

**Kentucky Court Of Appeals**  
**Cases of Note**  
**July-August, 2015**

Note: To open hyperlink, take one of the following steps:

1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

**AUTOMOBILES**

**Fentress v. Martin Cadillac, Inc.**

**2014-CA-000177 08/14/2015 2015 WL 4776297 DR Pending**

Opinion by Judge Thompson; Judges Jones and Taylor concurred. The surviving spouse of a motorist who was killed in a collision with a stolen vehicle brought a negligence action against, among others, the automobile dealership that owned the vehicle and the motor vehicle salesman who was given the vehicle for his personal use, and who left the vehicle unlocked and with the key in the vehicle in the parking lot of his apartment complex. The circuit court awarded summary judgment to the dealership and salesman, and the Court of Appeals affirmed. The Court held that the salesman did not violate a statutory duty by leaving the vehicle unlocked and with the key inside, and that any breach of duty by the salesman was not the proximate cause of the motorist’s death. The statute in question, KRS 189.430(3), which bars a person in control of a vehicle from leaving it unattended without locking the ignition and removing the key, applies only to public ways, and not to places like the subject parking lot, which was owned by the owner of the apartment complex and made available for the use of residents and guests. Moreover, the thief’s actions in stealing the vehicle, and in driving recklessly while being chased by police, were a superseding cause of the motorist’s death, and the thief’s recklessness was not reasonably foreseeable. The Court further held that the dealership could not be held liable for any negligent hiring, training, or retention of the salesman.

**DAMAGES**

**Service Financial Company v. Ware**

**2013-CA-002121 07/24/2015 2015 WL 4571712**

Opinion by Chief Judge Acree; Judges Stumbo and Taylor concurred. The Court of Appeals granted discretionary review to address appellant’s appeal of an opinion by the Franklin Circuit Court affirming a Franklin District Court order of default judgment that limited post-judgment interest on a retail installment contract to 12% per annum. Appellant is the assignee of a retail installment contract executed by appellee. Appellee defaulted, and appellant filed suit to collect on the contract. After appellee failed to respond to the lawsuit, appellant moved for default judgment and, citing KRS 360.040 - which allows a court to deviate from the statutory post-judgment interest rate of 12% when a party has agreed to accruing interest on a written obligation - requested post-judgment interest at the rate of 15% per annum, the purported interest rate contained in the contract. The district court denied the claim of 15% post-judgment interest and allowed only 12% post-judgment interest. The circuit court affirmed, finding the damage claim to be an unliquidated sum. The Court of Appeals granted discretionary review and affirmed on the alternative ground that the contract sued upon was a retail installment contract in which appellee agreed to pay the cash price of the vehicle plus a time price differential (finance

charge), but did not agree to the accrual of interest at any rate, much less a rate in excess of that stated in KRS 360.040. Because the contract bore no interest, appellant was only entitled to post-judgment interest at the statutory rate of 12% per annum.

**LePort v. Allstate Insurance Co.**

**2013-CA-001076 08/21/2015 2015 WL 4969816 DR Pending**

Opinion by Judge Nickell; Judges Kramer and J. Lambert concurred. Appellant was the backseat passenger in a pickup truck (insured by Allstate) that was rear-ended by another pickup truck driven by Kermit Stone. Stone pled guilty to driving under the influence in a separate criminal proceeding. Appellant settled with Stone and his insurance carrier for the policy limits and then sought underinsured motorist (UIM) benefits from Allstate. At trial, Stone did not appear and Allstate was the only defendant. Because Stone's liability was conceded, and the parties stipulated to past medical expenses, the only questions to be decided were whether appellant was injured and, if so, to what extent. The jury awarded zero dollars as to appellant's pain and suffering and future medical expense claims, and the circuit court entered a judgment in accordance with the verdict. On appeal, the Court of Appeals affirmed. The Court first held that introducing evidence of Stone's impairment by oxycodone at the time of the collision would have been irrelevant and prejudicial and was properly excluded by the circuit court. Revealing the impairment could have influenced jurors to punish Allstate in contravention of the rule on balancing probative value against prejudicial effect. The Court next held that the jury's award of zero dollars was reasonably related to the evidence and did not warrant a new trial. The Court also held that an explanation of UIM coverage and limits was not needed or relevant since Allstate was identified as the defendant and acknowledged contractual liability. The Court further held that appellant had failed to properly preserve her argument that the circuit court abused its discretion in answering a jury question posed during deliberations.

**EVIDENCE**

**Harrington v. Argotte**

**2014-CA-001050 07/31/2015 2015 WL 4597536**

Opinion by Judge Taylor; Judges Jones and Thompson concurred. The circuit court entered a directed verdict dismissing appellant's medical negligence action against appellee. After appellant presented her opening statement, appellee moved for a directed verdict pursuant to CR 50.01. Appellee argued that appellant admitted during her opening statement that no expert witness would testify as to whether appellee breached the standard of care as to appellant's claim of lack of informed consent. The circuit court sustained the motion for directed verdict, thus concluding the trial proceedings without any evidence being presented. The Court of Appeals reversed and remanded. The Court noted that the language of CR 50.01 plainly contemplates the introduction of some evidence at trial before granting a directed verdict. An opening and closing statement at trial does not constitute "evidence" but rather is intended to merely inform the jury of the case and the issues therein. The Court acknowledged that a directed verdict may be rendered after opening statement in very limited cases where counsel made an admission unequivocally fatal to her cause of action. However, in this case, the circuit court prematurely determined that expert testimony was required to demonstrate the standard of care and breach thereof by appellee. In a medical negligence claim, the law recognizes an exception where expert testimony is unnecessary if the failure to disclose is so obvious that a layperson can recognize the necessity of such disclosure to a patient. The circuit court viewed this exception as only being triggered in cases where no consent was given by the patient. The Court of Appeals disagreed with this perspective and noted that the application of the exception is highly fact-specific and is dependent upon whether the failure to disclose is obvious and apparent to a layman based upon

the underlying facts as established by the evidence introduced at trial. As no evidence was heard or introduced before the directed verdict was granted, the circuit court could not have properly determined whether the exception to the general rule requiring expert testimony was applicable. Therefore, reversal was merited.

## **WORKERS COMPENSATION**

### **Cruse v. Henderson County Board of Education**

**[2014-CA-001439](#) 07/10/2015 2015 WL 4159419 Rehearing Denied**

Opinion by Judge Stumbo; Chief Judge Acree and Judge Taylor concurred. The Court of Appeals affirmed a decision of the Workers' Compensation Board finding that the Administrative Law Judge did not err in determining that most of appellant's work injuries were temporary and had resolved within one year. The Court also affirmed the finding of the Board that KRS 342.730(4), which terminates workers' compensation benefits on the date that the employee qualifies for old-age Social Security retirement benefits, does not violate the federal Age Discrimination in Employment Act found at 29 U.S.C. § 623(a)(1). The Court further held that KRS 342.730(4) does not violate the equal protection clause of the United States Constitution by limiting the duration of benefits based on the employee's age.

### **Liberty Mutual Fire Insurance Company v. Cato**

**[2014-CA-000403](#) 07/10/2015 2015 WL 4145064 DR Pending**

Opinion by Judge Combs; Judges J. Lambert and Stumbo concurred. The estate and widow of an employee who was electrocuted while working on storage tanks owned by his employer's customer brought a wrongful death action against the electrical utilities responsible for the high voltage power lines on the customer's property. The employer's workers' compensation insurer intervened to recover the workers' compensation death benefits it paid. After settlement of the estate's and widow's claims against the utilities, the circuit court awarded summary judgment to the estate and widow, finding that the insurer had waived its subrogation rights against the utilities. Therefore, it could not recover the workers' compensation death benefits it paid to the widow out of the widow's wrongful death settlement with the utilities. The insurer appealed and the Court of Appeals affirmed. The subject waiver was contained in an endorsement to a policy with the employer, which was based in Texas, and was held to be a binding waiver as to the alleged tortfeasors in Kentucky. The waiver agreed to waive subrogation against any person or organization for whom the employer agreed by written contract to furnish the waiver, and the employer's contract with the customer required it to obtain insurance waiving subrogation against, among others, the customer's invitees, such as the utilities. The Court further held that any underlying choice of law issues were rendered moot by the Court's holding that the waiver was enforceable.