

Kentucky Court of Appeals
Cases of Note
[November-December, 2011](#)

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TORTS

PCR Contractors, Inc. v. Danial

[2010-CA-000247](#) 11/4/11 2011 WL 5244930

Opinion by Judge Moore; Judge Nickell concurred; Judge Combs concurred in result only. The Court affirmed in part, reversed in part and remanded a summary judgment in favor of appellee on appellant’s claims for fraudulent and negligent misrepresentation based upon an alleged promise by appellee to personally guarantee payment to appellant relating to a contract appellant entered into with a company partly owned and co-managed by appellee. The Court first held that the trial court erred in concluding that there was no evidence to defeat summary judgment on the fraudulent misrepresentation claim. It was for the trier of fact to resolve whether the evidence supporting that appellee actually made the promise was more convincing than the evidence to the contrary and whether appellant’s reliance upon it was reasonable and justified. The Court also held that appellant’s pleadings, taken together with the sum of the evidence, adequately stated a prima facie claim of fraudulent misrepresentation. The Court then held that the trial court did not err in dismissing the negligent misrepresentation claim. Assuming appellant proved that appellee made a promise he never intended to carry out, he did not make the promise carelessly but rather, made it knowing it was false. In addition, consistent with Restatement (Second) of Torts § 552 and Kentucky law, appellee’s intent to perform a promise or agreement could not form the basis of a negligent misrepresentation claim.

Messerly v. Nissan North America, Inc.

[2010-CA-000717](#) 12/02/2011 2011 WL 6004318

Opinion by Judge Caperton; Judge Wine concurred; Chief Judge Taylor dissented by separate opinion. The Court reversed and remanded a summary judgment of the circuit court dismissing appellants’ complaint, brought after their son sustained fatal injuries when his mother backed over him in the driveway, alleging that their automobile was defective and negligently designed because it was not equipped with a rearview camera or back-up sensors. The Court held that the trial court erred by granting summary judgment because the question of the risk of a backover injury in the automobile was a question for the jury.

True v. Fath Bluegrass Manor Apartment

[2010-CA-001784](#) 12/22/2011 2011 WL 6412093

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. The Court affirmed a summary judgment dismissing appellant’s claims against his landlord for injuries he sustained when he fell from his apartment balcony. The Court held that the circuit court properly granted summary judgment because the landlord could not be held liable for appellant’s injuries caused by an open and obvious hazard that appellant was aware of prior to his fall. Recovery for appellant’s claim for negligent repair could only be permitted if a repair resulted in an increased danger that was unknown to the tenant or if the repair gave the deceptive appearance of safety. However, the undisputed facts were to the contrary. The Court also held that the exceptional circumstances described in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not apply. Further, because the common law precluded recovery, the disputed facts were immaterial and therefore, did not preclude summary judgment.

WORKERS COMPENSATION

Hampton v. Intech Contracting, LLC

[2011-CA-001195](#) 11/18/11 WL Cite Not Yet Available

Opinion by Judge Thompson; Chief Judge Taylor and Judge Lambert concurred. The Court affirmed an opinion and order of the Workers' Compensation Board affirming an order of the ALJ dismissing appellant's claim alleging that he fell from a bridge and was severely and permanently injured within the scope and course of his employment. The Court held that the Board correctly determined that appellant's injuries did not originate from a risk connected with his employment and did not flow from his employment as a rational consequence. His work on the deck of a bridge did not place him in a position of risk. Although he was atop the bridge deck, he did not fall from the bridge deck but rather, he placed himself in a position of risk when he climbed over the guardrail.

Gogel v. Hancock

[2011-CA-001143](#) 12/22/2011 2011 WL 6757421

Opinion by Judge Keller; Judges Acree and Combs concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming a decision by the ALJ to dismiss appellant's claim after finding that appellant, an exercise rider for the appellee horse trainer, was an independent contractor, not an employee. The Court first held that the ALJ and the Board did not misapply the factors in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965) and *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969). While there was some evidence supporting a finding that appellant was an employee, the evidence did not compel such a finding. The Court rejected appellant's public policy argument, that the law should be changed from its current focus on control to a focus on the nature of the work performed, on the basis that the argument was one for the legislature, not the Court.