

**Kentucky Court of Appeals**  
**Cases of Note**  
**[September-October, 2011](#)**

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1. Hold down the control (“Ctrl”) key and click on the link.
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**TORTS**

**Buda v. Schuler**

**[2010-CA-001087](#) 9/23/11 2011 WL 4408448**

Opinion by Senior Judge Shake; Judges Keller and Lambert concurred. The Court affirmed a summary judgment in favor of appellee on his claim for damages for injuries he sustained during an altercation with appellant. The Court first held that the trial court did not err by finding an absence of a genuine factual dispute as to liability based on the uncontroverted evidence that appellant caused serious physical injury to appellee and in light of appellant’s statements on the record taking responsibility for severe injuries inflicted on appellee. The Court next held that the trial court did not err in awarding compensation to appellee for his lost income and lost profits even though he received his base salary during the time he was unable to work. The salary received was a fraction of what his income would have been to his for-profit corporation and concomitantly to him, when his labor was the sole source of income for his business. Further, appellee’s testimony was substantial evidence to prove lost profits and appellee’s claim advised appellant that he intended to seek damages in the amount of \$95,000 in lost profits to his business. The Court then held that the record contained significant evidence indicating that appellant viciously attacked appellee and severely beat him with an object. This conduct constituted an egregious display of total disregard for the safety of others to support the trial court’s award of punitive damages. The Court finally held that the trial court did not err in awarding appellee the full amount of medical bills even though his healthcare providers accepted less payment than the full amount billed.

**Smith v. Bargo**

**[2010-CA-000241](#) 9/30/11 2011 WL 4502074**

Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court reversed and remanded a judgment entered upon a jury verdict assigning to appellant a portion of the liability arising from a motor vehicle accident after the trial court granted appellant a directed verdict. The Court held that the trial court erred in presenting the question of appellant’s liability to the jury after it granted appellant’s unopposed motion for a directed verdict as it pertained to the claims against him. While it was appropriate for the jury to determine appellant’s portion of fault incident to its determination of the comparative fault of the other parties, it was error for the trial court to adjudge liability for that fault after appellant had already been dismissed from the case.

**South Woodford Water District v. Byrd**

**[2009-CA-000854](#) 9/23/11 2011 WL 4420835**

Opinion by Judge Acree; Chief Judge Taylor concurred; Judge Combs dissented by separate opinion. The Court reversed an order of the circuit court denying appellant’s motion to dismiss appellee’s claim that the appellant water district failed to terminate water service to his property upon his request, resulting in damage to his property. The Court first held that it had jurisdiction to review the interlocutory order under the collateral order doctrine. The Court next held that it did not have jurisdiction under the collateral order doctrine or any other jurisprudence to review appellant’s defense under the Claims Against Local Governments Act, KRS 65.200-65.2006. As a statutory defense to liability only, as with any other liability defense, the denial could be vindicated following

a final judgment. The Court then held that the water district was entitled to governmental immunity and therefore, instructed the circuit court to dismiss the claim. Because appellant did not name as a defendant any government official, the discretionary/ministerial function analysis was irrelevant and the circuit court erred in considering whether the alleged conduct constituted a ministerial or a discretionary act. Appellant was a state agency engaged in the governmental function of providing water and therefore, was entitled to governmental immunity from a claim of damages resulting from an employee's failure to terminate water service.

**Edwards v. Gruver**

**2008-CA-002348 10/14/11 2011 WL 4860431**

Opinion by Judge Acree; Judge Clayton concurred; Judge Caperton concurred in part and dissented in part by separate opinion. On rehearing, the Court affirmed a judgment of the circuit court entered against appellant on appellee's claims for negligent selection, retention, and supervision of individuals to serve as recruiters for appellant's wholly-owned unincorporated association, the Imperial Klans of America. The claims were brought after appellee was assaulted at a county fair by the recruiters. The Court first held that it was not palpable error for the trial court to admit testimony that appellant asked the witness many years earlier to kill the attorney representing appellee. In the context of the whole record, the testimony was not so consequential as to justify a finding that its admission constituted palpable error. The Court next held that it was not palpable error for the trial court to admit evidence of the assailants' criminal histories. First, appellee was not required to give appellant notice of intent to present such evidence under KRE 404 because the rule only required such notice in a criminal case. Second, the evidence was offered under the exception to KRE 404(b) to establish that appellant knew of the violent nature of the individuals he selected as members and recruiters. Third, the probative value outweighed any prejudice. Finally, the jury apportionment of only twenty percent of the compensatory damages to appellant undermined appellant's argument that the jury verdict was based solely on passion or prejudice against him. The Court next held that the trial court properly denied appellant's motion for a directed verdict. In reaching that conclusion, the Court held that negligent selection was a cognizable claim in Kentucky and that an entity could be held liable when its failure to exercise ordinary care in selecting or retaining persons to conduct its activity created a foreseeable risk of harm to a third person. The Court then held that there was substantial evidence to support each element of appellee's claim for negligent selection

**Rehm v. Ford Motor Company**

**2009-CA-001868 10/7/11 2011 WL 4632924**

Opinion by Judge Combs; Judge Thompson concurred by separate opinion; Judge Caperton concurred in part and dissented in part by separate opinion. On appeal and cross-appeal, the Court affirmed a judgment of the circuit court following a jury verdict in favor of Ford Motor Company on appellants' premises liability claims brought after an elevator mechanic was diagnosed with malignant mesothelioma. The Court first held that based on the lengthy passage of time, involving some thirty years, the trial court did not abuse its discretion in admitting newspaper articles under the ancient-documents exception to the hearsay rule. The Court next held that the trial court did not err in admitting the testimony of an occupational epidemiologist who offered a theory that the worker had developed mesothelioma as a result of household exposure to his own father's work clothes. The witness was qualified as an expert in asbestos-related diseases and was sufficiently qualified to review the literature pertaining to high risk for asbestos-related disease in elevator mechanics and while the evidence for the home-exposure theory was weak, it was the sole province of the jury to evaluate the conflict clearly demonstrated and highlighted by the effective cross-examination. The Court also held that appellants were not prejudiced by a fleeting reference by the expert witness to the worker's exposure from other locations, as the jury had been made aware of the other locations from other testimony presented in appellants' case-in-chief. The Court next held that the trial court improperly dismissed the loss of consortium claims by the workers' wife and children because the injury occurred when the mesothelioma became manifest, not upon mere exposure, which was after the marriage and the children were born. However, the error was moot because it was derivative

upon a finding of damages rejected by the jury. On the cross-appeal, the Court held that the trial court did not err in denying Ford's motion for summary judgment based on the issue of up-the-ladder immunity as the issue had already been determined by the Supreme Court and thus, was the binding law of the case. The Court also held that the trial court did not err in admitting internal memoranda listing other employees who had died as a result of mesothelioma. The documents were relevant to prove that Ford had notice of the risks of working with asbestos, not as proof that the worker's mesothelioma was caused by asbestos at the location where he worked. Further, Ford did not offer proof that the evidence was unduly prejudicial.

**Schulze v. Hinton**

**[2010-CA-000121](#) 10/28/11 2011 WL 5105382**

Opinion by Judge Lambert; Judges Caperton and Keller concurred. In an appeal and cross-appeal, the Court affirmed several orders of the circuit court in a personal injury suit wherein appellant sought damages for injuries she sustained in a motor vehicle accident. The Court first held that the trial court properly denied appellant's motion for a new trial. In so concluding, the Court first held that the jury's decision not to award damages for pain and suffering was supported by the record. The jury had a sufficient basis upon which to find that appellant's complaints were not causally related to the accident but were related to a pre-existing back problem. The Court next held that while appellant's six-minute delay in objecting to a comment made in closing argument did not make the objection untimely or the issue unpreserved, the admonition given by the trial court, requested by appellant, cured any alleged error. On the cross-appeal, the Court first held that when the trial court entered conflicting orders awarding costs, the more specific order awarding costs to appellant was the one that should be followed. The Court then held that while appellant did not receive the amount of damages she requested, she was nonetheless awarded a portion of what she claimed and therefore, she was properly considered the "prevailing party" for purposes of awarding costs. Therefore, the trial court did not commit any error or abuse its discretion in awarding the costs she requested.

**WORKERS COMPENSATION**

**Greg's Construction v. Keeton**

**[2011-CA-000761](#) 9/16/11 2011 WL 4347203**

Opinion by Judge Moore; Judges Dixon and Thompson concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion, order and award of an ALJ holding the appellant construction company exclusively liable, per KRS 342.7305(4), for paying benefits and medical expenses for a worker's claim of permanent partial hearing loss. The Court held that the Board did not overlook or misconstrue controlling law or commit an error in assessing the evidence so flagrant as to cause gross injustice and that the decision was supported by substantial evidence. The fact that the worker's hearing impairment was causally related to exposure to hazardous levels of workplace-related noise was uncontested as was the fact that appellant was the worker's last employer. The worker was only required to present substantial evidence demonstrating that he was exposed to hazardous levels of noise during his employment with appellant, which he did. Therefore, pursuant to the unambiguous language of KRS 342.7305(4), appellant was exclusively liable for the worker's benefits and the ALJ correctly declined to apportion the benefits between appellant and the worker's former employers.

**Uninsured Employers' Fund v. Stanford**

**[2010-CA-002288](#) 9/30/11 WL Citation Not Yet Available**

Opinion by Senior Judge Shake; Judges Dixon and Nickell concurred. The Court affirmed an opinion of the Workers' Compensation Board, which affirmed in part, reversed in part and remanded an opinion, award and order of the ALJ adjudicating a benefits claim by a worker after he fell from a zip line and suffered permanent injury. The worker was part of a federally-funded program, which placed him in a summer work program. The Court first held that the issue of reimbursement to the prevailing party was preserved for determination by the ALJ and therefore, the Board could properly

order reimbursement. The issue of reimbursement was a sub-issue of any liability presented to either the ALJ or the Board and once the Board held that liability had been reallocated to a party other than that designated by the ALJ, reimbursement was inevitable and proper. The Court also held that the Board properly dismissed issues presented by the employer as untimely taken after the worker filed a second motion for reconsideration seeking the same relief sought in an original motion for reconsideration. The Court finally held that the worker was not entitled to sanctions against the employer for filing a frivolous appeal when the claims were not so lacking in merit that they were brought in bad faith and the issue of the timeliness of the appeal to the Board was an issue of first impression and one which had a direct effect on the employer.