

**Kentucky Court Of Appeals**  
**Cases of Note**  
**March-April, 2019**

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## **INSURANCE**

### **Peterson v. Grange Property & Casualty**

**[2017-CA-000870](#) 10/26/2018 2018 WL 5310148 Released for Publication**

Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Maze concurred.

Appellant was severely injured in an automobile accident while riding as a passenger in one of the vehicles. She filed a claim for underinsured motorist (UIM) coverage against Grange Property & Casualty, the UIM insurer of the vehicle in which she was a passenger. Grange moved for summary judgment because appellant had her own UIM coverage through GEICO at the time of the collision. Grange asserted that because of this appellant did not qualify as an “insured” under its policy, which plainly excluded coverage for a non-family occupant insured for UIM coverage under another policy. Appellant conceded that she had UIM coverage through GEICO, which would pay regardless of what Grange did, but she sought to recover UIM benefits under both policies, claiming that otherwise she would not be fully compensated for her injuries. The circuit court granted Grange’s motion for summary judgment and dismissed appellant’s action. The Court of Appeals affirmed, holding that appellant did not qualify as an insured and that public policy considerations did not mandate a different outcome. The Court concluded that the Grange exclusion was enforceable because UIM coverage is fundamentally different than other motorist insurance coverage mandated under the Motor Vehicle Reparations Act. It is reasonable to limit optional coverage such as UIM coverage where the injured party is not the policyholder and has other primary coverage for her claims, and the provision is an unequivocally conspicuous, plain, and clear manifestation of the company’s intent to exclude coverage.

## **TORTS**

### **Dickson v. Shook**

**[2017-CA-000023](#) 03/29/2019 2019 WL 1412497**

Opinion by Judge Acree; Judges Jones and K. Thompson concurred.

This case concerned an intra-family business dispute and a claim that a mother was interfering with her daughter’s inheritance from her father. After a jury verdict and judgment on several counts against the mother and son and in favor of daughter and her solely-held limited liability company, the Court of Appeals reversed in part, vacated in part, and remanded. The Court held that: (1) the jury should not have been instructed on a cause of action not recognized in Kentucky (tortious/wrongful interference with devise/expectation of inheritance); (2) lawful estate planning by mother could not be the basis of a tort brought by daughter against mother; (3) the circuit court lacked subject matter jurisdiction to adjudicate a claim regarding settlements of fiduciaries or mismanagement other than as authorized by KRS 395.510; (4) daughter’s claim of intentional infliction of emotional distress could not be affirmed in the absence of expert evidence of severe emotional distress; (5) punitive damages are not recoverable independently of the establishment of liability on an underlying claim; (6) when statutes establish a standard of care, the jury

instruction must reflect that statutory language; (7) aiding and abetting verdicts must be reversed to the extent that the verdicts upon which they depend are reversed; and (8) a damages award based on a single aggregate damages instruction for multiple liability verdicts must be set aside when one or more of those liability verdicts is set aside.

**McMahon v. F & C Material Handling, Inc.**

[2017-CA-000430](#) 04/05/2019 2019 WL 1496154

Opinion by Judge Lambert; Judge Dixon and Special Judge Henry concurred. Appellant was injured at work when a loading dock leveler malfunctioned, causing his leg to be amputated above the knee. He filed suit against the manufacturer of the dock leveler (under a product liability theory) and against appellee, which specialized in the service and repair of loading docks and doors, for negligent repair of the leveler; his employer intervened as a subrogee and included the dispatch company as a defendant. Settlements were reached in all but the claim against appellee. The circuit court granted appellee's motion for summary judgment, ruling that there was no privity of contract between appellant and appellee. The Court of Appeals reversed and remanded for trial, holding that there was a duty owed appellant as an expected user of the repaired dock leveling equipment and that there were genuine issues of material fact as to whether appellee was negligent and whether its negligence, if any, was a substantial factor in causing appellant's injuries.

**NEGLIGENCE**

**Johnson v. Bond**

[2017-CA-001150](#) 03/22/2019 2019 WL 1302397 DR Pending

Opinion by Judge K. Thompson; Judge L. Thompson and Special Judge Henry concurred. Tia Jonson, as Administrator of the Estate of Cristiano Waide, (the Estate) filed this wrongful death action against a number of Lexington-Fayette Urban County Government (LFUCG) employees after Cristiano fell from bleachers located in a public park owned by LFUCG. The employees raised the Recreational Use Statute, KRS 411.190, as a defense. The circuit court granted summary judgment to LFUCG and the Estate appealed. The Court of Appeals affirmed. The Court held that under the Recreational Use Statute, the employees could only be liable if they had acted willfully or maliciously. There was no such evidence here. The bleachers had been at the park for over three decades without any report of injury caused by the bleachers' condition. The Court also noted that the danger of a two-year-old child playing on a set of bleachers was obvious. Moreover, even if the bleachers did not comply with applicable building codes and were not grandfathered into those codes, the danger was obvious and there was no evidence that the employees had any knowledge that the bleachers were not compliant. The Court further held that the Estate could not maintain an action for negligent hiring and supervision against the employees. If any such claim existed, it would have to be brought against LFUCG, who hired and supervised the employees.

**Richmond v. Hunt**

[2018-CA-000182](#) 04/05/2019 2019 WL 1496951 DR Pending

Opinion by Judge Combs; Judges Acree and Maze concurred. Appellant brought a medical malpractice action against his treating doctors and the medical practices where they worked, alleging that their failure to timely diagnose a blood clot deprived him of the opportunity to receive treatment that could have saved his hand from amputation. The circuit court granted summary judgment in favor of the doctors. Although the court acknowledged that genuine issues of material fact existed as to the doctors' deviation from the standard of care, it nonetheless granted their motions for summary judgment based on causation alone - namely, that causation could not be established with certainty as a result of the testimony

of appellant's medical expert. The Court of Appeals vacated and remanded, holding that a genuine issue of material fact existed regarding whether the doctors' failure to timely diagnose the blood clot caused appellant to eventually require amputation of his hand. The Court noted that there was "unquestioned deviation by the doctors from the proper standard of care" and concluded that the testimony and medical report from appellant's expert demonstrated enough of a causal nexus between this deviation and appellant's injuries to allow the case to survive summary judgment. In reaching this conclusion, the Court emphasized that while evidence of causation must be in terms of probability rather than mere possibility, substance should prevail over form and the total meaning - rather than a word-by-word construction - of the evidence should be the focus of the inquiry. Here, both appellant and appellees picked and chose language from the expert's deposition utilizing "probability" and "possibility" almost interchangeably. The fact that emerged, however, was that the doctor opined that time was of the essence in saving appellant's fingers. In light of this, summary judgment was inappropriate.

## **WORKERS' COMPENSATION**

### **R & T Acoustics v. Aguirre**

**[2018-CA-001277](#) 03/29/2019 2019 WL 1411915**

Opinion by Judge Dixon; Judges Goodwine and Maze concurred.

The Court of Appeals affirmed a decision of the Workers' Compensation Board that reversed and remanded an Administrative Law Judge's order dismissing Bernabe Aguirre's claim for workers' compensation benefits. Aguirre was injured when he fell from a ladder while working for R & T Acoustics. Aguirre received medical treatment, and a urine drug screen was positive for cocaine metabolites. The employer raised the affirmative defense of voluntary intoxication pursuant to the version of KRS 342.610(3) in effect at the time of the injury. The ALJ dismissed Aguirre's claim, concluding that the employer presented substantial evidence that Aguirre's injury was proximately caused primarily by his voluntary intoxication. On appeal, the Board vacated and remanded the decision for additional findings, and the ALJ issued an opinion and order on remand again dismissing the claim. This time the Board concluded that substantial evidence did not support the ALJ's decision and reversed and remanded the matter for a determination of the merits of Aguirre's claim. In affirming, the Court held that the Board properly concluded that the employer was not entitled to the affirmative defense because it failed to produce substantial evidence that Aguirre's injury was proximately caused primarily by voluntary intoxication.

## **IMMUNITY**

### **Albright v. Childers**

**[2017-CA-000669](#) 03/29/2019 2019 WL 1412490**

Opinion by Judge Maze; Judges D. Lambert and Nickell concurred.

In 2015, brothers Cameron and Kyle Pearson were engaged in a physical altercation over a handgun in the parking lot of a gun store. Albright, the owner of the gun store, heard gunshots and took his own gun outside to investigate. Seeing the two fighting, he ordered them to drop the gun. When they failed to stop, Albright fired his gun, killing Cameron and wounding Kyle. As a result of the incident, Albright was charged with murder and first-degree assault.

However, following a hearing, the circuit court found that Albright was immune from prosecution under the provisions of KRS 503.085. The Court of Appeals affirmed that ruling and the Supreme Court of Kentucky denied discretionary review. While the criminal matter was pending, Cameron's estate and Kyle brought civil actions against Albright and the gun store. After the criminal action was dismissed, Albright moved to dismiss the civil claims, arguing that collateral estoppel barred the estate and Kyle from re-litigating the issue of immunity. The circuit

court disagreed and denied the motion for summary judgment. The Court of Appeals reversed, holding that a finding of criminal immunity under KRS 503.085 bars a civil action arising from the same conduct from going forward. The Court noted that collateral estoppel requires: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. While the parties were not identical, KRS 503.085 makes clear that the standard of liability is the same for both criminal and civil actions, creating a unique situation where collateral estoppel may apply between civil and criminal issues. Here, the Commonwealth fully litigated the issue of immunity in the criminal matter and had failed to meet its burden of going forward under the statute. While the parties were different in the civil claim, Cameron's estate and Kyle had the same interests as the Commonwealth and, therefore, were not prevented from a full and fair opportunity to present their case. Finally, with the Supreme Court's denial of discretionary review, the finding of immunity was now final. Consequently, the Court concluded that collateral estoppel barred Cameron's estate and Kyle from re-litigating the issue of immunity and that the circuit court erred by denying Albright's motion for summary judgment on that basis.

### **Ford Motor Company v. Sheets**

**[2018-CA-000044](#) 03/22/2019 2019 WL 1302680**

Opinion by Judge Combs; Judges Dixon and Goodwine concurred.

Stephen Ray Sheets filed suit against Ford Motor Company and multiple other defendants alleging that he had contracted mesothelioma as a result of his exposure to asbestos. After its motion for summary judgment was denied, Ford filed an appeal, arguing that it was entitled to "up-the-ladder" immunity under the Kentucky Workers' Compensation Act, KRS 342.690. The Court of Appeals first noted that although a motion denying summary judgment is usually interlocutory and non-appealable, under *Ervin Cable Constr., LLC v. Lay*, 461 S.W.3d 422 (Ky. App. 2015), it has jurisdiction to review an order denying summary judgment in a case where the circuit court has determined that the defendant is not entitled to up-the-ladder immunity as a matter of law. The problem here, though, was that the circuit court's order denying summary judgment consisted of one handwritten sentence that provided no basis or reasoning underlying the ruling. Thus, the Court could not ascertain the basis for the ruling, which was determinative of whether the Court could actually review it. Consequently, the Court vacated and remanded for an order specifically setting forth the basis for the circuit court's determination.

### **Noel v. Welch**

**[2018-CA-000187](#) 03/15/2019 2019 WL 1213253 DR Pending**

Opinion by Judge Nickell; Judges Kramer and Lambert concurred.

Appellant collided with a Lexington-Fayette Urban County (LFUCG) police cruiser driven by Officer Trevor Welch. Appellant sustained significant injuries and, alleging negligence, filed suit against Welch in his individual and official capacities and against multiple LFUCG entities. LFUCG moved to be dismissed from suit on grounds of sovereign immunity. In response, appellant claimed that LFUCG's purchase of third-party automobile liability insurance - as permitted by KRS 67.180(1) - waived sovereign immunity up to the policy limits. The circuit court granted the motion to dismiss, and the Court of Appeals affirmed. The Court noted that close inspection of LFUCG's retained limits policy confirmed that it was not the type of coverage contemplated by KRS 67.180(1). A liability policy in name only, it merely indemnified LFUCG for damages it had become legally obligated to pay, and it absolved the third-party carrier of any and all responsibility for defending claims against LFUCG - unlike a traditional "automobile liability policy." Consequently, the existence of this policy did not constitute an express waiver of LFUCG's sovereign immunity defense under KRS 67.180.