

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

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INSURANCE

Kentucky Associated General Contractors Self-Insurance Fund (KAGC) v. Music Construction, Inc.

[2008-SC-000795-DG](#) October 29, 2009

Opinion of the Court. All sitting; all concur. Employee suffered permanent and total disability from a trench collapse. KOSHA subsequently cited the employer for intentional safety violations. Because of these violations, employee sought and received a 30% enhancement to his disability award, as allowed under KRS 342.165(1). KAGC, the employer’s workers’ compensation insurance carrier (the Appellant), sued the employer for reimbursement of the amount of the increase in benefits, citing a specific exclusion in the contract of insurance. The trial court dismissed the suit for failure to state a claim. The Court of Appeals affirmed the dismissal, holding that under *AIG/AIU v. South Akers Mining*, the claim was barred. The Supreme Court reversed, noting that *AIG/AIU* did not apply since it was a workers’ compensation case involving a statutory requirement that carriers promptly pay all benefits. By contrast, the Court held this case was centered on a contract dispute where the injured worker has no stake or interest in the outcome. The Court remanded the case back to the circuit court.

TORTS

Comair, Inc.; and Comair Services, Inc. v. Lexington-Fayette Urban County Airport Corporation et. Al

[2007-SC-000602-TG](#) October 1, 2009

Opinion by Justice Noble. All sitting; all concur. The estates of persons killed in a commercial airplane crash sued Comair, the flight operator. Comair then filed a third-party complaint against the Lexington-Fayette Urban County Government Airport Board, the LFUCG Airport Corporation and members of the board in their official capacities alleging negligence in operation of the airport where the accident occurred. The circuit court granted the third-party defendants motion to dismiss, holding they were entitled to immunity. Comair appealed and the Supreme Court transferred the case to its docket from the Court of Appeals. The Court affirmed, holding that the airport board and airport corporation were both agencies of the LFUCG, exercising a function integral to state government by providing essential transportation infrastructure—and thus immune from suit.

In reaching this decision, the Court moved away from the two-pronged test for sovereign immunity set forth in *Berns* (1: direction and control by central state government; 2: supported by funds from the state treasury). The Court concluded the *Berns* test was overly simple and limiting and that it did not lend itself to analyzing municipal entities. Instead, the Court held a preferable approach is a case-by-case analysis of a) the origins of the organization seeking immunity (i.e. state, county, municipal) to determine the level of immunity enjoyed by the “parent” entity; and b) whether the organization exercised a function integral to state government.

The Court rejected Comair’s argument that the airport board was engaged in a purely proprietary function—distinguishing providing transportation services from providing transportation infrastructure (terminals, runways, etc.). The Court concluded that the latter was a “quintessentially governmental function.”

Tina Martin, Administratrix of the Estate of Billie Carol Shreve, Deceased; and Donald Ray Shreve, Individually v. Ohio County Hospital Corporation

[2008-SC-000211](#) October 1, 2009

Opinion by Justice Noble. All sitting; all concur. Billie Carol Shreve died after suffering injuries in a car accident. Her estate and surviving spouse brought suit against the hospital under three causes of action: medical negligence, inadequate policies and procedures and violations of the Emergency Medical Treatment & Active Labor Act (EMTALA). The jury returned a verdict in favor of the plaintiffs, which included \$250,000 in damages for Mr. Shreve’s loss of consortium for the period of time from the accident until Mrs. Shreve’s death (approximately 5 and a half hours). The Court of Appeals reversed, holding that the hospital was entitled to a directed verdict on the EMTALA claim and that Mrs. Shreve had not lived long enough after the accident to allow for loss of consortium damages since such damages terminated at her death.

The Supreme Court first addressed the loss of consortium issue, noting that at common law, damages terminated at the death of the spouse since the loss would then be covered by a wrongful death suit. However, the General Assembly enacted a loss of consortium claim by statute (KRS 411.145) which creates a cause of action for the spouse, not the estate. The Court noted that the statute is silent as to when the loss terminates. The Court determined that the focus of KRS 411.145 is compensatory in nature. Thus, the Court reasoned—full compensation could not be gained if damages are required to terminate at death. Further, the Court held that to put a value on loss of consortium while a spouse is incapacitated but to then say the loss is worthless after death defies common sense. The Court also pointed out that terminating loss of consortium damages at death provides a “perverse incentive” for tortfeasors to kill their victims instead of leaving them disabled. Lastly, the Court noted that the vast majority of states have statutory or case law providing that loss of consortium damages do not terminate at death. For these reasons, the Court reinstated the jury award and held that it would not impose a limitation on damages where the statute was silent on the matter.

The plaintiffs had also prevailed at trial on their claim that the hospital’s failure to follow EMTALA—the federal act designed to prevent hospitals from “dumping” patients who lack insurance or cannot pay—resulted in delayed treatment which caused Mrs. Shreve’s death. The Court upheld the Court of Appeals’ ruling that the hospital was entitled to a directed verdict on the EMTALA claim—agreeing that all statutory requirements were met. However, the Court held that the trial court’s refusal to grant a directed verdict on the EMTALA claim was harmless since the jury found liability for wrongful death on three theories of causation. Lastly, the Court provided appropriate jury instructions for use in EMTALA claims. These instructions do not include a general negligence instruction, since negligence is not a proper element of an EMTALA claim.

WORKERS' COMPENSATION

Betty J. Sweasy v. Wal-Mart; ALJ; & Workers' Compensation Board **[2009-SC-000219-WC](#) October 29, 2009**

Opinion of the Court. All sitting; all concur. The Supreme Court reversed the Court of Appeals, holding that the compensable period for permanent partial workers' compensation begins on the date the impairment arises. The Court of Appeals had previously ruled that KRS 347.730(1)(d) gave the ALJ discretion to award benefits beginning with the date the claimant reached maximum medical improvement (MMI). The Supreme Court held that neither the Court of Appeals nor the employer (the Appellee) could point to a reasonable basis for benefits to commence on any date other than when the impairment or disability arose.