# Kentucky Court Of Appeals
# Cases of Note
# November-December, 2016

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## INSURANCE

### LaCrosse v. Owners Insurance Company
**2015-CA-000418 12/22/2016 2016 WL 7405775 Rehearing Pending**

Opinion by Judge VanMeter; Judge Maze concurred; Judge D. Lambert concurred in part, dissented in part, and filed a separate opinion. On review from an order granting summary judgment in favor of Owners Insurance Co. and Progressive Northern Insurance Co. in an insurance case, the Court of Appeals affirmed in part, holding that the trial court correctly applied Illinois law and correctly offset the underinsured motorist ("UIM") coverage at issue with collateral sources, but reversed in part and remanded, holding that the trial court erred in finding that sufficient evidence had been presented to show a written request or rejection of the higher UIM coverage limit. Following a motor vehicle accident involving an underinsured motorist and appellant, who was driving a commercial vehicle owned by his employer, Tuttle Trucking, appellant sought UIM benefits against both Owners, the insurer for Tuttle Trucking, and Progressive, his personal automobile insurance provider, to cover the expense of his damages. The Court of Appeals first held that the trial court was correct in applying Illinois law since Illinois had the most significant relationship to the formation and performance of both the Owners and Progressive insurance policies/contracts, the test for which is set forth in Lewis v. Am. Family Ins. Grp., 555 S.W.2d 579 (Ky. 1977). The Court also noted that Kentucky has no clear public policy on UIM coverage that would be given preference, citing to State Farm Mut. Auto Ins. Co. v. Hodgkiss-Warrick, 413 S.W. 3d 875 (Ky. 2013). Second, the Court held that the trial court erred in relying only on the affidavit of Sandy Tuttle, of Tuttle Trucking, to find that the UIM coverage selected was $100,000, not the $1,000,000 allowed by the insured's liability limits. Under Illinois law, UIM coverage is equal to the amount of liability coverage unless the insurance company obtains a written rejection/request from the insured or applicant. Although evidence other than the original policy can be sufficient, the Court held that this affidavit alone was not sufficient to satisfy the requirement for a written request or rejection to subvert the automatically equivalent UIM coverage provided in the Illinois statute. Absent evidence of such a written request/rejection, the Court vacated the trial court's reliance on this affidavit and remanded for a determination as to whether Tuttle Trucking provided a written request or rejection of the higher UIM limits. Third, the Court held that the trial court correctly used offsets from collateral sources, including liability coverage from the tortfeasor, workers' compensation benefits, and no-fault benefits received by appellant, to reduce each insurer's UIM coverage, since such an offset of UIM benefits was permissible under Illinois law, contractually agreed upon by the parties, and not contrary to Kentucky public policy. Last, since the Court reversed the trial A. 2015-CA-000418 12/22/2016 2016 WL 7405775 Rehearing Pending court's determination of the Owners policy's UIM limits, the Court addressed Owners' cross-appeal regarding the "other insurance" excess clauses contained in both the Owners and Progressive policies, which would make any insurance benefits provided secondary, or excess, to any other applicable UIM coverage. The Court held that because appellant was driving a vehicle covered by Owners and the accident did not involve a "covered auto" under Progressive, neither policy's

clause was applicable at the same time as the other, thereby implicating only Progressive's excess clause: the Owners' UIM coverage was primary, and Progressive's UIM coverage was to be applied as excess.

## TORTS

**Resnick v. Patterson**
**2011-CA-001657 11/23/2016 2016 WL**
Opinion by Judge J. Lambert; Chief Judge Kramer concurred; Judge Thompson dissented without separate opinion.
Appellant, while assisting his mother in her move from appellee's residence, sustained injuries after falling in appellee's backyard. Appellant and his wife sued appellee for compensation under a theory of negligence and failure to warn. The circuit court granted summary judgment in appellee's favor, and the Court of Appeals affirmed on appeal. However, the Supreme Court of Kentucky granted discretionary review and vacated and remanded the Court's decision for reconsideration under *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015); *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013); and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). Upon consideration of these cases, the Court of Appeals vacated the circuit court's order granting summary judgment and remanded for an analysis of the comparative fault, if any, of both appellant and appellee and whether summary judgment was appropriate under the circumstances. In so doing, the Court noted that because the trial court analyzed the case in terms of a duty, its reasoning was not in line with the Supreme Court's requirement that cases be considered in terms of foreseeability and comparative fault. The question was whether or not it was foreseeable to appellee that appellant might be on his property helping his mother move, might be distracted while carrying boxes from the storage shed, and might trip on a hole next to a tree stump. Ultimately, the trial court had to determine whether appellee did everything he reasonably could under the circumstances and to what extent appellant was responsible for his injuries.

**D.W. Wilburn, Inc. v. K. Norman Berry Associates, Architects, PLLC**
**2015-CA-001254 12/22/2016 2016 WL 7405774**
Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. Appellant challenged a summary judgment entered in favor of K. Norman Berry Associates (KNBA). The issues presented were: (1) whether appellant could maintain a negligent misrepresentation claim against KNBA for alleged negligence in preparing plans and specifications for the construction of a school project; (2) whether appellant's claim was precluded by the economic loss rule; and (3) whether change orders and final application for payment waived or released appellant's claim for delay damages. In reversing and remanding, the Court of Appeals held that under the Restatement (Second) of Torts § 552, KNBA owed a duty to appellant independent of its contractual duties to the school board. It further held that the economic loss rule did not apply to a claim for negligent misrepresentation under Section 552 where there was no privity of contract. Finally, the Court held that change orders signed by appellant and the school board did not waive or release appellant's negligent misrepresentation claim because they did not constitute a contract between appellant and KNBA.

## DAMAGES

**Burkhead v. Davis**
**2014-CA-000012 11/23/2016 2016 WL 6892587**
Opinion by Judge Nickell; Judges Acree and Taylor concurred.
In an action stemming from a contentious dispute between neighbors, a jury awarded Burkhead nominal damages on a claim of nuisance, but awarded the Davises $500 in compensatory damages and $30,000 in punitive damages on counter-claims for nuisance, outrageous conduct, and malicious prosecution. Burkhead challenged the punitive damages award as unconstitutionally excessive. The Court of Appeals undertook a detailed analysis of the three "guideposts" regarding the constitutionality of a punitive damages award as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and the application of those factors to the case at bar. The Court noted the general rule that damage ratios exceeding single digits are burdened with at least the appearance of unconstitutionality. However, upon examination of the record and application of the pertinent factors, the Court concluded that the reprehensibility of Burkhead's conduct presented circumstances necessitating application of an exception to the single-digit damage ratio limitation. Therefore, the jury's award was affirmed. On cross-appeal, Davis challenged the trial court's rulings on the admissibility of three pieces of documentary evidence. The panel affirmed the trial court's rulings upon determination that the proffered evidence constituted inadmissible hearsay and did not fall under one of the recognized exceptions for admissibility.

## WORKERS' COMPENSATION

**Homestead Family Farm v. Perry**
**2015-CA-001988 11/23/2016 2016 WL 6892578**
Opinion by Judge Dixon; Chief Judge Kramer and Judge Taylor concurred.
The Court of Appeals reversed and remanded a decision of the Workers' Compensation Board reversing an ALJ's dismissal of Perry's claim. Perry was employed as a truck driver and laborer for Homestead Family Farms. He injured his back unloading soybeans at Homestead's grain bins and filed a claim for benefits. The ALJ concluded that both Homestead and Perry were engaged in agricultural work pursuant to KRS 342.630(1) and 342.650(5) and dismissed Perry's claim pursuant to the agriculture exemption. The Board reversed the ALJ, finding that the statutory agricultural exemption did not apply to Perry because he was engaged in the commercial drying and storing of agricultural commodities when he was injured, which is an activity excluded from the definition of agriculture set forth in KRS 342.0011(18). The Court disagreed, holding that the Board misconstrued the definition of agriculture found in KRS 342.0011(18) and that there was no evidence to support the Board's conclusion that Perry was engaged in a "commercial" drying and storing activity. It was undisputed that Perry was tasked with hauling the harvested crops and unloading them at Homestead's storage silos. Testimony established that Homestead only harvested and stored its own crops and that the farm's sole source of income was from the eventual sale of those crops at market. Therefore, Perry's activities fit within the statutory definition of agriculture, *i.e.*, the "harvesting, and preparation for market of agricultural ... commodities ... and any work performed as an incident to or in conjunction with the farm operations." Consequently, Perry was a "person employed in agriculture" and not covered by the Act pursuant to KRS 342.650(5).