

**Kentucky Court of Appeals**  
**Cases of Note**  
**May-June, 2010**

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

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

**INSURANCE**

**Curtis Green & Clay Green, Inc. v. Clark**

**2006-CA-000086 5/21/10 2010 WL 2010506**

Opinion by Judge Stumbo; Judges Keller and Lambert concurred. The Court affirmed a judgment of the circuit court declaring that the members of AIK Comp, a workers’ compensation self-insurance group organized under 803 Kentucky Administrative Regulations 25:026, Section 3, were jointly and severally liable for all claims against the fund (as opposed to those of only their own employees). The Court first held that Senate Bill (S.B.) 86, transferring the regulation of group self-insurers to the Office of Insurance and specifically defining the self-insured groups as insurers, was not unconstitutional special legislation. The language applied to all workers’ compensation self-insured groups and there were distinctive and natural reasons supporting the classification of self-insured groups. The Court also held that the retroactive effect of S.B. 86 was consistent with its purpose as a remedial statute because it rectified a defect in the previous law by subjecting self-insured groups to regulation under the Insurance Code and extended the right of the state and insureds to seek protection of the Insurance Code, thereby protecting injured workers’ benefits. The Court then held that the application of S.B. 86 did not violate appellants’ right to be governed by Workers’ Compensation law. The Court, relying upon federal caselaw interpreting Fed.R.Civ.P. 15, next held that the Franklin Circuit court had jurisdiction over the rehabilitation petition because the filing of the amended complaint after the passage of S.B. 86 was the equivalent to filing a new lawsuit. The Court next held that appellants’ due process rights were not violated when neither the petition seeking rehabilitation nor summons was served on the individual members of AIK Comp. The notice provided by the Rehabilitator by first-class mail, posting on the AIK Comp website and publication through state-wide newspapers of all the hearings, rulings and other court proceedings was enough to put the members of the group on notice of all relevant actions. The Court finally held that by obtaining a waiver for aggregate excess insurance from the Office of Workers’ Claims, but still maintaining specific excess insurance, the AIK Comp trustees fulfilled both the statutory requirements and their contractual obligations. Therefore, there was no breach of the Indemnity Agreement which would allow appellants to rescind the provisions that made all members jointly and severally liable for all workers’ compensation claims raised against the group.

**Stewart v. Elco Administrative Services, Inc.**

**2009-CA-000828 5/14/10 2010 WL 1928150**

Opinion by Judge Dixon; Judge Nickell and Senior Judge Knopf concurred. The Court reversed and remanded an order of the circuit court granting summary judgment in favor of appellees, ruling that appellant constructively waived his right to basic reparations benefits (BRB) despite the fact he was injured while riding as a passenger in a secured automobile. The Court held that appellant’s failure to procure insurance on his own vehicle could not act as a constructive waiver of his right to BRB. While public policy dictates that a motorist who voluntarily fails to comply with the insurance requirements of the MVRA should not be entitled to BRB if the accident and injury results from the operation or use of that uninsured vehicle, the same is not true when the injury is not attributable to the motorist’s use or operation of the uninsured vehicle. Because appellant was not operating his vehicle, but was rather merely riding as a passenger in another vehicle, he was not prohibited from claiming BRB without a specific rejection of the limitation upon his tort rights as provided in KRS 304.39-060(4).

**Western Leasing, Inc. v. Acordia of Kentucky, Inc.**

[2008-CA-002237](#) 5/07/10 2010 WL 1814959

Opinion by Judge Lambert; Judges Acree and Keller concurred. The Court affirmed in part, vacated in part, and remanded a summary judgment in favor of the appellee insurance broker on appellant's claims related to a certificate of insurance (COI) issued to appellant's predecessor-in-interest. The Court first held that the trial court erred as a matter of law in ruling that the broker did not have a duty to exercise reasonable care or competence in the communication of information on the COI that it issued. The Court then held that there was sufficient evidence in the record to allow a reasonable juror to conclude that the predecessor-in-interest justifiably relied on the false information supplied by the broker. The Court distinguished the holding in *Ann Taylor, Inc. v. Heritage Ins. Svs., Inc.*, 259 S.W.3d 494 (Ky. App. 2008), and held, in a matter of first impression, that affirmative misrepresentations on the face of a COI could give rise to claim of negligent misrepresentation in Kentucky. The Court also held that the trial court did not err in dismissing appellant's claim under the Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230, because insurance brokers who operate as agents of the insured are not subject to regulation or liability under the UCSPA.

**Owners Insurance Company v. Utley**

[2009-CA-001471](#) 6/18/2010 2010 WL 2428730 DR Pending

Opinion by Judge Lambert; Judges Caperton and Nickell concurred. The Court affirmed an order of the circuit court denying an insurer's motion for declaratory judgment that it was not obligated under its policy to defend or indemnify appellee with regard to an attack in which appellee injured a man while defending himself. The Court held that the trial court did not err in finding that appellee did not subjectively intend to injure the man who attacked and threatened to kill him and harm his wife and therefore, that the exclusion in appellee's homeowner's policy for "bodily injury or property damage reasonably expected or intended by the insured" did not apply. The Court further held that the doctrine of inferred intent was not applicable to the facts of the case. There was no evidence that appellee intended to injure the man but only that he was acting in self defense to protect himself and others.

**TORTS**

**Abel v. Austin**

[2009-CA-000465](#) 5/28/10 2010 WL 2132745

Opinion by Judge Clayton; Judge Nickell and Senior Judge Knopf concurred. The Court affirmed an order of the circuit court granting the appellee attorneys motions for summary judgment on appellants' claims alleging breach of fiduciary duty, misrepresentation, and violation of the Kentucky fraudulent conveyance statute. The claim concerned the alleged mishandling or misappropriation of settlement funds and the trial court granted summary judgment based on a determination that the claims were brought outside the one-year limitation period found in KRS 413.245. The Court first held that the trial court did not commit palpable error in *sua sponte* extending the grant of summary judgment to all 50 appellants when the summary judgment motion was based on only one representative plaintiff. The trial court's exhaustive and thorough review of all the cases would have rendered individual rulings for the remaining forty-nine cases a useless formality. The Court next held that, pursuant to KRS 413.320, since Alabama's statute of limitations for legal malpractice was shorter than Kentucky's it was the applicable statute of limitations. Further, Alabama's malpractice cause of action was not so unlike Kentucky's so that they were not "like causes of action." Finally, no matter which limitations statute was applicable, appellants' claims were barred under either limitations period, rendering an incorrect choice-of-law decision as harmless error. The Court next held that the trial court had sufficient information to conclude that appellants' claims were time-barred as a matter of law and there were no genuine issues of material fact to submit to a jury. The Court then held that the trial court correctly interpreted appellants' misrepresentation claim based on

the rendering of professional services, which was subject to KRS 413.245 and not the five-year statute of limitations set forth in KRS 413.120(12).

**Aull v. Houston**

**[2008-CA-001238](#) 5/07/10 2010 WL 1814839**

Opinion by Judge Acree; Judge Clayton and Senior Judge Harris concurred. The Court affirmed a partial summary judgment prohibiting appellants' claim for damages for their child's loss of future earning capacity in their wrongful death claim. The Court first held that the child's disability was so profound as to render him incapable of ever earning money by his labor. The Court then held that the child's speculative receipt of disability benefits was not proof of the destruction of his power to labor and earn money. Because damages under KRS 411.130 are measured by the loss resulting from the destruction of the decedent's power to labor and because the child did not experience, at the hands of appellees, the destruction of his power to labor, there was no genuine issue of fact regarding the entitlement to damages for the child's loss of future earning capacity. Therefore, summary judgment was properly granted. The Court also held that nothing in the record at the time of the opinion prohibited appellants from continuing to pursue all categories of damages available pursuant to KRS 411.133 and KRS 411.135, except those specifically addressed in the opinion.

**WORKERS COMPENSATION**

**The following Workers' Compensation cases were appealed to the Kentucky Supreme Court and therefore, are no longer published. The Supreme Court case number is included for your information.**

**Pella corporation v. Bernstein, [2010-SC-000448](#)**

**Martinez v. Peabody Coal Company, [2010-SC-000438](#)**