

Kentucky Court of Appeals
Cases of Note
[January-February, 2012](#)

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TORTS

Nichols v. Hazelip

[2010-CA-002168](#) 01/13/2012 2012 WL 95569

Opinion by Judge VanMeter; Judges Keller and Stumbo concurred. The Court affirmed a judgment entered after a jury rendered a verdict in favor of appellees, finding that appellant was the initial aggressor in an altercation on a golf course. The Court first held that the trial court did not err by denying appellant’s motion for a directed verdict on appellee’s counterclaim for assault. Physical contact was not required to recover for fright or other mental suffering caused by an assault and if the jury believed the evidence warranted it, damages based on appellee’s mental suffering were appropriate under the circumstances. The Court next held that trial court did not err by denying appellant’s motion for a directed verdict and submitting appellee’s assault claim to the jury. While there was conflicting evidence, evidence was presented to support a finding that appellant was the initial aggressor. The Court next held that the trial court did not err by denying appellant’s motion for JNOV or for a new trial wherein he argued that the jury’s award was excessive. Based on the evidence, the trial court correctly found that the award was not influenced by passion or prejudice. The Court next held that the trial court did not err in denying appellant’s motion for a new trial based on the questioning of a defense witness about appellant’s insurance coverage and questioning appellant regarding prior psychiatric care, when appellant failed to address how either question resulted in prejudice so as to affect his substantial rights. The Court next held that the trial court did not abuse its discretion in granting both appellees four peremptory strikes under CR 47.03. The trial court properly considered the relevant factors in determining that appellees maintained antagonistic interests. The Court finally held that the trial court did not err in granting appellees’ motion to exclude damages related to appellant’s shoulder injury. Based on the evidence before it, the jury unanimously found appellant to be the aggressor and therefore, not entitled to any recovery. Thus, there was no likelihood that the jury would have awarded appellant damages and any error in this regard was harmless.

Rogers v. Integrity Healthcare Services, Inc.

[2010-CA-001876](#) 01/27/2012 2012 WL 246639

Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed a summary judgment in favor of appellee on appellant’s medical malpractice claims. The Court held that the circuit court did not err in granting appellee’s motion for summary judgment or in denying appellant’s motion to set it aside. The Court first held that appellant waived the issue of whether the circuit court correctly relied upon prior caselaw in concluding that affidavits, which contradicted appellant’s answers to interrogatories, could not be submitted for the purpose of attempting to create a genuine issue of material fact, when appellant failed to raise the argument before the trial court. The Court next held that appellant also waived any argument that his interrogatory answers were not entirely inconsistent with the subject affidavit. Moreover, the argument lacked merit. The Court next held that that appellant had ample time to produce expert witnesses to support his cause of action and to sustain his burden of proof. Because he failed to do so, appellee was entitled to summary judgment as a matter of law. The Court finally held that the circuit court did not abuse its discretion in denying the motion to set aside the summary judgment when the motion did nothing more than reassert the

same arguments made in challenging the motion for summary judgment. Although the circuit court cited to CR 60.02, rather than to CR 59.05, its decision was otherwise sound.

Frost v. Dickerson

[2010-CA-000537](#) 02/24/2012 2012 WL 592193

Opinion by Judge Nickell; Judge Combs and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court dismissing appellants' action for damages and loss of consortium in a personal injury case stemming from an automobile accident. The Court held that the "discovery rule" did not toll the limitations period for bringing a tort action under Kentucky's Motor Vehicle Reparations Act (MVRA), KRS 304.39-230.

Ryan v. Fast Lane, Inc.

[2011-CA-000300](#) 02/10/2012 2012 WL 413684

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court affirmed a summary judgment in favor of appellee on appellant's claim that she was injured while pumping gas at appellee's establishment and that her injury was due to a latent defect in the gasoline pump. The Court held that the trial court did not err in granting summary judgment and that it correctly determined that *res ipsa loquitur* did not apply. Appellant was operating the pump at the time of the injury and therefore, it was not under the exclusive control of appellee. Further, there was no evidence that appellee was negligent, as appellant submitted no evidence that the pump was defective. Appellant's conclusory allegations and subjective beliefs that the accident would not have happened but for appellee's negligence were not enough to survive summary judgment.

WORKERS COMPENSATION

Hardin Memorial Hospital v. Hornback

[2011-CA-001707](#) 02/24/2012 WL Citation Not Available

Opinion by Judge Thompson; Judge Caperton and Senior Judge Lambert concurred. The Court reversed and remanded an opinion and order of the Workers' Compensation Board affirming an ALJ's award of permanent total disability benefits to a worker and an enhanced benefit pursuant to KRS 342.165(1) for injuries the worker suffered when she fell down an elevator shaft while working at the appellant hospital. The Court held that substantial evidence did not support the ALJ's finding that the employer intentionally violated its general duty to provide a safe workplace. The one-time malfunctioning of an elevator was an unanticipated event responded to by employees without direction from the employer, the instruction given by the elevator company was not a safety policy, and although removal from the malfunctioning elevator was a plausible event, it was not a hazard associated with hospital employment. Thus, the factors in *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000), were not met to establish KRS 338.031(1)(a) was violated.