

**Kentucky Court of Appeals**  
**Cases of Note**  
**July-August, 2012**

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

**INSURANCE**

**Stull v. Steffen**

**[2011-CA-000229](#) 07/27/2012 2012 WL 3047130**

Opinion by Judge Keller; Judges Taylor and Thompson concurred. The Court affirmed a summary judgment in favor of appellees on appellant’s claim for injuries she received in an automobile accident. The Court held that the trial court did not err in finding that the claim was filed outside the statute of limitations in KRS 304.39-230(6). While only payment of personal injury protection (PIP) benefits could extend the statute of limitations and all PIP benefits had to be paid before the insurer could disburse MedPay benefits, the insurer’s failure to exhaust PIP benefits did not convert all subsequent disbursements of MedPay benefits into PIP benefits but only converted the portion of MedPay benefits necessary to reach the PIP benefits. Therefore, the statute of limitations began to run on the date the PIP benefits were exhausted.

**TORTS**

**Gibson v. Hicks**

**[2011-CA-001090](#) 07/27/2012 2012 WL 3047209**

Opinion by Judge Thompson; Judges Lambert and VanMeter concurred. The Court reversed and remanded an order of the circuit court denying appellant’s motion for summary judgment in an action filed against her by appellee for her failure to initiate an investigation under the Kentucky Adult Protection Act, KRS Chapter 209. The Court held that the circuit court erred in denying appellant’s motion for summary judgment. In reaching that conclusion, the Court first held that the action against appellant was not precluded by the doctrine of res judicata because the question of appellant’s immunity in her individual capacity was not presented in a prior appeal. The Court next held that because appellee was not in the Cabinet’s custody or otherwise restrained by appellant or the Cabinet at the time she was neglected or abused, she could not meet the test in *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995), to establish that appellant had a special relationship and thus, a common law duty to her. The Court next held that the clear and unambiguous language of the Act did not mandate a Cabinet employee investigate all allegations of abuse and neglect of a person eighteen years of age or older and the General Assembly did not intend the Cabinet to investigate every case of alleged abuse against an adult. Because appellant did not have actual or personal knowledge of appellee’s mental or physical condition, she was only required to initiate an investigation if there was reasonable cause to believe that appellee was an adult as defined in the statute. This determination was a discretionary act and therefore, appellant was entitled to qualified official immunity.

**Peoples Bank of Northern Kentucky, Inc. v. Crowe Horwath**

**[2010-CA-001709](#) 07/13/2012 2012 WL 2892352**

Opinion by Judge Thompson; Judges Clayton and Stumbo concurred. The Court affirmed a judgment of the circuit court entered following a jury verdict in favor of appellee on appellants’ claims for professional negligence and breach of fiduciary duty in performing its auditing duties. The Court first

held that the trial court properly instructed the jury that criminal wrongdoers caused the appellant bank's losses. Regardless of whether liability could be apportioned, the instruction was not confusing or misleading and the evidence supported the instruction that informed the jury that the criminal wrongdoers breached their duties owed to the bank and that their breaches caused the losses to the bank. The Court next held that the trial court properly instructed the jury that the bank's agents caused losses to the bank in connection with check conversions. The instruction was not confusing or misleading and the evidence regarding the converted check scheme was presented to prove that the converted checks were the cause of the bank's undercapitalization and ultimate closing. The Court next held that the trial court did not abuse its discretion in admitting expert testimony describing the duties of bank directors and, specifically, appellant's directors. The nature and scope of the duties owed a financial institution by its directors was a matter beyond the experience of the average juror. The Court finally held that the any error by the trial court in directing a verdict in favor of the individual auditor's favor was harmless when the jury was not informed that the individual was dismissed from the action and the jury was properly instructed that the firm was accountable for the conduct of its CPA's, including the individual auditor.

### **Bates v. Curtis**

**[2010-CA-000285](#) 08/17/2012 2012 WL 3538271**

Opinion by Judge Taylor; Chief Judge Acree and Judge Combs concurred. The Court reversed, and remanded with instructions, a judgment entered upon a jury verdict in favor of appellees on their claim for malicious prosecution. The Court held that because there were numerous trial errors, the trial court erred in denying appellant's motion for a directed verdict. The trial court made a substantial and continuing error by submitting the case to the jury as being one for malicious prosecution, as opposed to one for wrongful use of civil proceedings. The trial court erred by submitting the issue of probable cause to the jury thus, impermissibly delegating the court's mandatory duty. The trial court also erred by not directing a verdict in appellant's favor when appellant's proof that he relied on counsel's advice in filing a civil action against appellees was unrefuted.

### **Carruthers v. Edwards**

**[2011-CA-001612](#) 08/10/2012 2012 WL 3236604**

Opinion by Chief Judge Acree; Judges Clayton and Stumbo concurred. The Court affirmed an order of the circuit court granting appellees' motion to dismiss appellant's complaint for injuries she received when she was struck in the parking lot of a bar on premises owned by appellees and leased to the bar. The Court held that the trial court properly dismissed the complaint. In reaching that conclusion, the Court first held that appellant's complaint did not state a valid claim under the Dram Shop Act, KRS 413.241. Liability could not be imposed upon the lessors who simply held title to the property on which the properly licensed lessee engaged in the regulated sale of intoxicating liquors. The Court then held that appellant failed to state a common law claim against appellees when there was no allegation that, at the inception of the lease, appellees expressly authorized the bar to over-serve patrons or an unreasonably great likelihood that the bar would do so. The Court finally held that, independent of appellees status as lessors, any claim of negligence against them would not survive a motion pursuant to CR 12.02(f).

### **Martin v. Elkins**

**[2011-CA-000862](#) 08/31/2012 2012 WL 3762419**

Opinion by Senior Judge Lambert; Judges Combs and Stumbo concurred. The Court affirmed a summary judgment of the circuit court finding that appellee breached no duty under Kentucky law by allowing his son to host a party at his residence where alcohol was consumed by teenagers. The Court held that, as an adult landowner who was aware that minors were imbibing on his property, appellee had a special relationship with those minors and the scope of foreseeability was expanded. However, because the tortious conduct was an assault which occurred at another location due to an

automobile fender bender, it was beyond the scope of reasonable foreseeability by appellee. Therefore, the circuit court did not err in granting summary judgment to appellee.

**Stathers v. Garrard County Board of Education**

**[2010-CA-002212](#) 08/31/2012 2012 WL 3762035**

Opinion by Chief Judge Acree; Judges Moore and VanMeter concurred. The Court affirmed in part, reversed and remanded an order granting summary judgment in favor of the appellee board of education, construction companies, and drilling and blasting companies on appellants' claim that blasting during the construction of a new high school caused damage to their homes. The Court first held that appellants showed a genuine issue of material fact as to causation to maintain their strict liability claim and survive summary judgment. There was no requirement that a plaintiff in a blasting case produce any expert testimony to establish causation. The homeowners' depositions provided evidence concerning the condition of the houses prior to blasting, gave graphic descriptions of the blasting and the corresponding vibrations and effects, and gave descriptions of significant changes to their homes after the blasting. Therefore, a fact-finder could reasonably conclude that blasting caused the damage to appellants' homes. The Court next held that the board of education was not entitled to governmental immunity merely because it was engaged in a government function. If appellants were able to successfully prove that their homes were damaged or destroyed as a direct result of the construction of the new high school, the board may be liable in damages under section 13 of the Kentucky Constitution for a taking.

**Walker v. Love**

**[2010-CA-002150](#) 08/17/2012 2012 WL 3538280**

Opinion by Judge Stumbo; Senior Judge Lambert concurred; Judge Moore dissented by separate opinion. The Court reversed and remanded orders of the circuit court granting summary judgment to appellees on appellants' medical malpractice claims. The Court held that the trial court erred in granting summary judgment. Appellants' failure to name a medical expert witness did not constitute failure of proof that justified the grant of summary judgment. There was no specific expert disclosure deadline and summary judgment was granted two months before the pretrial conference. Further, there was sufficient medical evidence to create a legitimate dispute about the need for an expert witness.

**WORKERS COMPENSATION**

**Rock Drilling, Inc. v. Howell**

**[2012-CA-000490](#) 08/24/2012 2012 WL 3642476**

Opinion by Judge Caperton; Judges Combs and Nickell concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion of the ALJ finding that the statutory three multiplier under KRS 342.730(1)(c) could be awarded on reopening and finding that the impairment agreed upon at the time of the original settlement could not be considered as the impairment on reopening. Because the reopening was not solely for the application of the three multiplier but was largely because of a claim for increased impairment following a second surgery, the ALJ's decision to award the three multiplier was supported by substantial evidence. The Court next held that the ALJ properly exercised his discretion in finding a 1% disability rating most credible, rather than a compromised and agreed-upon 6% disability rating from the original settlement, when there was not a 6% impairment rating assessed by a medical expert.