its conduct was fairly debatable, the best evidence being the split at the appellate courts. Howard replied that dissenting opinions are not the law. The motion was denied and the insurer has appealed.

Underinsured Motorist - The verdict for a plaintiff who was left in a coma for several days and suffered a permanent brain injury was less than the UIM floor of coverage; also in this case, notable expert Granacher was excluded by the court from testifying because of his failure to comply with discovery orders

Keating v. Nationwide, 92-0444
Plaintiff: John M. Famularo and James W. Taylor, *Stites & Harbison*, Lexington
Defense: J. Dale Golden and Timothy C. Feld, *Golden & Walters*, Lexington
Verdict: $30,000 for plaintiff less 15% comparative fault
Circuit: **Jessamine**, J. Daugherty, 4-6-04

This case started with a serious red light crash in Nicholasville on 11-1-00. William Sears traveled northbound on U.S. 27 near its intersection with South Main Street. As he approached Main, the light changed red. Sears, driving a truck with a cattle trailer, kept on coming. One eyewitness would later indicate Sears ran the light by some twenty seconds.

At the same time, Michael Keating, then age 22 and a self-employed telephone network engineer, was traveling on Main. He had a green light to permit a turn onto the four-lane U.S. 27. As he made his turn, Sears plowed into his vehicle. It caused Keating's vehicle to roll over. For his part, Keating never saw Sears, only seeing a flash. Fault continued to be in issue, Sears thinking the light might have been yellow.

Regardless of how the wreck happened, Keating was badly hurt. From the scene he was choppered to Lexington. His acute injuries included cuts to his head, face, hands and legs. He later had plastic surgery. More seriously, Keating was also comatose for several days.

Keating has since treated for a closed head injury, suffering memory loss, depression, dementia, a mood disorder and cognitive dysfunction. The brain injury was quantified by an neuropsychiatry expert, Robert Granacher, Lexington. [Interesting motion practice discussed later in this report would lead to Granacher's testimony being excluded at trial.]

Beyond the brain injury, Keating has also suffered a hormone disorder as discussed by Dr. Wendell Miers, Endocrinology, Lexington. Plaintiff's proof indicated he will permanently require hormone replacement therapy. Keating's medicals were $50,369 and he sought $500,000 for future care. Lost wages were $111,369, plaintiff also claiming $1,447,797 for impairment. Suffering was not capped. In considering suffering, there was evidence that before the wreck, Keating was an active horseman and spelunker.

Procedurally Keating first moved against Sears. That claim was settled, Sears paying $265,000 of his $300,000 policy limits. Above that sum Keating sought UIM coverage from his carrier, Nationwide. As the case was tried, Nationwide's identity was known to the jury.

In defending the case, Nationwide relied on a multi-faceted strategy. While calling no witnesses, it relied on Sears' yellow light memory, comparative fault remaining in issue. The claimed injury was also diminished, Keating physically appearing well-healed before the jury.

Nationwide also defended procedurally. Regarding Granacher, Nationwide conducted a deposition of Granacher's records custodian to discover his IME invoices from 2001 to 2004. The custodian appeared at the deposition but didn't bring the invoices. Instead he testified he was told not to produce them by Granacher in an attempt to protect client confidentiality. [While Granacher attempted this subpoena end run (simply not producing the records) he failed to make a proper CR 45 motion for a protective order.]

Nationwide then moved to compel compliance with the subpoena. Judge Daugherty directed that Granacher comply with the subpoena. Daugherty's order also included a sanction -- if Granacher didn't comply, he wouldn't testify.

Granacher then made his first appearance in the case with separate counsel. He asked Daugherty to reconsider the order, calling it inconsistent with the recently decided *Primm v. Isaac*, 127 S.W.3d 630 (Ky. 2004). In that regard, Granacher argued he was amenable to producing his gross totals, just not an individualized breakdown. Nationwide responded that any challenge to the subpoena had been waived by Granacher's failure to file a timely CR 45 objection. Daugherty remained unmoved and the order stood. Granacher didn't move either and he did not testify at trial.

Just as the trial was beginning, Nationwide sought to avoid a Keating damages ambush. It seems that the day before the trial began, Keating first tendered CR 8.01(2) interrogatories. The befuddled insurer was helpless to value the claim without the answers. It had only one choice -- during plaintiff's opening arguments, Nationwide raised a *Fratzke* challenge. Daugherty reserved ruling on the motion until after trial. The matter pressed on and proof was introduced for two days.

The jury's verdict was mixed on fault, the panel assessing 85% to the tortfeasor, remainder to Keating. [The assessment was odd, several independent witnesses confirming the tortfeasor ran the light badly.] Then to damages, Keating took $20,000 of his medicals, plus $5,000 more for future care. Lost wages and impairment were both rejected. Finally suffering was valued at $5,000, the verdict totaling $30,000. A defense judgment followed, the adjusted verdict less PIP and comparative fault of $17,000, falling far short of the $300,000 UIM threshold. [The jury's finding also made moot the court's reservation of a ruling on the *Fratzke* question.]

Ed. Note - The *Fratzke* question raised in this case is similar to those presented in last month's issue, *Starner v. Tirone*, 8 KTCR 6 at page 8. There CR 8.01(2) answers were filed after the trial began. Despite the *Fratzke* precedent, the trial court in that case permitted the case to go forward. A defense verdict was returned and arguably the *Fratzke* violation became moot. Or did it?

We wondered if a Fratzke violation could lead to a legal malpractice action even when (1) the court ignores the violation (clear reversible error) and lets the action go forward and (2) a defense verdict is returned. Further as if a plaintiff's verdict would have been reversed on appeal, wasn't plaintiff's counsel's interest adverse to the client at the moment the *Fratzke* violation was revealed? By that we mean, any verdict for the plaintiff (to be reversed on appeal) essentially valued the lawyer's malpractice. Thus wouldn't the interests of the *Fratzke*-violating attorney then be adverse to his client, client wanting the largest award, attorney wanting the smallest?