

**Kentucky Supreme Court**  
**Cases of Note**  
**[September-October, 2022](#)**

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1. Hold down the control (“Ctrl”) key and click on the link.
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**INSURANCE**

**Ashland Hospital Corporation D/B/A King’s Daughters Medical Center, et al. v. Darwin Select Insurance Co. N/K/A Allied World Surplus Lines Insurance Co., et al.**

**[2020-SC-0260-DG](#) October 20, 2022**

Opinion of the Court by Justice Conley. Minton, C.J.; Conley, Hughes, Keller, Nickell, and VanMeter, JJ., sitting. Hughes, Keller, Nickell, and VanMeter, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion. Lambert, J., not sitting. In May 2011, the DOJ began an investigation into KDMC for potential violations of federal health laws. KDMC notified and obtained coverage for the costs of complying with that investigation under a D&O policy. In September 2013, hundreds of plaintiffs filed suit against KDMC in Boyd Circuit Court, alleging tortious conduct related to the DOJ investigation (but this would not be an established fact until May 2014). KDMC notified and sought professional liability and excess coverage for those claims under its 2012-13 policies. Darwin and Homeland Insurance denied coverage based on Exclusion 15, the prior notice of events exclusion, arguing the coverage obtained under the D&O policy in 2011 was notice of facts, matters, and events giving rise to a claim to a prior insurer based on the subpoena issued by the DOJ in May 2011. KDMC filed a declaration of rights in 2015. The Circuit Court ruled in KDMC’s favor. On appeal, the Court of Appeals reversed and found Exclusion 15 was applicable to bar coverage. The appellate court further ordered KDMC pay recoupment costs to the insurers for the costs of litigation up to that point. KDMC sought discretionary review and the Supreme Court granted.

Held: Exclusion 15 did not apply to bar coverage because the May 2011 subpoena was lacking in the requisite specificity required by the insurance policy to constitute notice of circumstances giving rise to a claim and because KDMC had given the insurers notice of the subpoena and investigation during the negotiation period for the 2012-13 policies. The Court noted that the insurers’ understanding of the subpoena up until November 2013 had also been the subpoena was insufficient to constitute notice of circumstances giving rise to a claim—only when coverage was sought for the tort litigation in Boyd County did the insurers officially reverse their position. Nonetheless, the unambiguous language of the policy required the time, date and place of the incident giving rise to a claim; a description of it; a description of the injury or damage which has allegedly resulted or may result from it; how and when KDMC first became aware of the incident and the names, addresses and ages of the injured parties and any witnesses. The subpoena simply did not contain this information with the requisite specificity, and in several respects wholly omitted the required information altogether.

The Court also reversed the Court of Appeals in holding that notice could be obtained from multiple sources over a number of years. Instead, a reasonable interpretation of the policy as a lay reader would understand it would require notice of circumstances giving rise to a claim be contained in a single communication, with supplementation allowed for errors or inadvertent

omissions within a reasonable time. The Court also held that despite KDMC obtaining insurance coverage for the investigation under the D&O policy in 2011-12, because the insurers were aware of that fact when negotiating the insurance policies for 2012-13, it was incumbent on the insurers to clearly state in the policy that they would not cover any potential claims which may have arisen from the same facts, matters, and events of the DOJ investigation. The failure of either party to clearly state its understanding of the effect notice of the DOJ investigation had on the policy coverage led to a latent ambiguity as to the effect of the notice on Exclusion 15's applicability. Under normal rules of insurance contract interpretation, an interpretation favoring coverage will be adopted so long as it is reasonable given a lay reader's understanding of the facts and language. According to this rule, the Court held the specific notice of the DOJ investigation to the insurers prior to the policies taking effect defeated the general provision of Exclusion 15. The insurers stimulated the expectation of risk protection by failing to inform KDMC of their belief Exclusion 15 would bar any coverage of potential claims related to the DOJ investigation.

Finally, the Court reversed the Court of Appeals ruling as to recoupment, holding the lack of a final order or judgment from the circuit court on that matter, as well as the fact the issue had not been identified on appeal by either party nor briefed before the appellate court, means the Court of Appeals lacked subject matter jurisdiction to make that ruling. The Supreme Court remanded back to the Court of Appeals to consider the applicability of two other exclusions invoked by the insurers but not considered by that court previously due its ruling on Exclusion 15.

## **TORTS**

### **The City of Barbourville, Kentucky, et al. v. Evelyn Hoskins, et al. [2021-SC-0435-DG](#) October 20, 2022**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Civil appeal. Discretionary review granted. In this premises liability case, the City of Barbourville appealed from a decision of the Court of Appeals reversing the trial court's grant of summary judgment to the City with regard to Hoskins's premises liability claim. Evelyn Hoskins suffers from diabetic neuropathy, which causes a loss of protective sensation in her feet. She visited Barbourville Water Park and walked on the sunheated concrete sidewalks for approximately ten minutes. After returning home, she discovered blisters on her feet. Her feet eventually became infected and required partial amputation. Hoskins brought suit against the City, claiming the City did not fulfill its duty of care to her as an invitee to the water park. The trial court granted summary judgment in favor of the City. The Court of Appeals reversed, concluding that Hoskins's claims included questions of fact that should have been submitted to a jury. On discretionary review, the Supreme Court reversed the Court of Appeals' holding regarding Hoskins's premises liability claims, finding that Hoskins's case was a rare circumstance in which no reasonable jury could find an unreasonable risk to exist and no reasonable jury could deem Hoskins's injuries sufficiently foreseeable to impute liability to the City. Thus, the trial court did not err in granting summary judgment in the City's favor on Hoskins's premises liability claim.

## **WORKERS COMPENSATION**

### **Lakshmi Narayan Hospitality Group Louisville v. Maria Jimenez, et al. [2021-SC-0449-WC](#) September 22, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Maria Jimenez was employed as a housekeeper by Lakshmi Narayan Hospitality Group (Holiday Inn) when she slipped and sustained injuries to her neck, head, left shoulder, and back in 2014. The Chief Administrative Law Judge (CALJ) awarded temporary total disability benefits and in 2019, Jimenez’s claim was reopened pursuant to Kentucky Revised Statute (KRS) 342.125(1)(d) after she alleged a worsening of her condition. Holiday Inn objected and asserted that *res judicata* barred reopening. Relying on Jimenez’s deposition testimony and medical evidence, a different Administrative Law Judge (ALJ) awarded Jimenez permanent partial disability benefits and future medical benefits for treatment of her cervical spine. The Workers’ Compensation Board (Board) disagreed and determined that Jimenez’s claim was barred by *res judicata*. The Court of Appeals concluded that Jimenez’s claim was not barred and that the Board misconstrued the reopening statute because nothing in the statute precludes the reopening of an award of temporary disability benefits.

The Supreme Court affirmed the Court of Appeals, holding that the Board misconstrued the reopening statute. The statute does not restrict or limit reopening to particular types of claims or awards. Further, *res judicata* does not apply if the issue is the claimant’s physical condition or degree of disability at two entirely different times. The observable symptoms necessary to support a permanent disability award can become more manifest over a period of time extending beyond the original proceedings and applying *res judicata* in this instance would undermine the purpose of the workers’ compensation system.

## WRITS

### **Latrice Marie Leslie-Johnson, Individually, et al. v. Honorable Audra Jean Eckerle, et al. [2021-SC-0450-MR](#) September 22, 2022**

Opinion of the Court by Justice VanMeter. All sitting; all concur. On appeal from the Court of Appeals’ denial of petitioners’ writs of prohibition and mandamus, the Supreme Court affirmed, finding petitioners failed to make the necessary showing of irreparable harm or to demonstrate an error to justify invocation of the “special circumstances” exception. The matter arose from civil litigation between Johnson and Norton Hospitals. Johnson gave birth at a Norton facility by way of a c-section, but the child died of complications shortly after birth. Johnson and her husband, as administrators of the child’s estate, filed a medical negligence action against the hospital. As part of that litigation, Norton sought in discovery extensive social media records for both parents. The Johnsons objected and Norton moved to compel production. The circuit court granted the motion and denied a subsequent motion to reconsider. The Johnsons then filed an original action in the Court of Appeals seeking writs of prohibition and mandamus. The Court of Appeals denied the petition and the Johnsons appealed. The Supreme Court affirmed, noting that writs are extraordinary remedies which may only be granted in two circumstances. Only the second circumstance was at issue, where the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. The Court reasoned the production of social media information did not fall into the second circumstance. CR 26.02(1), read liberally, tilts in favor of production and the Johnsons could point to no specific privilege that production of the records would violate. The discovery request was relevant, the period for which discovery was sought was made broad partially by the actions of the Johnsons, and the trial court ordered all social media data to be treated as “strictly confidential.” Accordingly, the Court found the Johnsons failed to show the irreparable harm required to justify the grant of the writs.