# Kentucky Court Of Appeals
# Cases of Note
# January-February, 2018

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**INSURANCE**

**Consolidated Insurance Company v. Slone**
**2016-CA-001070 01/05/2018 2018 WL 296975**
Opinion by Judge Thompson; Judges Clayton and J. Lambert concurred. School bus occupants, including students, who were injured while riding the bus filed a declaratory judgment action against Consolidated. They sought to stack the underinsured motorist (UIM) coverage in a fleet policy issued to the Magoffin County Board of Education to provide $31,500,000 in coverage. The circuit court declared that the UIM limit on each of the 63 school buses owned by the Board could be stacked. The Court of Appeals reversed and remanded, holding that the bus occupants who were not the named insured or family members of the named insured could not stack the UIM coverages where the policy was clear and unambiguous that the coverages could not be stacked by insureds of the second class. The Court noted that the "reasonable expectations" doctrine is not applicable to insureds of the second class and held that regardless of the mandatory nature of UIM coverage applicable to school buses and the fact that it was anticipated that students would be on a bus, the bus occupants could not be classified as anything other than insureds of the second class. The Court added that there was nothing unreasonable about the anti-stacking provision in the policy, noting that the total UIM premium was $5,049, and that the UIM coverage was not illusory as there was $500,000 in coverage. The Court further held that Consolidated was not estopped to deny stacking because of alleged representations made by its alleged agent to a Board member. There was no connection between such misrepresentation and the bus occupants' right to stack UIM coverages.

**Isaacs v. Sentinel Insurance Company, Limited**
**2017-CA-000204 02/02/2018 2018 WL 663001 DR Pending**
Opinion by Judge Taylor; Judges Jones and D. Lambert concurred. Appellant Darryl Isaacs was injured when he was struck by a motor vehicle while riding his bicycle. Isaacs and his wife subsequently filed suit against the driver, and they also claimed entitlement to underinsured motorist (UIM) coverage under a motor vehicle policy of insurance issued by Sentinel Insurance Company to Isaacs & Isaacs, P.S.C. In making this argument, appellants acknowledged that the named insured on the motor vehicle insurance policy was Isaacs & Isaacs, P.S.C. and not Darryl individually. However, they maintained that because Darryl was the "sole owner" of the P.S.C., the two were synonymous and, therefore, he was entitled to UIM coverage as a named insured. The circuit court rejected this argument, and the Court of Appeals affirmed. The Court noted that under the unambiguous terms of the policy, an individual was entitled to UIM coverage only if they were occupying a covered motor vehicle at the time of the accident - which Darryl was not. The Court did not agree that Isaacs & Isaacs, P.S.C. and Darryl were "synonymous" under the insurance policy because the policy clearly did not equate the two being one and the same. The Court noted that appellants essentially argued that the P.S.C. was nothing more than a "legal fiction" for tax purposes only, yet they cited no Kentucky legal precedent to support this argument. It further noted that a professional service corporation is a distinct legal entity under

Kentucky law and that the record reflected that Darryl was a shareholder of the corporation. The Court also rejected appellants' contention that the doctrines of illusory coverage and reasonable expectations compelled UIM coverage in this case.

**Metzger v. Auto-Owners Insurance Company and Owners Insurance Company**
**2016-CA-001625 01/19/2018 2018 WL 794740 DR Pending**
Opinion by Judge Stumbo; Judges Clayton and Thompson concurred. Appellants argued that Diana Metzger was entitled to underinsured motorist (UIM) coverage under a commercial automobile insurance policy issued to Metzger's Country Store, LLC (Metzger's), after she was struck by a vehicle while out walking. Appellants were part-owners and members of the LLC. The appellee insurance companies argued that Diana was not covered under the terms of their UIM coverage. The Court of Appeals agreed with the insurers and affirmed. In particular, the Court rejected appellants' argument that Diana should be considered a first-class insured, as a member of the LLC, for purposes of UIM coverage. Distinguishing the facts of this case from those of several others, the Court noted that Metzger's itself was not given first-class UIM coverage under the policy. Instead, the policy specifically required that the named insured be an individual before first-class coverage applied - which was not the case here. Appellants cited to no case or statutory law that requires all UIM policies to provide first-class coverage under any and all circumstances. Consequently, because Metzger's was not given first-class coverage, nor did the UIM coverage mention the members of the LLC, Diana was not entitled to UIM benefits. The Court also rejected appellants' argument that the policy at issue was ambiguous.

## WORKERS' COMPENSATION

**Fields v. Benningfield**
**2015-CA-001975 02/16/2018 2018 WL 911483**
Opinion by Judge Taylor; Judge Nickell concurred; Judge J. Lambert dissented. Appellant, a former employee of a county jail, brought suit against county entities and officials alleging wrongful termination for his pursuing a workers' compensation claim. The circuit court granted summary judgment in favor of defendants/appellees. In a 2-1 vote, the Court of Appeals reversed and remanded, holding that KRS 342.197, which prohibits an employer from engaging in workers' compensation retaliation, constitutes a waiver of governmental immunity for claims against any governmental entity or government employer who violates the statute. The Court further held that genuine issues of material fact existed as to whether appellant's termination was motivated by his filing of a workers' compensation claim. Therefore, reversal was required.

**Gregory v. A & G Tree Service**
**2015-CA-000721 02/16/2018 2018 WL 911855**
Opinion by Judge Nickell; Judges Dixon and Taylor concurred. The Court of Appeals affirmed a decision of the Workers' Compensation Board vacating an award of permanent partial disability benefits because the Administrative Law Judge set forth insufficient findings of fact. In addition, the Court affirmed the Board's decision vacating two impairment ratings because one injury was not at maximum medical improvement and the other was not based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Finally, the Court affirmed the Board's holding that appellant was not entitled to the safety violation enhancement set forth in KRS 342.165(1). Appellant argued that the employer violated KRS 338.031, commonly known as the "general duty" clause, by allowing appellant to transport crew in a company vehicle while impaired, thereby entitling him to a safety violation enhancement. The Court, relying on the four factors set forth in Lexington-Fayette Urban Cty. Gov't v. Offutt, 11 S.W.3d 598 (Ky. App. 2000), held that one of the factors, whether there was a feasible means to eliminate or reduce the hazard, had not been established.