at Page 884).

The trial Court would not authorize the hiring of an expert. The Supreme Court reversed the conviction of Sommers because he was not allowed to hire an arson expert. The Puckett fire occurred in October 1993. The *Sommers* case was decided one year before there was a *Puckett* case. Apparently, the witnesses who testified for Kaplan had not read the *Sommers* case. Ignoring the science for a moment, if Kaplan or his experts had done a few minutes of legal research, they would have found the *Sommers* case and would have known that experts are needed in arson cases.

II. WHETHER TWO LAWYERS WHO, COMBINED, HAVE TRIED MORE THAN 200 CASES (MORE THAN HALF OF THEM CRIMINAL CASES) ARE QUALIFIED TO TESTIFY ABOUT THE STANDARD OF CARE THAT A COMPETENT LAWYER WOULD USE IN DEFENDING A COMPLEX CASE

After Judge Revell said Heavrin's standards are higher than other lawyers, Kaplan now asserts that Heavrin and James Earhart (both expert witnesses for

Puckett in the malpractice case), cannot pass a *Daubert* test (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) and *Goodyear Tire and Rubber v. Thompson*, Ky., 11 S.W.3d 575 (2000)). If Heavrin and Earhart cannot pass a *Daubert* test, no lawyers can pass the *Daubert* test. Between them, they have tried over 200 jury trials, and well over half of the cases were criminal cases. Obviously, these two men have some idea about what constitutes an adequate defense in a criminal case. Kaplan complains that Earhart tried *only* 60 cases as an Assistant United States Attorney and a dozen cases as a defense lawyer, and he lacks the requisite qualifications to render an expert opinion (Appellant's Brief, Page 11). This is nonsense.

Earhart testified that, as a prosecutor, he always turned over the scientific data to defense counsel if a request was made, *which happened quite often*. His testimony, of course, negates the testimony proffered by Kaplan's witnesses, who seemed to be astounded that someone had asked for the scientific data.

Both Earhart and Heavrin testified that Kaplan's defense of Gary Puckett in the first trial was below the standard of a reasonably competent defense lawyer.

Earhart testified that a prosecutor is not looking at a case from a defense perspective and can be totally honest and overlook something that the defense would consider exculpatory. (Earhart, TAPE No. 1; 06/02/04; 14:40:34).

He further stated that the Commonwealth's obligations to disclose *do not eliminate defense counsel's duty to defend*. (Emphasis added. *Id.*, 14:34:58).

He also testified that a reasonably competent attorney would hire his own expert. (*Id.*, 13:34:58). If it was a low-budget case, the defense lawyer could *consult*

with the experts for the Commonwealth or buy books on the subject and read until he understood the issues. (Id., 14:35:46).

If the evidence is not conspicuously exculpatory, a prosecutor will frequently take the position that, if you do not ask, they do not tell. (Id., 14:44:40).

If the reports do not agree with the defense theory of the case, a competent lawyer must look behind the report. (Id., 14:51:00). Kaplan had no theory except Gary was not telling the truth, and he (Kaplan) did not believe him.

Unless you are an expert, you must rely on an expert. (Id., 14:53:00). You cannot sit back and wait for the Commonwealth to produce the evidence or explain the evidence to you. The Commonwealth is looking at what evidence supports guilt and is not looking at the evidence from a defense perspective. (Id., 14:40:30).

When Gary said, 'I didn't set the fire,' it required Kaplan to look behind all the reports in the Commonwealth's theory. (Id., 14:41:40).

It is up to the defense to defend.

Thus, the case morphed into, 'The Commonwealth did not provide the underlying science.' Exhibits C and D are examples of the underlying science. They have been introduced at various stages of the malpractice case and the criminal case and are included as part of this Brief for the convenience of the Court. If this information had been provided to Kaplan, what would he have done with it? All of this relates back to the fact that he was shooting in the dark and simply had no idea about what he was doing. Next, Kaplan argues that, not only did the Commonwealth not give him the underlying information, they did not tell him what the underlying information meant. Therefore, his complaint distills to: The prosecutor did not come to his office and tell him how to defend the case.

He also complains that he knew that the lab technician, Kenneth Rider, was not telling the truth. His position in his Appellant's Brief has changed since the malpractice trial. At trial, he testified:

I guess its my many years of experience, I felt he (Ken Rider, Lab Technician) was holding back. Somehow or another, I knew he was keeping something from me, but I couldn't put my finger on it. (Kaplan, TAPE No. 2; 06/02/04; 16:16:20).

I cross examined him over and over again until the Court told me I was badgering the Witness and I had to stop. (Emphasis added). (Kaplan, TAPE No. 2; 06/02/04; 16:16:40).

That is what Kaplan said in the malpractice case. Here is what actually happened in the criminal trial:

KAPLAN: Sir (asking Rider), is it the same substance in each one that we are talking about, or is it a different medium petroleum distillate?

RIDER: Exhibits 1, 2, and 3 were found to contain a medium petroleum distillate.

KAPLAN: Is it the same in each one or are they different?

RIDER: They bear *similarities*. (Emphasis added). (TAPE No. 2; 06/16/94; 16:45:08).

While Kaplan claims that Rider lied, it is obvious he was *not listening to the answers*. Similar means related in appearance, but not identical¹.

The next question Kaplan asked was, "Were they the same?" The Commonwealth objected, and Kaplan *withdrew* the question before the Court could rule on the objection. Former Judge Schneider reviewed the transcript and agreed that Kaplan never gave him a chance to rule on the objection. (Schneider, TAPE No. 2; 06/19/94; 16:45:08). Contrary to Kaplan's characterization of the events, the Judge did not stop the Cross-examination. Moreover, a reasonably competent defense lawyer does not wait until he is in the middle of a trial to learn about the science on cross-examination by taking shots in the dark. He learns by filing Motions and hiring experts BEFORE TRIAL. (Heavrin, TAPE No. 2; 06/02/04; 11:06:34).

Kaplan's excuse has evolved to where he asserts that he would have won the case if the Commonwealth had not withheld exculpatory evidence. First, it was not withheld -- Rider testified the two substances were not identical -- and it is highly questionable whether the presence of two medium petroleum distillates was exculpatory! In the malpractice case, Kaplan testified and explained to the Jury that it was the Commonwealth's fault that he did not get an acquittal because the laboratory technician impeded his ability to defend Puckett. The Court of Appeals held (Exhibit A, Page 7):

The Jury was not persuaded, and neither are we, that the Commonwealth or its expert Rider, impeded Kaplan's ability to defend Puckett in such a way as to excuse him from liability for his failure to develop an alternative theory.

¹The American Heritage Dictionary of the English Language, 1971.

Remember Earhart's testimony that the prosecution views the case from a different perspective than the defense lawyer (Supra, Page 10). One of the Commonwealth's Attorneys, Tom Dyke, knew there were two medium petroleum distillates present, but did not think that was exculpatory and did not pass that information along to the defense because he did not think it was material². (Heavrin, TAPE 1; 06/02/04; 10:52:24). Inculpatory means, 'tends to incriminate.' Exculpatory means, 'tends to exonerate.'

Consider: on the way home from work, Gary Puckett stops at the grocery store and buys a bottle of Wizard charcoal-lighter fluid, or a can of paint thinner, or a large can of lighter fluid. He gets home and pours the Gulf Lite on the floor, dowses his mother in one of the other medium petroleum distillates, manages to get some of the second distillate on his clothing, and pours the rest on the floor. During the fire, the second accelerant on the floor is completely combusted, which happens quite often in a fire, leaving only the Gulf Lite on the floor, and the other distillate on him and his mother. This is not exculpatory, it is inculpatory. Puckett wanted to make sure the house burned up and his mother died, therefore, he used two MPD's instead of one, which is what the Commonwealth's Attorney was thinking. The presence of different distillates is only relevant if there is an innocent, alternative source of both distillates. The Gulf Lite was in the house. The True Grit got on Gary's clothes at work. Gary did not use either MPD to set the fire.

Since Kaplan was not an expert, the only way to find out where the other accelerants may have come from was to ask an expert, which is exactly what Heavrin did. (Id., 10:46). As Earhart testified, if it was a low-budget case, he could have

² Anne Leitsch Haynie, the other Commonwealth's Attorney, did not know there were two accelerants.

called the lab technician at the crime lab and question him about the distillates. (Earhart, 14:35:46). The crime lab technician is not the exclusive property of the Commonwealth. Neither are the arson investigators. They are witnesses who are readily available by telephone.

Since Kaplan believed an expert would only confuse the Jury (Exhibit B), it is a moot point that Kaplan did not call the crime lab or hire an expert. (Earhart Testimony, Supra, Page 11).

The Trial Court in the case at bar instructed the Jury:

It was the duty of Defendant, David Kaplan, in undertaking the representation of Gary W. Puckett to exercise the degree of care and skill expected of a reasonably competent lawyer acting under similar circumstances.

If you believe from the evidence that Defendant, David Kaplan, failed to comply with his duty and that such failure was a substantial factor in causing Gary W. Puckett to be convicted of arson and murder of his mother, then you will find in favor of Plaintiff, Gary W. Puckett. Otherwise you will find in favor of the Defendant, David Kaplan.

The Court of Appeals held at Page 7 (Exhibit A):

Specifically, Kaplan's claim that Rider Failed to disclose exculpatory evidence is without merit; a review of the record disclose that the opportunity to reveal, at trial, that the substances were not the same was irrevocably lost when Kaplan asked Rider whether the substances found in the kitchen and on the clothing were the same, and then withdrew the question in the face of the Commonwealth's objection—an objection which the circuit court would have had no reason to sustain. By

withdrawing the question and abandoning the line of inquiry, Kaplan lost not only the opportunity to force the Commonwealth's own expert to admit that the substances found were not the same, thus crippling the Commonwealth's theory of how Puckett could have started the fire, but also any chance of appellate review had the court sustained the objection.

It is meaningless that, in the one case Judge Revell remembered trying, no expert was employed. Most Arson cases involve alibis, *exempli gratia*, 'I was in San Francisco at the time the fire broke out.'

Risking redundancy, the fact that the MPD on Peggy Puckett's nightgown and Gary's clothing was different than the distillate found on the kitchen floor is significant only if there was an alternative source of MPD, and an *alternative* way for the fire to have started, *id est*, electrical fire *versus* Gary striking a match and throwing it in the accelerant.

Kaplan testified:

I didn't do it, the *fire was started by the refrigerator*, and that's all he would tell me. That's all he knew and that's all he would say, over and over again. (Emphasis added. Kaplan, TAPE No. 2; 06-02-04; 16:27:37).

In response to a question on cross-examination to the effect, 'you could have cast doubt on the Commonwealth's case if you could have proven (by using an expert) an alternate source of ignition,' Kaplan answered:

Yes, except it wouldn't have been an electrical fire. I didn't believe that story about the electric going on fire. If I didn't believe it, I wouldn't expect the Jury to believe it! (Emphasis added. Kaplan, TAPE No. 2; 06-02-04; 16:24:04).

A jury does not have the option of believing or not believing if the evidence is not presented. Also, this is an admission, under oath, that he knew that he needed an expert witness - - someone who could offer an explanation for an alternate source of ignition. Presumably, if an expert had been employed and said it was an electrical fire, Kaplan thinks the Jury would not have believed the expert either. And there is more at issue than the fire around the refrigerator. Several arson investigators and firemen testified that, in their professional opinion, the fire was deliberately set. But if the fire had been caused by a short in the refrigerator, the electric box behind the refrigerator, the water heater, the furnace, the television, the VCR, lightning, or any cause other than Gary Puckett setting it, the defense wins. It was negligence, *per se*, for Kaplan not to hire an expert and consider the possibility of an alternative source of ignition.

Further, if Kaplan did not believe that it was an electrical fire, why did he let Gary Puckett take the witness stand and testify about the fire being next to the refrigerator? It turned out that Puckett was telling the truth about the fire being next to and behind the refrigerator. As observed by the Court of Appeals, Kaplan failed to develop an alternate theory supported by expert testimony about the origin of the fire. (Court of Appeals Opinion, Exhibit A, Page 7).

While Kaplan did not think he needed an expert, he assumes the role of an expert and decided the fire in the Puckett home was not an electrical fire. Then, after these blunders, Kaplan tries to shift the blame to the Commonwealth for not disclosing that there was more than one medium petroleum distillate, but there is no rule that says an arsonist cannot use two accelerants. Therefore, the fact that

there were two MPD's present is irrelevant. What is relevant is there had to be an innocent source for both medium petroleum distillates, and Kaplan failed to consider any alternatives (Supra, Page 13).

Kaplan's testimony is vacuous. If a client repeats, over and over, 'I'm innocent,' a reasonable lawyer has to ask, 'If you are innocent, how did you get medium petroleum distillate on your clothing?,' and that question would have, inexorably, led to the employment of an expert witness who could tell the defense lawyer and the Jury about alternate sources of medium petroleum distillate. Then the presence of two MPD's would have been exculpatory, vis-à-vis, the MPD on Gary's clothing was the same as the MPD in the waterless hand cleaner. Heavrin got the bottle of waterless hand cleaner and had it tested by a lab (Heavrin, TAPE 1; 06/02/04; 50:00). To make certain there was no chicanery, the Commonwealth bought a bottle of True Grit off the shelf and tested it. It contained the same medium petroleum distillate found in the bottle from the garage and on Gary's clothing and his mother's nightgown. As per the testimony of Earhart and Heavrin, in not hiring an expert to assist in the defense of the case, Kaplan failed to exercise the degree of care and skill *expected of a reasonably competent lawyer* acting under similar circumstances (Supra, Page 17).

III. DOES A REASONABLY COMPETENT LAWYER MAKE AN OPENING STATEMENT?

If the entire defense was, 'The Commonwealth cannot prove beyond a reasonable doubt that the Defendant committed the crime,' in the opinion of

Heavrin and Earhart, the defense lawyer has to stand up and tell the jury to weigh the evidence against the reasonable doubt standard.

However, 'when the Defendant is going to take the stand and testify that he did not start the fire,' counsel has to tell the Jury his client is going to testify and deny that he set the fire.

The Bureau of National Affairs conducted extensive interviews with jurors and reported:

It is an often-repeated truism that most jurors actually make their final decisions on cases after hearing opening statements. This is something of an exaggeration, but the kernel of truth it contains is that after opening statements, most jurors will be silently 'rooting for' one side or another. Winning a juror's sympathies in an opening statement may not assure victory, but it will affect the way the juror listens to the evidence. (BNA Criminal Practice Manual, 91.101).

After Kaplan heard the Commonwealth's Attorney, in her opening statement, call upon God to rend the Philistines, he sat there in a stupor and reserved his opening statement, but then, *forgot* to give an opening statement after the Commonwealth closed. When asked in the malpractice case why he did not give an opening statement, he said:

Not knowing what the Commonwealth was going to put on, I didn't do it. (Emphasis added. Kaplan, TAPE No. 2; 06-02-04; 16:14:35).

And he, further, explained that whether he gave an opening statement depended on his gut feeling. (Kaplan, TAPE No. 2; 06-02-04; 16:14:44).

Because the Commonwealth gives the *first* opening statement, Kaplan had to know what the Commonwealth was going to put on. After the Commonwealth's

Attorney opened, he reserved his right to give an opening statement, and after the Commonwealth closed its case, *he forgot* to give an opening statement. Kaplan's testimony is sophistry of the first order.

Heavrin testified:

The lawyer has got to stand up and tell the jury what his client is going to say. (Heavrin, TAPE No. 1; 06-02-04; 10:32:07).

Why does the Commonwealth try to protect Kaplan?

The Motion for New Trial Pursuant to RCr 11.42 eviscerated Kaplan and explained in detail the arrogance, the sloth, and the lack of preparation Kaplan employed in the defense of Gary Puckett. The Motion for New Trial was set for a hearing, and Kaplan was subpoenaed as a witness for the Commonwealth to *oppose* Gary Puckett's Motion for New Trial. Fearing a rash of RCr 11.42 motions, both Kaplan and the Commonwealth wanted to shift the blame away from Kaplan. On the day the case was set for a hearing, the Commonwealth asked for a continuance, which was granted. Subsequently, Commonwealth's Attorney Nick King read the Motion for New Trial and agreed to join Puckett's Motion for New Trial. However, there was a problem. He had to agree to the new trial without inculcating Kaplan. To achieve this goal, he assigned the case to his assistant, Lloyd Vest, and asked him to make a report. The pertinent part of Vest's report states:

I propose that we put the factual predicates of the interpretation by Mr. Ryder and our prosecutors in the pleading. We could do this in terms of our investigational post-trial information that Mr. Heavrin brought to us. That should accurately reflect the reasons for our actions in agreeing to a new trial. It will also properly protect Mr. Kaplan. It should also place

our prosecutor's actions into the proper or correct perspective. It would be a variance of the pleading options we discussed yesterday. (Emphasis added. Vest, TAPE 2; 06/03/04; 10:31:30).

A small, but important phrase: "It would be a variance of the pleading options we discussed yesterday." Apparently, the day before, the Commonwealth was having difficulty fashioning an order that did not acknowledge Kaplan's malpractice. The conversation regarding the report was to create a report that would allow a new trial without inculpating Kaplan.

Kaplan goes to bat for the Commonwealth, and the Commonwealth, in turn, goes to bat for Kaplan. It is pure *quid pro quo*.

IV. IS THE PERFORMANCE OF AN ATTORNEY A QUESTION OF FACT FOR A JURY TO DECIDE?

Kaplan is mistaken in his definition of the standard of care to which an attorney is held. Kaplan cites *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky., 2002), in which the Supreme Court held that an evidentiary hearing is not automatically necessary in every RCr 11.42 Motion. The case at bar is well past the RCr 11.42 stage, and *Sanders* has nothing to do with a legal malpractice claim.

In *McKay v. Dudley*, 35 F.3d 566 (Sixth Circuit, 1994), the Sixth Circuit applied Kentucky law to determine if a legal malpractice action was viable. The Sixth Circuit held:

Under Kentucky law, the plaintiff in a legal malpractice action must show: 1) the existence of a duty of care arising out of the lawyer/client relationship; 2) that the lawyer "neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances"; and 3) that the lawyer's

negligence resulted in and substantially contributed to the plaintiff's injury.

The Sixth Circuit then cited the landmark Kentucky case of *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. Ct. App., 1978).

The Sixth Circuit, further, held:

To meet the third requirement, the plaintiff need not show that the lawyer's negligence was the sole factor contributing to his injury. He need only show that it was a contributing factor. (*Daugherty v. Runner* at Page 20).

It is beyond doubt that Kaplan's negligence contributed to the conviction of Gary Puckett.

In *Marrs v. Kelly*, 95 S.W.2d 856 (Ky., 2003), also cited by Appellant, the Supreme Court of Kentucky held that a plaintiff in a legal malpractice case has the burden of proving: (1) that there was an employment relationship with the defendant/attorney, (2) That the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances, and (3) that the attorney's negligence was a proximate cause of the damage to the client. All of these elements were proven in the case at bar.

The Kentucky Supreme Court, further held:

. . . 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.

In *Stephens v. Denison*, 64 S.W.3d 297 (Ky. App., 2001) the Court of Appeals adopted the same three elements and cited *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. App., 1978).

On two different occasions, the Appellant cites “Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony,” Kentucky Law Journal, Volume 75, 1986-1987, Number One (KLJ). The Appellant cites the KLJ, but never quotes word-for-word from Justice Leibson’s article. On Page 13, Justice Leibson stated:

Thus, in a case founded upon alleged improper conduct of prior litigation, the factual question that a prior jury would have decided if the defendant/attorney had conducted a proper investigation, presentation, or exclusion of evidence, or other steps baring on a decision based on facts, is a question for the jury. (Emphasis added).

Then on KLJ Page 19, citing *Chocktoot v. Smith*, 571 P.2d 1255 (1979), Justice Leibson quotes:

The Court decides the underlying legal issues of whether the attorney committed an error of law. It is then left to the jury to determine the factual questions of whether other attorneys similarly situated would have made the same error. (Emphasis added).

On Page 20:

Negligence is an ultimate fact issue for the jury to determine.

On Page 42:

It is for the jury to decide:

- A) Whether the attorney has been proved negligent in the handling of the prior case.

Page 43:

Expert testimony addressing the issue of an attorney's negligence is appropriate to assist the jury in deciding whether the attorney was negligent in the prior case, unless the facts speak for themselves. (Emphasis added).

CONCLUSION

When the experts disagree, it is up to the Jury to decide. The Jury heard the witnesses, evaluated the evidence, and returned a verdict in 30 minutes awarding Gary Puckett \$590,000, which was all he asked for. Now, the Appellant seeks to re-try the case on Appeal. In overriding the Motion for Judgment NOV, the Trial Court cited *Taylor v. Kennedy*, 700 S.W.2d 415 (Ky., 1985), which held:

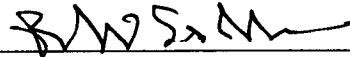
The Motion is not to be granted, "unless there is a complete absence of proof on a material issue in the action or if no disputed issue of fact exists upon which reasonable men could differ."

When the experts disagree, the Jury gets to decide.

Kaplan's representation of Gary Puckett was far beneath the standard of care expected of an attorney.

The Jury verdict should be AFFIRMED and the Opinion of the Court of Appeals should be AFFIRMED.

Respectfully submitted,



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