

**Kentucky Court of Appeals**  
**Cases of Note**  
**January-February, 2010**

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## **INSURANCE**

### **Lynch v. Claims Management Corporation**

**[2007-CA-001840](#) 01/22/2010 2010 WL 199343**

Opinion by Judge Wine; Judges Clayton and Dixon concurred. The Court reversed and remanded a summary judgment in appellee’s favor on its intervening subrogation/reimbursement claim from settlement proceeds appellant received from his uninsured motorist carrier. Appellee was the claims administrator for a disability policy purchased by appellant, an independent contractor. The Court held that the trial court erred in granting summary judgment to appellee and denying summary judgment to appellant on the intervening claim. The insurance contract was both ambiguous and subject to a reasonable interpretation that appellee would only seek reimbursement from a third-party tortfeasor, not another insurer. Therefore, appellant was entitled to summary judgment.

### **Baldwin v. Doe**

**[2009-CA-000721](#) 02/05/2010 2010 WL 392343**

Opinion by Judge Caperton; Judge Stumbo and Senior Judge Knopf concurred. The Court reversed and remanded an order of the circuit court granting summary judgment to an insurer on appellant’s claim for a back injury he suffered after stopping to remove a tarp that flew from a flatbed truck onto his vehicle. The Court held that the impact set forth by the facts was sufficient to satisfy the physical contact required by the “strike” provision in appellant’s uninsured motorist coverage.

## **TORTS**

### **Baxter v. AHS Samaritan Hospital, LLC**

**[2008-CA-000541](#) 01/15/2010 2010 WL 133796**

Opinion by Judge Keller; Judge Acree concurred; Judge Caperton dissented in part by separate opinion. The Court affirmed a judgment of the circuit court dismissing a medical malpractice action after a jury found that a doctor was not negligent in failing to remove a surgical sponge following an appendectomy. Following the holding in *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009), the Court first held that the trial court did not err in overruling motions for partial summary judgment and directed verdict against the doctor under the doctrine of negligence per se. The Court next held that trial court correctly denied motions for partial summary judgment and directed verdict under the doctrine of *res ipsa loquitur*. Although the presence of the sponge constituted prima facie evidence of negligence, the expert testimony created a question of fact as to the doctor’s liability for the injuries. The Court next held that the trial court did not err by failing to give an instruction on the doctrine of *res ipsa loquitur*. Although *Nazar* allowed the jury to infer negligence and a party to avoid a directed verdict or to win a directed verdict, the instructions on the doctrine should not be submitted to a jury. The Court finally held that the trial court did not err in granting partial summary judgment, precluding a deceased infant from bringing a wrongful death action pursuant to KRS 411.130, because the experts concluded that the infant was never viable and was not capable of sustaining life apart from his mother. Even so, because the jury determined that the doctor was not negligent, he could not have been liable for the death of the infant.

**Bobbitt v. Collins**

[2007-CA-001422](#) 01/22/2010 2010 WL 199308

Opinion by Judge Wine; Judges Stumbo and Thompson concurred. The Court reversed and remanded summary judgment orders dismissing personal injury claims arising from a multi-vehicle collision. The Court held that the trial court did not err in finding that the clear language of a general release discharged all the defendants. Because the claimant did not make a timely acceptance of an offer of judgment and the settling defendants did not extend the settlement offer beyond the ten-day period allowed by CR 68, the settlement offer was subject to ordinary contract law. The Court then held that the trial court correctly found that the general release, signed by the claimant, was enforceable as a contract provision. Because the release was not ambiguous, the trial court was not required to look beyond its terms to interpret it. However, the Court held that the trial court erred in finding that the release precluded the claimant from seeking rescission and that the parol evidence rule precluded an equitable claim for rescission or reformation based on fraud, illegality or mutual mistake. The Court then held that the evidence clearly established a mutual mistake and that the parties to the contract never intended the general release language to be included. Therefore, the trial court erred by denying the request for rescission of the release.

**Brett v. Media General Operations, Inc.**

[2008-CA-000620](#) 01/29/2010 2010 WL 323136

Opinion by Senior Judge Harris; Judges Lambert and VanMeter concurred. The court affirmed a summary judgment entered by the circuit court in favor of appellant's former employer, a television station, and its general manager and an order awarding costs to the employer. The Court first held that summary judgment was not based upon improper evidence when the majority of the proof consisted of witness depositions that were properly certified and notarized. Further, appellant's deposition was complete, as he did not request a re-direct examination, nor did he file an affidavit to explain, correct, or contradict the testimony he gave under examination by opposing counsel, which was authorized by CR 56.03. The Court also held that although the employer and general manager may have violated office policies by destroying documents, appellant failed to demonstrate that any law or court orders were violated or that they were lost or destroyed in anticipation of litigation. The Court next held that appellant failed to present evidence demonstrating any genuine issue of material fact on his breach of contract claim. His contract contained a morals clause and his termination letter made it clear that he was terminated for cause after four women complained that he had sexually harassed them on numerous occasions. Absent a specific contractual provision, the employer was under no obligation to provide additional investigative measures or an opportunity to be heard. The Court next held that appellant failed to demonstrate the existence of any genuine issue of material fact on the basic element of material misrepresentation to support his claim that he was fraudulently induced into entering the employment contract. The Court next held that appellant failed to show how his allegations of misrepresentations and improper termination constituted contractual interference. The Court next held that appellant failed to specifically describe any alleged defamatory statements or state where they were published to show how the employer was responsible for dissemination of information to support a claim for defamation. The Court next held that appellant failed to produce evidence to show that his termination was outrageous or intolerable in the manner required under Kentucky law to support his claim for intentional infliction of emotional distress. The Court finally held that the ruling by the Kentucky Supreme Court in the employer's favor, in an original action wherein appellant argued that the trial court lost jurisdiction under CR 52.02 to award costs after appellant filed his Notice of Appeal, was dispositive of the appeal from the order awarding costs.

**Caudill v. Salyersville National Bank**

[2008-CA-000017](#) 01/08/2010 2010 WL 45882

Opinion by Judge Thompson; Judges Caperton and Wine concurred. The Court affirmed a judgment of the circuit court granting a directed verdict to the appellee bank on a estate's claim that the bank aided and assisted the deceased's nephew, acting under the authority of a power of attorney and as an

authorized signatory on the deceased's personal checking account, to convert funds held by the Bank. The Court held that there was no evidence that the bank acted in bad faith or with knowledge that the nephew breached his fiduciary duty when it conducted financial transactions concerning the account. It acted pursuant to a valid power of attorney and Consumer Account Agreement and was not obligated to look beyond the language of the power of attorney to determine the extent of the power.

**Flint v. Stilger**

[2009-CA-000475](#) 01/22/2010 2010 WL 199566

Opinion by Judge Caperton; Judge Dixon and Senior Judge Henry concurred. The Court reversed and remanded a summary judgment entered in favor of appellee on appellant's claim for defamation. The trial court found that statements made in response to appellant's appeal for the Attorney General to prosecute a condominium association's failure to comply with KRS 381.990 were entitled to absolute privilege. The Court first held that appellant's naming of additional appellees as "Jane and John Does" was not fatal to the appeal. As members of the Board of Directors of the association, they were not necessary parties because the defamation claim was only between appellant and the named appellee, the attorney for the association. The Court next held that review was confined to one for manifest injustice, as appellant failed to properly cite to the record as required by CR 76.12(4)(c)(iv)-(v). The Court ultimately held that the statements made in the response to the appeal for the Attorney General to prosecute was not entitled to absolute privilege because the Attorney General's office was undertaking an investigation and had not made known whether it would pursue a judicial remedy. Therefore, the statements were only entitled to a qualified privilege, which could be overcome by a showing of malice.

**Higginbotham v. Keeneland Association**

[2009-CA-000301](#) 01/29/2010 2010 WL 323287

Opinion by Judge Lambert; Judge Wine and Senior Judge Harris concurred. The Court affirmed a summary judgment entered in favor of appellee on appellants' claims related to a motor vehicle accident. A passenger was killed and a passenger was injured when the driver improperly reacted to a flat tire, lost control of her vehicle, and struck a vehicle owned by appellee's employee who had parked the vehicle on the shoulder to activate temporary signs directing traffic into Keeneland racetrack. The Court held that the trial court properly granted summary judgment in favor of the employer. The Court first declined to review appellants' argument or supporting documentation that the employee's parking on the shoulder constituted negligence per se because the argument was not raised before the trial court and the documents, which were not part of the record on appeal, were improperly attached as an appendix to the brief. The Court then held that the employee did not owe appellants a duty to refrain from parking on the shoulder of the road. The particular harm was not foreseeable as no reasonable person could have foreseen the injuries sustained or that the driver would lose control to the extent that she could not bring her vehicle to a complete stop utilizing the portions of the shoulder available. KRS 189.450(3) did not impose a duty of care because the statute was inapplicable to the road where the accident occurred, nor did KRS 189.290(1) because the employee was not operating the vehicle at the time of the accident. The employee did not have a common law duty, as there was no authority for the proposition that the shoulder was reserved exclusively for emergency purposes. Public policy considerations also supported the finding that the employee did not have a duty to refrain from parking on the road, as he acted within the guidelines of the encroachment permit. The Court finally held that the trial court properly found that the employee's actions were not the proximate cause of the collision, when it was undisputed that the driver lost control of her vehicle when she improperly reacted to a flat tire. Further, the evidence established that the vehicle was out of control, traveling at a high rate of speed, and would have collided with whatever was in its path - either the temporary sign, the steep earth berm or both.

**Helton v. Tri-County Cycles Barbourville, LLC**

[2009-CA-000049](#) 02/19/2010 2010 WL 567319

Opinion by Senior Judge Buckingham; Chief Judge Combs and Judge Dixon concurred. The Court affirmed summary judgments granted by the circuit court in favor of a cycle dealership, car

dealership and the majority shareholder/officer of the dealership on appellant's claim related to injuries he sustained in an all-terrain vehicle accident. Appellant was injured while riding as a passenger on the ATV. The Court held that the trial court properly granted summary judgments, pursuant to KRS 342.690(1), on the basis of workers' compensation immunity. The Court first held that the issuance of appellant's license for both businesses established his joint employment status as both an employee of the car dealership and the cycle dealership. The Court then held that while appellant's employer may have been recklessly and negligently operating the ATV at the time of the accident, his actions were within the scope of his employment, thereby affording him immunity under KRS 342.690(1). The Court finally held that although the car dealership did not produce a certification of coverage from the Department of Workers' Claims or an affidavit from the insurer, it produced a copy of its workers' compensation insurance policy establishing coverage and, coupled with appellant's workers' compensation award, was sufficient to invoke the exclusive remedy immunity under KRS 342.690(1).

## **WORKERS COMPENSATION**

### **Damron v. Kentucky May Mining Company**

[2009-CA-000867](#) 01/29/2010 2010 WL 335602 N/A Filed in S. Ct.

THIS OPINION HAS BEEN APPEALED TO THE SUPREME COURT AND THEREFORE, IS NO LONGER LISTED AS PUBLISHED.

### **Jones v. Aerotek Staffing**

[2009-CA-001238](#) 01/22/2010 2010 WL 254429

Opinion by Judge Keller; Judges Wine and Senior Judge Lambert concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an administrative law judge's opinion and order that an employer was not liable for enhanced benefits under KRS 324.165 for failing to provide the injured worker with a safe work place. The Court held that to establish that a temporary employment agency intentionally violated a safety statute or regulation, an employee must show that the agency had knowledge of, approved of, directed, or acquiesced in its client's actions. Absent evidence that the agency had a duty to inspect the premises or knowledge of the safety violation, the Board correctly determined that the agency was not responsible for the safety violation.

### **Kentucky Associated General Contractors Self-Insurance Fund v. Lowther**

[2008-CA-002090](#) 01/29/2010 2010 WL 323199

Opinion by Senior Judge Lambert; Chief Judge Combs concurred; Judge Moore dissented by separate opinion. The Court affirmed a judgment of the circuit court upholding a penalty imposed by the executive director of the Kentucky Office of Workers' Claims on an insurer and claims administrator for their failure to pay a claim. The Court held that after a final utilization review decision revealed a dispute, the obligor was required to file a Form 112 medical dispute within 30 days, whether services had been rendered and a bill sent, or whether pre-authorization had been denied. Because the insurer did not seek reopening of the claim, it was in violation of its duty under the workers' compensation laws to promptly pay or contest the claim. Upon the proper determinations by the executive director that the insurer failed to attempt in good faith to promptly pay a claim in which liability was clear and that it failed to meet the appropriate time limits imposed by KRS Chapter 342, the Office of Workers' Claims was authorized to impose a fine for each violation.

### **Quebecor Book Company v. Mikletich**

[2009-CA-001370](#) 01/22/2010 2010 WL 199300

Opinion by Chief Judge Combs; Judge Taylor and Senior Judge Henry concurred. The Court affirmed a decision of the Workers' Compensation Board that affirmed an administrative law judge's opinion and award of benefits to a worker for cumulative, work-related hearing loss. The Court held that the Board ruled correctly under the circumstances and statutory percentages unique to hearing loss by not applying the statutory limitation analysis codified in KRS 342.185. Since the worker would not have been eligible to receive income benefits unless and until he reached an 8% whole person impairment, pursuant to KRS 342.7305(2), and the employer had timely notice of the 6% disability that existed more than two years before the worker filed his claim, there was no legal or equitable basis to carve out from the final award that portion attributable to the earlier onset of the injury.

**American Greetings Corporation v. Bunch**

**[2009-CA-001750](#) 02/26/2010 2010 WL 682342**

Opinion by Judge Lambert; Judge Thompson and Senior Judge Knopf concurred. The Court affirmed a decision of the Workers' Compensation Board reversing a finding of the ALJ that a workers' claim was not compensable and dismissing her claim. The Court held that the Board correctly determined that participation in a charity event during the worker's unpaid lunch break was, as a matter of law, within the course and scope of her employment. In reaching that conclusion, the Court held that an unpaid lunch break was included within the term "working hours" to meet the test articulated in *Smart v. Georgetown Community Hospital*, 170 S.W.3d 370 (Ky. 2005). The Court then held that the charity event at which the worker injured her knee was a "regular incident" of her employment. Not only did the employer have actual knowledge of the event, it sponsored and hosted the activity and actively encouraged employees to participate. The Court rejected the employer's argument that an event must be held more than once a year in order to be considered a regular incident. The facts, considered in their entirety were sufficient to regularize the conduct and stamp it part and parcel of the employment.

**Wal-Mart Stores, Inc. v. Wells**

**[2009-CA-001682](#) 02/19/2010 2010 WL 566176 Rehearing Pending**

Opinion by Judge Stumbo; Chief Judge Combs and Judge Clayton concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an ALJ 12 opinion and award of workers' compensation benefits to an injured employee after he pursued a civil suit against two third-party tortfeasors who were responsible for his injuries. The Court first held that KRS 342.700(1) did not prohibit the worker from collecting from the civil suit and the workers' compensation claim. The ALJ correctly found the amount of the civil damages duplicating workers' compensation benefits were amenable to a claim of subrogation by the employer and correctly deducted the worker's attorneys' fees and expenses from the subrogation amount. The Court also held that the employer's argument that, as part of the tort settlement, the worker waived his right to bring a workers' compensation claim was without merit when the settlement set out the exact requirements of KRS 342.700(1).