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# Highway to the Danger Zone: 7 Tips for Managing Personal Injury Claims Post- Construction: A Case Study

John D. “Chip” Clay, Esq.  
July 19, 2022

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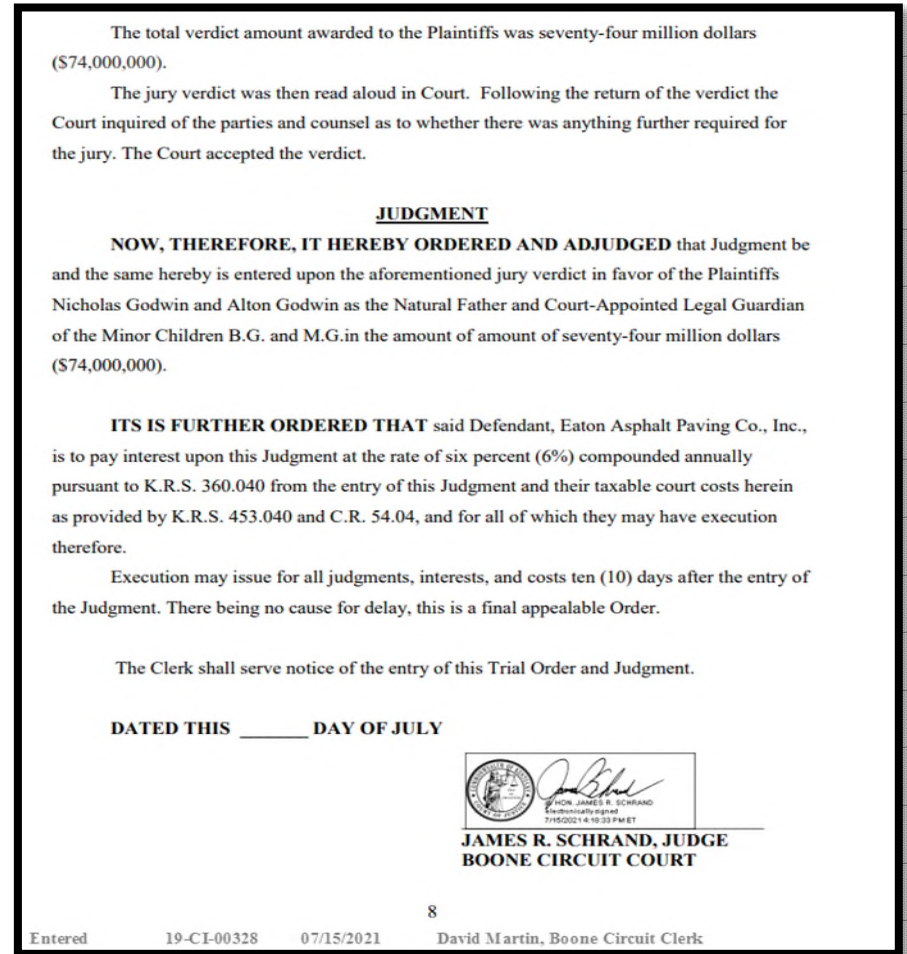
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2022

# Overview and Usual Disclaimer (Naturally)

- On July 15, 2021, the Boone Circuit Court confirmed one of the largest jury verdicts in Kentucky history (\$74,000,000) against a roadway contractor stemming from work performed for a KYTC resurfacing project.
- The project was not large.
  - 2-Lane Road, KY-338, 1.68 Miles.
- The case had individual considerations.
  - **In no way arm-chair quarterbacking counsel or court.**
- There are some important takeaways, however.



- **Nothing herein in constitutes legal advice, nor does it create an attorney/client relationship.**

# Overview: How did the Award get so Large?

- Death Case
  - Sympathetic Plaintiff-Retired School Teacher Driving Kids to School
- Hit by a fellow motorist head-on
  - There was evidence of prior drug use days before
- 3 children who were riding in vehicle/close by
  - **Negligent Infliction of Emotional Distress**
  - **Loss of Consortium**
    - Together accounted for \$24,000,000
- The point is this is can be an everyday occurrence

If you did assess separate percentages of fault in Question No. 3, you shall not take them into account in awarding damages.

1. Nicholas Godwin:

A. Emotional Distress: \$ \_\_\_\_\_

B. Loss of Parental Consortium: \$ \_\_\_\_\_

2. Brayden Godwin:

A. Emotional Distress: \$ \_\_\_\_\_

B. Loss of Parental Consortium: \$ \_\_\_\_\_

3. Macie Godwin:

A. Emotional Distress: \$ \_\_\_\_\_

B. Loss of Parental Consortium: \$ \_\_\_\_\_

The Jurors answered unanimously in awarding each of the Plaintiffs three million dollars (\$3,000,000) in emotional distress and five million dollars (\$5,000,000) for loss of parental consortium. The total amount awarded under Question No. 4, was twenty-four million (\$24,000,000).

# Overview: How did the Award get so Large?

- Allegations of Fraud/Bad Faith opened door for **Punitive Damages** of \$50,000,000.
- Used Contractor's Bid v. Engineer's Estimate to play off of the fact the Contractor was "the low bidder"
- Proved the \$ saved by Contractor was comparatively small (Learned Hand Formula)

Number of Bidders 3							
1	00117	EATON ASPHALT PAVING CO INC AND SUBSIDIARY		189,286.00			
2	00837	RIEGLER BLACKTOP INC		189,882.50			
3	02804	BLUEGRASS PAVING INC		194,216.25			
ENGINEERS ESTIMATE 233,882.00				LOW BIDDER Is -19.07% from ENGINEERS EST.MATE			
Apparent Low Bidder Low > EATON ASPHALT PAVING CO INC AND SUBSIDIARY							
Prop Line	Item Description	Quantity	Unit	Bidder1	Bidder2	Bidder3	
0010	CL3 ASPH SURF 0.385 PG64-22	1,990,000	TON	59.60	58.00	57.54	
0020	BARRICADE-TYPE III	3,000	EACH	100.00	150.00	50.00	
0030	TEMPORARY SIGNS	410,000	SQFT	4.00	5.00	5.00	
0040	MAINTAIN & CONTROL TRAFFIC	1,000	LS	3,012.00	2,500.00	9,300.00	
0050	MOBILIZATION FOR MILL & TEXT	1,000	LS	200.00	1,500.00	500.00	
0060	ASPHALT PAVE MILLING & TEXTURING	1,990,000	TON	6.00	7.00	9.26	
0070	SIDEWALK-4 IN CONCRETE	101,000	SQYD	125.00	175.00	105.48	
0080	BASE FAILURE REPAIR	240,000	SQYD	40.00	45.00	48.55	
0090	PAVE STRIPING-TEMP PAINT-4 IN	40,000,000	LF	.15	.14	.01	
0100	PAVE STRIPING-PERM PAINT-4 IN	40,000,000	LF	.10	.15	.15	
0110	PAVE MARKING-THERMO X-WALK-6 IN	200,000	LF	3.00	3.00	3.00	
0120	PAVE MARKING-THERMO STOP BAR-24IN	125,000	LF	10.00	8.50	8.60	
0130	PAVE MARKING-THERMO CURV ARROW	15,000	EACH	100.00	95.00	95.00	
0140	PAVE MARKING-THERMO ONLY	3,000	EACH	105.00	160.00	160.00	
0150	REMOVE PAVEMENT MARKER TYPE V	100,000	EACH	4.00	5.00	3.53	
0160	DETECTABLE WARNINGS	98,000	SQFT	50.00	25.00	20.71	
0170	ASPHALT MATERIAL FOR TACK NON-TRACKING	8,000	TON	900.00	975.00	1,348.29	
0180	DEMOLITION	1,000	LS	2,600.00	3,700.00	3,100.00	
Total Bid				189,286.00	189,882.50	194,216.25	

When developing the parameters for the project, the KYTC estimated this milling portion of the project would cost **\$12.93 per ton** as opposed to \$6 per ton that Eaton bid<sup>17</sup>.

ASPHALT PAVE MILLING & TEXTURING	02677	1,895.1	TON	I	12.93
24,502					

# Overview: How did the Award get so Large?

- Used the Contractor’s Schedule (late in the construction season) to prove the job was “rushed”
- Only 6 days left on the schedule, came back to the project in November so that it could complete more lucrative projects

The other reason that it requested permission to omit milling was that it simply did not have time to mill the entire length of project and resurface it before the forecasted weather made it impossible to finish the project by the deadline of November 15, 2018<sup>22</sup>.

24... Q... And you were running out of days to get the  
25... job done, correct?

1... After November 9th, there were only six days left  
2... under the terms of the contract, correct?

3 A. Correct.

4... Q... And after the deadline, then the state  
5... imposes liquidated damages if you don't finish on time,  
6... right?

7 MR. RINEAR: Objection.

8 A. Yes. That's -- there's -- yes.

9... Q... And so that means even more money out of  
10... Eaton Asphalt's pocket, correct?

11 A. Correct.

<sup>21</sup> We know this is true because the KYTC did make them mill a small portion of the project, and it cost them \$12.90 per ton to do that section.

# Overview: How did the Award get so Large?

- Used Contractor's Proposal to prove something within Contract Scope was not Performed

- Used Contractor's Employees' own Testimony against them

## SPECIAL NOTE FOR PAVEMENT WEDGE AND SHOULDER MONOLITHIC OPERATION

**1.0 MATERIALS.** Provide an Asphalt Surface Mixture conforming to Section 403 of the Standard Specifications, as applicable to the project, for the pavement wedge.

**2.0 CONSTRUCTION.** Place the specified Asphalt Surface Mixture on shoulders monolithically with the driving lane. Prime the existing shoulder with tack material as the Engineer directs before placing the wedge. Construct according to Section 403.03 of the Standard Specifications.

Equip the paver with a modified screed that extends the full width of the wedge being placed and is tapered to produce a wedge. Obtain the Engineer's approval of the modified screed before placing shoulder wedge monolithically with the driving lane.

The wedge may vary in thickness at the edge of the milled area in the shoulder. If the area to receive the shoulder wedge is milled prior to placement, during rolling operations pinch the outside edge of the new inlay wedge to match the existing shoulder elevation not being resurfaced. Unless required otherwise by the Contract, construct rolled or sawed rumble strips according to Section 403.03.08, as applicable.

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# Overview: How did the Award get so Large?

- Used Federal Standards to Prove “Common Knowledge in the Industry” (AASHTO, Various Trade Publications, FDOT has a hydroplaning analysis program)
- Used Before and After Pictures to Compare what was there before was “Safer” than what was Constructed

The Federal Highway Administration has long recognized the danger of vertical road edges to motorists. According the FHA:

*“Pavement edge drop-offs are known to contribute to some of the most severe roadway departure crashes. The typical scenario begins with one or more of the vehicle tires leaving the paved roadway. If the driver attempts to return to the paved surface without slowing, and **a significant vertical edge drop-off is present**, the sidewall of one or more tires will scrub against this edge and the driver may oversteer in an effort to return to the paved roadway. This may **result in a driver losing control** of the vehicle, contributing to a head-on collision in the opposing travel lane, a rollover, or a run-off-road (ROR) event on either side of the road. To mitigate roadway departure crashes, it is important to reduce the number of vehicles that encroach onto the roadside, and to minimize the consequences of a roadway departure event. One strategy to achieve the latter objective is to eliminate vertical pavement edges that may become drop-offs over the life of the pavement.”*

The FHA recognizes that the safety wedge is one of the most important safety features to mitigate this risk of road-edge drop offs.





# Overview: How did the Award get so Large?

- Used Expert Testimony to Prove the Circumstances of the Injury were Avoidable (and typically Avoidable for just a little additional \$)
  - » Engineer
  - » Retired GC
  - » Accident Reconstructionist
  - » “Human Factors”
  - » Economists



# Overview: How did the Award get so Large?

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  - » “Human Factors”
  - » Economists

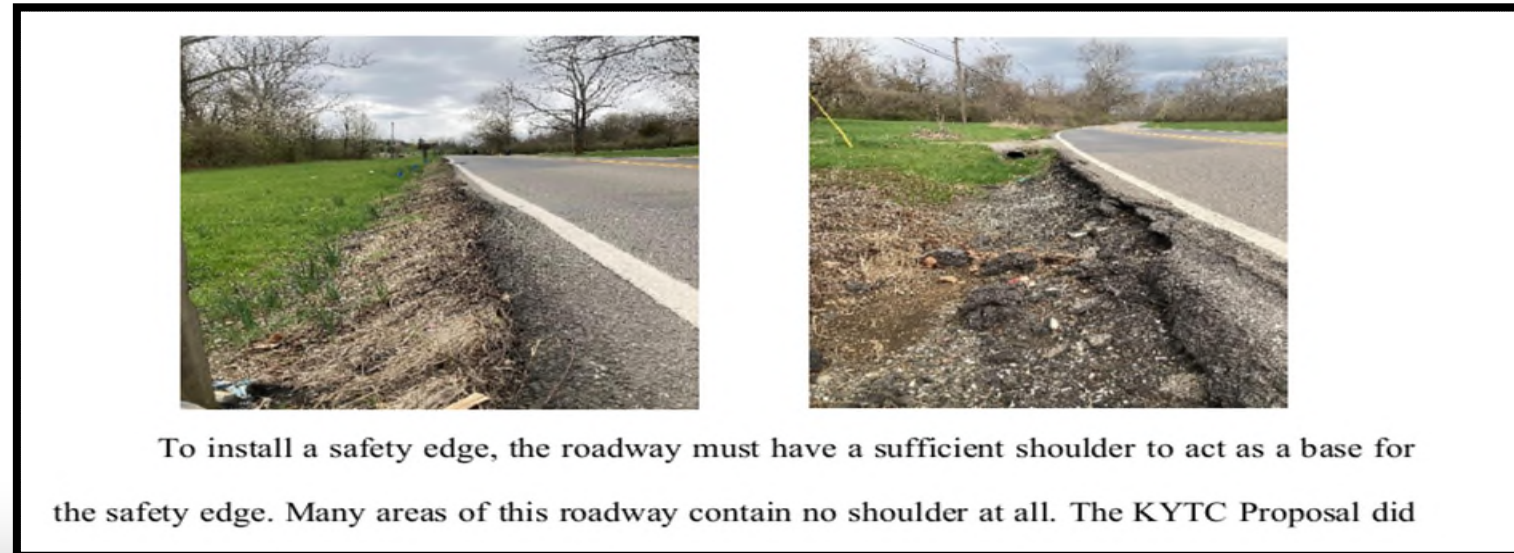
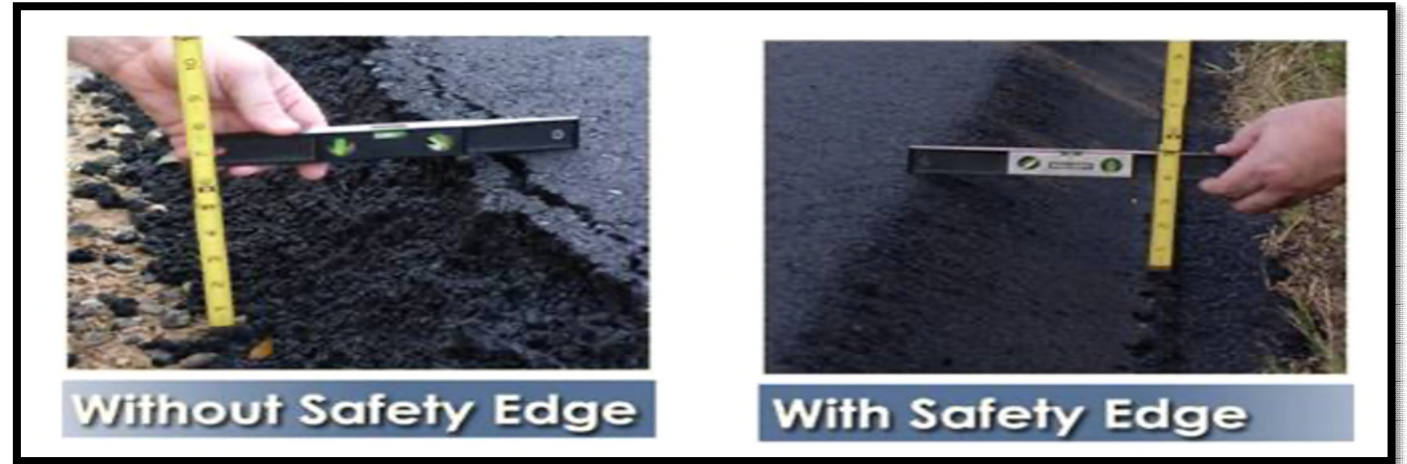


Image courtesy Commonwealth of Kentucky court files

# 1. \$: Cost-Savings ≠ Increased Risks

- If you are changing scope (reduction or increase), go ahead and notify the Owner somehow **and get acceptance in writing from the person with authority to give it.**

- Especially, if the construction conditions are not conducive for a particular scope item (seek a claim...)



# 1. \$: Cost-Savings ≠ Increased Risks

- Especially, if the scope item is a safety feature in and of itself.



## 2. The Government can be a Powerful Ally... or Not!

- If something is missed, pure “government acceptance” is unlikely to be accepted.
- Note: Published Ky COA case from 2 months ago confirmed this point

KENTUCKY COURT OF APPEALS  
MAY 20, 2022 MINUTES  
RELEASED: 10:00 A.M.

329. TRACY WINDUS v. [2020-CA-1035-MR](#) JEFFERSON  
BUFFALO CONSTRUCTION, INC. **TO BE PUBLISHED**

**OPINION REVERSING AND REMANDING  
BY JUDGE MCNEILL**

LAMBERT, J. (CONCURS) AND  
TAYLOR, J. (CONCURS IN RESULT ONLY)

- It is more likely to imply some sort of concealment (punitive damages)

182219-00117\_EST\_0003



Page 1 of 4

Report\_Id: 182219 Est NO 0003

Date: 11/29/2018

**COMMONWEALTH OF KENTUCKY  
TRANSPORTATION CABINET**

*070491 SH*

Contract ID 182219 Estimate Number 0003 Estimate Type PROGRESS

District Office COVINGTON (05340) Griggs, Anthony D. *8843589 / 80798083*

Contractor EATON ASPHALT PAVING CO INC AND SUBSIDIARY AND SUBSIDIARY  
136 EAST FROGTOWN ROAD  
WALTON, KY, 41094

Pay Period 08/25/2018 TO 11/16/2018  
Date Approved 11/29/2018  
Primary Proj Number MP00803381803  
Project No. FD05 008 0338 000-003  
Primary County BOONE  
Name of Road RICHWOOD ROAD (KY 338)  
Description BEGIN 175 FEET EAST OF FROGTOWN CONNECTOR EXTENDING NORTH TO CHAMBERS ROAD

Date Let	05/25/2018	Formal Acceptance		
Date Awarded	06/07/2018	Date Work Began		08/07/2018
Date Contract Executed	06/26/2018	Open To Traffic		
Date NTP Issued	06/26/2018	Actual Completion Date		
Current Contract Amount	\$189,286.00	Total to Date	Prev to Date	This Estimate
Original Amount	\$189,286.00	Total Earnings	\$161,963.46	\$26,224.00 \$135,739.46
Percent Complete	85.57	Stockpiled Materials	\$0.00	\$0.00 \$0.00
Funds Available	\$27,322.54	Gross Earnings	\$161,963.46	\$26,224.00 \$135,739.46
Total Change Orders	\$0.00	Other Adjustments	\$0.00	\$0.00 \$0.00
		<b>TOTAL</b>	<b>\$161,963.46</b>	<b>\$26,224.00 \$135,739.46</b>



*processed 12.10.18 ✓  
subs pd 12.10.18 ✓*

## 2. The Government can be a Powerful Ally... or Not!

- Federal, state, or county government acceptance of a **notified issue** can provide powerful legal defenses, however.
  - » *Slavin Doctrine; Preemption; Immunity, Spearin Doctrine*
  - » The Government typically has the discretionary flexibility to accept well-articulated exceptions (Federal and State Design Manuals, CFRs)
  - » The Government certainly does not want to be on the hook for legal action based on its own regulations so there is often adaptability built in.

182219-00117\_EST\_0003



Page 1 of 4

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*processed 12.10.18 ✓  
subs pd 12.10.18 ✓*

## 2. The Government can be a Powerful Ally... or Not!

- » Paper Your Submittals (change orders, scope deductions, field orders, RFIs, NCRs) with adequate description of the issues to be accepted
- Beware of local municipalities and utilities, which may not offer have the same protections as other government and quasi-governmental entities
- » Don't let informality get in the way of proper documentation

Entered 19-CI-00328 06/18/2021 David Martin, Boone Circuit Clerk

**IT IS HEREBY ORDERED AND ADJUDGED** that Defendant's, Eaton Asphalt Paving Co., Inc., Motion for Summary Judgment on issue of punitive damages is **DENIED**.

DATED this \_\_\_\_\_ day of June 2021.



JAMES R. SCHRAND  
BOONE CIRCUIT COURT

**JAMES R. SCHRAND, JUDGE  
BOONE CIRCUIT COURT**

COPIES TO: ALL ATTORNEYS AND PARTIES OF RECORD

## 2. The Government can be a Powerful Ally... or Not!

- Even in a construction claim situation, if you can work with the government agency to resolve an issue.
  - VE process, prevent future claims, public safety
  - Make sure meeting minutes are accurate in substance and attendance
  - Seek an affidavit early
- Note for Design-Build: Paper the Design Executive Summary, Drainage Folder, and any Categorical Exclusions, Permit Submittals etc. with approvals, meeting minutes, and design exceptions to avoid confusion later on as to what was approved.
  - » Obtain government approval (1) in writing and (2) from the person with the proper authority
  - » Also, make sure the approval clearly approves the notified issue.



## 2. The Government can be a Powerful Ally... or Not!

- Government employees can present devastating evidence against you if the mistake is not brought to their attention, as they will most likely be sued as well.

*i. Only after being sued personally did the KYTC personnel change their position on ██████ work.*

Ten months later, on January 16, 2020, the Skiba Plaintiffs filed an Amended Complaint adding KYTC personnel, including ██████, ██████ and ██████, personally, as Defendants. On March 13, 2020, the Godwin Plaintiffs filed their Amended Complaint adding these same additional parties.

KYTC personnel ██████ admitted that it was not until after they were personally sued that they told anyone – the Cabinet, ██████ or anyone else – that ██████ did not complete the Richwood Road project in compliance with the Proposal and the specifications.<sup>50</sup>

### 3. Prepare Adequately For Depositions on the Front End

- A lot of the old tricks are known and stale
  - “Objection, if you know”
    - » A: “I don’t know”
  - “Objection, he’s not a lawyer”
    - » A: I’m not a lawyer”
  - There are seminars all over the country teaching people how to overcome an unprepared witness and handle “obstructionist” tactics
  - The rules heavily weigh in favor of compelling testimony from a prepared witness
  - Optics also suffer

### 3. Prepare Adequately For Depositions on the Front End

- If you don't spend the time and/or \$ to prepare adequately on the front end, the results can be harmful:
  - The Plaintiff can file a motion and make you and your attorney appear to have something to hide
  - The Judge may order a second deposition and require you to cover the attorneys' fees for the second deposition
    - » Your attorneys' hands will largely be tied in the second deposition
    - » The Plaintiff's attorney will have the advantage of your prior deposition answers and will be able to focus in on the issues that help prove his case using loaded questions
    - » You have to prepare and take the time out of your normal schedule for a second time

## 4. Retain the Right Experts Early

- The Plaintiff has to Prove a Breach of the Standard of Ordinary Care:

### INSTRUCTION NO. 2

“Ordinary care” means such care as the jury would expect an ordinarily prudent person to exercise under similar circumstances.

“Ordinary care” as applied to a business means such care as the jury would expect an ordinarily prudent person engaged in the same type of business to exercise under similar circumstances.

- The Plaintiff will have to pay an expert who will have to write a report and testify (1) what the standard of care was, (2) in the place where the breach occurred, (3) at the time of the alleged breach, and (4) that somebody actually violated the standard.
  - The Plaintiff’s expert will not always have the right experience.
  - But, the industry should have plenty of people with adequate experience willing to defend the actions of its members.
    - » Practical experience, backed with knowledge and credentials, can overcome a hired gun.
    - » Get them on board early (your attorneys may need them)
    - » Nothing beats a good survey!

## 4. Retain the Right Experts Early

- The Plaintiff will have to pay an expert who will have to write a report and testify:
  - (1) what the standard of care was
  - (2) in the place where the alleged breach occurred
  - (3) at the time of the alleged breach, and
  - (4) that somebody actually violated the standard.
- The Plaintiff's expert will not always have the right experience.
  - Assess the Plaintiff's expert disclosures with an eye toward qualifications and experience as much as substance

## 4. Retain the Right Experts Early

- But, the industry should have plenty of people with adequate experience willing to defend the actions of its members.
  - » Practical experience, backed with knowledge and credentials, is a great way to overcome a hired gun—particularly an academic.
  - » Get the expert on board early (your attorneys may need them), so that adjustments can be made
    - “Nothing beats a good survey!” –Yours Truly
      - » Use appropriate technology and personnel

## 5. Point Fingers with Caution

- If your subcontractor messes up, by all means utilize your defense and indemnity options
  - Make sure subcontracts conform with prevailing law regarding express indemnification clauses (duty to defend, hold harmless, and indemnify for their negligence)
  - Examine common law indemnification options
- If a third-party is at fault, measure your approach carefully.
  - Is it your customer?
  - Is it an industry contact?
  - How culpable is the party at fault really?
    - » Juries know where there is \$
    - » Juries know about insurance



A police report placed most of the blame for the fatal crash on Darrin Carroll (bottom, at a Boone County, Ky., court appearance shown on the WKRC television news website), who was arrested, charged and jailed. But attorneys for Amy Skiba's children helped convince prosecutors to drop the charges, even as Eaton Asphalt Paving continued to blame Carroll's allegedly negligent driving for the tragedy.

*Photo credit: Screenshot of WKRC Channel 12 website; Kentucky*

## 5. Point Fingers with Caution

- If a third-party is at fault, measure your approach carefully.
  - Is it your customer?
  - Is it an industry contact?
    - » Are they going to refuse to work with you on future jobs?
  - How culpable is this third-party really?
    - » Never underestimate the power of “Inc.” after your name compared to an individual
      - Juries know where there is \$ (and where there isn’t)
      - Juries know about insurance (and who does and doesn’t have it)

830 / 0

COMMONWEALTH OF KENTUCKY  
UNIFIED COURT OF JUSTICE  
BOONE CIRCUIT COURT  
CASE NUMBER 19-CR-00554

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER DISMISSING

DARRIN C. CARROLL

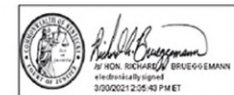
DEFENDANT

\*\* \*\* \* \* \*

The Court having considered the Motion of the Commonwealth and being in all ways sufficiently advised;

**NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:** For the reasons stated in the Commonwealth’s Motion, and hearing no objection from Defendant, said indictment shall be dismissed with prejudice. Defendant stipulates to probable cause at the time of his arrest. Defendant is released from home incarceration/electronic monitoring and any and all other conditions.

**IT IS SO ORDERED.**



BY HON. RICHARD A. BRUGGEMANN  
JUDGE OF THE COURT  
3/20/2020 10:25:43 PM ET

JUDGE RICHARD A. BRUGGEMANN  
BOONE CIRCUIT COURT



## 6. Speaking of Insurance...

- Project Specific Risk
  - It's not always the “big” projects that do you in
    - » Lawyers typically cost the same regardless of the size of the issue
  - Price the potential risks into your Bid and mitigate risks with contracts/exceptions
- Policy Limits?
  - \$1 million isn't what is used to be...
    - » Umbrella and Excess Policies
- Deductible/SIR?
  - Is “winning” actually losing?
- Use settlement opportunities to your advantage
  - Mediation as a discovery tool

### Contractors Dispute Fault in Army Base Roadwork Wrongful Death Case



Frank Hill had obtained a permit from Fort Jackson to bicycle on the base.

*Photo by Mark E. Morrow/USMC ComCam*

## 7. Prepare for an Adverse Verdict

- Plan for Claims
  - The cases seem to get more and more horrific
  - This one from Boone County is very particular, but that is unlikely to stop the Plaintiff's Bar
    - » We can expect creative theories, particularly when there is a fatality and the Plaintiff is in need of a scapegoat with “deep pockets”
- There are always trial issues and strategies that can make a difference; but at minimum, it is important to eliminate the alleged bad “motive”
  - » Control narrative
  - » Consider audience
  - » Counter demonstratives
  - Beware of relying on claims like this is what we've always done or that we have done this in several other places—this can backfire
  - In closing the Plaintiff's attorney was able to turn prior testimony that the safety wedge had been left out 80-100 times, into a request for \$1 million for each time it was left out.

## 7. Prepare for an Adverse Verdict

- While case is pending
  - Monitor new business wisely
  - Protect reputation and licenses (professional and occupational)
  - Protect professional relationships
    - » Are they really your friends if they are threatening your economic interests?
  - Budget for next steps
  - Monitor Employee Well-Being
    - » These cases take years and can lead to significant anxiety (Plaintiff's attorneys love to write threatening letters to individuals to "divide and conquer" and to draw an insurance bad faith claim)
  - Maintain Former Employee Relationships Involved in the Project to the extent possible...
    - » Retirees
    - » Death/Disability
    - » Turnover
  - Accounting Disclosures
    - » Lenders/Credit/Surety
  - Keep in communication with your attorneys!

## 7. Prepare for an Adverse Verdict

- Post-judgment
  - There are legal options
    - » It's not the NCAA tournament, there is an appeals process
      - but with strict rules and a bond posting requirement that accrues statutory interest (most likely for years)
        - » Post-judgment settlement?
        - » Bankruptcy?
  - Encouraged to seek independent counsel; be wary nevertheless.



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**Questions/Comments?**  
**[cclay@grsm.com](mailto:cclay@grsm.com)**

John D. “Chip” Clay, Esq.  
July 19, 2022