Kentucky Legal Cases of Note
December 15, 2008

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".

KY COURT OF APPEALS:

Insurance: "Coots" notice requirements can be waived
Case No. 2006-CA-001386
Young vs. Farm Bureau Mutual Insurance Company
Rendered 4/11/08
This appeal addresses the waiver by the underinsured motorist carrier of the notice requirements under KRS 304.39-329(3) regarding subrogation rights and offer of limits (e.g., the "Coots" Notice). Trial court granted summary judgment dismissing the claim for UIM benefits stating Kentucky Farm Bureau Mutual Insurance Company was not obligated to pay underinsured motorist (UIM) benefits to the Youngs because they failed to comply with the notification requirements contained in Kentucky Revised Statutes (KRS) 304.39-320(3). COA REVERSE the trial court's award of summary judgment to Farm Bureau, and remanded.

The facts briefly were that KFBM received notice by first class mail of the tender of limits and rights of subrogation. The UIM carrier did not advance the proceeds within the 30 day period and wrote back requesting sufficient or additional documentation. The insureds brought action against underinsured motorist (UIM) carrier after settling tort claim and the Court of Appeals held KFBM had waived any defense based on failure to comply with statutory requirement to send notice of tort settlement by certified or registered mail, and the insured's letter notifying carrier of tort settlement provided reasonable and sufficient notice despite potentially misleading content.

Request by underinsured motorist (UIM) carrier for more documentation does not toll thirty-day limitations period for carrier to permit insured to settle tort claim or advance settlement amount. (From KY Cases)

Insurance: Transfer of ownership between non-dealers and proof of insurance
Case No. 2007-CA-000963-MR
Graham v. Rogers
Rendered 4/25/08
CA affirms TC entry of SJ, holding that defendant was not the owner of the car at the time of collision.

Loudon sold his car to Rogers for $400; he accompanied her to the local county clerk's office, signed the back of the title (in both the "transfer" and "application for title" sections); his signature was notarized by county clerk staff; he turned over possession of the title and the car to Rogers. The car was involved in a hit-and-run approximately 7 weeks after the sale. A witness recorded the license plate number, which was traced to Loudon. Rogers had apparently failed to obtain insurance, submit the application for new title, or re-register the car. With the help of hit-and-run detectives, Loudon got Rogers to execute a bill of sale reflecting the original sale date. Loudon also contacted the clerk's office to notify them of the sale. Graham filed this claim for property damage, alleging "negligent entrustment" against Loudon and arguing that since Loudon was listed as the owner by the clerk, he was still the owner for insurance purposes. The trial court concluded that Loudon had taken all steps necessary under KY statutes to transfer

ownership to Rogers, therefore finding that Rogers was legal owner of the car at the time of the accident and dismissing all claims against Loudon (and State Farm).

CA affirms, holding that statute cited by Graham applies to change in registration and issuance of new title *after* transfer of ownership takes place. There is no affirmative duty upon the seller to verify buyer has insurance. Also, statute does not place duty upon seller to verify that buyer has timely submitted the necessary documents for transfer of title. (From KY Cases)

Insurance: Inferred intent doctrine and its effect on coverage
Case No. 2006-CA-001335
Farm Bureau Mutual Insurance Company v. Coyle
Rendered 5/16/08
KFB appeals TC judgment upon jury verdict that a homeowner's policy issued to its insured Tweed provided coverage for the shooting of Elliott by Tweed's husband, Coyle. KFB argued there was no "occurrence" under this factual scenario and that alternatively, the policy exclusion applied since the injury was expected or intended by Coyle. The TC denied both of KFB's MSJ's and submitted the question of intent to the jury by tendering the following instruction: Do you believe from the evidence that Coyle intentionally fired a pistol at or in the general direction of Elliott with the expected result of wounding/harming Elliott and was not an "accident" in the sense of being merely negligent and unintended? The second instruction read as follows: Do you believe from the evidence that Coyle understood the physical nature of the consequences of his actions and intended to shoot or expect to injure Elliott upon discharge of the firearm ..., and was not an "accident" in the sense of being merely negligent and unintended? The jury answered "No" to both thereby concluding Coyle's shooting was a negligent and unintended accident.

On appeal, KFB argues that summary judgment should have been entered on the basis of the inferred intent doctrine. The COA acknowledged this exception to the general rule that if the injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable. Under the inferred intent rule, however, the actor's intent to cause harm can be reasonably inferred from the facts and the nature of the action without having to resort to proof of that intent. As applied to the subject case, the COA held that Coyle's admission that he intentionally pointed a firearm at Elliott with the intent of discharge a bullet at him was not an "occurrence" as contemplated by even a liberal reading and broad application of the terms of the policy. As such, the COA reversed the TC judgment and remanded for entry of judgment in favor of KFB. (From KY Cases)

Insurance: Negligent misrepresentation; certificate of insurance; exclusions
Case No. 2007-CA-000317
Ann Taylor, Inc. v. Heritage Insurance Services, Inc.
Rendered 7/11/08
CA affirms SJ for insurance company and broker on property loss action.

Appellant contracted with third party to transport goods; the contract included the requirement for insurance and proof thereof. Appellant secured proof of insurance in the form of a certificate of insurance ("COI") which specifically stated that it in no way altered the terms of the underlying policy. Appellant never attempted to confirm coverage under the policy. The shipment was stolen while the driver slept inside a rest stop. The policy had an exclusion for unattended shipments and refused payment. Appellant sued, arguing that the COI did not list this exclusion. Appellant alleged negligent misrepresentation.

CA held that the COI clearly does not alter the terms of the policy. Cases cited regarding differences between a COI and the policy are clearly distinguishable. (From KY Cases)

Insurance: Underinsured (UIM) motorist benefits and "Coots" advance
Case No. 2007-CA-001165
Auto Owners Ins. Co. v. Omni Indemnity Co.
Rendered 8/01/08
The tort victim's underinsured motorist carrier, Auto Owners Insurance Co., appeals from an order of the Jefferson Circuit Court determining that Auto Owners is not entitled to restitution from the tortfeasor's insurer, Omni Indemnity Company, for funds advanced to the tort victim pursuant to Coots v. Allstate Insurance Company, 853 S.W.2d 895 (Ky. 1993).

In this motor vehicle accident case, Omni tendered its liability limits and Auto Owners advanced to preserve its subrogation claim against the tortfeasor for any UIM benefits it might pay. Subsequent to the advancement, the tortfeasor filed bankruptcy and Auto Owners failed to file proof of its claim with the bankruptcy court, resulting in the tortfeasor's dismissal from the lawsuit with no finding of liability against him. The tortfeasor was dismissed from the tort lawsuit which did not bar the claimant's claim for UIM benefits against Auto Owners who also sought to recover its advance from the tortfeasor's liability insurer Omni.

The trial court entered an opinion and order determining, based upon Nationwide Mutual Insurance Co. v. State Farm Automobile Insurance Co., 973 S.W.2d 56 (Ky. 1998), and USAA Casualty Insurance Company v. Kramer, 987 S.W.2d 779 (Ky. 1999), that Auto Owners was not entitled to recover the $25,000.00 it had advanced pursuant to Coots from Omni Indemnity. This appeal followed. (From KY Cases)

Insurance: Rescission of insurance contract based upon false statement on application
Case No. 2007-CA-000799
Rudolph v. Shelter Insurance Companies
Rendered 9/05/08
Trial court granted summary judgment in favor of insurer seeking to rescind homeowner's insurance policy based upon misrepresentation in the insurance application. The COA found a genuine issue of material fact existed and vacated and remanded back to circuit court for further proceedings. (From KY Cases)

Insurance: Attorneys fees and prejudgment interest award affirmed in UCSPA Claim
Case No. 2007-CA-000911
Tennessee Farmers Mutual Ins. Co. v. Jones
Rendered 9/12/08
The Court affirmed a circuit court judgment finding personal jurisdiction against the appellant Tennessee insurer and awarding attorney's fees and prejudgment interest to appellee on a claim for that the insurer violated the Kentucky Unfair Claims Settlement Practices Act, KRS 304.12-230, related to a claim for personal injuries appellee received in an automobile accident. Appellant insured the Tennessee resident who owned the vehicle driven by the person responsible for the causing collision. The Court held that the trial court did not err in finding personal jurisdiction through Kentucky's long-arm statute. The accident occurred in Kentucky; appellee, a Kentucky resident, filed her third-party claim in Kentucky; there was no privity of contract between appellee and appellant in any state; and appellant investigated and adjusted the claim in Kentucky. Further, allowing the insurer to ignore a legitimate claimant would under undermine the intent of the UCSPA. The Court then held that the trial court properly awarded appellee attorney's fees and prejudgment interest under KRS 304.12-235. While the statute was ambiguous on whether interest and attorney fees were available to third-party claimants, KRS 304.12-230 evinced the intent by the legislature to allow for a more expansive reading of the statute. The Court finally held that appellee's failure to move the trial court for a new trial,

precluded the Court from reviewing her argument on cross-appeal that she was entitled to a new trial on damages. (From KY Cases)

Insurance: Coverage for theft by person claiming superior title
Case No. 2007-CA-002289
Best v. West American Ins. Co.
Rendered 9/26/08
Best and the Lazzarinis entered into a contract to purchase two vehicles. Diana Lazzarini used self help to take possession of the two vehicles from Best who was not aware that Diana had taken the vehicles. Approximately two months later, Best informed his insurance company, West American, that the vehicles were missing. Best claimed that they had been stolen. He tried to have the police investigate the allegedly stolen vehicles but was told it was a civil matter. After conducting an investigation into the alleged "theft" of the vehicles,

West American denied Best's insurance claims on the basis that the vehicles had been properly repossessed by their true owner and, accordingly, there could not have been a "theft within the common meaning of insurance coverage." Best subsequently filed his complaint in the circuit court, alleging that West American had improperly denied his insurance claims for the alleged theft of the vehicles. (From KY Cases)

Insurance: Torts; bad faith, agent, independent contractor, attorney, insurance company, UCSPA
Case No. 2004-CA-002296
Cincinnati Insurance Co. v. Hofmeister
Rendered 10/17/08
The Kentucky COA found the trial court erred by: (1) denying CIC's motion for directed verdict in that the attorney retained by CIC for its insured was not CIC's agent, but rather was an independent contractor; (2) denying CIC's motion for directed verdict on the Hofmeisters' claim of fraud; and (3) denying CIC's motion for a directed verdict on the Hofmeisters' claim that CIC violated the UCSPA. The court also identified sufficient factors to convince it that the jury's verdict was the product of passion and/or prejudice. The court dismissed as moot the Hofmeisters' cross-appeal regarding the trial court's reduction of the punitive damages award.

This litigation began as the result of a motor vehicle collision in which an employee who was returning vehicle keys and a credit card to his employer fell asleep at the wheel and caused a collision, injuring George Hofmeister. The court found the central question of the appeal to be what legal relationship exists between an insurer and legal counsel hired to defend its insured. In its analysis, the court found that counsel began and maintained his representation of CIC's insured as CIC's independent contractor.

The court found that the Hofmeisters could not and did not establish fraud and CIC's motion for directed verdict should have been granted.

The court also held that the requirement under the UCSPA that liability be reasonably clear was not met; CIC had a reasonable basis for denying the Hofmeisters' claims and therefore did not violate the UCSPA.

As to the jury's verdict being a product of passion and/or prejudice, the court specifically identified the jury's consideration of inadmissible evidence of litigation conduct of defense counsel, "improper" conduct of the plaintiffs' attorney, and mere speculation as to the allegation that CIC's conduct caused the plaintiffs' economic loss. (From KY Cases)

Torts: Dismissal remanded on school personnel's duty to report due to failure to include lower court's reasoning in summary judgment
Case No. 2007-CA-000489
Nelson v. Turner
Rendered 6/06/08
CA affirms in part and vacates and remands in part entry of SJ against parent regarding claims of negligent supervision and failure to report sexual assault.

Nelson filed suit against KSBIT alleging unfair claims settlement practices; failure to timely respond and complete an investigation; unfair or deceptive acts; and several other claims, including intention infliction of emotional distress. This action was dismissed, but Nelson immediately filed an amended complaint renewing these claims and also alleging failure to supervise and report the abuse against Turner and the Board. Nelson also alleged outrageous conduct. Defendants alleged governmental and qualified official immunity. Turner contended her supervision was a discretionary act and she was not required to report under KRS 620.030.

As to Turner's duty to report, CA remands to the TC because, though the court found the duty to report to be discretionary, the opinion did not include the court's reasoning for the CA to review. CA affirms as to the dismissal of the outrage claim. CA cannot affirm the dismissal of bad faith against KSBIT until Turner's liability is established. (From KY Cases)

Torts: Fireman's Rule did not apply to animal control officer bit by dog off the premises he was to retrieve the dog
Case No. 2007-CA-000547
Fetchco v. Morgan
Rendered 6/27/08
Fetchko was employed as a Louisville Metro Animal Control Officer and was attacked by the dog off the property. Fetchko filed his complaint in the circuit court, alleging claims of negligence, negligence per se, and strict liability against the dog's owners.
The court determined that, as an animal control officer, Fetchko had "assumed the risk of being bitten or injured by one of the animals he transports." However, in response to the defendant's argument that the "Firefighter's Rule" should apply to Fetchko's cause of action, "thereby exempting all of the Defendants from liability" for Fetchko's injuries, the court declined to extend the Firefighter's Rule to the facts presented in this case Despite her assertions, the COA agreed with the circuit court that K. Morgan's actions were sufficient to statutorily define her as an "owner" of Bandit at the time of the incident and this portion of the circuit court decision is affirmed. (From KY Cases)

Torts: Fraud, Consumer Protection Act
Case No. 2007-CA-001576
Keeton v. Lexington Truck Sales, Inc.
Rendered 7/18/08
Keeton appeals the TC's entry of summary judgment for Lexington Truck Sales (LTS) on Keeton's numerous claims that included fraud, Kentucky Protection Act violations, Magnuson-Moss Warranty Act violations, and finally a violation of KRS 186A.540. Keeton's claims stemmed from his purchase of a used commercial truck from LTS and problems that he encountered with the truck and its engine after the purchase.

The COA reversed the dismissal of Keeton's negligence per se claim against LTS for further proceedings. (From KY Cases)

Torts: Vicarious liability not found in facts of this case; dismissal affirmed against business who exercised no control over driver who was doing a gratuitious errand for the business

Case No. 2007-CA-001087

Brooks v. Grams, Inc.

Rendered 8/08/08

This lawsuit arises from a personal injury claim by the Brooks arising from a car accident against Ferand Dillingham ("Ferand"). In their complaint, the Brookses named Ferand's estate; Edith and Farland Dillingham (the owners of the vehicle which Ferand was driving); Grams Inc., d/b/a Gram's Grocery ("Grams"); and Ferand's automobile insurance carrier, State Auto Property and Casualty Insurance Company.

Ferand had driven his wife Apryl to work. Apryl states that Grams' owner, Mark Fitzpatrick ("Fitzpatrick"), was in the back preparing the store's morning breakfast items. She recalled Fitzpatrick announcing that the store was out of sausage. In response, Apryl offered to have Ferand go to the Wal-Mart in Danville to buy some sausage for the store. Apryl took $20.00 from the store register, went outside, and made the errand request of her husband. Apryl states that she took the initiative in asking Ferand to go on the errand, and that Fitzpatrick had little to do with it. Fitzpatrick states that he does not recall any discussion with Apryl about Ferand doing the errand, but Apryl informed him about it afterwards.

The trial court dismissed the claims against Grams who had moved for summary judgment denying any liability for Ferand's negligence because it had no agency relationship with him who was simply a "sub agent". Plaintiff appealed. COA affirmed. (From KY Cases)

Torts: Medical negligence verdict affirmed; Damages arising from infant's death during delivery include loss of power to labor and earn money

Case No. 2007-CA-001616

Maysville Obstetric v. Lee

Rendered 8/29/08

Maysville Obstetric and Gynecological Associates, P.S.C. (hereinafter "Maysville Obstetric") appealed the jury verdict rendered against it for negligence in the death of Katelyn Lee. Harlan Lee, administrator of the estate of Katelyn Michelle Lee, and Harlan Lee and Penny Lee, individually, separately appealed, arguing that they were entitled to a new trial on damages. The COA reversed the order denying the underlying plaintiffs a new trial on damages and instructed that the parties be allowed to present evidence as to the damage to the estate by virtue of the destruction of Katelyn's power to earn money. (From KY Cases)

Torts: Amusement park ride injury; Daubert, summary judgment, duties

Case No. 2007-CA-001463

West v. KKI, LLC d/b/a Six Flags Kentucky Kingdom

Rendered 10/03/08

The COA affirmed the trial court's summary judgment dismissing the plaintiff's personal injury claims, since there was no competent testimony that the amusement ride (the Chang) at Kentucky Kingdom was dangerous or defective, and the trial judge's Daubert ruling striking the expert's testimony was not an abuse of discretion. (From KY Cases)

Workers Comp: Work-Relatedness of PTSD

Case No. 2007-CA-001469

Wal-Mart Stores, Inc. v. Smith

Rendered 6/13/08

The claimant alleged an injury to her low back and post-traumatic stress disorder when the Wal-mart store where she was working was shaken by a blast from a nearby mining operation. She

was awarded benefits for a temporary low back injury and permanent disability for PTSD. Wal-Mart appealed on the basis that she did not prove a physical injury, and that a psychiatric disability can only be upheld if there is a permanent physical injury. The Court rejected these arguments on the basis that Kentucky law allows a psychiatric claim based only on temporary physical injury, and that there was substantial evidence of a physical injury. The Court included scathing criticism of Wal-Mart's arguments particularly since they cited to an Iowa case to argue that Kentucky had rejected using a claimant's own testimony as substantial evidence of injury (it has not), and relied on Wal-Mart's surveillance videos as proof that the claimant was not injured in the blast, when they were unclear and incomplete. (From KY Cases)

Workers Comp: Future Medical Treatment without permanent impairment
Case No. 2007-CA-001855
White v. Great Clips
Rendered 7/18/08
The ALJ found that the claimant's upper and lower back injuries caused her no permaent impairment, but awarded future medical treatment for those conditions. The claim for upper back injuries was first dismissed, but then upon petition for reconsideration the ALJ ordered future medical benefits based on that condition. That award was reversed by the workers' compensation board because it impermissibly reconsidered the merits of the claim. The Court of Appeals found that there were insufficient findings of fact to show whether the injury caused a temporary or a permanent exacerbation of the underlying degenerative disc condition in the low back and remanded for further findings of fact. This particular ALJ has resigned, so another ALJ will have to address the orders of the Court of Appeals and Workers' Compensation Board. (From KY Cases)

Workers Comp: Asbestosis and statute of limitations
Case No. 2007-CA-001698
AK Steel Corp. v. Pollitt
Rendered 7/18/08
The claimant last worked at AK Steel in 1992, where he was exposed to asbestos. He developed respiratory symptoms in 2004, and discovered that he had a calcified plaque spot on his lung which was due to asbestos exposure. He filed a claim for asbestosis and the ALJ found that it was timely filed based on the 20-year statute of limitations for asbestos-related diseases. However, the ALJ found that he did not have asbestosis, but a calcified plaque condition which caused no impairment but required yearly monitoring, and ordered AK Steel to pay for this. AK Steel's argument that the claim was time barred because this was an injury and the asbestosis statute of limitations did not apply was rejected. (From KY Cases)

Workers Comp: Employment relationship
Case No. 2008-CA-000149
Pike County Board of Education v. Mills
Rendered 8/01/08
Mills was hired on a contract basis to direct the color guard at Shelby Valley High School, however, he was hired by the band director and never by the superintendent of the Board of Education. He was injured on the job, and the Board of Education argued that he was not an employee, but a contractor. The ALJ found that he was an employee, this covered by the workers' compensation act, and the Court of Appeals affirmed, citing the broad wording of KRS 342.640(3) which covers every person in the service of the school district under any contract of hire, express or implied, without limiting its scope to those properly hired under the school reform act. (From KY Cases)

Workers Comp: Agriculture did not include logging operation for workers compensation coverage

Case No. 2008-CA-000482

Commonwealth of KY v. Gussler

Rendered 8/08/08

On appeal, the Uninsured Employers' Fund (UEF) argues that the Board erred in overturning the ALJ, thereby excluding Williams' tree harvesting activities from the definition of agriculture. COA disagreed and affirmed. (From KY Cases)

Workers Comp: Up the ladder and contractors

Case No. 2008-CA-000709

Commonwealth of KY v. Gussler

Rendered 9/26/08

R.O.Giles was a landowner of certain land in Knox County. His company planned to strip mine the land, but before doing so, wanted to harvest the timber from it. He entered into a contract with L. Mills Logging to do so. A bulldozer operator, Roger Mills (no relation) was killed on the job. However, L. Mills Logging was uninsured for workers' compensation. The ALJ found, and the Board affirmed, a decision that the up-the-ladder contractor provisions of KRS 342.610(2)a made R.O. Giles liable for workers' compensation benefits paid to the widow and family of Roger Mills, because their relationship fit squarely within the wording of the contractor statute. The Court of Appeals affirmed. (From KY Cases)

Medical Negligence: Multiple issues

Case No. 2006-CA-001279

Barkman v. Overstreet, M.D.

Rendered 4/11/08

The patient suffered permanent paralysis of all four limbs after an automobile crash and brought a claim for medical malpractice against her treating internal medicine doctor who treated her at the hospital. The jury returned a verdict in favor of the physician, and the patient/Barkman argued on appeal that the trial court used the wrong standard of care in the jury instructions, erred in not granting a mistrial when Overstreet (the doctor) mentioned insurance during his testimony and erred when it denied Barkman's request to produce a document prepared by Overstreet in anticipation of litigation. Finding no error, the COA affirmed. (Note: much more detail is available at the link above.) (From KY Cases)

Medical Negligence: Multiple issues

Case No. 2007-CA-000376

Woolum M.D. v. Hillman

Rendered 5/02/08

This appeal and cross-appeal stem from a medical negligence wrongful death action. Lisa Ann Hillman was the patient of Dr. Jerry Woolum during her pregnancy with Caitlynn Hillman. Complications occurred during her pregnancy and Caitlynn was stillborn. A jury found medical negligence on the part of Dr. Woolum and awarded Mr. and Mrs. Hillman a total of $500,000 for their loss of companionship claims ($250,000 each) and $600 for funeral expenses, but chose to award $0 for the child's permanent earnings impairment. The TC later ordered a new trial on the issue of the $0 verdict for permanent impairment. Following the court's ruling on motions in limine in regard to certain evidentiary issues concerning the second trial, the parties entered into an agreement stipulating that the loss to Caitlynn's estate was $475,000 and this appeal followed.

On appeal, Dr. Woolum argued that the TC made several evidentiary mistakes and errors in certain rulings, most notably as follows: 1) it erred in denying his motion for directed verdict; 2) it erred in not declaring a mistrial during the first trial, and 3) it erred by granting the Hillmans a new trial on the issue of damages. The Hillmans cross-appeal and raise two additional issues to

be considered by the COA: 1) TC erred by not excluding the testimony of two of Dr. Woolum's experts during the first trial, and 2) it erred by not preventing the jury of the proposed second trial from being informed about the damages awarded to them at the first trial.

The COA affirmed the TC in all respects except that it held that Woolum should be permitted to present evidence of the child's lack of earning capacity at the new trial on damages concerning the wrongful death claim. (From KY Cases)

KY SUPREME COURT:

Insurance: No fault PIP benefits and assignment of benefits
Case No. 2006-SC-000857-DG
Neurodiagnostic vs. Farm Bureau Mutual Insurance Company
Rendered 5/22/08
At issue in this case is whether, under the Kentucky's Motor Vehicle Reparations Act , a medical provider can have a direct right of action against an automobile insurer for basic reparation benefits by assignment from the insured. The SCOKY concluded, consistent with the lower courts that have addressed this issue, that under the old law, it could; but under the current law, it cannot and thus affirmed the COA decision. (From KY Cases)

Insurance: UIM - "furnished" and "owned" have two distinct connotations and that the State Farm exclusion did not preclude UIM coverage for decedent under the parents' policy
Case No. 2006-SC-000856-DG
Williams vs. State Farm Mutual Automobile Association
Rendered 6/19/08
Williams appeals COA's opinion affirming TC's entry of summary judgment in favor of State Farm on Williams' claim for UIM benefits stemming from a one-vehicle accident in which Williams' son, Paul, was killed while riding as a passenger. Williams first presented a claim to State Farm under the policy insuring the vehicle involved in the accident (which happened to be owned by Williams' other son, Aaron, who was also killed), which was promptly paid. Williams then presented an UIM claim to State Farm under the policy insuring Williams and his wife's vehicle in which Paul was included as a household driver, but State Farm denied this claim based on the exclusion which provided that UIM coverage was not afforded where the injury occurred in a vehicle "furnished for the regular use of you, your spouse or any relative." At the TC level, State Farm successfully argued that the vehicle involved in the accident was owned by a relative (Aaron) that lived in the same household as the policyholders (parents), with the TC granting summary judgment by finding that the vehicle owned by Aaron was furnished for his use. On appeal, the COA affirmed the TC in a 2-1 decision and rejected Williams' argument that since the vehicle was owned by Aaron, it could not have been "furnished" by the parents to Aaron. The COA found no ambiguity in the exclusionary language by the mere omission of the phrase "owned by" in the clause. Williams again appealed.

The Supreme Court granted discretionary review to consider whether a vehicle "furnished" to a relative includes a vehicle "owned" by the relative rather than the policyholder in the context of this UIM exclusion. The SC felt that the main case relied upon by State Farm (and the lower courts) to support its position, Murphy v. Ky. Farm Bureau (2003), was easily distinguishable in that the exclusion contained in the KFB policy at issue therein expressly excluded vehicles "owned by or furnished or available" for the regular use of family members. The SC found this language to be much broader in scope than the similar language contained in State Farm's policy.

As Kentucky law dictates that terms in insurance contracts be given their plain, ordinary meaning according to the usage of the average person, the SC concluded that "furnished" and "owned" have two distinct connotations and that the State Farm exclusion did not preclude UIM coverage for Paul's estate under the parents' policy. (From KY Cases)

Torts: "Lost or diminished chance" of survival because of physician's misdiagnosis is not a recoverable claim in Kentucky

2005-SC-000306-DG
2006-SC-000077-DG
Warren Kemper M.D. v. Gordon
Rendered 6/19/08

This wrongful death case involves the profoundly sad death of a young mother, thirty-eight year old Lori Gordon. The decedent's family and estate (Gordons) alleged that Lori's death was the result of a negligent misdiagnosis by, among others, Dr. Warren Kemper. Various claims filed by the Gordons were resolved, both before trial and up through the return of the jury verdict. As a result, the jury's finding of no negligence on the part of Lori's healthcare providers had an impact only on Dr. Kemper. SCOKY granted discretionary review to address the decision of the Court of Appeals adopting the "lost or diminished chance" doctrine of recovery In their cross-appeal, the Gordons argue separate grounds for reversal and a new trial. Further, in the event a new trial is granted, the Gordons asked SC to review numerous evidentiary issues.

While SC rejected the adoption of the "lost or diminished chance" doctrine of recovery, the SC did conclude the Gordons established sufficient grounds for a new trial.

Specifically, the holding in this case that the doctrine of lost or diminished chance for recovery or survival did not apply in medical-malpractice cases was contained in a plurality (rather than a majority opinion) which was authored by Cunningham, with one justice and one special justice concurring and two justices concurring in result only. As for the other issues raised, the SC held that whether physician breached standard of care in failing to diagnose patient's gastric cancer was for the jury; the trial court did not err and acted within its discretion in declining to qualify internist as an expert for purpose of giving an opinion as to likelihood of patient's survival had her gastric cancer been diagnosed by physician and in excluding a portion of testimony of one of plaintiffs' experts. However, the trial court's refusal to allow plaintiffs to question one of physician's experts about apparently inconsistent testimony that expert had given in a previous case was reversible error. (From KY Cases)

Workers Comp: Triple Multiplier

Case No. 2007-SC-000361-WC
Miller v. Square D Company
Rendered 4/24/08

The claimant worked as a mold technician and also at an assembly job for Square D. He was injured performing the mold technician job, but was able to perform that work after recuperating from his injury. He testified that he was unable to perform the assembly job. The Administrative Law Judge found that he was not entitled to an enhanced benefit for being unable to return to work at the job he was doing at the time of the injury, under Lowes #0507 v. Greathouse 182 SW3d 584, (2006), a case which involved two different employers. The Court reversed and remanded the case to the ALJ for a finding as to whether the claimant could perform all of the jobs which he was doing for the employer at the time of the injury, including the assembly job, holding that the Lowes #0507 was inapplicable to these facts. (From KY Cases)

Workers Comp: Credit for Payments Made by Employer
Case No. 2007-SC-000361-WC
Millersburg Military Institute v. Puckett
Rendered 4/24/08
The Employee was over 65 years old when he was injured, thus his benefit period was limited to two years. He was awarded disability benefits, and the employer was given credit for periods of temporary total disability paid during recuperation, and also for wages paid for two hours of work per day thereafter. The Court of Appeals reversed, finding that the wages paid were bona fide wages and not payments for disability, therefore, no credit is allowed per KRS 342.730. The Supreme Court affirmed the reversal. (From KY Cases)

Workers Comp: Unexplained fall and presumption of work relatedness
Case No. 2007-SC-000515-WC
AK Steel v. Adkins
Rendered 5/22/08
The Claimant fell while attempting to close the door of a coal hopper, hitting her head and injuring her shoulder. She testified that she assumed it was because she lost her footing but could not remember. The Administrative Law Judge referred to cases which establish a presumption of work relatedness if the employee is unable because of the injury to remember how the accident happened, however, KRS 342.720 is the statute which contains the precise situations where the presumption applies. While the case contains a good discussion of the presumption, the Supreme Court considered the circumstantial evidence of work-relatedness as a permissible inference and affirmed on substantial evidence grounds. (From KY Cases)

Workers Comp: Employer not liable for claimant's attorneys fees absent unless employer disputed medical expenses without reasonable ground
Case No. 2007-SC-000567-WC
Rager v. Crawford & Co.
Rendered 6/19/08
The workers' compensation claimant was successful in his defense of a post-award medical dispute with the employer regarding payments of medical bills. The ALJ awarded claimant's attorney a fee, but refused to impose liability for the fee on employer, finding that employer had a reasonable basis to contest the disputed expenses. Claimant appealed to the Workers Compensation Board which affirmed the ALJ. COA affirmed, and SC affirmed.

The Supreme Court affirmed the award of the attorneys fees and held the claimant was required, however, to pay his own attorney fee, absent a showing that employer had disputed the medical expenses without reasonable ground. (From KY Cases)

Workers Comp: Workers' Compensation Exclusive Remedy Provisions for Liability does not apply to Governmental Agencies
Case No. 2007-SC-000066-DG
Davis v. Hensley
Rendered 6/19/08
In a tort action, both the employer and an up-the ladder general contractor are protected from liability by the injured worker if the employer or its general contractor have workers' compensation coverage. This case holds that a governmental entity, in this case the Kentucky Department of Transportation, does not enjoy immunity under KRS 342.690 because it is not liable for workers' compensation benefits as a general contractor. The Court based this on the definition in KRS 342.610 of up-the-ladder contractors as "persons", and KRS 342.630 defines "persons" and governmental entities separately. Thus the government cannot be an up-the-ladder contractor because it is not a "person". The implications of this decision could be that the state no longer has up-the-ladder responsibility to cover employees of subcontractors for the state who

are uninsured for workers' compensation. However, the state will have to cover those workers through the Uninsured Employer's Fund. This decision does not address sovereign immunity, which should still apply to the Transportation Cabinet. (From KY Cases)

Workers Comp: Treating physician's testimony not to be given greater weight
Case No. 2007-SC-000885-WC
Andrea Sue Sweeney v. King's Daughters Medical Center
Rendered 8/21/08
An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits, finding that she failed to show a permanent, work-related injury. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant argues that Kentucky should adopt a rule that gives the opinions of a treating physician greater weight than those of an examining physician. She also argues that the ALJ misconstrued the law regarding pre-existing injuries and failed to support the decision with substantial evidence.

SCOKY affirmed hold neither Chapter 342 nor the applicable regulations affords greater weight to a treating physician's testimony. Substantial evidence supported the decision under a correct interpretation of the law. KRS 342.185 gives the ALJ the sole authority to judge the weight, credibility, and inferences to be drawn from the evidence of record. Chapter 342 and the regulations continue to be silent regarding the weight to be afforded a treating physician's testimony. We construe that silence as a legislative intent to give it no particular weight . (From KY Cases)

Workers Comp: Evidence considered in re-opening of claim
Case No. 2007-SC-000688-WC
St. Joseph Hospital v. Pamela Littleton-Goodan
Rendered 8/21/08
When deciding the reopening that is the subject of this appeal, the Administrative Law Judge (ALJ) relied on a Form 107 medical report that accompanied the claimant's initial application for benefits although neither party designated it as being part of the evidence at reopening. The Workers' Compensation Board (Board) and the Court of Appeals affirmed.
The Supreme Court held that the administrative law judge could consider medical report submitted with initial claim, even though the report was not designated as part of the evidence at reopening. (From KY Cases)

Workers Comp: Computation of wages in profit-sharing
Case No. 2007-SC-000658-WC
Sara Pendygraft v. Ford Motor Co.
Rendered 8/21/08
The injured workers' compensation claimant sought review of decision from Workers' Compensation Board, in which the Board included profit-sharing bonuses in the claimants pre-injury and post-injury average weekly wage and, on that basis, the WCB had found the claimant was not eligible for a double income benefit. The Court of Appeals affirmed, and the SC affirmed on different ground the COA, holding that the claimant's profit-sharing bonuses were not includable as claimant's "average weekly wage" for purposes of determining basic income benefits. (From KY Cases)

Workers Comp: Statute of limitations tolled by employer's failure to strictly comply with notice of termination of TTD benefits
Case No. 2007-SC-000533-WC
Kentucky Container Service, Inc. v. Kenneth Ashbrook
Rendered 8/21/08

In this workers compensation appeal, the Supreme Court affirmed the COA and held that the two-year limitations period for filing a workers compensation claims was tolled by the employer's failure to strictly comply with statutes governing notice of termination of temporary total disability benefits. In this case the injured employee filed his claim for workers' compensation benefits after his employer terminated temporary total disability income benefits. The ALJ had found the claim for the 1998 injury to be timely under Billy Baker Painting v. Barry, 179 S .W.3d 860 (Ky. 2005) reasoning that Midwestern submitted a defective Form IA-2 that failed to cause the Office to send a WC-3 letter and thus the failure to comply strictly tolled the statute of limitations, regardless of whether it resulted from bad faith or misconduct. (From KY Cases)

Medical Negligence and Products Liability: Daubert hearing, findings of fact, etc.
Case No. 2006-SC-000175-DG
Hyman & Armstrong, PSC & Sandoz Pharmaceuticals v. Gunderson, et al
Rendered 4/24/08
In this well-publicized case, a Jefferson County jury awarded Gunderson's estate, her surviving husband and two minor children a total of almost $19.1 million ($6 million for loss of parental consortium and approx. $1.85 million for loss of earning power and services along with $11.25 million in punitives) in February 2004 against Dr. Lynn Armstrong and Sandoz Pharmaceuticals (90% of compensatorys and all of punitives assessed to Sandoz) stemming from the sudden death of Gunderson in October 1993 while taking Parlodel postpartum (to stop lactation) as prescribed by Dr. Armstrong and manufactured by Sandoz. On appeal, the COA affirmed the compensatory damages award, but vacated the punitives award based on its determination that the TC failed to instruct the jury that punitives could not be based on conduct of Sandoz that occurred outside Kentucky. By opinion dated October 21, 2005, the COA remanded for a new trial on the amount of punitives only. Dr. Armstrong and Sandoz filed separate motions for discretionary review, which were granted and consolidated for the Supreme Court's review. In its 48-page opinion, the SC addresses a number of issues raised by one or both Appellants. (From KY Cases)