

**Kentucky Court of Appeals**  
**Cases of Note**  
**September-October, 2008**

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

1. Hold down the control (“Ctrl”) key and click on the link.
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**Items captioned in red were previously reported in prior “Kentucky Legal Cases of Note.”**

**INSURANCE**

**Kentucky Farm Bureau Mutual Insurance Co. v. Blevins**

**2008-CA-000525 08/22/2008 2008 WL 4530712 Ord pub 10/31/2008**

Opinion by Judge Keller; Judges Thompson and Wine concurred. The Court reversed on direct appeal and affirmed on cross-appeal, a declaratory judgment holding that an insurer did have a duty to defend and provide coverage on a claim of fraudulent misrepresentation but that it had no duty to defend on claims for breach of contract and defective workmanship in an action brought against appellees by the purchasers of their home. The Court held that because the transaction involved was a private sale of residential property from one homeowner to another, there was no business transaction as required by Restatement (Second) of Torts § 552 and therefore, the tort of negligent misrepresentation could not be established. Because the tort was inapplicable, the insurer was not required to provide a defense or indemnification. The Court then adopted the holding in *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574 (6th Cir. 2001), and held that appellees allegedly false representation on the disclosure statement concerning the condition of the house did not cause the damage to the house. Therefore, the claim for breach of contract did not constitute an “occurrence” under the liability provisions of the homeowners’ policy so as to trigger the insurer’s duty to defend and indemnify.

**Rudolph v. Shelter Insurance Companies**

**2007-CA-000799 09/05/2008 2008 WL 4091648 Reh filed 09/17/2008**

Opinion by Judge Clayton; Judge Dixon and Senior Judge Graves concurred. The Court vacated and remanded a summary judgment in favor of the appellee insurer on a claim that the insurer was liable under a contract for homeowner’s insurance after a fire destroyed appellants’ home. The Court first held that one of the appellants, not a party to the complaint against the insurer and not a signatory to the insurance application, was properly dismissed as a party to the appeal. The Court then held that the trial court erred in granting summary judgment to the insurer. Whether appellant was aware of his false answer to a question regarding his felony conviction when he signed the application for insurance was a question of fact for a jury.

**Tennessee Farmers Mutual Insurance Company v. Jones**

**2007-CA-000911 09/12/2008 2008 WL 4182022 DR filed 10/15/2008**

Opinion by Judge Lambert; Judges Dixon and Stumbo concurred. The Court affirmed a circuit court judgment finding personal jurisdiction against the appellant Tennessee insurer and awarding attorney’s fees and prejudgment interest to appellee on a claim for that the insurer violated the Kentucky Unfair Claims Settlement Practices Act, KRS 304.12-230, related to a claim for personal injuries appellee received in an automobile accident. Appellant insured the Tennessee resident who owned the vehicle driven by the person responsible for the causing collision. The Court held that the trial court did not err in finding personal jurisdiction through Kentucky’s long-arm statute. The accident occurred in Kentucky; appellee, a Kentucky resident,

filed her third-party claim in Kentucky; there was no privity of contract between appellee and appellant in any state; and appellant investigated and adjusted the claim in Kentucky. Further, allowing the insurer to ignore a legitimate claimant would undermine the intent of the UCSPA. The Court then held that the trial court properly awarded appellee attorney's fees and prejudgment interest under KRS 304.12-235. While the statute was ambiguous on whether interest and attorney fees were available to third-party claimants, KRS 304.12-230 evinced the intent by the legislature to allow for a more expansive reading of the statute. The Court finally held that appellee's failure to move the trial court for a new trial, precluded the Court from reviewing her argument on cross-appeal that she was entitled to a new trial on damages.

### **Best v. West American Insurance Company**

**[2007-CA-002289](#) 09/26/2008 2008 WL 4368208 Reh filed 10/16/2008**

Opinion by Judge Moore; Judges Nickell and Stumbo concurred. The Court vacated and remanded a summary judgment in favor of the appellee insurer on appellant's claim alleging that the insurer had improperly denied his insurance claims for the alleged theft of vehicles and that the insurer violated the Kentucky Unfair Claims Settlement statute, KRS 304.12-230. The Court first held that the trial court erred in granting summary judgment to the insurer, as there were issues of fact in dispute as to whether appellant fulfilled his contractual obligations to become the owner of the vehicles pursuant to a bona fide contract and as to how the person who took the vehicles obtained title. Enough evidence was presented to question whether the person who took the vehicles, claiming a superior right to ownership, could lawfully repossess the vehicles or whether appellant was the victim of a theft. The Court next held that the insurer failed to carry its burden of establishing that appellant failed to provide prompt notice of the loss so that it suffered substantial prejudice from the delay. The Court finally held that appellant's failure to include in his prehearing statement his challenge to a trial court finding that he did not have a claim for bad faith precluded review of that issue.

### **Commonwealth v. Reinhold**

**[2007-CA-000661](#) 10/10/2008 2008 WL 4530900**

Opinion by Senior Judge Rosenblum; Judge Nickell concurred in result only by separate opinion; Judge Thompson dissented by separate opinion. The Court affirmed an order of the circuit court that found that the appellee nonprofit publication designed to match subscribers with donors willing to pay the subscribers' medical expenses was not insurance. The Court held that, although the publication shared many similarities to insurance, because all risks and obligations to pay medical expenses remained with the subscribers, it did not meet the definition of insurance under KRS 304.1-030.

### **Cincinnati Insurance Company v. Hofmeister**

**[2004-CA-002296](#) 10/17/2008 2008 WL 4601140**

Opinion by Judge Acree; Senior Judge Knopf concurred; Judge Keller concurred in result only. The Court reversed on direct appeal and dismissed as moot on cross-appeal from a judgment entered after a jury found the appellant insurer liable to appellees for fraudulent misrepresentation and for violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230, related to a tort claim stemming from an automobile accident. Appellant was the insurer for the tortfeasor's employer. The Court held that the trial court erred in failing to enter a directed verdict in the insurer's favor on the issue of whether the attorney hired by the insurer to represent the insured employer was an agent of the insurer for purposes of settlement negotiations. There was no evidence to support the finding of an agency relationship between the insurer and the attorney it hired to defend its insured. Further, the attorney began and maintained his representation of the employer as an independent contractor and therefore, the insurer could not be vicariously liable for any actions taken by the attorney in the performance of his representation of the insured. The Court next held that the trial court erred in

failing to direct a verdict in favor of the insurer on the claim of fraudulent misrepresentation. The insurer was not vicariously liable for the statements made by the attorney, appellees' failed to prove reasonable reliance on representations made by the attorney and there was no evidence that the attorney knew the representations were false. The Court then held that the trial court erred in failing to direct a verdict in favor of the insurer on the claim for violations of the UCSPA, as the issue of the vicarious liability of the employer was fairly debatable and therefore, the insurer's actions were reasonable. Further, the trial court erred in allowing the case to go to a jury when the evidence revealed a complete absence of proof of tortious conduct, outrageous behavior, evil motive or reckless indifference by the insurer. Because the Court determined that appellant was entitled to a directed verdict, the cross-appeal challenging the reduction of the punitive damage award was moot.

## **TORTS**

### **Bolin v. Davis**

[2006-CA-002259](#) 10/31/2008 2008 WL 4754848

Opinion by Judge Nickell; Judges Stumbo and Thompson concurred. The Court affirmed an order granting summary judgment to a county road engineer on an estate's claim for wrongful death after the deceased's truck skidded off a roadway at a sharp curve at the bottom of a steep hill, plunged into a creek, submerged upside down in icy water and trapped the deceased. The Court first held that the estate asserted a claim against the county road engineer in his individual capacity. Although the estate did not identify him in his individual capacity in the heading, body or demand, the complaint stated a claim based upon the engineer's individual actions and therefore, the complaint sufficiently stated a claim against the engineer in his individual capacity. Since he did not file a motion for a more definite statement under CR 12.05, the Court concluded that he was neither misled nor prejudiced. The Court then held that the engineer's decision not to install a guardrail at the location, but rather to reduce the speed with signs to that effect, was a discretionary function for which he was cloaked in qualified official immunity. Therefore, the trial court did not err in granting summary judgment in his favor.

### **West v. KKI, LLC**

[2007-CA-001463](#) 10/03/2008 2008 WL 4664232

Opinion by Senior Judge Henry; Chief Judge Combs and Judge Keller concurred. The Court affirmed a summary judgment granted to Kentucky Kingdom amusement park on appellant's claim related to injuries she allegedly suffered while riding a stand-up roller coaster. The Court held that the trial court properly granted summary judgment on appellant's theories of ordinary negligence in the operation of the roller coaster, products liability/design defect and products liability/manufacturing defect, as there was no evidence to support those theories. The Court then held that the trial court did not abuse its discretion in excluding, pursuant to Daubert, the testimony of appellant's amusement park safety expert on appellant's failure-to-warn claim. The expert's conclusions regarding the safety of the roller coaster were based upon little more than his exclusively subjective opinion. The Court further held that the testimony of appellant's medical expert was not sufficient to defeat summary judgment in that it was based upon the inadmissible testimony of the amusement park safety expert and appellant's anecdotal representations. After the exclusion of the expert's testimony, appellant could not show that there was a genuine issue of material fact and therefore, the trial court properly granted summary judgment on the failure-to-warn claim.

### **Young v. Carran**

[2008-CA-000082](#) 10/24/2008 2008 WL 4683236

Opinion by Senior Judge Lambert; Judges Keller and Wine concurred. The Court affirmed an order granting summary judgment to the appellee law firm on appellant's claims under HIPAA for the inadvertent disclosure of her medical and psychiatric records to the opposing party in child custody litigation. The Court held that KRS 446.070, which provided an avenue by which a damaged party may sue for a violation of a statutory stand of care, did not extend to federal statutes. The Court then held that 42 U.S.C. § 1320d-6 and its corresponding regulations did not impose a duty of care on appellees allowing for a Kentucky common law negligence per se claim. The Court declined to consider appellant's preemption claims as they were not presented to the trial court.

## **WORKERS' COMPENSATION**

### **R.O. Giles Enterprises, Inc. v. Mills**

**[2008-CA-000709](#) 09/26/2008 2008 WL 4379584**

Opinion by Judge Moore; Judges Nickell and Stumbo concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming a finding by the ALJ that appellant was an up-the-ladder contractor pursuant to KRS 342.610(2)(a). The Court held that there was substantial evidence to support the finding that appellant entered into a contract for the service of removal of timber from its property for the purpose of generating revenue and to facilitate the subsequent removal of coal by strip mining. Therefore, it was subject to liability under the unambiguous terms of the statute.