

**Kentucky Court of Appeals**  
**Cases of Note**  
**March-April, 2009**

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

## **TORTS**

### **Wasson v. Morris**

**2008-CA-000780 03/06/2009 2009 WL 563599**

Opinion by Judge Stumbo; Judge Taylor and Senior Judge Graves concurred. The court affirmed an order of the circuit court granting summary judgment to the county sheriff on a Kentucky state trooper’s negligence claim for injuries he received in the line of duty while responding to a domestic disturbance call. The Court held that summary judgment was proper in that appellee owed no duty of care to appellant because there was no special relationship. The Court further held that appellee was absolutely immune from suit in both his official and individual capacities. The Court distinguished the holding in *Jones v. Cross*, 260 S.W.3d 343 (Ky. 2008) and held that KRS 70.040 did not waive appellee’s absolute official immunity because neither appellee, nor the deputy who allegedly failed to give specific facts about the call to appellant, owed a duty of care to the trooper.

### **Tapp v. Owensboro Medical Health System, Inc.**

**2008-CA-000848 04/10/2009 2009 WL 960826**

Opinion by Judge Acree; Judge Moore and Senior Judge Knopf concurred. The Court affirmed a judgment of the circuit court dismissing a negligence action against a doctor and hospital. The Court held that the trial court did not abuse its discretion in allowing a doctor to testify regarding the nurses’ standard of care. The testimony complied with the requirements of KRE 702 in that the testimony was within the board certified pediatrician’s area of expertise; his opinion was based upon facts and data, including deposition testimony of all relevant witnesses and medical records admitted into evidence; the principles and methods used to assess the facts and data were obtained from the doctor’s career focusing on pediatric patients, including emergency situations, and were typical of traditional medical education in the specialty; and the doctor clearly applied reliable principles and methods to the specific circumstances. The Court declined to adopt holdings from other jurisdictions that physicians were incompetent to testify regarding a nurses’ standard of care.

## **WORKERS' COMPENSATION**

### **Airtran Airways, Inc. v. Fortney**

**2008-CA-001223 03/27/2009 2009 WL 804216**

Opinion by Judge Clayton; Judges Lambert and Wine concurred. The Court reversed an opinion of the Workers’ Compensation Board reversing an ALJ decision that a widow was not entitled to workers’ compensation benefits when her husband, a pilot, died in an airplane accident while taking a flight on ComAir to Atlanta to begin his workday for AirTran. The Court first held that the widow’s issue regarding the “going and coming” rule was preserved for appellate review and was properly before the Board when it was listed as a contested issue at the benefit review conference. The Court then held that because the deceased was going to his workplace when the accident occurred, the going and coming rule was applicable and that the Board erred by holding

that the reciprocal jumpseat agreement between the airlines benefited AirTran so as to bring it under the employer conveyance exception to the coming and going rule.

## **CIVIL PROCEDURE (WORKERS' COMPENSATION)**

**Kaminski v. Bremner, Inc.**

**[2006-CA-002439](#) 03/27/2009 2009 WL 792518**

Opinion by Judge Nickell; Judges Moore and Stumbo concurred. The Court affirmed a judgment of the circuit court entered subsequent to jury verdict finding in favor of appellee on his claim that he was terminated for filing a workers' compensation claim and an order denying a motion for a new trial alleging juror misconduct and irregularities in the jury verdict. The Court first held that the modification of the jury verdict by the foreman in open court did not constitute reversible error and that the trial court did not abuse its discretion in denying appellant's motion for a new trial. The trial court's action in invalidating the original verdict and sending jurors back to the jury room sanitized any irregularity or inconsistency. The Court next held that the trial court did not abuse its discretion in choosing to clarify a juror's agreement with the verdict instead of sending jurors back to the jury room for a third time. Further, the phraseology used by the trial court in posing the oral polling inquiry did not alter how each individual juror had already voted. The Court finally held that the trial court did not abuse its discretion in crafting the written jury instructions. Appellant's version was essentially the same as the one given by the Court, it was not confusing, it correctly reflected the law, and appellant accepted the instruction without complaint and did not suggest that it be clarified before jurors were returned to the jury room to resume deliberations.