

**Kentucky Court of Appeals**  
**Cases of Note**  
**[January-February, 2011](#)**

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**

**One Beacon Insurance Company v. KIGA**  
**[2010-CA-000220](#) 1/28/11 2011 WL 262995**

Opinion by Judge Lambert; Judge Moore and Senior Judge Isaac concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of Kentucky Insurance Guaranty Association (KIGA), on the appellant insurer’s petition to enforce an order requiring KIGA to pay one-half of the medical bills paid on behalf of an injured worker. In a case of first impression, the Court held that the circuit court properly granted judgment as a matter of law. Appellant was not a claimant nor was the subrogation claim a “covered claim” under KRS 304.36-050. By the clear language of the statute, appellant was not an insured making a first-party claim or a person seeking a liability claim. Further, its claim for subrogation of paid medical benefits was specifically prohibited in the statute.

**Motorists Mutual Insurance Company v. Hartley**  
**[2010-CA-000202](#) 02/11/2011 2011 WL 474944**

Opinion by Judge Thompson; Judge Moore and Senior Judge Lambert concurred. The Court reversed and remanded an opinion and order of the circuit court declaring that an “owned but not scheduled for coverage” exclusion contained in a insurance policy issued by appellant to appellee was invalid and unenforceable. The Court first held that the exclusion was not ambiguous as it unequivocally stated that UIM coverage was not afforded for motor vehicles not covered under the policy and the motorcycle involved in the accident was not listed as an insured motor vehicle. The Court also held that the exclusion was not unenforceable on public policy grounds. In doing so, the Court distinguished the holdings in *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), and *Hamilton Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky. App. 1996). Unlike an owner of all other motor vehicles who must opt out of uninsured/underinsured coverage pursuant to KRS 304.20-020, motorcycle owners must affirmatively purchase all optional coverage. To afford UIM coverage to appellee, who did not pay premiums to appellant for coverage of his motorcycles and who expressly rejected such coverage, would be contrary to public policy because the insurance companies would ultimately raise premiums on all consumers to reflect the increased risk.

**Stamper v. Hyden**  
**[2009-CA-002033](#) 02/18/11 2011 WL 557796**

Opinion by Judge Dixon; Judges Clayton and Wine concurred. The Court vacated and remanded a judgment entered upon a jury verdict in favor of the appellee insurance company on appellant’s claims for recovery under her uninsured motorist benefits pursuant to her automobile insurance policy for damages resulting from the intentional criminal conduct of her former boyfriend. In a case of first impression, the Court held that in order to achieve the protective purpose of KRS 304.20-020, on a claim for UM benefits, the term “accident” must be interpreted from the perspective of the insured-victim, not the uninsured motorist-tortfeasor. Therefore, the incident

was an accident within the meaning of appellant's UM policy and the trial court erred by instructing the jury to determine whether damages were the result of an accident. The Court also held that the error was not harmless because the instructions potentially confused or misled the jury by limiting appellant's recovery to damages that were caused by an accident.

## **TORTS**

### **Akins v. The News Enterprise**

[2009-CA-002188](#) 1/28/2011 2011 WL 255447

Opinion by Judge Thompson; Judges VanMeter and Wine concurred. The Court affirmed an order of the circuit court dismissing appellant's complaint for libel against a newspaper. The Court held that the newspaper did not commit the tort of libel by publishing an article using the term "carjacking" in describing appellant's criminal case. Although appellant was not charged with carjacking, the article merely conveyed that appellant's rape and kidnapping charges arose from a carjacking. Further, under KRS 411.060, a publication containing an accurate description of a judicial proceeding, regardless of the falsity or defamatory character of its contents, is absolutely privileged unless it was made for the sole purpose of causing harm. In this case, the article was written to inform the public and necessarily described the alleged conduct giving rise to the indictment. The trial court properly found that the complaint was devoid of any allegation of maliciousness and that appellant did not request an explanation or contradiction concerning the article. Therefore, the dismissal of the complaint was proper under KRS 411.060.

### **Booth v. CSX Transportation, Inc.**

[2009-CA-002103](#) 1/28/11 2011 WL 255408

Opinion by Senior Judge Isaac; Judge Acree and Senior Judge Henry concurred. The Court reversed and remanded an order of the circuit court granting summary judgment to appellee on appellant's claims for injuries to his knees while employed as a railroad carman for appellee. The Court first held that a regulation promulgated under the Federal Railway Safety Act, 49 U.S.C. § 20101, et seq. (FRSA) may preclude a claim under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (FELA). However, the Court concluded that in this case, because 49 C.F.R. § 213.103, the regulation at issue, did not address what constituted safe walking conditions in its rail yards, appellant's FELA claim was not precluded and the trial court erred in concluding it was. The Court also held that although deposition testimony by a person who assisted in reviewing and revising the federal regulations under the FRSA might be useful in clarifying the regulations, the Court was bound by the plain language of the regulation, which did not cover walkway safety.

### **Edwards v. Gruver**

[2008-CA-002348](#) 1/14/11 2011 WL 111969 Rehearing Pending

Opinion by Senior Judge Buckingham; Judge Caperton concurred in part and dissented in part by separate opinion; Judge Clayton concurred in part and dissented in part by separate opinion. The Court reversed and remanded a judgment of the circuit court entered against appellant and in favor of appellee on appellee's claims for negligent or reckless hiring, retention, or supervision of three men who assaulted him. The jury returned a \$2.5 million verdict in favor of appellee for which appellant was responsible for over \$1 million. The Court first held that there was not a special relationship between appellant, the head of the Imperial Klans of America (IKA), an unincorporated association, and its members so as to create in the association head an affirmative duty of supervision and control over the activities of the members. Although appellant was the head of the association and the assailants were members and the members were encouraged to recruit new members, appellant did not have any ability to control their activities. Thus, the trial

court erred in not granting a directed verdict in appellant's favor. However, because appellant did not move the trial court for judgment notwithstanding the verdict, the court reversed for a new trial, rather than for the entry of judgment. The Court also held that testimony that 10 years earlier appellant had encouraged the witness to kill Morris Dees, who was appellee's attorney, was admissible for the purpose of rebutting appellant's contention that he did not encourage IKA members to engage in violent or illegal activities. The Court finally held that the trial court did not err in allowing testimony concerning the past criminal records of the assailants when the cause of action was for the negligent or reckless hiring, retention, or supervision of the assailants and the evidence was used to show the violent propensities of the assailants and appellant's knowledge of those propensities

**Cunningham v. Abbott**

**[2007-CA-001971](#) 02/04/11 2011WL336459 Rehearing pending**

Opinion by Judge Nickell; Judges Stumbo and Wine concurred. The Court affirmed in part, vacated in part, reversed in part, and remanded orders entered in actions related to the mediated settlement of claims against the manufacturer of Fen-Phen. The actions were brought to retrieve what the plaintiffs claimed were misallocated monies and to receive damages for breaches of professional duty. On direct appeal the Court first held that the plaintiffs' filing of an independent action was not an impermissible collateral attack on valid orders entered in the products liability action against the drug manufacturer. The plaintiffs had no opportunity to learn of the handling of the settlement in the products liability action; the independent action was not the result of a modification or vacation of the orders in the products liability action; the failure of the attorneys to disclose settlement details, the amount of attorney fees, and information regarding the creation of a cy pres trust allowed for an inference that the plaintiffs were lulled, gulled, or seduced into inactivity during the products liability action; and CR 60.03 offered equitable relief by means of an independent action. The Court next held that the trial court erred in awarding partial summary judgment to the plaintiffs as an affidavit of a practicing attorney and expert in mass litigation raised genuine issues of material fact as to whether the entire settlement, minus fees and expenses was to be split between the settling claimants; whether the settling complainants were fairly and adequately compensated; whether the cy pres trust was funded with money that should have been distributed to the settling claimants or was funded with excess funds for which the plaintiffs' consent to its ultimate use was not required; and whether the attorneys were obligated to indemnify the manufacturer for additional claimants who might come forward after settlement had been dispersed. The Court next held that the order denying the defendants' motion for summary judgment was interlocutory. The Court next held that an attorney did not have standing to appeal on behalf of the cy pres trust, which was a separate corporate entity that did not appeal the adverse ruling seizing its assets and placing them in a constructive trust. The Court finally held that the trial court did not abuse its discretion in denying the plaintiffs' motion to transfer venue from the Boone Circuit Court to Fayette Circuit Court. There was no statutory provision allowing for the bifurcated proceedings requested by the plaintiffs, seeking only that the trial be moved. Further, plaintiffs' active prosecution of the matter for nearly two years before complaining regarding venue operated as a bar to the request.

**Engle v. Baptist Healthcare System, Inc.**

**[2009-CA-002170](#) 02/25/11 WL citation not available**

Opinion by Judge Moore; Judge Dixon and Senior Judge Isaac concurred. The Court reversed and remanded on direct appeal and affirmed on cross-appeal a defense verdict in a medical negligence action regarding care and treatment provided to a patient. The Court first held that the trial court erred in admitting an investigative report from the Department for Community Based Services (DCBS) resulting from an investigation of the executor's allegations concerning the care and treatment. The report was hearsay and in light of *Jordan v. Commonwealth*, 74 S.W.3d

263 (Ky. 2002), KRE 803(8) did not exempt it from the rule against hearsay. The report, entered into evidence without the safeguards described by Jordan, did nothing more than put before the jury another social worker's improperly admitted written belief that a preponderance of the evidence did not support a finding that the health care provider deprived the deceased of services necessary to maintain her health and welfare. The erroneous introduction of this evidence prejudiced the executor's substantial rights and mandated reversal and a new trial. On the cross-appeal, the Court held that the trial court did not err in its decision to grant the executor leave to amend his answers to interrogatories to seek punitive damages after the close of evidence but prior to submission of the matter to the jury. Because a new trial was warranted, there was no authority to prohibit the executor from moving to supplement his answers during the course of retrial.

**McAlpin v. Davis Construction, Inc.**

[2009-CA-002154](#) 02/11/11 2011 WL 480761

Opinion by Judge VanMeter; Judge Lambert and Senior Judge Shake concurred. The Court affirmed an order and judgment of the circuit court dismissing with prejudice appellant's negligence claim against the appellee construction company following a unanimous jury verdict in favor of the company. Appellant filed suit against appellee for the negligent maintenance and operation of its dump truck with which she was involved in a collision. The Court first held that the trial court did not err by instructing the jury that the driver's duties were subject to a sudden emergency qualification. The driver testified he was traveling at a lawful speed and that he applied his brakes immediately upon seeing appellant enter his path and appellee submitted evidence that the driver reacted typically. Therefore, a reasonable jury could deduce that the driver did not create the emergency and had little to no time for deliberation of alternative courses of action. The Court next held that the trial court did not err by denying appellant's motion for a directed verdict as the evidence was sufficient to support a finding that the driver acted as a reasonably prudent driver when appellant failed to yield to his right-of-way. The Court finally held that the trial court did not err by failing to instruct the jury according to the Code of Federal Regulations when the instructions given stated that the driver was under the duty to exercise ordinary care to avoid collision with other persons or vehicles using the highway and the detail concerning the duties to maintain the vehicle in a safe condition could have been fleshed out during appellant's closing statements.

**Smith v. Martin**

[2009-CA-002226](#) 02/04/11 2011 WL 336850

Opinion by Chief Judge Taylor; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed in part, vacated in part and remanded a summary judgment dismissing appellant's defamation claims against appellee. The Court first held that that the statements directed to appellant at a city council meeting by the mayor presiding at the meeting were entitled to an absolute privilege under KRS 83A.060(15). As such, the circuit court properly rendered summary judgment dismissing the defamation claim based upon those statements. The Court then held that KRS 411.060 provided a qualified privilege for the publication of a report recounting the events at the city council meeting. However, whether the report was fair and accurate or was maliciously made was not addressed by the trial court. Therefore, the Court remanded to the trial court for a determination of whether the qualified privilege operated as a defense to the defamation claim.