

Kentucky Court of Appeals
Cases of Note
[September-October, 2010](#)

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INSURANCE

Reynolds v. Safeco Ins. Co. of Illinois

[2008-CA-002258](#) 9/17/2010 2010 WL 3603982

Opinion by Judge Thompson; Judge Caperton concurred; Judge Acree concurred by separate opinion. The Court affirmed an order of the circuit court granting summary judgment to the appellee auto insurance provider on appellant’s claim for compensation under the uninsured motorist clause in her insurance policy. The Court held that the trial court did not err in granting summary judgment to the insurer. The ice striking appellant’s vehicle was not a “hit” as contemplated by the portion of the policy covering an insured against hit-and-run accidents. Therefore, the trial court correctly concluded that the facts in *Masler v. State Farm Mutual Automobile Insurance Company*, 894 S.W.2d 633 (Ky. 1995), were so similar that it was compelled to grant the insurer’s motion. The Court rejected appellant’s argument that *Shelter Mutual Insurance company v. Arnold*, 169 S.W. 3d 855 (Ky. 2005), impliedly overruled *Masler* and held that the holding in *Shelter Insurance* was limited to chain-reaction accidents.

William C. Eriksen, P.S.C. v. Kentucky Farm Bureau Mut. Ins. Co.

[2009-CA-000812](#) 9/3/2010 2010 WL 3447688 DR Pending

Opinion and order by Judge Moore; Judge Wine concurred; Senior Judge Harris concurred in part and dissented in part by separate opinion. On direct appeal, the Court affirmed an order of the circuit court dismissing a medical services provider’s counterclaim to recover unpaid interest from an insurer under the Motor Vehicle Reparations Act (MVRA) and finding that the provider did not have standing under MVRA to file a direct action against a reparations obligor. The Court held that the trial court did not err in dismissing the counterclaim as the holding in *Neurodiagnostics Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321 (Ky. 2008) was applicable and therefore, the medical provider did not have a direct right of action to collect the interest provided for in KRS 304.39-210(2). The Court then dismissed the cross-appeal, holding that it was interlocutory because the trial court had not ruled on the provider’s first amended counterclaim, which added claims of fraud and wrongful initiation of civil proceedings against the insurer.

Auto Owners Insurance Co. v. Consumers Insurance USA, Inc.

[2009-CA-000955](#) 10/08/2010 2010 WL 3927782

Opinion by Senior Judge Lambert; Judges Dixon and Keller concurred. The Court reversed and remanded a judgment of the circuit court finding that it lacked personal jurisdiction over an out-of-state insurer. The appellant auto insurance company sought recovery of payments it made to its insured for injuries she received due to the negligence of appellee’s insured and for what it alleged was appellee’s bad faith. The Court held that the trial court erred in finding that Kentucky did not have personal jurisdiction through the Kentucky long-arm statute, KRS 454.210, based on appellee’s minimum contacts with the state. By its automobile insurance contract with the negligent driver, appellee invested her with the right to drive lawfully in Kentucky and states other than her home state of Tennessee. Appellee availed itself of the privilege of acting in Kentucky by writing an automobile policy in an adjoining state with which Kentucky shares hundreds of miles of border, the automobile accident arose from appellee’s insured’s activity in Kentucky, and the commission of an automobile tort by the insured of a non-resident insurer was a sufficiently substantial connection to Kentucky to

make the exercise of jurisdiction reasonable. Further, to allow appellee to succeed on its lack of jurisdiction claim, the insured would have been an uninsured driver in Kentucky with the result that the public policy of Kentucky would be entirely frustrated.

TORTS

York v. Petzl America, Inc.

[2009-CA-001483](#) 9/24/2010 2010 WL 3717266

Opinion by Senior Judge Buckingham; Judges Clayton and Keller concurred. The Court reversed and remanded a summary judgment entered in favor of appellee in a personal injury action. The Court first held that summary judgment was not appropriate. Even though appellant had agreed to indemnify settling parties, his liability claims were not extinguished merely because he would be responsible for any judgment rendered in his favor against appellee. No agency or quasi-agency relationship existed between the parties, nor could it be said that any negligence on the part of the settling parties was the entire or primary cause of appellant's injuries. A jury could decide that appellant was injured solely as a consequence of appellee's negligence or that appellee and the settling parties were all equally liable, which would bar any claims for indemnity by appellee. Further, because there was no determination made regarding the settling parties' liability, there could be no summary judgment on the issue of common law indemnity. The Court next held that appellant did not waive the issue of whether the trial court erred by granting appellee summary judgment by not specifically stating the issue in his prehearing statement. Appellant substantially complied with CR 76.03 by clearly stating the issue upon which the summary judgment was based.

Boon Edam, Inc. v. Saunders

[2008-CA-001606](#) 10/15/2010 2010 WL 4025735

Opinion by Judge Caperton; Judges Acree and Thompson concurred. The Court affirmed a judgment awarding appellee damages arising from injuries she sustained when a revolving door manufactured by appellant struck her. The Court first held that the trial court did not err or abuse its discretion in allowing appellee's expert witness to testify. The witness's extensive knowledge, education, training and professional experience qualified him as an expert in the matter. There was no requirement that he have worked in the revolving door industry and there was no precedent mandating that he could not rely upon or evaluate tests performed by another. The court next held that the trial court did not err in denying the manufacturer's motion for a directed verdict because there was not a complete absence of proof as to whether the door was in a defective condition unreasonably dangerous for use when it was placed on the market. The Court also held that the trial court did not err in denying the manufacturer's motion for directed verdict based upon the statutory presumption of non-defectiveness established by KRS 411.310(2) when appellee presented ample evidence that the door was defective. The Court finally held that because appellant failed to object to the jury instructions for the award of future pain and suffering, or to tender jury instructions, it failed to preserve any error for review under CR 51(3).

Ragland v. Digiuro

[2009-CA-000186](#) 10/22/2010 2010 WL 4137183

Opinion by Senior Judge Harris; Judges Acree and Nickell concurred. The Court affirmed in part and reversed in part and remanded a judgment awarding an estate damages in the amount of \$63,341,708.00 in its wrongful death claim against appellee and an order denying a motion to alter, amend or vacate the judgment. The Court first held that the law-of-the case doctrine applied to the issue of whether the wrongful death action was commenced within the applicable statute of limitations because the Court of Appeals had already decided that the claim was not barred by the statute of limitations. Subsequent caselaw did not change the law with regard to the primary basis for the Court of Appeals decision and the pertinent facts upon which the Court of Appeals based its finding did not change after the rendering of the opinion. The Court then held that the punitive damage award of \$60 million was constitutionally excessive in that it violated appellant's federal due

process protections. Although the murder of the deceased was sufficiently reprehensible, in light of the substantial compensatory award of more than \$3.3 million, the 18-to-1 ratio of punitive to compensatory damages was grossly excessive in relation to the State's legitimate interests in punishment and deterrence. The Court directed the circuit court to reduce the amount of punitive damages to the constitutionally acceptable amount of \$30 million, representing a single-digit ratio of 9-to-1.

River Run Farm, LLC v. Storm

[2009-CA-000096](#) 10/15/2010 2010 WL 4025772 Rehearing Pending

Opinion by Judge Clayton; Judge Combs and Senior Judge Lambert concurred. The Court affirmed a summary judgment in favor of an individual home builder and a jury verdict in favor of a circulation pump manufacturer on appellants' claims for negligence brought after a fire in their home which originated with the water circulation pump. The Court first held that the trial court properly granted summary judgment to the home builder. The individual, who oversaw the construction of the home but was not in the business of building, could not be held liable to a purchaser of the home for negligence. The Court next held that the trial court did not abuse its discretion by precluding the admission of an x-ray of the pump's terminal box cover to impeach an expert witness when appellants did not reveal the x-ray to the expert until just before the trial, the expert was not present when the x-ray was taken, and appellants did not present an expert witness to provide a foundation for the x-ray. The Court next held that there was not sufficient evidence for the trial court to grant a new trial under CR 59.01(b). The Court next held that the trial court did not err in admitting other expert testimony. The Court finally held that the trial court did not err in omitting the language "without a reasonable notice or warning of danger" from the jury instructions when neither sets of tendered instructions contained the language set forth in John S. Palmore, Kentucky Instructions to Juries § 49.02 (5th Ed., 2006), and it did not appear the language would benefit appellants.

Taylor v. King

[2009-CA-001599](#) 10/01/2010 2010 WL 3810797 DR Pending

Opinion by Judge Wine; Judge Moore and Senior Judge Harrison concurred. The Court reversed and remanded a declaratory judgment finding that the Dram Shop Act, KRS 413.241, prohibited recovery of punitive damages. The Court first held that the prior interpretations of the Act were consistent with the clear language of the statute that punitive damages may not be recovered for a claim under the Act. However, in a case of first impression, the Court then held that the Act's implicit prohibition of recovery of punitive damages violated the jural rights doctrine and separation-of-powers provision of the Kentucky Constitution. Therefore, it was unconstitutional to the extent that it prohibited recovery of punitive damages.

Willis v. Louisville/Jefferson County Metropolitan Sewer District

[2009-CA-001874](#) 10/22/2010 2010 WL 4137492

Opinion by Judge Wine; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed a summary judgment of the circuit court in favor of appellee on appellant's claims of loss of consortium and negligent infliction of emotional distress (NIED) stemming from the death of her minor granddaughter for whom she served as legal guardian. On an issue of first impression, the Court held that it was compelled to follow the clear language of KRS 411.135, which did not extend a loss of consortium claim to grandparents, guardians or other custodial family members. The Court next held that it was without authority to abandon the "physical impact rule" as applied to bystanders in NIED cases. Therefore, the Court affirmed the summary judgment on both claims.

WORKERS COMPENSATION

Campbell v. Hauler's Inc.

[2009-CA-001727](#) 9/3/2010 2010 WL 3447613

Opinion by Judge Thompson; Judge Lambert concurred; Judge Combs concurred in result only. The Court affirmed an opinion of the Workers' Compensation Board that reversed in part, vacated in part, and remanded a claim to the Administrative Law Judge for further findings of fact. The Court held that it was within the absolute discretion of the Board to remand the opinion of the ALJ for further findings of fact. The ALJ failed to articulate the substantial evidence that supported the determination that an accident caused the worker's fatal heart attack and therefore, the opinion did not afford meaningful review. The Court then held that the Board correctly applied KRS 324.730(4). Because the worker's widow was sixty-two years old at the time of her husband's death and qualified for Social Security benefits under 42 U.S.C.A. § 402(e), she did not qualify for a minimum two years of income benefits.

Abel Verson Construction v. Rivera

[2009-CA-000771](#) 10/15/2010 2010 WL 4108551

Opinion by Judge Acree; Judge Keller concurred; Judge Lambert dissented. The Court affirmed in part and reversed in part an opinion of the Workers' Compensation Board affirming in part and remanding in part an ALJ's opinion awarding an undocumented immigrant worker benefits based on a finding of permanent partial impairment and temporary total disability. The Court held that KRS Chapter 342 was not preempted by federal immigration law to the extent Kentucky law permits benefit payments to undocumented aliens. The Court also held that the Board properly reversed and remanded the case to the ALJ for the purpose of reconsidering whether the employer should have been assessed a penalty for violations of state or federal workplace safety statutes or regulations and if so, whether such violations caused the worker's accident. The Court also held that the Board improperly reversed the ALJ's refusal to qualify the worker's witness as an expert on occupational safety regulations. The Court finally held that the Board properly affirmed the ALJ's decision with respect to the employer/employee relationship, the workers' weekly wage and his total temporary disability when the decision was based on substantial evidence.

Graham v. TSL, Ltd.

[2010-CA-000547](#) 10/08/2010 2010 WL 3928528 N/A Filed in S. Ct.

Note that this appeal was appealed to the Kentucky Supreme Court and therefore, it is no longer a published opinion of this Court.