

**Kentucky Court of Appeals**  
**Cases of Note**  
**[September-October, 2009](#)**

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

**Bryant v. Hopkins**

**[2008-CA-002099](#) 10/09/09 2009 WL 3231220 DR Pending**

Opinion by Judge Lambert; Senior Judge Henry concurred; Judge Stumbo dissented by separate opinion. The Court affirmed an order of the circuit court granting summary judgment and dismissing appellant’s complaint against the appellee insurer for underinsured motorist (UIM) benefits. The Court held that the trial court did not err in ruling that the insurer was not estopped from denying liability for UIM insurance benefits. The insurer’s election to protect its subrogation rights under *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993), and KRS 304.39-320 by advancing payment, did not create a presumption or acknowledgement that the UIM insurance carrier had admitted coverage to the injured party beyond the amount advanced under its policy or that it waived any defense of non-coverage in any subsequent litigation. Simply discussing the claim prior to the initiation of litigation did not imply or create a reasonable presumption that the claim was accepted or admitted. Further, once the trial court permitted the insurer to amend its answer, the existence of an admission upon the record was essentially extinguished. Finally, the contract of insurance could not be created or enlarged by estoppel or waiver. Since appellant was not entitled to UIM benefits in the first place, estoppel was not available to provide benefits.

**Cain v. American Commerce Insurance Company, Inc.**

**[2008-CA-001500](#) 10/30/09 2009 WL 3486701**

Opinion by Judge Stumbo; Judges Acree and Wine concurred. The Court affirmed a declaratory and final judgment of the circuit court interpreting KRS 304.39-140 and determining that appellee fully satisfied its obligation to pay benefits under an insurance policy it issued to appellant. The Court held that KRS 304.39-140(1) did not require the insurer to provide \$40,000 in added reparation benefits but merely to offer it to appellant. Because appellant did not request the coverage, the insurer was not required to provide it. The Court further held that because appellant did not request the coverage, the trial court did not err in ruling that she was not entitled to relief under the Kentucky Unfair Settlement Practice Act or a common law bad faith claim. Similarly, she was not entitled to interest on any overdue payments nor attorney fees.

**TORTS**

**Boland-Maloney Lumber Company, Inc. v. Burnett**

**[2008-CA-000059](#) 9/11/09 2009 WL 2901206 DR pending**

Opinion by Judge Wine; Judges Acree and Stumbo concurred. The Court affirmed on direct appeal and reversed on cross-appeal a judgment of the circuit court entered subsequent to a jury verdict in favor of the injured person in a negligence action involving an injury occurring on a staircase. The Court first held that the trial court did not abuse its discretion in allowing the matter to proceed to the jury absent expert testimony on the defendant’s duty. The uniformity of

stair risers on a stairway is an abundantly apparent standard, even among laypersons, so that anyone could interpret the exceptional foreseeability of risk. The Court then held that the trial court did not err in refusing to allow any apportionment of fault to a subcontractor. The right to apportionment did not extend to the subcontractor that had been determined not to be liable as a matter of law. The Court then held that the trial court had the inherent authority to enforce its orders and therefore, did not err in refusing to grant a motion to allow expert testimony when the defendant failed to disclose the experts after an order was entered that no additional discovery would be allowed. The Court then held that the trial court did not abuse its discretion in allowing testimony from an economic expert concerning the injured person's earning capacity. Although the testimony was not based on actual earnings at the time of injury, nothing precluded testimony on the impairment to earn money or the use of a "proxy" to do so, where current earnings were not indicative of earning power. The Court then held that the trial court did not err in allowing testimony in violation of an order that the plaintiff's witnesses could not testify that the stairs violated the Kentucky Building Code. The defendant waived the issue when it failed to object to the testimony at trial, defendant's counsel brought up the reference to the Kentucky Building Code, and the testimony was not in violation of the order. The Court then held that the defendant's failure to specifically object to the final written instructions precluded review but even so, although the present case was not a premises liability case, the use of the term "unreasonably dangerous" was often found instructed in cases other than products liability when dealing with an ordinary care standard so that the trial court did not abuse its discretion in including the instruction. The Court finally held that the trial court erred in excluding evidence related to plaintiff's claim for future prescription medication expenses. Although there was no expert testimony as to the amount of medication required or the likely cost of the medication over the remainder of the plaintiff's lifetime, the plaintiff entered the yearly cost of the prescription drugs by avowal and the doctors testified that the plaintiff suffered from a seizure disorder which would likely require him to take medication for the remainder of his life. The Court reversed and remanded for a determination on the sole issue of future prescription medication expenses.

### **Fuel Transport, Inc. v. Gibson**

**[2008-CA-000969](#) 9/25/09 2009 WL 3047578 Rehearing pending**

Opinion by Judge Clayton; Judge Thompson and Senior Judge Lambert concurred. The Court affirmed in part and reversed in part a judgment of the circuit court entered subsequent to a jury verdict in favor of an estate in a wrongful death case awarding compensatory and punitive damages. The Court first held that the trial court did not abuse its discretion in denying a motion for a new trial based on a claim of juror misconduct. During *voir dire*, appellants failed to ask a proper question to elicit a response they complained was prejudicially omitted by the juror. Further, the juror did not sign the verdict form awarding compensatory damages. The Court next held that, although appellant failed to exercise reasonable care in failing to fix the coal truck that caused the accident, the failure did not rise to the level of wanton or reckless disregard for others so as to prove the gross negligence necessary for an award of punitive damages. Therefore, the trial court erred in overruling appellant's motion for a directed verdict on the issues of punitive damages. The Court next held that the trial court properly admitted an affidavit regarding the ownership of the coal truck and the employment of the driver, as it affected the credibility of a key witness. The Court next held that appellants waived the right to challenge the award for pain and suffering when they failed to object to the \$2 million limit on possible recovery. Even so, the award was supported by evidence that the deceased had intervals of consciousness until her death. The court then held that appellants' failure to object to jury instruction until immediately prior to the reading of the instructions to the jury, and failure to request an instruction limitation for "conscious" pain and suffering, waived the issue. The Court finally held that the trial court properly denied appellants' requests for change of venue.

**Goodman v. Goldberg & Simpson, P.S.C.****[2008-CA-000921](#) 10/16/09 2009 WL 3321024 Rehearing Pending**

Opinion by Senior Judge Harris; Judges Acree and Lambert concurred. The Court affirmed a summary judgment granted in favor of lawyers (including appellant's brother) and a law firm and dismissed appellant's tort claims against them related to the distribution of assets from two estates. The Court held that the trial court correctly concluded that there were no genuine issues of material fact. First, even if appellant's brother made alleged representations as to the division of their father's estate, appellant provided no evidence that he relied upon the representations to his detriment other than to state that he would have initiated criminal proceedings against the father. The court next held that there was no evidence of a contract between appellant and the father so that his claim of intentional interference with contract must fail. The Court next held that the father did not owe appellant a fiduciary duty as an intended beneficiary of the mother's estate so that his claim for aiding and abetting breach of fiduciary duty failed as a matter of law. The Court next held that there was no concrete evidence to establish that the brother committed any wrongdoing against appellant and it was the father's prerogative to dispose of his estate as he saw fit. Therefore, the claim for the tort of outrage must fail. The Court next held that because there was no attorney-client relationship between the brothers, the claim of legal malpractice must fail. The Court next held that there was no evidence that the law firm or the attorney who drafted the father's will had any knowledge of any purported agreement as to the distribution of assets and moreover, they owed a fiduciary duty to the father and therefore, the claim for breach of fiduciary duty and malpractice as to them must fail. The Court next held that the law firm did not owe a duty to appellant as an intended third-party beneficiary of the father's will. The Court finally held that the trial court did not prematurely enter summary judgment. Appellees moved for summary judgment after two years after which the trial court allowed another six months of discovery, the record was voluminous, appellant had the opportunity to and did supplement the record, and appellant did not specify what significant information he was not able to obtain through discovery.

**Hawes v. LaPointe****[2008-CA-001559](#) 10/16/09 2009 WL 3321082 Rehearing Pending**

Opinion by Judge Dixon; Judge Caperton and Senior Judge Henry concurred. The Court vacated and remanded an order of the circuit court dismissing appellant's/cross-appellee's civil action against appellee/cross-appellant in which he sought damages for assault, battery and emotional distress. The Court first held that the trial court did not erroneously violate appellant's/cross-appellee's right to a jury trial by granting the motion to dismiss. His rights could not be violated by a procedure he specifically agreed to. The Court next held that the trial court clearly erred in dismissing the civil action against appellee/cross-appellant on the grounds that his conduct was lawful and justified under KRS 503.080 and KRS 503.055. While KRS 503.058 was remedial and thus retroactive, KRS 503.055 was not in effect at the time of the incident in question and since it was deemed to be a substantive change in the law, it could not be applied retroactively. The Court further held that the trial court erroneously interpreted KRS 503.055. There was no evidence in the record to support a finding that appellee/cross-appellant held a "reasonable fear of imminent peril or great bodily harm."

**WORKERS COMPENSATION****Bell v. Consol of Kentucky, Inc.****[2009-CA-000673](#) 9/4/09 2009 WL 2830950 Released for pub.**

Opinion by Senior Judge Harris; Judges Moore and Nickell concurred. The Court affirmed a decision by the Workers' Compensation Board affirming a decision of the ALJ to reduce benefit payments by 50%, pursuant to KRS 342.730(3), after the worker died in an accident. In a case of

first impression, the Court held that KRS 342.730(3) applies to settlement agreements. The Court further held that KRS 342.265(4) and KRS 342.125 were not applicable, as the issue was how remaining benefits of an award were to be distributed to a widow after the employee's death from a non-work related injury. The Court rejected the argument that the application of KRS 342.730(3) was contrary to public policy.

**Sullivan v. Wolf Creek Collieries**

**[2009-CA-000385](#) 9/11/09 2009 WL 2901561 Released for pub.**

Opinion by Senior Judge Harris; Judges Moore and Nickell concurred. The Court affirmed a decision of the Workers' Compensation Board finding that an employer was equitably estopped from contesting a worker's treatment for depression but that the employer was only estopped from denying compensability to the date of the ALJ's decision. The worker was treated by a physician who did not accept Kentucky workers' compensation patients and with whom the worker entered into an arrangement whereby the worker paid for his treatment out of pocket and was then reimbursed by the employer. The Court held that it was undisputed that the balance billing arrangement violated KRS 342.020(1) and KRS 342.035(2) and once the employer filed the medical fee dispute, the worker was on notice that the fees were being challenged and he could no longer rely upon past representations or omissions on the employer's part.

**Bowerman v. Black Equipment Company**

**[2008-CA-000828](#) 10/02/09 2009 WL 3162147 Released for publication**

Opinion by Judge Nickell; Judge Caperton concurred; Judge Keller dissented by separate opinion. The Court reversed and remanded an opinion of the Workers' Compensation Board affirming the opinion and award of an Administrative Law Judge. The Court held that the reversal of prior dispositive factual findings rendered in an interlocutory opinion - absent the introduction of new evidence, fraud or mistake - was arbitrary, unreasonable, unfair and unsupported by sound legal principles. While the abatement of the claim pending maximum medical improvement did not mandate an award of temporary total disability (TTD) benefits, the ALJ's original factual findings mandated an award under KRS 342.0011(11)(A) during the abatement of the claim.