

DIGEST OF INSURANCE LAW

KENTUCKY

Courtesy of
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Bowling Green, Kentucky

CIVIL JUDICIAL SYSTEM

Kentucky Courts include the Supreme Court, Court of Appeals, Circuit Court (trial court of general jurisdiction), and District Court (trial court of limited jurisdiction). Ky. Const. §109. All Courts shall constitute a unified judicial system for operation and administration. *Id.* All judges are elected. Ky. Const. §117.

Courts of Original Jurisdiction

District Court. District courts are located in each county. Ky. Const. §113. They have exclusive jurisdiction in civil cases in which amount in controversy does not exceed \$54,000, except matters affecting title to real estate, and matters of equity. KRS 24A.120. The district court has limited criminal jurisdiction. KRS 24A.110. It does not have appellate jurisdiction. KRS 24A.010. If a district has more than one judge, there shall be one Chief Judge. Ky. Const. §113. If there is more than one county in a district, a trial commissioner is appointed by the Chief Judge. *Id.* The Kentucky Supreme Court outlines duties of the Trial Commissioner. *Id.*

Circuit Court. There is a circuit court in each county. Ky. Const. §112. Circuit courts have original jurisdiction of all justiciable causes not vested in some other court. KRS 23A.010. Circuit courts have limited appellate jurisdiction. *Id.* Circuit courts have authority to review actions or decisions of administrative agencies as original actions. KRS 23A.010(4). In circuits with more than one Judge, one Chief Judge is elected by his or her associates. Ky. Const. §112.

Appellate Courts

Supreme Court. The Supreme Court is composed of a Chief Justice and six Associate Justices elected by judicial districts (configurations of circuits). Ky. Const. §110. The Supreme Court normally assumes appellate jurisdiction by grant of discretionary review only, except for some matter of right appeals. *Id.* It is the court of last resort, civil and criminal, except where federal appeals are warranted. It has the power to issue writs necessary to regulate its appellate jurisdiction. Ky. Const. §110.

Court of Appeals. The Court of Appeals is composed of fourteen Judges, an equal number elected from each Supreme Court District. Ky. Const. §111. The Court of Appeals has appellate jurisdiction only, except it may review directly decisions of administrative agencies. *Id.* It has the power to issue writs necessary to regulate its appellate jurisdiction. *Id.*

Circuit Courts. Circuit Courts have appellate jurisdiction over judgments and final orders of District Courts. KRS 23A.080. It has the power to issue writs necessary to regulate its appellate jurisdiction. *Id.*

LAW

Abbreviations

C.R. – Kentucky Rules of Civil Procedure.
F.2d – Federal Reporter, Second Series.
F.3d – Federal Reporter, Third Series.
F. Supp. – Federal Supplement.
F. Supp. 2d – Federal Supplement, Second Series.
K.A.R. – Kentucky Administrative Regulations.
K.R.E. – Kentucky Rules of Evidence (codified at KRS 422A.)
KRS – Kentucky Revised Statutes.
O.A.G. – Opinion Attorney General.
S.C.R. – Rules of Kentucky Supreme Court.
S.W. – South Western Reporter.
S.W.2d – South Western Reporter, Second Series.
S.W.3d – South Western Reporter, Third Series.
The Kentucky Insurance Code, KRS 304, should be consulted for all insurance matters. The Kentucky Uniform Commercial Code, KRS 355, should be considered in any commercial transaction.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract Law. Renewal of a contract may be refused if the right to deny renewal is reserved, subject to any required notice. KRS 304.17-070. A contract based



upon mistake of fact can be rescinded. *Cox v. Wagner*, 907 S.W.2d 770 (Ky. 1995). Agreement signed by members of religious-based system for sharing medical costs was a contract for insurance and was not exempt from state insurance regulation under religious publication exemption. *Commonwealth v. Reinhold*, 325 S.W.3d 272 (Ky. 2010).

Damages – Double Indemnity. When injured insured committed suicide while insane, double indemnity was denied. *Equitable Life Assur. Soc. v. Bailey*, 262 S.W. 280 (Ky. 1924). Where a policy provided double indemnity for insured and insured named the beneficiary “in initial principal sum,” beneficiary was denied double indemnity benefits. *Chicago Bonding v. Pulliam*, 220 S.W. 316 (Ky. 1920).

Disease Induced by Accident. While terms of a contract may determine liability, a policy covers disability from any disease that is a direct result of an accident covered in the policy. *Pacific Mut. Life Ins. Co. v. McCabe*, 162 S.W. 1136 (Ky. 1914). Preexisting infirmity is not cause of subsequent disability if it does not “substantially contribute” to the disability; there must be more than a mere relationship of undetermined degree. *Continental Cas. Co. v. Freeman*, 481 S.W.2d 309 (Ky. 1972).

Excepted Risks. The context of exceptions in policy must be considered in ascertaining meaning intended. *John Hancock Mut. Life Ins. Co. v. Tabb*, 117 S.W.2d 587 (Ky. 1938).

Notice and Proof of Loss. Written notice of claim must be given to insurer within 60 days after occurrence or commencement of any loss covered by policy, or as soon thereafter as is reasonably possible. KRS 304.17-090. When policy requires, notice and proof of loss are conditions precedent to an action on the policy unless such notice is waived by insurer. *Lemons v. State Auto. Mut. Ins. Co.*, 181 F. Supp. 281 (E.D. Ky. 1960), *aff’d*, 284 F.2d 843 (6th Cir. 1960); *Prudential Ins. Co. v. Dismore*, 72 S.W.2d 433 (Ky. 1934).

ACCIDENTAL MEANS

In General. Under Kentucky law, death by “accidental means” as used in an insurance policy must be interpreted as generally understood by the purchasing public. *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986). Unless otherwise excluded by terms of a policy, death is accidental absent showing that death was the result of a plan, design or intent on the part of decedent. *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205 (Ky. 1986). Insured’s death as a result of driving intoxicated was “accidental” within the meaning of an accidental death policy. *American Family Life Assur. Co. v. Bilyeu*, 921 F.2d 87 (6th Cir. 1990) (applying Kentucky law).

Examples of Accidental Means. Insect sting causing blood poisoning. *Omberg v. U.S. Mut. Ass’n*, 40 S.W. 909 (Ky. 1897); Meat lodged in trachea, although policy required “external means.” *American Acc. Co. v. Reigart*, 23 S.W. 191 (Ky. 1893); Murder. *Interstate Business Men’s Assn. v. Ford*, 170 S.W. 525 (Ky. 1914); Fall causing pneumonia. *National Life & Acc. Ins. Co. v. Cox*, 192 S.W. 636 (Ky. 1917); Skull fracture producing insanity. *Provident Life & Acc. Ins. Co. v. Watkins*, 76 S.W.2d 889 (Ky. 1934); Lifting causing hernia. *Travelers Ins. Co. v. Witt*, 260 S.W.2d 641 (Ky. 1953); Drinking poison. *Republic Life & Acc. Ins. Co. v. Hatcher*, 51 S.W.2d 922 (Ky. 1932); Sunstroke. *Pack v. Prudential Cas. Co.*, 185 S.W. 496 (Ky. 1916); Overexertion causing ruptured blood vessel. *Continental Cas. Co. v. Semple*, 112 S.W. 1122 (Ky. 1908); Death by gunshot wound sustained during domestic dispute (under specific facts of case). *Life & Cas. Ins. Co. v. Jones*, 436 S.W.2d 75 (Ky. 1968); Motorcycle accident. *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205 (Ky. 1986).

Examples of Non-accidental Means. Overexertion in routine activity, in which insured intentionally engages, that causes heart trouble. *Mutual Benefit Health & Acc. Ass’n v. Blanton*, 206 S.W.2d 70 (Ky. 1947) (explained in *Travelers Ins. Co. v. Witt*, 260 S.W.2d 641 (Ky. 1953)); Bruise causing infection, where policy required open wound. *Bahre v. Travelers Protective Ass’n*, 277 S.W. 467 (Ky. 1925); Death as result of provoked fight. *Prudential Life Ins. Co. v. Overby’s Adm’x*, 65 S.W.2d 1006 (Ky. 1933); Death by gunshot wound sustained in struggle over gun. *Kentucky Cent. Life Ins. Co. v. Willett*, 557 S.W.2d 222 (Ky. App. 1977).

ADJUSTERS

Definition of Adjuster. An apprentice adjuster is a person who meets the requirements to hold a license as an independent, staff, or public adjuster, except for the experience, education and training requirements. 304.9-020. A staff adjuster is a person that is an employee of an insurer who investigates, negotiates, or settles property, casualty, or workers’ compensation claims on behalf of his employer. *Id.* A public adjuster is a person who for compensation or anything of value engages in any of the actions listed in KRS 304.9-070(15).

License Requirements. A person may not hold himself out as an adjuster unless he has been licensed by the Kentucky Department of Insurance. KRS 304.9-080; KRS 304.9-430. To be licensed as an adjuster, one must (a) be 18; (b) be eligible to designate Kentucky as his home state; (c) be trustworthy, reliable and of good reputation; (d) not have committed any act that is grounds for probation or suspension, revocation, or refusal of li-

cense; (e) pass the exam for adjuster license and line of authority for which he has applied; (f) pay the required fees; and (g) be financially responsible to exercise the license. KRS 304.9-430. Some reciprocity provisions with other states. *Id.* An adjuster's authority is limited to investigation and settlement of loss and, generally, the adjuster cannot alter contract or waive terms in the insurance contract. *Kentucky Farm Bureau Mut. Ins. v. Cann*, 590 S.W.2d 881 (Ky. App. 1979); KRS 304.9-070.

AGE

See "AUTOMOBILE BODILY INJURY CLAIMS"; "LIABILITY INSURANCE"; "NEGLIGENCE."

Age of Majority. 18 is the age of majority. For purchase of alcoholic beverages or for care and treatment of children with disabilities, age of majority is 21. KRS 2.015; *Pyles v. Raisor*, 60 F.3d 1211 (6th Cir. 1995). No minimum age to testify, contingent upon court's determination of competence. *Humphrey v. Com.*, 962 S.W.2d 870 (Ky. 1998); *Pendleton v. Com.*, 685 S.W.2d 549 (Ky. 1985) (six year old permitted to testify). Criminal defendant not entitled to have witness subjected to psychological evaluation to determine if old enough to be competent. *Bart v. Com.*, 951 S.W.2d 576, 579 (Ky. 1997).

AGENTS AND BROKERS

Definition. An agent is "a person who sells, solicits or negotiates insurance or annuity contracts." KRS 304.9-020. Kentucky law recognizes only agents, solicitors, adjusters, and consultants. There is no statutory provision for or recognition of brokers.

Generally, an insurer is bound by the acts of its agent when performed within the actual, *Pan-American Life Ins. Co. v. Roethke*, 30 S.W.3d 128 (Ky. 2000), or apparent scope of his authority, *Investors Heritage Life Ins. Co. v. Colson*, 717 S.W.2d 840 (Ky. App. 1986). When an insurance agent holds himself out as a counselor or advisor to the public, the scope of the agent's duty to advise is commensurate with the obligation assumed by the agent selling insurance. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992).

Fraud by Agent. Fraud of an agent cannot affect contract rights of an innocent insured. *Sovereign Camp, W.O.W. v. Alcock*, 117 S.W.2d 938 (Ky. 1938). However, if insured consents to fraud, recovery will be denied. *Com. v. Spears*, 294 S.W. 138 (Ky. 1927).

Knowledge of Agent. Information given to insurer's agent is deemed knowledge of the insurer. *Ketron v. Lincoln Income Life Ins. Co.*, 523 S.W.2d 228 (Ky. 1975). *But see, Hornback v. Bankers Life Ins. Co.*,

176 S.W.3d 699 (Ky. App. 2005) (information allegedly given to agent, but because not on application signed by insured, claim barred).

Liability of Agent.

Failure to Procure Policy. A cause of action against an agent for failure to procure coverage must be brought within 5 years. KRS 413.120(1); *Plaza Bottle Shop v. Al Torstrick Ins. Agency*, 712 S.W.2d 349 (Ky. App. 1986). Premiums received by surplus lines broker are deemed to have been received by insurer. KRS 304.10-110(1).

For Insolvent Company. An agent is liable personally for loss covered by a company not authorized to do business in Kentucky. KRS 304.11-030(3)(a) & (b); *Stokes v. Huddleston*, 13 S.W.2d 784 (Ky. 1929).

Licensing and Regulation. For general licensing and regulatory procedures relating to agents, see KRS 304.9-010 to -490.

ARBITRATION

Kentucky Insurance Arbitration Association. All basic reparation obligors (no-fault insurers) shall be and remain members of the Kentucky Insurance Arbitration Association (KIAA) as a condition of their authority to transact business in Kentucky. KRS 304.39-290. The KIAA provides a mechanism for reimbursement for certain losses paid as basic or added reparation benefits. *Id.*

Uniform Arbitration Act. Kentucky adopted the Uniform Arbitration Act (UAA) on July 13, 1984. KRS 417.045. The UAA does not apply to insurance contracts. KRS 417.050. Payment and performance bonds are not insurance contracts exempt from arbitration. *Buck Run Baptist Church v. Cumberland Surety Ins. Co.*, 983 S.W.2d 501 (Ky. 1998). Arbitration provision regarding future disputes in automobile liability policy that is delivered, issued or renewed in Kentucky is not binding. KRS 304.20-050. Where there is no showing of fraud or mistake, Kentucky courts favor settlements by compromise or arbitration and will uphold awards under a settlement if possible under the applicable law. *General Exchange Ins. Corp. v. Harmon*, 157 S.W.2d 126 (Ky. 1941). Generally, arbitration agreements are valid, irrevocable and enforceable. *Newton v. Snap-On Tools*, 783 F. Supp. 1019 (E.D. Ky. 1991). The Federal Arbitration Act is applied liberally. *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995). Claim of fraud in inducement is subject to arbitration clause in contract unless claim goes to the making or performance of arbitration agreement itself. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004), *overruling Marks v. Bean*, 57 S.W.3d 303 (Ky. App. 2001). Kentucky court had no subject matter jurisdiction and therefore could not, under UAA, enforce arbitrator's award where arbitration

agreement did not specify Kentucky as place of arbitration. *Artrip v. Sammons Constr.*, 54 S.W.3d 169 (Ky. Ct. App. 2001).

ATTORNEYS

Appointment and Authority. Attorney employed to secure a particular purpose has implied authority to take steps necessary for its accomplishment and incur any necessary expenses. *Anglo-American Mill Co. v. Phillips*, 32 S.W.2d 994 (Ky. 1930). Negligence of an attorney is imputable to the client and not a ground for relief from judgment. *Brozowski v. Johnson*, 179 S.W.3d 261 (Ky. App. 2005). Settlement entered into by attorney is not binding unless he has client's express authority. *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996).

Conflict of Interest between Clients. Attorney should not represent a client if representation of that client will be directly adverse to another client or if representation of that client may be materially limited by representation of another client, unless attorney reasonably believes that representation will not be adversely affected and each client consents after consultation. S.C.R. 3.130(1.7)(a). For an attorney to have a conflict of interest, there must be conflicting attorney-client relationships in existence at the same time. *In re Advisory Opinion of Kentucky Bar Ass'n*, 526 S.W.2d 306 (Ky. 1974). Counsel should avoid conflicts of interest by notifying clients of potential conflicts, choosing one client to represent, and advising other clients to retain separate counsel. *Moore v. Roberts*, 684 S.W.2d 276 (Ky. 1985).

Fees. Kentucky law implies an agreement between attorney and client that the attorney will be reasonably compensated. *Daniels v. May*, 467 S.W.2d 372 (Ky. 1971). In an action under the Motor Vehicle Reparations Act, if attorney's representation of insured confers a benefit upon reparations obligor, attorney has the right to collect reasonable attorney's fees from the reparations obligor for any benefit conferred. KRS 304.39-070(5); *Baker v. Motorist Ins. Co.*, 695 S.W.2d 415 (Ky. 1985). See generally S.C.R. 3.130(1.5) (listing the factors to consider in determining the reasonableness of an attorney's fee). Contingent fee agreement must be in writing. S.C.R. 3.130(1.5)(c).

Legal Malpractice. A client may expect the following from an attorney: fair dealing, fidelity, and a high degree of competency. *KBA v. Cowden*, 727 S.W.2d 403 (Ky. 1987). Attorney-client relationship is fiduciary in nature; attorney must exercise the most scrupulous honor, good faith and fidelity to his client's interests. *American Continental Ins. Co. v. Weber & Rose, PSC*, 997 S.W.2d 12 (Ky. App. 1998). Attorney's duties include an obligation to investigate the facts. *Daugherty v. Run-*

ner, 581 S.W.2d 12 (Ky. 1978). Actions for professional malpractice must be brought within one year from date of occurrence or discovery of injury. KRS 413.245. However, the claim does not arise and the statute of limitations does not begin to run until plaintiff's damages are "fixed and non-speculative." *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994). But see, *Matherly Land Surveying, Inc. v. Gardiner Park Development, L.L.C.*, 230 S.W.3d 586 (Ky. 2007). (No specific dollar amount must be known before statute of limitations begins to run). No requirement of privity exists; persons who are not an attorney's client may recover for damages due to an attorney's negligence. *Sparks v. Craft*, 75 F.3d 257 (6th Cir. 1996). To prevail in a claim for legal malpractice, must prove 1) duty, 2) breach of duty, 3) causation, and 4) damage. *Marrs v. Kelly*, 95 S.W.3d 856 (Ky. 2003). An attorney is held to a standard of care exercised by a reasonably competent attorney under similar circumstances. *Humboldt Ass'n v. Ducker*, 64 S.W. 671 (Ky. 1901). Claims for legal malpractice are not assignable. *Am. Continental Ins. Co. v. Weber & Rose, PSC*, 997 S.W.2d 12 (Ky. App. 1998).

AUTOMOBILES

See "NEGLIGENCE" and "NO-FAULT."

Age. An operator's license may not be issued to any person under 16 years of age or to any person under 18 years of age who has not graduated from high school or is not enrolled in school, with limited exceptions. KRS 186.440(1). A learner's permit is not available for persons under 16 years of age. KRS 186.450. A parent or legal guardian must sign a minor's application for a license or permit. *Id.* Negligence of a minor who was licensed upon an application signed by an adult is imputed to that adult, unless applicant maintains proof of financial responsibility. KRS 186.590(2). Both parents are liable for a minor, even if only one signs application. KRS 186.470. Parent may request that a minor's permit or license be canceled and should not be liable for acts of minor thereafter. *Id.* Any vehicle owner who permits a minor to drive automobile will be jointly and severally liable with minor. KRS 186.590(3); *State Auto Ins. v. Reynolds*, 32 S.W.3d 508 (Ky. App. 2000). One who sells an automobile to a minor under 18 years of age is not liable for minor's negligence. *Ingram's Adm'r v. Advance Motor Co.*, 140 S.W.2d 840 (Ky. 1940).

Agency. Owner of a vehicle may be liable for negligence of a driver operating that vehicle if the driver is: a person under age of 18, KRS 186.590(3), *State Auto Ins. v. Reynolds*, 32 S.W.3d 508 (Ky. App. 2000); an incompetent driver, *Owensboro Undertaking & Livery Ass'n v. Henderson*, 115 S.W.2d 563 (Ky. 1938); a member of the owner's family using the vehicle for a

family purpose, *Wireman v. Salyer*, 336 S.W.2d 349 (Ky. 1960); a person driving with the owner's consent and in his presence, *Siler v. Williford*, 350 S.W.2d 704 (Ky. 1961); or a servant or employee who operates the vehicle on his master's business, *Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594 (Ky. 1953).

Comparative/Contributory Negligence. Kentucky has pure comparative negligence. *Hilen v. Hayes*, 673 S.W.2d 713 (Ky. 1984); KRS 411.182. In all tort actions, including products liability actions, involving the fault of more than one party to an action, including third-party defendants and persons released by plaintiff, unless all parties agree otherwise, the court shall instruct jury to allocate percentage of fault to each party. KRS 411.182; *Ky. Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005). KRS 411.182 provides for apportionment of liability among parties before the court and those who have settled or been released, but not absent parties. *Copass v. Monroe County Medical Foundation, Inc.*, 900 S.W.2d 617 (Ky. App. 1995). But, no liability can be assessed unless fault is found. *Owens Corning Fiberglass Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001).

Compulsory Insurance Coverage. The Motor Vehicle Reparations Act (MVRA), KRS 304.39, requires insurance coverage of \$10,000 per person for "basic reparations benefits" for all economic loss from injury to any one person as a result of one accident, regardless of number of persons entitled to such benefits. KRS 304.39-020, and -110. MVRA also requires liability insurance of \$25,000 per person, \$50,000 per accident and \$10,000 property damage, or \$60,000 for all damages for both bodily injury and damage to property as the result of any one accident. KRS 304.39-110. As a matter of public policy, insurer may not deny minimum limits coverage to injured third party based on misrepresentation by insured. *Progressive Northern v. Corder*, 15 S.W.3d 381 (Ky. 2000). Self-insurance may be provided in lieu of policy in certain circumstances. KRS 187.600, 304.39-080.

DUI. A person under the influence of intoxicating beverages or any substance which may impair one's driving ability may not operate a motor vehicle in Kentucky. KRS 189.520(1). Alcohol concentration in the blood of .08% creates presumption of intoxication. KRS 189.520(3)(c). Various mandatory sentences for driving under the influence of alcohol or similar substances. KRS 189A.010. A person may be prosecuted for driving under the influence on a private road. *Lynch v. Com.*, 902 S.W.2d 813 (Ky. 1995). DUI conviction does not require proof that defendant was driving erratically or in an unsafe manner. *Kidd v. Commonwealth*, 146 S.W.3d 400 (Ky. App. 2004). Farm tractor is "motor vehicle" for purpose of DUI. *Nemeth v. Com.*, 944 S.W.2d 871 (Ky. App. 1997). Moped is "motor vehicle" for purpose of

DUI. *Adams v. Commonwealth*, 275 S.W.3d 2090 (Ky. App. 2008). Preliminary breathalyzer tests are allowed, KRS 189A.100, but cannot prosecute for DUI for .08 unless blood test taken within two hours of driving. *Lopez v. Com.*, 173 S.W.3d 905 (Ky. 2005). But can prosecute for DUI under other portions of statute. KRS 189A.010. A person with alcohol concentration of .15% or above must be detained in custody for at least four hours following arrest. KRS 189A.110. Insurer may void a policy if insured has misrepresented information regarding any DUI convictions. KRS 304.14-110; *Progressive Specialty Ins. Co. v. Rosing*, 891 F. Supp. 378 (W.D. Ky. 1995).

Damages.

Compensatory Damages. Purpose of compensatory damages is to place injured party in same position he was in prior to suffering injury. *Hughett v. Caldwell County*, 230 S.W.2d 92 (Ky. 1950). Courts generally divide compensatory damages into general damages and special damages, whether action is for breach of contract or for injury to person or property. *U.S. Bond & Mortgage Corp. v. Berry*, 61 S.W.2d 293 (Ky. 1933). Damages recoverable from the Commonwealth under the Board of Claims Act (maximum \$200,000) are reduced by amount of basic reparations benefits received. KRS 44.070; *Com. v. Roof*, 913 S.W.2d 322 (Ky. 1996).

Excessive Verdict. Damages award is excessive under the "first blush rule" if the mind is immediately shocked and surprised at the great disproportion of the size of the verdict in relation to amount authorized by evidence, such that it must have been the result of passion and prejudice. *Wilson v. Redken Labs., Inc.*, 562 S.W.2d 633 (Ky. 1978); *Morrow v. Stivers*, 836 S.W.2d 424 (Ky. App. 1992). Court will scrutinize verdict for passion or prejudice when counsel has engaged in inflammatory argument to jury. *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 630 (Ky. 2003). Court may grant a new trial if a jury awards excessive damages in disregard of evidence or instructions of the court. C.R. 59.01.

Punitive Damages. Punitive damages are available only when it is proven by clear and convincing evidence that defendant acted with oppression, fraud or malice. KRS 411.184(2). See, *Roberie v. VonBokern*, 2006 WL 2454647 (Ky. 2006). But, Kentucky Supreme Court has held portions of statute, including requirement of "subjective awareness" to find malice, violated the Kentucky Constitution. See *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). Punitive damages are not covered under UM policy. KRS 304.20-020. *Ky. Central Ins. v. Schneider*, 15 S.W.3d 373 (Ky. 2000). Punitive damages may not be assessed against a principal or employer for act of an agent or employee unless principal or employer author-

ized or ratified the act or should have anticipated conduct in question. KRS 411.184(3). Punitive damages may not be awarded for breach of contract. KRS 411.184(4), but can be awarded if there is also tortious conduct. *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634 (Ky. App. 1997).

Family Purpose Doctrine. Parent is held responsible for damages caused by automobile operated within scope of a family purpose. *Sale v. Atkins*, 267 S.W. 223 (Ky. 1924). "Family purpose" includes any "convenience, pleasure, or benefit" for the family. *Wireman v. Salyer*, 336 S.W.2d 349 (Ky. 1960). To qualify under the family purpose doctrine, user of a vehicle must be a member of the family for whom parents have a legal obligation of support. *Keeney v. Smith*, 521 S.W.2d 242 (Ky. 1975).

Guests. Kentucky does not have a guest statute. *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932) (holding Kentucky's guest statute unconstitutional). Family immunity abolished. *Bentley v. Bentley*, 172 S.W.3d 375 (Ky. App. 2005).

Imputed Negligence/Joint Enterprise. A joint venture is an agreement to seek commercial profit with an equal right of control among the parties. *Shedd Brown Mfg. Co. v. Tichenor*, 257 S.W.2d 894 (Ky. 1953). In a joint venture, each member is an agent of the other and all are vicariously liable for the acts of members of the joint venture. *Huff v. Rosenberg*, 496 S.W.2d 352 (Ky. 1973). Owner of a vehicle may be liable for negligence of a driver who is: a person under 18, KRS 186.590(3); a person driving with his consent and in his presence, *Siler v. Wofford*, 350 S.W.2d 704 (Ky. 1961); a servant or employee operating a vehicle operated according to the master's business, *Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594 (Ky. 1953).

Last Clear Chance Doctrine. The Last Clear Chance Doctrine was superseded by comparative fault statute. KRS 411.182; *Kennedy v. Hageman*, 704 S.W.2d 656 (Ky. App. 1985).

Motorized Bicycles/Motorcycles. Persons under 16 are forbidden to operate a motorcycle on highways or on private property. O.A.G. 77-277. Kentucky has no general requirement that motorcyclists must wear a helmet. Only motorcycle operators and passengers under 21, or operating with a permit, or who have had a motorcycle license for less than one year, must wear a helmet. KRS 189.285(3). Operators of ATVs are required to wear helmets with limited exceptions. KRS 189.515. No operator or passenger of motorcycle is entitled to no-fault benefits unless those benefits are purchased as optional coverage for the motorcycle or the injured individual. KRS 304.39-040(4). Although a moped is not a "motor vehicle" under MVRA, the two-year statute of limita-

tions applies to moped accidents involving another motor vehicle. KRS 304.39-230(6); *Howard v. Hicks*, 737 S.W.2d 711 (Ky. App. 1987). MVRA applies to motorcycles. *Troxell v. Trammell*, 730 S.W.2d 525 (Ky. 1987). Two-year statute of limitations applies to both resident and nonresident personal injury plaintiffs. *Id.* MVRA does not apply to bicyclists. *Whiteman v. Lowe*, 702 S.W.2d 436 (Ky. 1986). Likewise, MVRA contemplates vehicles which transport persons or property on public highways, and thus does not apply to forklifts. *O'Keefe v. North American Refractories*, 78 S.W.3d 760 (Ky. App. 2002).

Negligent Entrustment. One who permits driver known to be inexperienced, careless, or given to excessive use of alcohol to use his car may be liable under theory of negligent entrustment. *Owensboro Undertaking & Livery Ass'n v. Henderson*, 115 S.W.2d 563 (Ky. 1938). Vehicle owner generally satisfies duty of care in test-drive situations by determining before the test drive that prospective purchaser and test driver is duly licensed and otherwise not obviously impaired. *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009) (per plurality opinion, one justice concurring in result).

No-Fault Insurance.

Motor Vehicle Repairs Act (MVRA or "No-Fault Act"). MVRA, KRS 304.39-010 through 39-350, is constitutional. *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975). Under MVRA, real party in interest who may bring a claim is the no-fault carrier, not injured party from whom the right to sue is transferred. KRS 304.39-010 to -350; *Zurich Am. Ins. v. Haile*, 882 S.W.2d 681 (Ky. 1994). MVRA preempts general insurance law where insurance claim arises as a result of physical injury caused by motor vehicle accident. *Foster v. KFB*, 189 S.W.3d 553 (Ky. 2006). Insurer cannot exclude intentional injuries from policy's minimum tort liability limits. *Mosley v. West Am. Ins. Co.*, 743 S.W.2d 854 (Ky. App. 1987). Automobile insurer cannot attempt by language of its policy to provide less coverage than required by MVRA. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928 (Ky. App. 1991). Loss of consortium is not recoverable under MVRA. *Moore v. State Farm Mut. Ins. Co.*, 710 S.W.2d 225 (Ky. 1986). Insurer of automobile driven without permission of owner must pay basic reparations benefits to passengers who have no knowledge that vehicle is converted. *Stuart v. Capital Enterprise Ins. Co.*, 743 S.W.2d 856 (Ky. App. 1987). Kentucky law does not require nonregistered/nonresident insurer to comply with Kentucky's MVRA when issuing a policy to a nonresident insured, and so insurer is not required to provide for no-fault coverage in its policy. *State Farm Mut. Auto. Ins. Co. v. Tennessee Farmers Mut. Ins. Co.*, 785 S.W.2d 520 (Ky. App. 1990). Not all actions arising out of motor vehicle

accidents are covered by MVRA. *American Premier Ins. v. McBride*, 159 S.W.3d 342 (Ky. App. 2004).

Benefits. Kentucky law does not require minimum benefits under automobile no-fault policy be paid if there is no contractual coverage or obligation. KRS 304.39-100(2); *U.S. Fire Ins. Co. v. Kentucky Truck Sales, Inc.*, 786 F.2d 736 (6th Cir. 1986). *But see, Progressive Northern v. Corder*, 15 S.W.3d 381 (Ky. 2000) (innocent third party entitled to minimum coverage even if policy void as to insured because of misrepresentation). No-fault insurance benefits for lost wages are available to injured employed person only for actual loss of earnings while absent from work. Such benefits are not available to the estate of a deceased person. *Gregory v. Allstate Ins. Co.*, 618 S.W.2d 582 (Ky. App. 1981). Survivor may recover for loss of services that in reasonable probability would have been rendered to him by decedent in future. *Couty v. Kentucky Farm Bureau Mut. Ins. Co.*, 608 S.W.2d 370 (Ky. 1980); *France v. Kentucky Farm Bureau Mut. Ins. Co.*, 605 S.W.2d 773 (Ky. App. 1980) (no recovery permitted where a loss to the surviving parents was not established).

Rejection of No-Fault. Unless owner of vehicle rejects no-fault coverage in writing, threshold coverage requirements of MVRA apply. KRS 304.39-030(1), -060(4); *Atchison v. Overcast*, 563 S.W.2d 736 (Ky. App. 1977). Minor injured in traffic accident is deemed to have accepted no-fault coverage when no rejection of no-fault coverage and provisions of MVRA had been filed on his behalf. *Lawrence v. Risen*, 598 S.W.2d 474 (Ky. App. 1980). To limit a non-resident plaintiff's right to sue, there must be a finding of fact that the plaintiff was notified of his right to reject no-fault provisions of MVRA. *Stinnett v. Mulquin*, 579 S.W.2d 374 (Ky. App. 1979).

Stacking Policies. Insured not entitled to stack UIM coverage if pay one premium regardless of number of vehicles covered. *Marcum v. Rice*, 987 S.W.2d 789 (Ky. 1999). However, if pay single premium but premium varies depending on how many cars are covered, may stack. *Estate of Swartz v. Metropolitan Prop. & Cas. Co.*, 949 S.W.2d 72 (Ky. App. 1997). May not stack ARB and UIM coverage. *Saxe v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 188 (Ky. App. 1997). Guest passenger may not stack UIM, even if insured paid four separate premiums for four separate cars. *James v. James*, 25 S.W.3d 110 (Ky. 2000). May not stack UM coverage. *Adkins v. Kentucky Nat'l Ins. Co.*, 220 S.W.3d 296 (Ky. App. 2007).

Ownership/Title. Before owner of a motor vehicle or trailer may operate vehicle upon state highways, he shall obtain motor vehicle insurance, certificate of registration, license plate, and apply for certificate of title in

his name. KRS 186A.065; *see also* KRS 186A.080 (regarding vehicles exempt from registration requirement). For purposes of insurance coverage, title passes when dealer signs and delivers title, even if title is not filed with county clerk. *Nantz v. Lexington Lincoln Mercury*, 947 S.W.2d 36 (Ky. 1997). But if dealer still retains title after buyer has possession, liability can be avoided by first verifying that buyer has a valid and current insurance policy that covers purchased vehicle. *Auto Acceptance Corp. v. TIG Ins. Co.*, 89 S.W.3d 398 (Ky. 2002); KRS 186A.220(5).

Parties in Interest. Personal representative, not heirs of the decedent, must prosecute an action for wrongful death. *Sparks v. Craft*, 75 F.3d 257 (6th Cir. 1996).

Pedestrians. Pedestrians are subject to traffic regulations. KRS 189.570(1). Pedestrian entitled to recover basic reparations benefits from either of two cars which hit him up to \$10,000, without proving which vehicle caused specific damages. *Capital Enterprise Ins. Co. v. Ky. Farm Bureau*, 804 S.W.2d 377 (Ky. 1991).

Permissive Users. Negligence of a driver of an automobile may not be imputed to a passenger who has no control over driver. *Beard v. Klusmeier*, 164 S.W. 319 (Ky. 1914). Uninsured owner whose permittee negligently causes property damage is liable for minimum coverage as required by MVRA. *McGrew v. Stone*, 998 S.W.2d 5 (Ky. 1999). Doctrine of imputed negligence is not applicable in action by one joint venturer against another. *Brown v. Sohn*, 449 S.W.2d 920 (Ky. 1970). Car dealer can only be exempt from liability on accident occurring while dealership has title if it has been verified that buyer has a valid and current insurance policy that covers purchased vehicle. *Auto Acceptance Corp. v. TIG*, 89 S.W.3d 398 (Ky. 2002); KRS 186A.220(5).

Seatbelts. No new passenger vehicle may be sold or registered without properly anchored front seatbelts. KRS 189.125(2). A driver who is transporting a child forty inches in height or less must have the child seated in an approved child restraint system. KRS 189.125(3). Failure to use a child restraint system is not admissible as evidence in a civil action. KRS 189.125(5). No person shall operate a 1981 or newer motor vehicle unless driver and passengers are wearing seat belts. KRS 189.125(6). Kentucky statutes require drivers to wear seatbelt, so jury instruction imposing that duty is proper. *Geyer v. Mankin*, 984 S.W.2d 104 (Ky. App. 1998). However, passenger has no such duty, so failure to wear seatbelt is merely evidence of comparative fault. *Tetrick v. Frashure*, 119 S.W.3d 89 (Ky. App. 2003). Failure of injured person to use a seatbelt may be admissible as evidence of comparative fault. *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987).

Service of Process. Kentucky's long-arm statute confers personal jurisdiction of Kentucky courts over non-residents to the extent constitutionally permissible. KRS 454.210; *Mohler v. Dorado Wings, Inc.*, 675 S.W.2d 404 (Ky. App. 1984); *National Grange Mut. Ins. Co. v. White*, 83 S.W.3d 530 (Ky. 2002). Nonresident motorists may be served by issuing summons to the Sheriff of Franklin County (Frankfort). KRS 188.030 The Secretary of State shall serve summons and plaintiff's petition on the defendant. *Id.* Both the Sheriff and the Secretary of State shall make the return of service to the court. KRS 188.030.

Speed Limit. Unless posted signs or circumstances reasonably require a lower speed, the speed limit for motor vehicles over 5 horsepower is 35 m.p.h. in business and residential districts, 65 m.p.h. on interstate highways, 55 m.p.h. on all other state highways, and 70 m.p.h. on certain segments of specified highways. KRS 189.390.

Trailers/Weight Limits. KRS 189.221 and 189.222 restrict weight, height, length, and width of motor trucks, semi-trailers and tractor-trailers. KRS 189.222 provides numerous exceptions to these requirements and allows the Kentucky Secretary of Transportation to alter standards, but not make more stringent than federal limits.

Uninsured Motorist ("UM") Coverage. Spouse of deceased uninsured motorist cannot recover no-fault benefits under MVRA. *Lane v. Travelers Ins. Co.*, 726 S.W.2d 313 (Ky. App. 1986). Insurance policy for basic reparations benefits includes UM coverage. Uninsured vehicle provision requires injured party's insurance carrier to pay reparation benefits even if insured is injured while riding as a passenger in uninsured vehicle. KRS 304.39-050(2); *Dairyland Ins. Co. v. Assigned Claims Plan*, 666 S.W.2d 746 (Ky. 1984). Under the MVRA, insurer is not entitled to credit or set off against bodily injury liability coverage for amounts paid to injured passenger under basic reparation benefits coverage. *Ammons v. Winklepleck*, 570 S.W.2d 287 (Ky. App. 1978). Plaintiff/insured suing under UM coverage is not subject to no-fault tort limitations and does not have to meet threshold under MVRA to recover for pain and suffering. *Hanover Ins. Co. v. Blincoe*, 573 S.W.2d 930 (Ky. App. 1978). Physical contact requirement in hit-and-run clauses does not conflict with UM statute. *Belcher v. Travelers Indem. Co.*, 740 S.W.2d 952 (Ky. 1987). Uninsured pedestrian is not entitled to recover basic reparations benefits if he sues uninsured driver instead of seeking his remedy through assigned claims plan. *Blair v. Day*, 600 S.W.2d 477 (Ky. App. 1979). Uninsured motorist could not recover UM benefits from insurer of other car in accident. *Bartlett v. Prime Ins. Syndicate*, 156 S.W.3d 299 (Ky. App. 2004). UM coverage is a direct contractual obligation from insurer to insured that

must be honored even if tortfeasor cannot be identified. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993). Insured entitled to be fully compensated before UM carrier can seek subrogation. *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558 (Ky. 1996). Statutes providing for UM coverage and statutes requiring personal injury insurance are interrelated and must be harmonized. *State Farm Mut. Auto. Ins. Co. v. Fletcher*, 578 S.W.2d 41 (Ky. 1979). Exclusion for a vehicle "available for the regular use of the insured" does not violate the MVRA. *Windham v. Cunningham*, 902 S.W.2d 838 (Ky. App. 1995).

Underinsured motorist ("UIM") coverage. Insurers are required to make available UIM coverage to their insureds. KRS 304.39-320(2). But insurers not required to provide specific amount of UIM coverage requested by insured. *Little v. Kentucky Farm Bureau Mut. Ins. Co.*, 320 S.W.3d 133 (Ky. App. 2010). Settlement of UIM with primary carrier for less than policy limits does not preclude claim for UIM benefits from excess underinsured motorist carrier. *Metcalf v. State Farm Mut. Auto. Ins. Co.*, 944 S.W.2d 151 (Ky. App. 1997). Judgment against the tortfeasor is not a precondition to recover UIM benefits. *Ky. Nat. Ins. Co. v. Lester*, 998 S.W.2d 499 (Ky. App. 1999). UIM carrier has statutory right of subrogation against underinsured tortfeasor for any sums it pays to plaintiff; that right is derivative of plaintiff's rights. *Cincinnati Ins. v. Samples*, 192 S.W.3d 311 (Ky. 2006). Vehicle owned, furnished, or available for regular use of insured or family member is not underinsured vehicle. *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky. App. 2010).

AVIATION

In General. KRS Chapter 183 authorizes the Department of Transportation to issue licenses to aviators, promulgate air traffic rules, acquire airports and provide for the financing and maintenance of such airports.

Damages. If death results from negligence or wrongful act of another, a personal representative of the deceased may recover damages. KRS 411.130. Punitive damages are recoverable upon a showing of gross negligence. KRS 411.130(1). Actions for personal injury and wrongful death may be joined. KRS 411.133.

Limits of Liability. Upon recommendation of the Secretary of the Transportation Cabinet, Commissioner of Insurance may purchase insurance to cover airplanes, passengers, pilots and other employees of the airport or the Commonwealth. KRS 183.125(1)-(2). Sovereign immunity may be waived to the extent of the policy limits. KRS 183.125(3). Where insurance policy excluded loss in flight while aircraft was in violation of government regulation, risk is excluded regardless of whether



violation is proximate cause of loss. *Arnold v. Glob Indemnity*, 416 F.2d 119 (6th Cir. 1969).

Service of Process. The Transportation Cabinet or any employee thereof may subpoena witnesses, administer oaths, and examine records and documents of parties. KRS 183.032(1). The Sheriff of the county shall serve all subpoenas. KRS 183.032(2).

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Marks made by tools or explosives are sufficient to sustain verdict against insurer. *Century Indem. Co. v. Williams & Bradley*, 44 S.W.2d 602 (Ky. 1931). However, insured must prove that loss occurred from burglary before insurer may be held liable. *Nat'l Surety Co. v. Redmon*, 190 S.W. 1081 (Ky. 1917). "Theft" occurs when one who obtains possession of property by lawful means and thereafter appropriates it to his own use intended to appropriate it to his own use and deprive owner of it permanently at the time the property came into his hands. *Fidelity & Guar. Fire Corp. v. Ratterman*, 90 S.W.2d 679 (Ky. 1936). Money stolen from cash drawer is not "equipment" covered under terms of burglary policy. *USF&G v. Lairson*, 271 S.W.2d 897 (1954).

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Cancellation of insurance contract may occur only upon strict compliance with provisions of the terms of the contract. *Osborne v. Unigard Indem. Co.*, 719 S.W.2d 737 (Ky. App. 1986). Under Kentucky law, insurer's compliance with cancellation provision is strictly construed. *Yates v. Transamerica Ins. Co.*, 928 F.2d 199 (6th Cir. 1991). Notice of or request for cancellation must be unequivocal and must contain a definite date on which cancellation becomes effective. *Partin v. United Services Auto. Ass'n*, 379 S.W.2d 741 (Ky. 1964).

Policy may be cancelled and premiums recovered, with credit given to the insurer for the actual cost of the insurance while the policy was in force, where insured was induced to accept insurance contract by fraudulent representations. *Provident Sav. Life Assur. Co. of New York v. Shearer*, 151 S.W. 938 (Ky. 1912). Cancellation notice must state clearly intent to cancel. *General Acc. Fire & Life Assur. Corp. v. Lee*, 178 S.W. 1025 (Ky. 1915). Any unearned premium must be returned to insured before cancellation is effective. *Metropolitan Life Ins. Co. v. Moore*, 79 S.W. 219 (Ky. 1904). Issuance of a

binder does not allow cancellation of a pre-existing policy pursuant to automatic termination clause. *General Accident Ins. Co. of Am. v. Guess*, 936 S.W.2d 97 (Ky. App. 1997).

For procedures governing cancellation of an automobile liability policy, see KRS 304.20-040. Proof of mailing notice of cancellation or of intention not to renew or of reasons for cancellation or nonrenewal to named insured at address shown in automobile insurance policy is sufficient proof of notice. KRS 304.20-040(9)(b); *Osborne v. Unigard Indem. Co.*, 719 S.W.2d 737 (Ky. App. 1986). For procedures governing cancellation of property or casualty insurance, see KRS 304.20-300 to -350. For procedures governing cancellation of health insurance, see KRS 304.17-070.

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Ambiguity of Terms. Ambiguous provisions are construed against insurer. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, (Ky. 2007). Non-existent ambiguity will not be used to resolve policy against insurer. *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223 (Ky. 1994). Reasonable expectations doctrine applies only when policy contains actual ambiguity, not fanciful ones. *True v. Raines*, 99 S.W.3d 439 (Ky. 2003). If terms of policy are ambiguous, specific clauses control general clauses. *State Auto. Mut. Ins. Co. v. Ellis*, 700 S.W.2d. 801 (Ky. App. 1985). Insurance policy is ambiguous only when provision to be construed is reasonably susceptible to more than one interpretation. *Foster v. Kentucky Housing Corp.*, 850 F. Supp. 558 (E.D. Ky. 1994). Construction of a contract, including its meaning and legal effect, is a matter of law. *Dowell v. Safe Auto Ins.*, 208 S.W.3d 872, 875 (Ky. 2006). Terms of policy are to be given their "plain and ordinary meaning." *J. Graham Brown Foundation v. St. Paul Ins. Co.*, 814 S.W.2d 273 (Ky. 1991). No extrinsic evidence allowed where there is no ambiguity. *Allen v. Lawyer's Mut. Ins. Co.*, 216 S.W.3d 657 (Ky. App. 2007).

Application. All statements and descriptions in any application for an insurance policy or annuity contract shall be deemed to be representations and not warranties. KRS 304.14-110. For life insurance policy to be admissible as evidence, application relied upon must be attached to the policy. KRS 304.14-100(1). Terms of insurer's bylaws, charter, rules or other constituent documents must be set forth in full in the policy provision to be effective. KRS 304.14-170.



Binders. Binders may be made orally or in writing, and shall be deemed to include all usual terms of the policy as to which binder was given. KRS 304.14-220(1). Binder is valid until date of issuance of policy or 90 days after its effective date, whichever is shorter. *Id. But see, Breeding v. Mass. Indem. & Life Ins. Co.*, 633 S.W.2d 717 (Ky. 1982) (binder must contain all terms of policy; insurer may not assert exclusion contained in master policy but not in binder). Insurance binder is not an “insurance policy.” *General Accident Ins. Co. of Am. v. Guess*, 936 S.W.2d 97 (Ky. App. 1997).

Construction. Contract is to be construed as a whole, and in accordance with intentions and expectations of parties. *National Ins. Underwriters v. Lexington Flying Club, Inc.*, 603 S.W.2d 490 (Ky. App. 1979). See also *K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751 (Ky. App. 2005). Reasonable expectation doctrine resolves any insurance policy ambiguity in favor of insured’s reasonable expectations. *Aetna v. Com.*, 179 S.W.3d 830 (Ky. 2005). Insurance contracts should be liberally construed and doubts resolved in favor of insured. *Dowell v. Safe Auto*, 208 S.W.3d 872 (Ky. 2006).

General. Relationship between insurer and insured is purely contractual and both parties’ rights are determined by contract. *City of Louisville v. McDonald*, 819 S.W.2d 319 (Ky. App. 1991). To form a valid contract of insurance in Kentucky, there must be an understanding of the identity of the parties, subject matter of risk insured against, premium, duration, and an amount of insurance. *Res-Care Development Co., Inc. v. Oakes Agency, Inc.*, 758 F. Supp. 1191 (W.D. Ky. 1989), *aff’d*, 911 F.2d 733 (6th Cir. 1990). Oral insurance contracts are valid in Kentucky as long as parties reach a “meeting of the minds” on all essential elements. *Id.* Oral contract for insurance must be supported by consideration. *Fryman v. Federal Crop Ins. Corp.*, 936 F.2d 244 (6th Cir. 1991). Construction of contract is a matter of law. *Pearson v. National Feeding Systems, Inc.*, 90 S.W.3d 46 (Ky. 2002).

DAMAGES

Appellate Review. Reviewing court will not set aside an award of damages unless amount is the result of passion, prejudice, corruption or mistake in the application of the law. *Carney v. Scott*, 325 S.W.2d 343 (Ky. 1959).

Apportionment. Kentucky does not have joint and several liability. In all tort actions involving fault of more than one party, including third-party defendants and persons released by plaintiff, jury may allocate percentage of total fault to each party. KRS 411.182. KRS 411.182 provides for apportionment of liability among parties before the court and those who have settled or

been released, but not absent parties. *Copass v. Monroe County Medical Foundation, Inc.*, 900 S.W.2d 617 (Ky. App. 1995). Non-settling, non-parties who were found not liable in another related suit were not properly included in apportionment instruction. *Jones v. Stern*, 168 S.W.3d 419 (Ky. App. 2005). Fault can only be apportioned to liable parties. *Owens Corning Fiberglass Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001). Fault may not be apportioned to party with absolute immunity. *Jeff Co. Atty’s Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001).

Arbitration Awards. Mere inadequacy in the amount of damages or mistakes in judgment by arbitrator are not grounds for setting aside an award. *Conagra Poultry Co. v. Grissom Transp. Inc.*, 186 S.W.3d 243 (Ky. App. 2006). Arbitrator’s award may be set aside if there has been a gross mistake of law or fact constituting evidence of misconduct amounting to fraud or undue partiality. *Taylor v. Fitz Coal Co., Inc.*, 618 S.W.2d 432 (Ky. 1981). Arbitrator’s award is given much deference. *Lombardo v. Investment & Research Inc.*, 885 S.W.2d 320 (Ky. App. 1994).

Caps on Awards. There is no statutory cap on awards. Under the “first blush rule,” if the mind is immediately shocked at the disproportionate size of verdict, the damages award is excessive and can be reversed. *Morrow v. Stivers*, 836 S.W.2d 424 (Ky. App. 1992). Failure to itemize damages in response to a specific interrogatory may result in a waiver of a claim for those damages. *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999).

Collateral Source Rule. Statute allowing for admission of collateral sources of recovery into evidence, KRS 411.188(3), held unconstitutional. *O’Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995).

Comparative/Contributory Negligence. Kentucky adopted pure comparative negligence in tort cases in *Hilen v. Hayes*, 673 S.W.2d 713 (Ky. 1984). Kentucky’s comparative negligence statute, KRS 411.182, eliminated joint and several liability.

Indemnification. A common law right of indemnification exists in Kentucky. *Kentucky Utilities Co. v. Jackson County Rural Elec. Co-op Corp.*, 438 S.W.2d 788 (Ky. 1968). Right of indemnification exists in favor of one secondarily or passively negligent against one actively or primarily negligent in causing harm to third party. *Crime Fighters Patrol v. Hiles*, 740 S.W.2d 936 (Ky. 1987). Common law indemnity is available so long as not in *pari delicto* with wrongdoer. *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000).

Loss of Power to Labor. Plaintiff who was receiving disability benefits was entitled to jury instruction regarding future impairment of ability to earn wages due

to negligence. *Jones v. Stern*, 168 S.W.3d 419 (Ky. App. 2005).

Psychic Injuries, Mental Pain and Suffering. Plaintiff may recover compensation for mental injury and suffering, in addition to physical injury. *Nussbaum v. Caskey*, 32 S.W.2d 18 (Ky. 1930). Jury may award \$0 for pain and suffering, even if they award plaintiff medical expenses and/or lost wages. *Miller v. Swift*, 42 S.W.3d 599 (Ky. 2001). Minor children may recover damages for loss of parental consortium. *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997). Adult children may not. *Smith v. Vilvarajah*, 57 S.W.3d 839 (Ky. App. 2000). Loss of consortium damages do not cease at death of injured spouse. *Martin v. Ohio Co. Hosp. Corp.*, 295 S.W.3d 104 (Ky. 2009).

Punitive Damages. Punitive damages are recoverable only upon proving by clear and convincing evidence that defendant acted toward plaintiff with oppression, fraud or malice. KRS 411.184(2). However, the Kentucky Supreme Court has held statute's definition of "malice" requiring a subjective awareness unconstitutional. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). Punitive damages may not be awarded against Estate of drunk driver. *Stewart v. Estate of Cooper*, 102 S.W.3d 913 (Ky. 2003). Although not generally recoverable for breach of contract, punitive damages may be recoverable when the breach involves tortious conduct. *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634 (Ky. App. 1997); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480 (Ky. App. 1978). Punitive damages statute is not retroactive. *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 56 F.3d 726 (6th Cir. 1995).

DEATH

Abatement and Survival of Actions. Most rights of actions and defenses survive and may be brought or revived in the name of a personal representative, or against personal representative, heirs or devisees. KRS 411.140.

Action for Wrongful Death - Damages. If death results from negligence or wrongful act of another, a personal representative of the deceased may recover damages. KRS 411.130. Measure of damages in a wrongful death case is decedent's loss of his power to labor and earn money. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003). Punitive damages are recoverable upon showing of gross negligence. KRS 411.130(1). Actions for personal injury and wrongful death may be joined. KRS 411.133.

Parties in Interest. A personal representative, not heirs of the decedent, must prosecute an action for wrongful death. *Sparks v. Craft*, 75 F.3d 257 (6th Cir. 1996). Potential beneficiaries may bring wrongful death action under two exceptional circumstances: (1) personal

representative has refused to bring action, or (2) fraud and collusion on part of personal representative and party sought to be made liable for the death. *Smith v. McCurdy*, 269 S.W.3d 876 (Ky. App. 2008).

Statute of Limitations. There is a one-year statute of limitations for personal injury and wrongful death actions in Kentucky. KRS 413.140(1)(a). One year, as measured by the statute, extends from the date of appointment of the personal representative. *Conner v. George Whitesides Co.*, 834 S.W.2d 652 (Ky. 1992). If MVRA applies, there is a two-year statute of limitations. KRS 304.39-230. The one-year statute of limitations to bring a claim against the Commonwealth in the Board of Claims runs from date personal representative is appointed. *Gaither v. Com.*, 161 S.W.3d 345 (Ky. App. 2004).

Unexplained Absence. A resident is presumed to be dead who is not known to be living for seven successive years, and is presumed to have died without heirs if none have been located in seven years. KRS 393.050, 422.130; *Daugherty v. Rouse*, 219 S.W.2d 42 (1949).

DISABILITY

Classifications. "Total disability" exists if insured is wholly incapacitated from conducting his ordinary employment or such other employment as he might fairly be expected to follow in view of his circumstances and capabilities. *State Mut. Life Assur. Co. of Worcester, Mass. v. Heine*, 141 F.2d 741 (6th Cir. 1944). Insured covered under non-occupational policy to be classified as totally disabled must show inability to follow his regular occupation or any other for which he is fit. *Mutual Life Ins. Co. of New York v. Bryant*, 177 S.W.2d 588 (Ky. 1943); *Ginsburg v. Insurance Co. of N. Am.*, 427 F.2d 1318 (6th Cir. 1970); *Travelers Ins. v. Williams*, 198 S.W.2d 797 (Ky. 1946). Terms in a policy such as "total disability," "temporary total disability," "partial disability," "temporary partial disability," "partial permanent disability," are not synonymous with the phrase "total disability by injuries or disease permanently preventing the insured from pursuing any remunerative occupation." *Jefferson Standard Life Ins. Co. v. Hurt*, 72 S.W.2d 20 (Ky. 1934).

Proof of Condition. Generally, a finding of total or partial disability requires the showing of more than a mere impairment of normal ability but less than a state of helplessness. *Penn Mut. Life Ins. Co. v. Schrader*, 158 S.W.2d 964 (Ky. 1941).

Proof of Loss. Clause in life policy making giving of notice of disability within specified period condition precedent to recovery of disability benefits is binding unless waived by insurer. *Prudential Ins. Co. v. Dismore*, 72 S.W.2d 433 (Ky. 1934).



Reimbursement. Provision of disability policy requiring reimbursement for amount recouped from “third party” was ambiguous, thus insured who received settlement from his UM insurer was not required to reimburse disability insurer. *Lynch v. Claims Management Corp.*, 306 S.W.3d 93 (Ky. App. 2010).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables, and “AUTOMOBILES, Compulsory Coverage.”

FIRE INSURANCE

Arson. Generally, the principles of public policy prohibit recovery by an insured who sets fire fraudulently and intentionally to property covered by an insurance policy. *American Hardware Mut. Ins. Co. v. Mitchell*, 870 S.W.2d 783 (Ky. 1993).

Appraisal and Arbitration. Contractual provision requiring appraisal or arbitration is valid, but demands for such must be made with reasonable promptness. *Mutual Life Ins. Co. of New York v. Thomson*, 22 S.W. 87 (1893). Company must appoint a disinterested appraiser or else waives right to demand arbitration. *Hartford Fire Ins. Co. v. Asher*, 100 S.W. 233 (Ky. 1907).

Assignment. Insurer’s agent may authorize another to sign agent’s name on form consenting to assignment of an interest in a fire policy, or agent may ratify such an act, thereby binding insurer. *Home Fire & Marine Ins. Co. of California v. Ball*, 287 S.W. 555 (Ky. 1926).

Cancellation. Insurer may cancel a policy, but insurer must act in strict compliance with any contractual provisions relating to cancellation. KRS 304.20-320 and -330; *Carden v. Liberty Mut. Ins. Co.*, 128 S.W.2d 169 (Ky. 1939); *Osborne v. Unigard Indem. Co.*, 719 S.W.2d 737 (Ky. App. 1986). Notice of cancellation must be given to insured. *Connecticut Ins. Co. v. T. C. Caum-misar & Sons*, 291 S.W. 776 (Ky. 1927); KRS 304.20-320. Any unearned premium must be returned to insured. *Continental Ins. Co. of New York v. Stratton*, 215 S.W. 416 (Ky. 1919). Insurer cannot be held liable for cancelled policy, even if insured retained it. *Richmond Ins. Co. v. Zettwoch*, 287 S.W. 964 (Ky. 1926). Provision in fire and casualty policies declaring them void upon filing of foreclosure suit is not void as against public policy. *Anderson v. Kentucky Growers Ins. Co., Inc.*, 105 S.W.3d 462 (Ky. App. 2003).

Chattel Mortgage. Even if insurer has not inquired about a chattel mortgage, concealment thereof by insured, if material, may void policy. *Niagara Fire Ins. Co. v. Layne*, 185 S.W. 1136 (Ky. 1916). Disclosure of one mortgage but concealment of another by insured will

invalidate policy. *Queen Ins. Co. of Am. v. Cummins*, 267 S.W. 144 (Ky. 1924).

Contract/Policy and Binder. Binders may be made orally or in writing, and shall be deemed to include all usual terms of the policy as to which the binder was given. KRS 304.14-220(1); *Rabb v. Public Nat. Ins. Co.*, 243 F.2d 940 (6th Cir. 1957). A binder is valid until date of issuance of the policy or 90 days after its effective date, whichever is shorter. *Id.* Where written agency contract granted an agent, who issued a binder on a house later destroyed by fire, authority to receive applications for insurance and to accept applications for fire policy together with payment for first year premiums, agent’s issuance of a binder pending receipt of formal policy rendered insurance company liable. *Cincinnati Ins. Co. v. Clary*, 435 S.W.2d 88 (Ky. 1968).

Damages/Excepted Risks - Friendly Fires. Generally, a fire that burns in a place where it is intended to burn to accomplish an intended purpose is a “friendly fire” for which insured cannot recover on fire policy. However, a fire which breaks out from where it was intended is a “hostile fire” for which insured may recover. *Mutual Fire Ins. Agency of Louisville v. Slater & Gilroy*, 265 S.W.2d 788 (Ky. 1954).

Damages/Excepted Risks - Explosion. The term “explosion” is to be construed as ordinarily understood, rather than as understood by scientists. *New Hampshire Fire Ins. Co. v. Rupard*, 220 S.W. 538 (Ky. 1920).

Multiple Policies - Concurrent Insurance. Provision against concurrent insurance may be waived. *Phoenix Ins. Co. v. Spiers*, 8 S.W. 453 (Ky. 1888).

Proof of Loss. Written notice of claim must be given to insurer within 60 days after occurrence or commencement of any loss covered by policy, or as soon thereafter as is reasonably possible. KRS 304.17-090. Insured must submit proof of loss within the time fixed by policy, unless delay is unavoidable. *Germania Fire Ins. Co. v. Nickell*, 198 S.W. 534 (Ky. 1917). Submitting proof of loss within the period stated in contract of fire insurance is a condition precedent to insured’s right to sue on the policy, but failure to furnish is not a ground for defeating recovery. *Niagara Fire Ins. Co. v. Layne*, 172 S.W. 1090 (Ky. 1915). When policy requires, notice and proof of loss are conditions precedent to an action on the policy unless such notice is waived by insurer. *Lemons v. State Auto. Mut. Ins. Co.*, 181 F. Supp. 281 (E.D. Ky. 1960), *aff’d*, 284 F.2d 843 (6th Cir. 1960). However, denial of liability waives proof of loss requirement to bring suit. *Home Ins. Co. of New York v. Roll*, 218 S.W. 471 (Ky. 1920).



GUEST CASES

See "AUTOMOBILES, guests."

HOSPITALS

Apportionment of Liability. Jury should be instructed to apportion liability between doctor and hospital where conduct of both resulted in death. *Reffitt v. Hajjar*, 892 S.W.2d 599 (Ky. App. 1994).

Evidence - Records. Where proper foundation has been laid, hospital records are admissible as to all matters proper for inclusion in record. *Buckler v. Com.*, 541 S.W.2d 935 (Ky. 1976); *Payne v. Com.*, 509 S.W.2d 264 (Ky. 1974). Hospital may elect to produce certified copies of records in response to a subpoena duces tecum, which may then be introduced into evidence without further proof as to foundation, identity, or authenticity. KRS 422.300-.330. However, other rules of evidence apply as to admissibility. *Young v. J. B. Hunt*, 781 S.W.2d 503 (Ky. 1989). Statements made by patient's widow, repeating what patient said on way to hospital, to the treating physician for purposes of diagnosis and treatment were admissible under hearsay exception for statements made for purposes of medical treatment or diagnosis. *Mary Breckenridge Healthcare v. Eldridge*, 275 S.W.3d 739 (Ky. App. 2008). Hearsay comments from wife of a dying patient transcribed by nurses were not admissible as business records. *Rabovsky v. Com.*, 973 S.W.2d 6 (Ky. 1998).

Immunity. Medical institutions that are operated under the direction and control of state government and funded from the state treasury, such as the University of Kentucky Medical Center, are protected by sovereign immunity against negligence claims. *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997); *Charash v. Johnson*, 43 S.W.3d 274 (Ky. App. 2000). General Assembly has waived immunity up to \$200,000, exclusive of interest and costs, per claim for negligence actions filed before the Board of Claims. KRS 44.070, .073. Negligent actions of a hospital employee are not protected by sovereign immunity. *University of Louisville v. O'Bannon*, 770 S.W.2d 215 (Ky. 1989). See generally Ky. Const. §§14, 54, 241.

Liens. Statutory mortgage lien exists on a municipal hospital for which money has been borrowed and bonds have been issued pursuant to KRS 216.100 in favor of holders of bonds and coupons. KRS 216.140.

Warranties. Standard of care that hospitals owe to patients is to exercise that degree of care and skill ordinarily expected of reasonable and prudent hospitals under similar circumstances. *Rogers v. Kasdan*, 612 S.W.2d 133 (Ky. 1981).

HUSBAND AND WIFE

Community Property. Kentucky is not a community property state. *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982).

Interspousal Immunity. Interspousal immunity for tort actions has been abolished in Kentucky. *Layne v. Layne*, 433 S.W.2d 116 (Ky. 1968). Husband and wife may sue each other in tort. *Combs v. Combs*, 262 S.W.2d 821 (Ky. 1953). However, neither may sue for intentional infliction of emotional distress due to spouse's affair. *Browning v. Browning*, 584 S.W.2d 406 (Ky. App. 1979). Where there are children that survive a wrongful death, the administrator may sue the surviving spouse for decedent's wrongful death to the extent that the children will benefit from a recovery. *Robinson's Adm'r v. Robinson*, 220 S.W. 1074 (Ky. 1920).

Loss of Consortium. Spouse may recover damages for loss of consortium against a third person based on negligent or wrongful acts of such third person. KRS 411.145(2). Statute of limitations period for loss of consortium claim is one year after the injury. KRS 413.140(1)(a). One-year statute of limitations applies even if insured's cause of action arose from a motor vehicle accident, which has a two-year statute of limitations. *Moore v. State Farm*, 710 S.W.2d 225 (Ky. 1986). Loss of consortium damages do not cease at death of injured spouse. *Martin v. Ohio Co. Hosp. Corp.*, 295 S.W.3d 104 (Ky. 2009).

INFANTS

See "AUTOMOBILES BODILY INJURY CLAIMS, Age"; "NEGLIGENCE, Age."

Definition of a Minor. 18 is the age of majority. For purchase of alcoholic beverages or for treatment of children with disabilities, the age of majority is 21. KRS 2.015; *Pyles v. Raisor*, 60 F.3d 1211 (6th Cir. 1995). No minimum age to testify, contingent upon court's determination of competence. *Humphrey v. Com.*, 962 S.W.2d 870 (Ky. 1998).

Infant's Claims. Claims by minor may be compromised only by minor's legal guardian or representative legally authorized to act for the minor. *Jones By and Through Jones v. Cowan*, 729 S.W.2d 188 (Ky. App. 1987). Compromise of a minor's claim must be supported by consideration, but slight consideration is sufficient. *Posey v. Lambert-Grisham Hardware Co.*, 247 S.W. 30 (Ky. 1923). A court must approve all settlements in excess of \$10,000 involving minors. KRS 387.280. Release signed by an unemancipated minor could be set aside after she became an adult. *Mitchell v. Mitchell*, 963 S.W.2d 222 (Ky. App. 1998). Children have a claim for loss of consortium due to death of par-



ent, which does not end at parent's death. *Charash v. Johnson*, 43 S.W.3d 274 (Ky. App. 2000).

Claims Against a Minor. Child's liability for negligence or contributory negligence is a question of fact dependent upon child's age and experience. *Meyer v. Smith*, 428 S.W.2d 612 (Ky. 1968); *Ham v. Hord*, 224 S.W. 868 (Ky. 1920). Child between the ages of seven and fourteen has a duty to exercise that degree of care reasonably to be expected from an ordinary child of like age, intelligence, and experience under like or similar circumstances. There is no rebuttable presumption against capacity for contributory negligence as to children within this age group. *Williamson v. Garland*, 402 S.W.2d 80 (Ky. 1966).

INLAND MARINE

Filing and approval of forms is not required for specially rated inland marine risks. KRS 304.14-120. Statute regarding delivery of policies does not apply to inland marine floater insurance. KRS 304.14-230.

LIABILITY INSURANCE

Cancellation. Cancellation of insurance contract may occur only upon strict compliance with provisions of the terms of the contract. *Osborne v. Unigard Indem. Co.*, 719 S.W.2d 737 (Ky. App. 1986). Under Kentucky law, insurer's compliance with cancellation provision is to be strictly construed. *Yates v. Transamerica Ins. Co.*, 928 F.2d 199 (6th Cir. 1991). Notice of or request for cancellation must be unequivocal and must contain a definite date on which cancellation becomes effective. *Partin v. United Services Auto. Ass'n*, 379 S.W.2d 741 (Ky. 1964).

Compromise of Claims.

Duty to Act in Good Faith. KRS 304.12-230 (the Kentucky Unfair Claims Settlement Practices Act) and KRS 446.070 (allowing a private cause of action for violations of a statute) together create a statutory cause of action for bad faith insurance practices. *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988). Insured may recover consequential and punitive damages in tort when an insurance company acts in bad faith. *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000). Mere delay in payment is not bad faith. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997). Insurance company has a non-delegable duty to investigate claims. *Hamilton Mut. v. Buttery*, 220 S.W.3d 287 (Ky. App. 2007). Self-insured tortfeasor is not subject to Kentucky UCSPA or to a suit for bad faith because not engaged in the business of insurance. *Davidson v. American Freightways*, 25 S.W.3d 94 (Ky. 2000). UCSPA applies to conduct before and during litigation. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky.

2006). MVRA provides exclusive remedy where insurance company wrongfully delays or denies payment of no-fault benefits. *Foster v. Ky. Farm Bureau Ins. Co.*, 189 S.W.3d 553 (Ky. 2006).

Right of Insurer to Settle. Insurer can control compromise settlements and, in absence of bad faith, is not liable for failing to settle at less than policy limits, even though judgment may amount to more than policy limits. *Terrell v. Western Cas. & Sur. Co.*, 427 S.W.2d 825 (Ky. 1968). Factors for court to consider in determining whether insurer is guilty of bad faith include: (a) probability of recovery in excess of policy limits; (b) negotiations with respect to the settlement; (c) offers to settle for policy limits or less; and (d) insured's demand for settlement upon insurer. *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. 1976).

Contribution among Joint Tortfeasors. Under Kentucky's comparative fault statute, a jury shall allocate the percentage of total fault among all parties, including each claimant, defendant, third party, or released party. KRS 411.182(1)(b). In determining percentage of fault for each party, the jury shall consider nature of the conduct and causal relationship between conduct and injury. KRS 411.182(2). It is proper to apportion between merely negligent and intentional tortfeasors. *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998).

Cooperation of Insured in Defense of Action. Failure to cooperate is a defense against insured and may also bar injured third party from recovery against insurer. *State Farm Mut. Auto. Ins. Co. v. Jacobs*, 409 S.W.2d 523 (Ky. 1966); *Travelers Ins. Co. v. Boyd*, 228 S.W.2d 421 (Ky. 1949). However, absence of insured at trial does not permit insurer to void policy on grounds of non-cooperation unless there is proof of prejudice. *Western Farm Bureau Mut. Ins. Co. v. Danville Constr. Co.*, 463 S.W.2d 125 (Ky. 1971). Insurer may void coverage based upon late notice only if it can establish substantial prejudice. *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798 (Ky. 1991); *Best v. West American Ins.*, 270 S.W.3d 398 (Ky. App. 2008).

Coverage.

Construction of Terms. Under Kentucky law, insurance policy is enforced as drawn. *Foster v. Kentucky Hous. Corp.*, 850 F. Supp. 558 (E.D. Ky. 1994). But terms in policy are to be interpreted in light of usage and understanding of average person. *American Commerce Ins. Co. v. Brown*, 168 S.W.3d 386 (Ky. 2004) (neighbor helping move piano is not a "domestic employee" under terms of homeowners' policy).

Standard Provisions. Insurance policies are strictly construed against insurer, especially when insurer

drafted policy to include standard provisions. *MGA Ins. Co. v. Glass*, 131 S.W.3d 775 (Ky. App. 2004).

Omnibus Provisions. Function of “Omnibus” provision in a policy is to extend coverage, not to determine exclusions by limiting coverage to a select few. *Withers v. Meridian Mut. Ins. Co.*, 626 S.W.2d 214 (Ky. App. 1980).

Direct Action against Insurer. To maintain a private cause of action against a first party insurer for bad faith failure to pay a claim, insured must establish insurer’s obligation to pay, that insurer lacked reasonable basis for failing to immediately pay, and that insurer had no reasonable basis to delay payment or that it acted in a reckless disregard as to whether such basis existed. KRS 304.12-230; *Sculimbrene v. Paul Revere Ins. Co.*, 925 F. Supp. 505 (E.D. Ky. 1996); *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993).

Duty to Defend. Insurer has a duty to defend if there is any allegation by insured that potentially, possibly, or might come within coverage of the policy. *O’Bannon v. Aetna Cas. & Sur. Co.*, 678 S.W.2d 390 (Ky. 1984). Insurance company must defend any suit in which the language of the complaint would bring it within policy coverage, regardless of the merit of the action. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991). Allegations of a complaint against a putative insured do not require insurer to defend where no coverage exists, and insurer that rightfully elects to deny coverage and provide no defense to insured is not estopped from litigating coverage issue. *Cincinnati Ins. Co. v. Vance*, 730 S.W.2d 521 (Ky. 1987). Insurer is estopped to deny coverage where it assumes defense of insured but does not assert a policy defense or reserve its rights until one year later. *American Cas. Co. of Reading, Pa. v. Shely*, 234 S.W.2d 303 (Ky. 1950). Insurer is not estopped from contesting validity of a binder for not investigating facts that were materially misrepresented in an application for insurance. *State Farm v. Crouch*, 706 S.W.2d 203 (Ky. App. 1986). An insurance company is not obligated to provide defense or coverage for automobile borrowed by one employee from another employee. *Consolidated Am. Ins. Co. v. Anderson*, 964 S.W.2d 811 (Ky. App. 1997) (automobile was not a “covered auto” under the policy).

Under the Unfair Claims Settlement Practices Act, insured may file suit against insurer if insurer has acted in bad faith to settle or defend insurance claim. KRS 304.12-230 & 446.070. Insured must establish three elements to prove bad faith: 1) insurer must be obligated to pay claim under terms of the policy; 2) insurer must lack a reasonable basis in law or fact for denying claim; and 3) it must be shown that insurer either knew there was no reasonable basis for denying claim or acted with

reckless disregard whether such basis existed. *Guaranty National Ins. Co. v. George*, 953 S.W.2d 946, 948-49 (Ky. 1997). Insurer is entitled to challenge a claim and litigate it if the claim is fairly debatable on the law or the facts. *Id.*

Liability between Insurers.

Primary. A liability policy with pro rata “other insurance” clause is primary with respect to a liability policy with an excess “other insurance” clause. *Hartford Ins. Co. v. Kentucky Farm Bureau Ins. Co.*, 766 S.W.2d 75 (Ky. App. 1989).

Excess. An excess clause making liability coverage excess over other valid and collectible insurance is mutually repugnant to excess clauses in a self-insured insurance trust’s contracts making the retained limit excess over other valid and collectible insurance. *Kentucky School Boards Ins. Trust v. Horace Mann Ins. Co.*, 919 F. Supp. 1056 (E.D. Ky. 1996).

Exclusions. Exceptions and exclusions should be strictly construed to give effect to the entire policy. *Eyler v. Nationwide Mut. Fire Ins. Co.*, 824 S.W.2d 855 (Ky. 1992); *Grimes v. Nationwide Mut. Ins. Co.*, 705 S.W.2d 926 (Ky. App. 1985).

Intentional Acts. Exclusion for intentional acts will be upheld if insured/actor knew nature and quality of his act and physical nature of the consequences of his actions. *Nationwide Mut. Fire Ins. Co. v. May*, 860 F.2d 219 (6th Cir. 1988); see *K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751 (Ky. App. 2005) (no duty to defend or indemnify insured who sexually molested child). A subjective standard applies. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991). If injury was not actually and subjectively intended or expected by insured, even though the act was intentional, there is coverage. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 2007 WL 1790685 (Ky. 2007).

Violation of Law. Insurer is not liable for damages resulting from a violation of law by the insured. *Heltsley v. Life & Cas. Ins. Co.*, 185 S.W.2d 673 (Ky. 1945) (elevator operator under legal age to consume intoxicating liquor). Clause excluding coverage for injuries sustained as a result of being under the influence of alcohol is ambiguous. *Healthwise of Ky., Ltd. v. Anglin*, 956 S.W.2d 213 (Ky. 1997). Exclusion for bodily injury caused by willful violation of a penal statute did not require a criminal conviction before it applied. *Employers Ins. of Wausau v. Martinez*, 54 S.W.3d 142 (Ky. 2001). Claim for negligent hiring and supervision is covered even if underlying acts intentional. *Ky. School Boards Ins. Trust v. Board of Educ. of Woodford Co., Ky.*, 2003 WL 22520018 (Ky. App. 2003).



Waiver. Insurer may waive provision inserted in a policy for the benefit of insurer. *Federal Union Life Ins. Co. v. Lambert*, 86 S.W.2d 688 (Ky. 1935). Failure to give proper notice to a liability insurer of a claim against insured absolves insurer of liability only if insurer can show prejudice. *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798 (Ky. 1991). Nonwaiver agreements are valid in Kentucky. *Federal Union Life Ins. Co. v. Lambert*, 86 S.W.2d 688 (Ky. 1935). An insurance company is estopped to deny coverage based on late payment of a premium, if it has accepted such payments in the past. *Howard v. Motorist Mut. Ins. Co.*, 955 S.W.2d 525 (Ky. 1997).

Rescission. Where oral representations are contrary to written language of a contract, rescission of the written contract should not be permitted by a party who failed to read it, but that party may bring a claim based upon fraud and deceit. *Hanson v. American National Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993), *overruled on other grounds*, *Sand Hill Energy, Inc. v. Smith*, 83 S.W.3d 483 (Ky. 2002).

Reservation of Rights. Carrier barred from raising defense in coverage suit not raised in denial of claim letter or answer to complaint. *Western Southern Life Assurance v. Maddox*, 2003 WL 22681410 (Ky. App. 2003); *see also*, 806 KAR 12:092(2)(9).

Insolvency of Insured. The rights of judgment creditors who obtain judgments against insured have no greater rights against insurer than the insured. *Baldwin v. Fidelity Phenix Fire Ins. Co. of N.Y.*, 260 F.2d 951 (6th Cir. 1958).

Notice. Failure to give notice of reasons for delay in paying claim waives the defense of existence of a reasonable foundation for denying the claim. *Shelter Mut. Ins. Co. v. Askew*, 701 S.W.2d 139 (Ky. App. 1985). An insurer may avoid coverage based upon late notice only by establishing prejudice against the insurer. *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798 (Ky. 1991). *But see*, *Hiscox Dedicated Corp. Member Ltd. v. Wilson*, 246 F. Supp. 2d 684 (E.D. Ky. 2003) (requiring strict compliance with notice provision in the policy).

Punitive Damages. Insured may purchase a policy to cover liability for punitive damages imputed for grossly negligent acts rather than intentional wrongs of insured. *Continental Ins. Co. v. Hancock*, 507 S.W.2d 146 (Ky. 1973). Punitive damages are covered under a liability policy unless expressly excluded. *Id. See, Deerfield Ins. Co. v. Warren Co. Fiscal Ct.*, 88 S.W.3d 867 (Ky. App. 2002).

Loan Receipt. An insurance company may sue in the name of insured under a loan receipt to prevent prejudice to insurer so long as insureds are not party to the

action. *Preferred Risk Mut. Ins. Co. v. Faulkner*, 553 S.W.2d 296 (Ky. 1977). If insurer becomes party, insurance company's participation as a real party in interest cannot be concealed. *Todd v. Ratcliffe*, 603 S.W.2d 925 (Ky. App. 1980). *But see, Preferred Risk Mut. Ins. Co. v. Faulkner*, 553 S.W.2d 296 (Ky. App. 1977) (substitution of insurer as real party in interest was proper despite execution of loan receipt).

Mistake. Insurer may recover from insured any benefits paid to insured by mistake. *Riverside Ins. Co. v. McDowell*, 576 S.W.2d 268 (Ky. App. 1979).

Reformation. General principles for reformation of contracts apply to insurance policies. *Flimin's Adm'x v. Metropolitan Life Ins. Co.*, 75 S.W.2d 207 (Ky. 1934). Insurance policy is a written contract and its terms are binding on both parties; after acceptance, mere lack of knowledge of contents by insured cannot furnish a sound legal basis for reforming the policy or voiding its provisions. *Grisby v. Mountain Valley Ins. Agency*, 795 S.W.2d 372 (Ky. 1990).

Proof of Loss. Claimant has obligation to provide reasonable proof of facts and amount of loss to insurer before he is entitled to recover from insurer. *State Auto Mut. Ins. Co. v. Outlaw*, 575 S.W.2d 489 (Ky. App. 1978). However, insurer's failure to pay within 30 days from date it receives proper proof of claim justifies awarding penalty, interest, and attorney's fees to a claimant. KRS 304.12-235; *Kentucky Farm Bureau Mut. Ins. Co. v. Roberts*, 603 S.W.2d 498 (Ky. App. 1980). Although there are different opinions re value of loss, insurer still obligated to investigate, negotiate and attempt to settle claim. *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Accrual. A party may file action on a written contract up to 15 years after cause of action accrued. KRS 413.090. Actions on oral contract must be brought within 5 years. KRS 413.120. Parties to insurance policy may provide for a shorter period of limitation in their contract as long as time period is reasonable, but not less than two years. *Gordon v. Kentucky Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky. 1995). Indemnification claim accrues when payment is made to injured party, not date of accident. *Poole v. Com.*, 892 S.W.2d 611 (Ky. App. 1995). Subrogation claim accrues at time of commission of the underlying tort. *American Premier Ins. Co. v. McBride*, 159 S.W.3d 342 (Ky. App. 2004).

Personal injury action must be commenced within 1 year after cause of action accrues. KRS 413.140. Under

MVRA, automobile accident victim has 2 years after last payment of no-fault benefits or 4 years after accident whichever is earlier, to file action for tort liability regardless of whether such benefits were first claimed or first paid within two years of the date of injury. KRS 304.39-230(1); *O'Keefe v. North American Refractories*, 78 S.W.3d 760 (Ky. App. 2002). If victim has died, and no basic or added reparation benefits have been paid to decedent or survivors, action for survivor's benefits may be commenced not later than one 1 year after the death or 4 years from accident, whichever is earlier. If survivor's benefits have been paid, an action for further survivor's benefits by the same or another claimant may be commenced within 2 years after the last payment of benefits. If basic or added reparation benefits have been paid for loss suffered by victim before his death, action for survivor's benefits may be commenced not later than 1 year after the death or 4 years after last payment, whichever is earlier KRS 304.39-230(2). Statute of limitations begins to run when any losses are incurred and in no event may an action be commenced more than 4 years after date of accident. *State Auto. Ins. Co. v. Lange*, 697 S.W.2d 167 (Ky. App. 1985).

Discovery Rule. Cause of action does not accrue until claimant has knowledge of sufficient facts to state a cause of action, that is, when claimant discovers, or in exercise of reasonable diligence should discover, not only that he has been injured, but also that the injury may have been caused by another's conduct. *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709 (Ky. 2000); *Hazel v. General Motors Corp.*, 863 F. Supp. 435 (W.D. Ky. 1994). Failure to appreciate extent of one's eventual damages because injury initially appears slight is not an excuse for failure to comply with statute of limitations. *Northwestern Nat. Ins. Co. v. Osborne*, 610 F. Supp. 126 (E.D. Ky. 1985), *aff'd*, 787 F.2d 592 (6th Cir. 1996). Injured party has affirmative duty to use diligence in discovering cause of action within the limitations period, any fact that should excite suspicion constitutes actual knowledge of claim. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55 (Ky. 2010). One year statute of limitations ran from date of asbestosis diagnosis, not later diagnosis of lung cancer. *Combs v. Albert Kahn Associates, Inc.*, 183 S.W.3d 190 (Ky. App. 2006). Discovery rule does not toll the statute to allow injured person to discover identity of wrongdoer unless there is fraudulent concealment or misrepresentation. *McLain v. Dana Corp.*, 16 S.W.3d 320 (Ky. App. 1999). Kentucky has adopted the continuous course of treatment rule, tolling statute as long as the patient, in good faith, is under continuing care of the physician for the injury. *Harrison v. Valentini*, 184 S.W.3d 521 (Ky. 2005). Discovery rule applies to property damage claims. *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604 (Ky. 2003).

Fraud. If defendant fraudulently conceals knowledge relating to injury of plaintiff, statute of limitations is tolled. *Roman Catholic Diocese of Covington v. Sec-ter*, 966 S.W.2d 286 (Ky. App. 1998).

Limitations in Contract. Group health policy's one-year time limitation from date of filing of a medical claim to bring action against insurer was reasonable. *Hale v. Blue Cross and Blue Shield of Kentucky, Inc.*, 862 S.W.2d 905 (Ky. App. 1993). One-year period established in policy for asserting uninsured motorist claim was unreasonable, and would not be enforced because it conflicted with the two-year limitation period in MVRA for personal injury claims. *Elkins v. Kentucky Farm Bureau Mut. Ins. Co.*, 844 S.W.2d 423 (Ky. App. 1992). Where policy requires action to be brought within a specific time period, claim is time-barred if brought after that period has expired. *Continental Ins. Co. v. Mingo Equip. Co.*, 468 S.W.2d 276 (Ky. 1971).

Tolling. Statements of architect to a property owner that cause of a water problem was being investigated was insufficient to toll running of statute of limitations. *Old Mason's Home of Kentucky, Inc. v. Mitchell*, 892 S.W.2d 304 (Ky. App. 1995). Kentucky law regarding tolling of the limitations period for personal injury actions applies to §1983 claims. *Ford v. Hill*, 874 F. Supp. 149 (E.D. Ky. 1995); *Grand Communities Ltd. v. Stepper*, 170 S.W.3d 411 (Ky. App. 2004). Borrowed Ohio statute of limitations was not tolled when tortfeasor left Ohio after accident and returned to his residence in Kentucky. *Ellis v. Anderson*, 901 S.W.2d 46 (Ky. App. 1995). See also KRS 413.140, & .190.

Waiver. "Waiver" is the voluntary and intentional surrender of a known right or choice to forego an advantage otherwise demanded or insisted upon; unlike estoppel it does not require proof that the other party was misled. *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995). Doctrine of equitable estoppel applies to transactions in which it would be unscrupulous to allow a person to maintain a position inconsistent with the one he has agreed to. *Bruestle v. S & M Motors, Inc.*, 914 S.W.2d 353 (Ky. App. 1996). Estoppel may be created by words or conduct. *Grayson Rural Elec. Corp. v. City of Vanceburg*, 4 S.W.3d 526 (Ky. 1999). Insured may not claim a waiver of policy provisions unless insurer's conduct would amount to fraud. *Owens v. National Life & Acc. Ins. Co.*, 29 S.W.2d 557 (Ky. 1930). Where conduct has induced a person to change his position to his detriment, so that enforcement of defense would be unjust, estoppel applies. *Edmondson v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 781 S.W.2d 753 (Ky. 1989).

Case Law. Insured's action against his insurer and insurance agent to recover overpayment of premiums was predicated upon written contract and, therefore, fif-



teen-year limitations period applied. KRS 413.090(2); *Spurlin v. Ranier*, 457 S.W.2d 491 (Ky. 1970). A group health policy was not “blanket health insurance” subject to the three-year statute of limitations where the policy involved benefits payable for health problems that were unrelated to insured’s employment. KRS 304.18-060(2), -070; *Hale v. Blue Cross and Blue Shield of Kentucky, Inc.*, 862 S.W.2d 905 (Ky. App. 1993). Expiration of the statute of limitations is not a bar if complaint is filed and summons issued in good faith before the period expired. *Jones v. Baptist Healthcare System, Inc.*, 964 S.W.2d 805 (Ky. App. 1997).

MALPRACTICE

Medical.

Statutory Requirements and Limitations. There is no malpractice liability for breach of any guaranty, warranty, contract, or assurance of results obtained from any procedure unless any such promise is in writing and signed by a health care provider. KRS 304.40-300. Action against a physician, surgeon, dentist, or hospital for negligence or malpractice shall be commenced within one year after the cause of action accrued. KRS 413.140(1)(e). Cause of action is deemed to accrue at time injury is first discovered or in exercise of reasonable care should have been discovered. KRS 413.140(2). *McCullum v. Sisters of Charity*, 799 S.W.2d 15 (Ky. 1990) (held unconstitutional language in KRS 413.140(2) limiting the time that a malpractice action could be filed to a maximum of five years). Action to recover for alleged medical malpractice that occurred when claimant was an infant must be commenced within the same number of years after the removal of the disability or death, whichever occurs first. KRS 413.170(1). Kentucky follows the “continuous course of treatment rule” to toll statute of limitations. *Harrison v. Valentini*, 184 S.W.3d 521 (Ky. 2005).

Expert Testimony. Expert testimony is generally necessary to support a patient’s claim for medical malpractice. *Andrew v. Begley*, 203 S.W.3d 165 (Ky. App. 2006). Expert testimony is required to negate informed consent. *Hawkins v. Rosenbloom*, 17 S.W.3d 116 (Ky. App. 1999).

Informed Consent. Informed consent is deemed given when: 1) actions of a health care provider in obtaining consent are in accordance with accepted standards among members of the profession with similar training and experience and 2) a reasonable individual would have a general understanding of the procedure and acceptable alternative procedures or treatments and substantial risks and hazards inherent in those procedures that are recognized among other health care providers who perform similar treatments or procedures.

There is no requirement that a physician obtain prior consent in emergency situations in which consent of the patient cannot be reasonably obtained. KRS 304.40-320.

Ordinarily, a physician is not liable for an honest mistake in judgment when he follows acceptable medical standards for examination, diagnosis and treatment. Extent of disclosure of risks and hazards of a proposed medical procedure relevant to securing patient’s consent must be evaluated in terms of what the physician knew or should have known at the time he recommended treatment to the patient. *Holton v. Pfingst*, 534 S.W.2d 786 (Ky. 1975); *Bennett v. Graves*, 557 S.W.2d 893 (Ky. App. 1977). Parol evidence concerning oral discussions between a doctor and his patient is admissible to establish existence of consent. *Kovacs v. Freeman*, 957 S.W.2d 251 (Ky. 1997). Lawsuits alleging lack of informed consent are treated as malpractice claims and must be brought within one-year statute of limitations. *Gregory v. Poor*, 862 F. Supp. 171 (W.D. Ky. 1994). A consent form is not a legally enforceable contract. *Kovacs v. Freeman*, 957 S.W.2d 251 (Ky. 1997). Cause of action for performing a procedure without consent is battery and does not fall within informed consent statute. *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000); *Coulter v. Thomas*, 33 S.W.3d 522 (Ky. 2000).

Standard of Care. In general, a physician has no duty to treat a person; however, law implies duty wherever circumstances place parties in a relationship where one’s negligent acts cause injury to the other. *Noble v. Satori*, 799 S.W.2d 8 (Ky. 1990).

Wrongful Birth/Wrongful Life. There is no cause of action in Kentucky for wrongfully causing a child to be born. *Schorck v. Huber*, 648 S.W.2d 861 (Ky. 1983).

Hospital.

Charitable Immunity/Limitations. Under Kentucky law, there is no charitable immunity from suit for hospitals. *Hillard v. Good Samaritan Hosp.*, 348 S.W.2d 939 (Ky. 1961); *Mullikin v. Jewish Hosp.*, 348 S.W.2d 930 (Ky. 1961).

Informed Consent. Under KRS 304.40-320, duty is upon “health care providers” to obtain informed consent. KRS 304.40-260 expressly includes hospitals within the definition of that term.

Respondeat Superior. A nurse can be the joint agent of a hospital and a doctor. *City of Somerset v. Hart*, 549 S.W.2d 814 (Ky. 1977). The surgeon, the hospital, the anesthesiologist and the surgical technician may be held liable for failing to check identification bracelet of patient who undergoes wrong surgery because of a mistaken identity. *Southeastern Kentucky Baptist Hosp., Inc. v. Bruce*, 539 S.W.2d 286 (Ky. 1976). Vicarious liability may be imposed upon a hospital for negligence of inde-



pendent staff personnel under doctrine of apparent authority or ostensible agency. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985); *Williams v. St. Claire Medical Ctr.*, 657 S.W.2d 590 (Ky. App. 1983).

Standard of Care. A hospital has a duty to act with reasonable care toward its patients, employees, and others as would any other similarly situated prudent hospital, including duties to investigate decisions and follow procedures. *NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993).

Legal. See “ATTORNEYS, Legal Malpractice.”

Other Professionals. A person has the duty to exercise ordinary care, whether for one’s own safety or for safety of others, commensurate with the circumstances. That duty carries with it the same responsibility for damages sustained as a result of its breach regardless of whether there is a statute imposing the standard of conduct or whether a jury or judge has determined breach. *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987). Statute of limitations for professional malpractice claims is one year. KRS 413.245.

NEGLIGENCE

See Law Digest Tables.

Age -Claims Against a Minor. Child’s liability for negligence or contributory negligence is a question of fact dependent upon the child’s age and experience. *Meyer v. Smith*, 428 S.W.2d 612 (Ky. 1968); *Ham v. Hord*, 224 S.W. 868 (Ky. 1920). A child between the ages of 7 and 14 has a duty to exercise that degree of care reasonably to be expected from an ordinary child of like age, intelligence, and experience under like or similar circumstances. There is no rebuttable presumption against capacity for contributory negligence for children within this age group. *Williamson v. Garland*, 402 S.W.2d 80 (Ky. 1966).

Attractive Nuisance. Owners with knowledge that children use premises must exercise care commensurate with danger to protect them from dangerous or attractive nuisances. *Deaton’s Adm’r v. Kentucky & West Virginia Power Co.*, 164 S.W.2d 468 (Ky. 1942).

Assumption of Risk. The assumption of risk doctrine was abolished in *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967).

Blackout Defense. Blackout defense is an affirmative defense that must be pleaded, but it is unavailable where defendant was put on notice of facts sufficient to cause a reasonable person to anticipate that his driving might lead to the injury of others or if, at time of accident, the defendant was violating his statutory duty (e.g.,

driving while intoxicated, speeding). *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988).

Comparative and Contributory Negligence. Kentucky has pure comparative negligence. *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); KRS 411.182. KRS 411.182 limits allocation of fault to parties in the litigation or those who have settled or released claims. *Baker v. Webb*, 883 S.W.2d 898 (Ky. App. 1994). Contributory negligence is no longer a complete defense. Instead, juries allocate the percentage of fault among all the parties each claimant, defendant, third party or released party. KRS 411.182(1). In determining percentage of fault for each party, the jury shall consider nature of the conduct and causal relationship between conduct and injury. KRS 411.182(2). In allocating fault, each person is charged with knowledge of an obvious danger. *Smith v. Louis Berkman Co.*, 894 F. Supp. 1084 (W.D. Ky. 1995).

Damages.

Compensatory. Compensatory damages are awarded to place the injured party in same condition he would have been in if contract had been performed. *Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961). Damages should reflect just compensation for injuries that are actually suffered by the injured party. *Ralston v. Thacker*, 932 S.W.2d 384 (Ky. App. 1996).

Medical Expenses. *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005). Plaintiff is entitled to recover, not merely introduce, the full amount billed to Medicare for medical expenses even though a percentage of the expenses billed may be classified as “Medicare adjustment or Medicare write off.” See, however, *Dennis v. Fulkerson*, ___ S.W.3d ___, 2011 WL 2496204, Ky. App. June 24, 2011 (No. 2009-CA-001367-MR, 2009-CA-001422-MR), upholding the reduction of an award for medical expenses to extent medical bill was written off by the health care provider.

Punitive Damages. The Kentucky Supreme Court has held part of Kentucky’s punitive damages statute unconstitutional because the statute’s definition of “malice” required a “subjective awareness” on the part of the defendant before punitive damages could be awarded. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). See also, KRS 411.184(1)(c) (defining “malice”). The common law instruction for punitive damages, which only required proof of gross negligence on the part of the defendant is reinstated. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). Punitive damages may be awarded when conduct is so outrageous that malice may be implied. *Kinney v. Butcher*, 131 S.W.3d 357 (Ky. App. 2004); *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991), held that the jural rights doctrine protected common law actions under theories of negligence



and strict liability. Plaintiff must establish his case for punitive damages by “clear and convincing evidence” proving that the other party acted with oppression, fraud, or malice. KRS 411.184(2). The constitutionality of this section of the statute has not been considered. Low awards of compensatory damages may support a higher ratio of punitive damages. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003).

Limitations on Awards. Under the “first blush rule,” a damages award is excessive if the mind is immediately shocked at the disproportionate size of the verdict in relation to the evidence. *Morrow v. Stivers*, 836 S.W.2d 424 (Ky. App. 1992).

Definition/Duty. The basic element in a negligence action is breach of duty; without breach of duty, there can be no recovery. *Transportation Cabinet v. Roof*, 913 S.W.2d 322 (Ky. 1996). Whether duty exists is a matter of law. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992); *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002). Every person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other person, however this duty is not boundless. *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840 (Ky. 2005).

Experts. Kentucky adopted *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) in *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

Exculpatory Agreement. Agreements to exempt future liability for ordinary or gross negligence are not invalid per se, but are disfavored and are strictly construed against parties relying upon them. *Peoples Bank of Northern Ky. Inc. v. Crowe Chizek*, 277 S.W.3d 255 (Ky. App. 2008). One may not contract away liability for failure to comply with duties imposed by safety statutes. *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005).

“Firefighter’s Rule.” Kentucky follows the Firefighter’s Rule which exempts the premises owner for liability to emergency personnel except for hidden hazards, actively negligent conduct or statutory violations that create an undue risk of injury. *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96 (Ky. 1964). Firefighter’s Rule also applies to emergency medical technicians. *Maggard v. Conagra Foods, Inc.*, 168 S.W.3d 425 (Ky. App. 2005).

Governmental Immunity. Under the sovereign immunity doctrine, the Commonwealth is immune to suit unless the General Assembly waives such protection. The doctrine of sovereign immunity is based on §§230 and 231 of the Kentucky Constitution. Sovereign immunity protects state, legislators, prosecutors, judges and

others doing work of state. *Autry v. Western Ky. Univ.*, 219 S.W.3d 713 (Ky. 2007). The sovereign immunity defense is limited by the jural rights doctrine, as explained in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). See also Ky. Const. §§14, 54 & 241. But see, *Fields v. Lexington-Fayette Urban County Gov.*, 91 S.W.3d 110 (Ky. App. 2001) (noting that the jural rights doctrine does not trump the doctrine of sovereign immunity).

Liquor Liability/Dram Shop Act. Ordinarily, a vendor of intoxicating liquors is not liable at common law to third persons for injuries or damages sustained as a result of the intoxication of a purchaser of liquor. KRS 413.241. A vendor who sells alcohol to minors, persons under the influence of alcohol or drugs, or known drunkards or felons may be subject to fines, revocation of license, or civil or criminal penalties. KRS 243.490, 244.080, 244.990(1); *Pike v. George*, 434 S.W.2d 626 (Ky. 1968). KRS 413.241(1) declares the consumption of alcohol, not the serving or sale, to be the proximate cause of any injury inflicted by an intoxicated person. However, a dram shop operator who furnishes intoxicating liquor to a person actually or apparently under the influence of alcoholic beverages may be held responsible for its own negligence. *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999) (holding that tavern was entitled to indemnity from drunken patron). KRS 413.241(1) only applies to legal sale, so minor has valid claim against dram shop that sells him alcohol thereby causing or contributing to his injury. *Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W.3d 171 (Ky. 2003). Likewise, a liquor store is liable for injuries arising from drunk driving accident of minor who was provided alcohol by another minor who purchased alcohol from store. *Watts v. K S & H*, 957 S.W.2d 233 (Ky. 1997).

Joint and Several Liability. With the adoption of apportionment of fault, judgment against each defendant is several. The liability of each defendant is limited to the degree of his causation of the plaintiff’s injury. *Stratton v. Parker*, 793 S.W.2d 817 (Ky. 1990); *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000).

Last Clear Chance Doctrine. The last clear chance doctrine was superseded by comparative fault statute. KRS 411.182; *Kennedy v. Hageman*, 704 S.W.2d 656 (Ky. App. 1985).

Negligent Misrepresentation. Kentucky has adopted §552 Restatement of Torts (Second) concerning negligent misrepresentation. *Presnell Constr. Mgrs., Inc. v. EH Constr., LLC*, 134 S.W.3d 575 (Ky. 2004).

Negligence per se. Statutes, regulations, ordinances, and building codes can supply the standard of care for a negligence action. *Lewis v. B&R Corp.*, 56 S.W.3d 432 (Ky. App. 2001); *Goldman Svcs. Mechanical Contract-*

ing, Inc. v. Citizens Bank & Trust Co. of Paducah, 812 F. Supp. 738 (W.D. Ky. 1992). Failure to comply with terms of a statute constitutes negligence per se. *Peak v. Barlow Homes, Inc.*, 765 S.W.2d 577 (Ky. App. 1988). However, negligence per se applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons the statute intended to protect. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94 (Ky. 2000). A violation of the Federal Gun Control Act does not create a private cause of action for the death of a minor. *T&M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526 (Ky. 2006).

Premises Liability. General rule is that existence of obvious, outdoor, natural hazards creates no duty upon an owner of land. *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000). However, such hazards will create a duty if there is evidence that the owner created the danger. *Wallingford v. Kroger Co.*, 761 S.W.2d 621 (Ky. App. 1988). It is the duty of the possessor to foresee that a condition known to himself presents an unreasonable risk of danger to an unexpected user of the premises exercising ordinary care for his own safety. *Gravatt v. B. F. Saul Real Estate Inv. Trust*, 601 S.W.2d 287 (Ky. 1980). There is no duty to warn a social guest of the readily apparent dangers of a swimming pool. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Once Plaintiff establishes something on floor caused a fall, burden shifts to Defendant to prove it was not aware of hazard. *Lanier v. Wal-Mart, Inc.*, 99 S.W.3d 431 (Ky. 2003). In premises liability case involving business proprietor and retail customer, issues of causation and notice are to be treated not as elements of customer's case, but as affirmative defenses of proprietor. *Id.* *Lanier* extended to other premises. *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612 (Ky. 2004).

Proximate Cause. Proximate cause is ordinarily a question for the jury, but where only one conclusion may be drawn reasonably from the facts, the question becomes one of law for the court. *Middleton v. Partin*, 347 S.W.2d 75 (Ky. 1961); *Dunn v. Central State Hosp.*, 248 S.W. 216 (Ky. 1923). Superseding cause is question of law for court. *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995). Negligence is actionable if it is a substantial factor in causing harm to the plaintiff. *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *Morales v. American Honda Motor Co.*, 71 F.3d 531 (6th Cir. 1995), *appeal after remand*, 151 F.3d 500 (6th Cir. 1998).

Res Ipsa Loquitur. Reliance on the doctrine of res ipsa loquitur is predicated upon plaintiff showing that accident could not have happened unless defendant was negligent, that defendant had full control of instrumentality that caused injury, and that plaintiff's injury resulted from accident. *Sadr v. Hager Beauty School*, 723 S.W.2d 886 (Ky. App. 1987).

Seatbelt Defense. Failure of injured person to wear a seatbelt, thereby contributing to cause or enhance his or her injuries, is an issue of fault for the jury. *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987). *But see, Geyer v. Mankin*, 984 S.W.2d 104 (Ky. App. 1998) (jury may not attribute 100% of fault to unbelted driver).

Sudden Emergency Doctrine. Comparative fault did not abolish the sudden emergency doctrine. *Regenstreif v. Phelps*, 142 S.W.3d 1 (Ky. 2004).

NO-FAULT INSURANCE

Arbitration. See "ARBITRATION."

Benefits.

Medical. If proposed medical services to be rendered to insured are necessary to treat injuries sustained in accident, and fees are reasonable, reparations obligor must pay claim for personal injury protection benefits even if acceptable, less extensive services may be obtained elsewhere at a lesser cost. *U.S. Fidelity & Guaranty Co. v. Smith*, 580 S.W.2d 216 (Ky. 1979).

Wages. No-fault insurance benefits for work loss are available only to an injured employed person for actual loss of earnings while absent from work. Such benefits are not available to estate of deceased person. *Gregory v. Allstate Ins. Co.*, 618 S.W.2d 582 (Ky. App. 1981). Survivor may recover for loss of services that, in reasonable probability, would have been rendered to him by decedent in the future. *Couty v. Kentucky Farm Bureau Mut. Ins. Co.*, 608 S.W.2d 370 (Ky. 1980); *France v. Kentucky Farm Bureau Mut. Ins. Co.*, 605 S.W.2d 773 (Ky. App. 1980) (no recovery permitted where loss to surviving parents was not established).

Non-Economic. Automobile insurer cannot, by language of its policy, attempt to provide less coverage than required by the No-Fault Act. KRS 304.39-010 to -350; *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928 (Ky. App. 1991). The no-fault statute converts real party in interest from injured party to no-fault carrier by stating that injured party is divested of his right to sue and that no-fault carrier is sole stakeholder. *Zurich Am. Ins. v. Haile*, 882 S.W.2d 681 (Ky. 1994).

Death. Loss of consortium is not a recoverable injury under the MVRA. *Moore v. State Farm Mut. Ins. Co.*, 710 S.W.2d 225 (Ky. 1986).

Compulsory Coverage. Required minimum coverages set forth in KRS 304.39. Kentucky law does not require that minimum benefits under an automobile no-fault policy be paid under circumstances in which there is no contractual coverage or obligation. KRS 304.39-100(2); *U.S. Fire Ins. Co. v. Kentucky Truck Sales, Inc.*, 786 F.2d 736 (6th Cir. 1986).



Motor Vehicle Reparations Act (MVRA). KRS 304.39-010 through 39-350. The MVRA held constitutional in *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975). Insurer cannot exclude intentional injuries from the minimum tort liability limits as required by the MVRA. *Mosley v. West American Ins. Co.*, 743 S.W.2d 854 (Ky. App. 1987). Insured cannot increase amount of basic reparations benefit by measure of injured person's pain and suffering. *Cooke v. Board of Claims*, 743 S.W.2d 32 (Ky. App. 1987). Loss of consortium is not recoverable under the MVRA. *Moore v. State Farm Mut. Ins. Co.*, 710 S.W.2d 225 (Ky. 1986). Insurer of automobile driven without permission of owner must pay basic reparations benefits to passengers who had no knowledge vehicle was converted. *Stuart v. Capital Enterprise Ins. Co.*, 743 S.W.2d 856 (Ky. App. 1987). But MVRA does not require policy minimum limits to operator using car without permission. *Preferred Risk Mut. Ins. Co. v. Ky. Farm Bureau Mut. Ins. Co.*, 872 S.W.2d 469 (Ky. 1994). Kentucky law does not require a nonregistered/nonresident insurer to comply with Kentucky's MVRA when issuing a policy to a nonresident insured, thus insurer not required to provide no-fault coverage. *State Farm Mut. Auto. Ins. Co. v. Tennessee Farmers Mut. Ins. Co.*, 785 S.W.2d 520 (Ky. App. 1990).

Rejection of No-Fault Coverage. Unless no-fault coverage is rejected in writing, threshold requirements apply. KRS 304.39-030(1) & -060(4); *Atchison v. Overcast*, 563 S.W.2d 736 (Ky. App. 1977); *Midwest Mut. Ins. Co. v. Wireman*, 54 S.W.3d 177 (Ky. App. 2001). Minor injured in traffic accident is deemed to have accepted no-fault coverage where no rejection of no-fault filed on his behalf. *Lawrence v. Risen*, 598 S.W.2d 474 (Ky. App. 1980). To limit non-resident plaintiff's right to sue, there must be a finding of fact that plaintiff was notified of his right to reject Kentucky no-fault coverage. *Stinnett v. Mulquin*, 579 S.W.2d 374 (Ky. App. 1979).

Stacking Policies. An insured may not stack no-fault coverage. KRS 304.39-050(3). Unless optional added reparation benefits have been purchased (KRS 304.39-140(4)), the maximum amount of basic reparations benefits, payable to any one person as a result of any one accident is \$10,000.

Subrogation. See "SUBROGATION."

Uninsured ("UM") Motorist Coverage. Uninsured drivers are subject to same tort limitations as insured drivers. *Thomas v. Ferguson*, 560 S.W.2d 835 (Ky. App. 1978). Spouse of a deceased uninsured motorist cannot recover no-fault benefits. *Lane v. Travelers Ins. Co.*, 726 S.W.2d 313 (Ky. App. 1986). If a person is injured by or in an uninsured vehicle, his own insurance carrier shall pay basic reparation benefits regardless of whether car is

located within Kentucky. KRS 304.39-050(2); *Dairyland Ins. Co. v. Assigned Claims Plan*, 666 S.W.2d 746 (Ky. 1984). Insurer is not entitled to a credit or set off against bodily injury liability coverage for no-fault payments to a passenger. *Ammons v. Winklepleck*, 570 S.W.2d 287 (Ky. App. 1978). Plaintiff/insured who sued under UM coverage is not subject to no-fault tort limitations and does not have to meet threshold to recover for pain and suffering. *Hanover Ins. Co. v. Blincoe*, 573 S.W.2d 930 (Ky. App. 1978). Physical contact requirement in hit-and-run clauses is not in conflict with UM statute. *Belcher v. Travelers Indem. Co.*, 740 S.W.2d 952 (Ky. 1987). Uninsured pedestrian is not entitled to recover basic reparation benefits if he sues uninsured driver instead of seeking remedy through assigned claims plan. *Blair v. Day*, 600 S.W.2d 477 (Ky. App. 1979).

Underinsured ("UIM") Motorists Coverage. Underinsured coverage is not required by state law. Customer test driving car is covered under provision of UIM policy which provides coverage to "occupants" of cars, even though policy excluded "customers" from coverage. *MGA Ins. Co., Inc. v. Glass*, 131 S.W.3d 775 (Ky. App. 2004).

PENALTY AND ATTORNEY'S FEES

Generally, insurer has no liability for attorney's fees if it has a reasonable basis for denying a claim or failing to pay loss. But a penalty of 18% is imposed for failure to pay no-fault benefits if insurer receives reasonable proof of loss from insured. KRS 304.39-220; *Automobile Club Ins. Co. v. Lainhart*, 609 S.W.2d 692 (Ky. App. 1980). KRS 304.12-230 (Kentucky Unfair Claims Settlement Practices Act) and KRS 446.070 (allowing a private cause of action for violations of a statute) together create a statutory cause of action for bad faith insurance practices. *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988). The Unfair Claims Settlement Practices Act and the tort of bad faith apply only to those persons or entities engaged in insurance business, not self-insured entities. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94 (Ky. 2000).

PRIVILEGED COMMUNICATIONS

Attorney-Client. See K.R.E. 503. Communications between attorneys and clients are privileged, if communications are legitimate and properly within the scope of lawful employment. *Standard Fire Ins. Co. v. Smithhart*, 211 S.W. 441 (Ky. 1919). Elements of the privilege: 1) legal advice is sought, 2) from a legal advisor, 3) the communications relate to such, 4) made in confidence, 5) by client, 6) are at his instance permanently protected, 7) from disclosure by self or legal advisor, 8) except where waived. *U.S. ex rel. Burns v. A. D. Roe Co., Inc.*,

904 F. Supp 592 (W.D. Ky. 1995). There is an absolute privilege for communications concerning past offenses and transactions between an attorney and client. When a client seeks advice for the purpose of planning a future crime or fraud, or in contemplation of a future crime or fraud, such communication is not privileged. *Lach v. Man O' War LLC*, 256 S.W.3d 563 (Ky. 2008). An attorney shall not reveal information relating to representation of a client unless client gives informed consent, or disclosure is impliedly authorized to carry out representation, or to the extent that attorney reasonably believes necessary to, among other things, prevent reasonably certain death or substantial bodily harm. Ky. R. Prof. Conduct 1.6 (S.C.R. 3.130). Attorney-client privilege protects only those disclosures necessary to obtain legal advice which might not have been made absent privilege. *Lexington Public Library v. Clark*, 90 S.W.3d 53 (Ky. 2002). Attorney-client privilege applies to communications or acts done within scope of professional employment of attorney but not to acts if attorney is merely agent or attorney-in-fact. *Steelvast v. Scansteel Service Ctr.*, 807 S.W.2d 476 (Ky. 1991), *appeal after remand*, 908 S.W.2d 104 (Ky. 1995). Attorney-client privilege in K.R.E. 503 applies to information sought from a paralegal. *Wal-Mart v. Dickinson*, 29 S.W.3d 796 (Ky. 2000).

Clergy-Penitent. Generally, a person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between a person and a clergyman in his professional capacity as a spiritual adviser. To be protected, statements must be made privately and not intended for further disclosure except to further the purpose of the communication. K.R.E. 505.

Doctor-Patient. There is no specific doctor-patient privilege in Kentucky. Parol evidence concerning oral discussions between a doctor and his patient is admissible. *Kovacs v. Freeman*, 957 S.W.2d 251 (Ky. 1997). Kentucky Rules of Evidence provide privilege for counselor-client privilege and psychotherapist-patient privilege. K.R.E. 506 & 507.

Husband-Wife. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by individual to his or her spouse during their marriage. Communication must be made privately and not for disclosure to any other person. K.R.E. 504. Privilege does not apply to claims between spouses or a minor child of either, or when parties are engaged in joint criminal enterprise. Husband-wife privilege is not a ground for excluding evidence regarding abuse, exploitation, or neglect of an adult. *Dawson v. Com.*, 867 S.W.2d 493 (Ky. App. 1993). Marital privilege does not apply where one spouse is charged with wrongful conduct against an individual in the household of either. *Lynch v. Com.*, 74 S.W.3d 711 (Ky. 2002).

Insurer-Insured. Under Kentucky law, there is no privilege between insurer and insured. *TARC v. Vinson*, 703 S.W.2d 482 (Ky. App. 1985). *But see, Asbury v. Beerbower*, 589 S.W.2d 216 (1979) (extending scope of attorney-client privilege to insurer/insured relationship); *Haney v. Yates*, 40 S.W.3d 352 (Ky. 2000) (no privilege between self insurer and insured); *Duffy v. Wilson*, 289 S.W.3d 555 (Ky. 2009) (work product doctrine protected witness statements taken by adjuster from discovery).

Offers of Compromise. Settlement discussions are privileged. Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for a claim or its amount. K.R.E. 408. This rule does not require exclusion when evidence is offered for another purpose, such as proving bias, prejudice, undue delay, or efforts to obstruct a criminal investigation or prosecution.

Waiver. A person who has a privilege against disclosure waives privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of privileged matter. K.R.E. 509. Claim of privilege is not defeated by a disclosure which was compelled erroneously or made without opportunity to claim the privilege. K.R.E. 510.

PRODUCTS LIABILITY

Theories of Recovery. In Kentucky, products liability action includes any action brought for personal injury, death or property damage resulting from manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product. KRS 411.300.

A plaintiff may bring products liability action under theories of strict liability, negligence, or breach of warranty. *Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985); *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997). Both statutory and common law govern products liability actions in Kentucky. KRS 411.300 -.350; *Monsanto Co. v. Reed, supra*. Plaintiff must prove feasible alternative design to prevail in design defect case. *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35 (Ky. 2004).

Strict Liability. Kentucky adopted Section 402A of the Restatement (Second) of Torts in *Dealers Transport Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1966); *see also Niehoff v. Surgidev Corp.*, 950 S.W.2d 822 (Ky. 1997); *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776 (Ky. 1984). Pursuant to Section 402A, plaintiff must prove that product: 1) was sold by defen-

dant (who is engaged in the business of selling such a product); 2) was in a defective condition unreasonably dangerous to user or his property; 3) caused physical harm, and 4) reached user or consumer without substantial change in its original condition. Restatement (Second) of Torts §402A. *See also Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002) (strict liability claim must be supported by resulting injury). Intangible thoughts, ideas and messages contained within video games, movies, and website materials are not “products” for purposes of strict products liability. *James v. Meow Media*, 90 F. Supp. 2d 798 (W.D. Ky. 2000), *aff’d*, 300 F.3d 683 (6th Cir. 2002).

Liability in tort for defective product is not liability without fault. Strict liability standard is no different from that of negligence, except that seller is presumed to have knowledge of actual condition of product when it leaves his hands. Causes of action for both strict liability and negligence are jural rights protected under the Kentucky Constitution. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991); *Wood, supra*.

Duty to Warn. Manufacturer has a non-delegable duty to warn ultimate user, and that duty is not abrogated by warning immediate purchaser. For example, subsequent warning to a department store concerning unsafe condition of escalator did not terminate liability of manufacturer. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776 (Ky. 1984). *See also Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1990); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000), *aff’d*, 300 F.3d 683 (6th Cir. 2002). Manufacturer must give both adequate directions for use and adequate warning of potential dangers, including dangers resulting from foreseeable misuse of product. *Morales v. American Honda Motor Co.*, 71 F.3d 531 (6th Cir. 1995). It is unclear whether duty continues after sale of product. *Smith v. Louis Berkman Co.*, 894 F. Supp. 1084 (W.D. Ky. 1995). There is no post-sale duty to retrofit. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530 (Ky. 2003). Plaintiff must prove causal connection between allegedly inadequate warning and her behavior. *Stewart v. General Motors*, 222 F. Supp. 2d 845 (W.D. Ky. 2002), *aff’d*, 102 Fed. Appx. 961 (6th Cir. 2004) (unpublished opinion).

Warranty. Breach of warranty claim is governed by terms of the contract and the Uniform Commercial Code, KRS Chapter 355. *Williams v. Fulmer*, 695 S.W.2d 411 (Ky. 1985). A warranty action extends only to buyer’s family or household and guests reasonably expected to use the goods. KRS 355.2-318. Exclusion or modification of a warranty of merchantability must mention merchantability and, if written, be conspicuous. KRS 355.2-316(2). Likewise, exclusion or modification of a warranty of fitness must be in writing and be conspicuous. *Id.* Any clause disclaiming implied warranties

must be conspicuous. *Lagrew v. Hooks-SupeRx, Inc.*, 905 F. Supp. 401 (E.D. Ky. 1995). Under the UCC, a seller may limit the remedies available to a buyer for breach of warranty pursuant to KRS 355.2-719. *Moore v. Mack Trucks, Inc.*, 40 S.W.3d 888 (Ky. App. 2001).

Damages. Basis of liability upon which the plaintiff brings a products liability action governs nature and extent of recoverable damages. Injured party may recover, under breach of contract or warranty, damages arising naturally from breach or damages that were contemplated by parties when they entered into the contract or when the warranty arose. KRS 355.2-714, -715. In an action based upon negligence or strict liability, injured party is limited to damages incurred as a natural and proximate result of the conduct at issue. A party suffering only economic damage cannot maintain a products liability action based upon negligence. *Miller’s Bottled Gas, Inc. v. Borg-Warner Corp.*, 955 F.2d 1043 (6th Cir. 1992), *on remand*, 817 F. Supp. 643 (W.D. Ky. 1993), *aff’d*, 56 F.3d 726 (6th Cir. 1995) (citing *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986)).

Punitive Damages. That part of Kentucky’s punitive damages statute requiring a “subjective awareness” on the part of the defendant before punitive damages could be awarded is unconstitutional. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). *See also* KRS 411.184(1)(c) (defining “malice”). This definition violated the Kentucky Constitution because it limited the common law instruction for punitive damages, which only required gross negligence on the part of the defendant. *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998). *See also, Farmland Mutual Ins. v. Johnson*, 36 S.W.3d 368 (Ky. 2000). *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991) held that the jural rights doctrine protected common law actions under theories of negligence and strict liability. Thus, the *Williams* decision applies to strict liability cases. Plaintiff must establish his case for punitive damages by “clear and convincing evidence.” KRS 411.184(2). Manufacturer not liable for punitive damages for extraterritorial conduct. *Sand Hill Energy v. Smith*, 142 S.W.3d 153 (Ky. 2004).

Defense of Action. Product Liability Act does not preclude jury from considering comparative fault of all parties. *Owens Corning Fiberglass Corp. v. Parrish*, 58 S.W.3d 467, 473 (Ky. 2001). Kentucky has adopted the learned intermediary rule in prescription drug cases. *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758 (Ky. 2004).

Warning is only one factor for the jury to consider in determining if the product is dangerous. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776 (Ky. 1984). Assumption of risk is not a defense to a products liability action. *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967). Where product is manufactured according to

plans and specifications furnished by buyer, and alleged defect is open and obvious, manufacturer is protected from liability for injuries sustained by user of the product. *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592 (Ky. 1980). Under the Product Liability Act, the plaintiff must prove the product was defective by a preponderance of the evidence. KRS 411.310; *Leslie v. Cincinnati Sub-Zero Products, Inc.*, 961 S.W.2d 799 (Ky. App. 1998). Generally, a purchasing corporation is not liable in a products liability action for defective products of the purchased company. *Pearson v. National Feeding Systems*, 90 S.W.3d 46 (Ky. 2002).

RELEASE

See Law Digest Tables.

Accord and Satisfaction. An accord is as much a contract as any other agreement. *Brown v. Noland Co.*, 403 S.W.2d 33 (Ky. 1966). An accord and satisfaction applies where there is a meeting of the minds of parties who offer and accept payment with consideration and full knowledge of material facts of a disputed or unliquidated debt. *Kentucky Lottery Corp. v. Casey*, 862 S.W.2d 888 (Ky. 1993); *Morgan v. Crawford*, 106 S.W.3d 480 (Ky. App. 2003).

Consideration. Valuable consideration must support a release. *Brown v. Kentucky Lottery Corp.*, 891 S.W.2d 90 (Ky. App. 1995). A covenant not to sue is sufficient consideration to support a release. *Harris, Speakes & Harris v. Kreigle*, 245 S.W. 866 (Ky. 1922).

Joint Tortfeasors. Each tortfeasor is only responsible for the portion of damages chargeable to his percentage of fault. KRS 411.182; *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000). The comparative fault statute establishes that liability among joint tortfeasors in negligence cases is no longer joint and several but is several only. *Dix & Assocs. Pipeline Contractors v. Key*, 799 S.W.2d 24 (Ky. 1990); *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998). In the event of a partial settlement, settling tortfeasor is included in jury's apportionment of fault. KRS 411.182(4). Fault may not be apportioned to a party, dismissed party or settling party unless the court or jury first finds that the party was at fault. *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001). Under Kentucky law, in an action for trespass the jury may assess joint or several damages against the defendants. KRS 454.040. Release of one joint tortfeasor releases all. *Ford v. Ratliff*, 183 S.W.3d 199 (Ky. App. 2006); *Copeland v. Humana of Kentucky, Inc.*, 769 S.W.2d 67 (Ky. App. 1989) (plaintiff's release of doctor also released hospital). An injured party does not forfeit right to full compensation by accepting partial payment from one of the claimants potentially liable; however,

his recovery is limited to amount of full satisfaction. *Burke Enterprises, Inc. v. Mitchell*, 700 S.W.2d 789 (Ky. 1985).

Mistake. A release of potential tortfeasors of all claims is binding on injured party although injured party's belief that she had no more injuries resulting from an automobile accident was mistaken. *Trevathan v. Tesseener*, 519 S.W.2d 614 (Ky. 1975).

REPRESENTATIONS AND WARRANTIES

Statute. All statements or descriptions in any application for insurance policy or in negotiation by or in behalf of insured, shall be deemed to be representations and not warranties. KRS 304.14-110.

Misrepresentations. Misrepresentation by insured may prevent recovery from insurance policy if misrepresentation is fraudulent or material to risk or if underwriters, acting in conformity with general custom of business, would have rejected risk if the falsity or misrepresentation had been known. *John Hancock Mut. Life Ins. Co. v. Conway*, 240 S.W.2d 644 (Ky. 1951); *State Farm Mut. Auto. Ins. Co. v. Crouch*, 706 S.W.2d 203 (Ky. App. 1986); KRS 304.14-110.

Materiality. A material misrepresentation is one that affects the decision to accept or reject the application. KRS 304.14-110(3); *Prudential Ins. Co. of America v. Lampley*, 180 S.W.2d 399 (Ky. 1944). See also, *Progressive Northern Ins. Co. v. Corder*, 15 S.W.3d 381 (Ky. 2000).

Rescission. An action for rescission must be established by clear and convincing evidence. *National Life Co. v. Wilkerson's Adm'r*, 71 S.W.2d 1034 (Ky. 1934).

Reformation. After acceptance of insurance policy, mere lack of knowledge of contents of the policy by insured does not allow insured to reform or void the provisions of policy. *Grisby v. Mountain Valley Ins. Agency, Inc.*, 795 S.W.2d 372 (Ky. 1990).

SERVICE OF PROCESS

See Law Digest Tables.

Upon Corporations. Corporations shall be served via corporation's registered agent. KRS 14A.4-040(1). If corporation has no registered agent, corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. KRS 14A.4-040(2).

Upon Insurance Companies. Foreign insurer is deemed to have appointed the Kentucky Secretary of State as its agent for service. KRS 304.3-230. A domestic insurer may be served like any other corporation pursuant to KRS 14A.4-040.

Upon Nonresidents. Kentucky's long-arm statute confers personal jurisdiction of Kentucky courts over non-residents to the extent constitutionally permissible. KRS 454.210; *Mohler v. Dorado Wings, Inc.*, 675 S.W.2d 404 (Ky. App. 1984). *National Grange Mut. Ins. Co. v. White*, 83 S.W.3d 530 (Ky. 2002). Nonresidents, including corporations, are served via Secretary of State. KRS 454.210(3). Nonresident motorists may be served issuing summons to the Sheriff of Franklin County (Frankfort). KRS 188.030. The Secretary of State shall serve summons and plaintiff's petition on the defendant and both the Sheriff and the Secretary of State shall make the return of service to the court. *Id.*

Personal Service. Service shall be made upon parties by clerk of court by registered or certified mail or upon an individual within the state by delivering a copy of the summons and the complaint personally or to an agent authorized to receive service of process. Ky. R. Civ. P. 4.01, 4.04.

SUBROGATION

In General. The Kentucky Supreme Court has held KRS 411.188, the statute governing assertion and notification of subrogation rights unconstitutional. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995). Prior to *O'Bryan*, an insurer had to intervene to assert its contractual subrogation rights after notification by the plaintiff of his action. KRS 411.188(2); *McCormack v. Trudeauaux*, 885 S.W.2d 708 (Ky. App. 1994). Although the *O'Bryan* court only considered the collateral source evidentiary rule and not the notice provisions in §411.188, it has restated that the entire statute is unconstitutional. *Burns v. Level*, 957 S.W.2d 218 (Ky. 1997).

No-Fault. A party paying no-fault benefits has the right of subrogation against the liability insurer of a negligent party. KRS 304.39-070; *Ohio Security Ins. Co. v. Drury*, 582 S.W.2d 64 (Ky. App. 1979). A reparations obligor is not required to intervene in an insured's tort suit against the tortfeasor to preserve its rights to subrogation for basic or added reparations benefits. *Saxe v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 188 (Ky. App. 1997). However, when a tortfeasor and his insurer exhaust limits of tortfeasor's insurance coverage, the reparation obligor is foreclosed from proceeding against tortfeasor and insurer. *Stovall v. Ford*, 661 S.W.2d 467 (Ky. 1983). If insurer that pays basic reparation benefits to insured under MVRA fails to join insurer of tortfeasor in insured's lawsuit or fails to arbitrate, it is barred from subrogation. *Progressive Cas. Ins. Co. v. Kidd*, 602 S.W.2d 416 (Ky. 1980).

Insured has priority over subrogated insurance carrier as against uninsured tortfeasor. *Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558 (Ky. 1996). Provision in an

auto liability policy preventing workers' compensation carrier from claiming subrogation is valid because minimum coverage required by MVRA cannot be reduced by an offset of workers' compensation benefits. *State Farm Mut. Ins. Co. v. Fireman's Fund Am. Ins. Co.*, 550 S.W.2d 554 (Ky. 1977). Tort liability for basic reparations benefits is abolished only between insureds, not between reparation obligors. *Safeco Ins. Co. of America v. Brown*, 887 F. Supp. 974 (W.D. Ky. 1995). Duplicative recovery for injury is not permitted. *U.S. Fidelity & Guaranty Co. v. Smith*, 580 S.W.2d 216 (Ky. 1979).

Parties to Action. Subrogation includes contribution. *Vance v. Atherton*, 67 S.W.2d 968 (Ky. 1934). Subrogation includes every instance in which one person, who is not mere volunteer, pays a debt which in justice, equity, and good conscience should be paid by another. *McCracken County v. Lakeview Country Club*, 70 S.W.2d 938 (Ky. 1934). Insured's settlement with a tortfeasor and tortfeasor's insurer does not defeat subrogation right of a no-fault insurer. *Morrison v. Kentucky Cent. Ins. Co.*, 731 S.W.2d 822 (Ky. App. 1987); *True v. Raines*, 99 S.W.3d 439 (Ky. 2003). A surety or liability insurer is entitled to subrogation; a volunteer who discharges a debt is not. *Henderson v. Selective Ins. Co.*, 242 F. Supp. 48 (W.D. Ky. 1965), *aff'd*, 369 F.2d 143 (6th Cir. 1966). Subrogation cannot be invoked to defeat a superior equity. *Com. v. Farmers Deposit Bank*, 95 S.W.2d 793 (Ky. 1936). UIM carrier must be identified to jury when it has substituted for real party in interest. *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004).

Liability Insurance. A professional liability insurer for a hospital and pharmacist was not entitled to equitable subrogation from pharmacist's insurer after settlement of claim against hospital, since pharmacist was not a party to the tort suit and had no legal obligation to pay any damages. *Kentucky Hosp. Ass'n Trust v. Chicago Ins. Co.*, 978 S.W.2d 754 (Ky. App. 1998).

Collision Insurance. Insurance company may include in automobile liability policy providing for medical payments a provision that, after making such payments, the insurance company is subrogated in that amount to the claim of its insured against a person causing the personal injuries which resulted in the medical expenses. KRS 342.700; *State Farm Mut. Auto. Ins. Co. v. Roark*, 517 S.W.2d 737 (Ky. 1974).

Settlements. Insured's settlement with tortfeasor and tortfeasor's insurer does not defeat subrogation rights of no-fault insurer that paid basic reparation benefits to insured. *Morrison v. Kentucky Cent. Ins. Co.*, 731 S.W.2d 822 (Ky. App. 1987); *True v. Raines*, 99 S.W.3d 439 (Ky. 2003). Agreement executed by and among insured, tortfeasor and tortfeasor's liability carrier releasing them from all claims did not release basic reparation

benefits insurer when it had paid no benefits prior to release. *Holzhauser v. West Am. Ins. Co.*, 772 S.W.2d 650 (Ky. App. 1989).

Workers' Compensation. Any subrogation claims of employer against third party defendants for workers' compensation benefits paid to employee are subject to apportionment. *Dix & Associates v. Key*, 799 S.W.2d 24 (Ky. 1990). Because statutory right to subrogation falls within the workers' compensation chapter, the administrative law judge has jurisdiction to resolve any subrogation issue. *Wittaker v. Hardin*, 32 S.W.3d 497 (Ky. 2000). Employer or insurer is entitled to recoup from the third-party tortfeasor the workers' compensation claims paid to injured worker. *AIK Selective Self-Ins. Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002). A workers' compensation carrier has no right to the settlement proceeds between the plaintiff and the tortfeasor. *AIK Selective Self Ins. Fund v. May*, 957 S.W.2d 257 (Ky. App. 1997). Workers' compensation insurance carrier has no right of subrogation for amounts recovered by an employee that exceed benefits that employee would have received under workers' compensation law. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002). Workers compensation carrier is entitled to recover benefits paid to worker who misrepresented his injuries as work related from driver sued by worker. *Clarendon Nat'l Ins. Co. v. Vctor*, 165 S.W.3d 484 (Ky. App. 2005).

WAIVER AND ESTOPPEL

In General. "Waiver" is the voluntary and intentional surrender of a known right or choice to forego an advantage; unlike estoppel it does not require proof that the other party was misled. *Greathouse v. Shreve*, 891 S.W.2d 387 (Ky. 1995). Doctrine of equitable estoppel applies to transactions in which it would be unconscionable to allow a person to maintain a position inconsistent with the one he has agreed to. *Bruestle v. S & M Motors, Inc.*, 914 S.W.2d 353 (Ky. App. 1996). Insured may not claim a waiver of policy provisions unless insurer's conduct would amount to fraud. *Owens v. National Life & Acc. Ins. Co.*, 29 S.W.2d 557 (Ky. 1930). Estoppel precludes enforcement of a defense where conduct has induced a person to change his position to his detriment, so that enforcement of defense would be unjust. *Edmondson v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 781 S.W.2d 753 (Ky. 1989).

Waiver by Agent. Accident insurance that was issued to a disabled individual may be enforceable notwithstanding terms of the policy that insurance agent waived. *Standard Life & Acc. Ins. Co. v. Holloway*, 72 S.W. 796 (Ky. 1903). A clause of sole and unconditional ownership may be waived. *Citizens' Ins. Co. v. Railey*, 77 S.W.2d 420 (Ky. 1934). A provision in health and

accident policy stating that the policy shall not cover persons over fifty years of age may be waived. *National Life & Acc. Ins. Co. v. Ransdell*, 82 S.W.2d 820 (Ky. 1935). What acts amount to a waiver is a question of law for the court; whether such acts were performed, or their intended effect, is a question for the jury. *Eaton v. Trautwein*, 155 S.W.2d 474 (Ky. 1941). Insurer waived right not to provide coverage when it backdated policy and reinstated policy on accident date. *State Farm Mut. Auto. Ins. Co. v. Davie*, 747 S.W.2d 604 (Ky. App. 1987). If insurer's agent, through words or conduct, induced insured to refrain from doing that which he is obligated under terms of policy, it will waive requirements and is estopped to deny authority of agent. *Dailey v. American Growers Ins.*, 103 S.W.3d 60 (Ky. 2003). Non-waiver agreements are legal in Kentucky. *Federal Union Life Ins. Co. v. Lambert*, 86 S.W.2d 688 (Ky. 1935).

Notice of Waiver. Insured charged with notice of contractual provision that agent cannot waive policy provisions. *Kentucky Farm Bureau Mut. Ins. Co. v. Cann*, 590 S.W.2d 881 (Ky. App. 1979). Insured's mistake in first notifying wrong insurance company of loss was not fatal to his rights under fire policy for other insurance. *Home Ins. Co. of New York v. Stroud*, 50 S.W.2d 934 (Ky. 1932). Failure to comply with clause requiring filing proof of loss within specified time prevents recovery unless waived by insurer. *Prudential Ins. Co. of America v. Dismore*, 72 S.W.2d 433 (Ky. 1934).

Nonwaiver Agreements. If insurer executes a non-waiver agreement before assuming the defense of an insured, insurer, by defending insured, may reserve the right to deny insurance coverage and does not thereby become liable on a judgment rendered against insured. *Western Cas. & Sur. Co. v. City of Frankfort*, 516 S.W.2d 859 (Ky. 1974).

Premiums. Although insurer may accept overdue premiums conditionally, if insurer accepts payment without informing insured of conditional nature of acceptance, then insurer is estopped from denying coverage. *Howard v. Motorists Mut. Ins. Co.*, 955 S.W.2d 525 (Ky. 1997).

WORKERS' COMPENSATION

Payments for workers' compensation are administered by the Department of Workers' Claims, which is attached to the Kentucky Labor Cabinet for administrative purposes. KRS 342; 803 K.A.R. 25.

Covered Employees. All employees are subject to the Workers' Compensation Act except: 1) any person employed as a domestic servant in a private home by an employer who has less than two employees each regularly employed forty or more hours per week in domestic

servant employment; 2) any person employed, for less than 20 consecutive work days to do maintenance, repair, remodeling in or about a private home of employer, or if employer has no other employees subject to Chapter, in or about premises where that employer carries on trade, business or profession; 3) any person performing services in return for aid or sustenance only, received from religious or charitable organization; 4) any person employed in agriculture; 5) any person who would be otherwise covered but who elects not to be covered; 6) any person who may recover for injury or death pursuant to laws of United States, except those persons covered by black lung benefits; 7) any person acting as driver or passenger in carpool or vanpool program while en route to or from place of employment; 8) members of religious sects or division that are conscientiously opposed to the acceptance of the type of benefits payable under the Act. KRS 342.650. Worker for Habitat for Humanity not performing services in return for aid or sustenance only when paid \$15,000 per year. *Anderson v. Homeless & Housing COA*, 135 S.W.3d 405 (Ky. 2004).

Method of Adjudication. Upon filing an application for benefits, an Administrative Law Judge (“ALJ”) is assigned to the claim. After the judge holds a hearing, he issues an opinion and award which may be appealed to the Workers’ Compensation Board. Thereafter, a petition for review by the Kentucky Court of Appeals may be filed. Finally, a direct right of appeal to the Kentucky Supreme Court is available after a decision by the Court of Appeals. KRS 342.270.

Covered Injuries. An injury under the Workers’ Compensation Act is any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause of producing a harmful change in the human organism evidenced by objective medical findings. “Injury” does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. “Injury” when used generally includes occupational diseases and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change unless it is the direct result of a physical injury. KRS 342.0011(1).

Occupational Disease. An occupational disease is one that arises out of and in the course of the employment. There must be a causal connection between the disease and the conditions under which the work is performed which can be traced to the employment as the proximate cause. KRS 342.0011(2)-(3).

Benefits, Waiting Period. Generally, no income benefits shall be payable for the first seven days of dis-

ability unless disability continues for more than two weeks, in which case compensation shall be allowed from the first day of disability. KRS 342.040.

Temporary Total Disability Benefits (“TTD Benefits”). TTD Benefits are payable during the period when an injured employee has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. TTD benefits equal 66 2/3% of the employee’s average weekly wage, subject to minimum and maximum amounts. (KRS 342.0011(11)(a) and 342.730(1)(a)).

Permanent Partial Disability Benefits (“PPD Benefits”). PPD Benefits are payable when an employee, due to an injury, has a permanent disability rating but retains the ability to work. PPD Benefits are payable based on 66 2/3% of the employee’s average weekly wage, multiplied by the AMA impairment rating. The PPD Benefit amount is further modified by an AMA Impairment Factor and may increase or decrease based on his post injury ability to work, wages, age and education. PPD Benefits are subject to a maximum but no minimum weekly amount. (KRS 342.0011(11)(b) and KRS 342.730(1)(b)).

Permanent Total Disability Benefits (“PTD Benefits”). PTD Benefits are due when the employee, due to an injury has a permanent disability rating and has a complete and permanent inability to perform any type of work. PTD Benefits are irrebuttably presumed for certain injuries such as total and permanent loss of sight in both eyes. PTD Benefits equal 66 2/3% of the employee’s average weekly wage subject to maximum and minimum amounts. The ALJ has limited discretion when determining PPD Benefits, but retains wide discretion when deciding if disability is partial or total. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). (KRS 342.0011(11)(c); KRS 342.730(1)(a)).

Duration of Payment of Benefits. PPD Benefits are payable for 425 weeks if the impairment rating is 50% or less; otherwise, the benefits are payable for 520 weeks. PTD Benefits are payable for the duration of the period of disability. However, PPD Benefits and PTD Benefits terminate on the date the employee qualifies for normal old age Social Security retirement benefits. (KRS 342.730(1)(d); KRS 342.730(4)).

Coal workers’ pneumoconiosis benefits. The Act provides income benefits and retraining incentive benefits for coal workers diagnosed with pneumoconiosis. Income benefits are awarded on a graduated scale based on radiographic classification and spirometric test values. The Act creates irrebuttable presumptions of disability ratings based on test results (KRS 342.732).

Pre-existing impairment. Pre-existing active impairment is not compensable (KRS 342.730(1)(e)). However, arousal of a pre-existing dormant condition by the injury is compensable by the employer. *Finley v. DBM Tech.*, 217 S.W.3d 261 (Ky. App. 2007). There is no longer a second injury fund (*i.e.*, Special Fund) in Kentucky.

Medical Benefits. In addition to disability and rehabilitation benefits, employers must pay for all reasonable and necessary medical expenses for the cure and relief from the effects of an injury or occupational disease. KRS 342.020. Medical benefits are payable to or on behalf of injured employee for the duration of disability regardless of the duration of income benefits. *Id.* Medical service providers may not collect for services beyond what is provided in the fee schedule (KRS 342.035(2)). Medical providers are capped at fifty cent (\$.050) per page for copying records (KRS 342.035(7)). Unreasonable failure to submit to or follow competent surgical treatment or medical aid or advice can result in denial of income benefits (KRS 342.035(3); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky. App. 1995)). Employer or its insurance carrier is liable for workers' compensation benefits for any aggravation of initial injury caused by necessary medical treatment of that injury. *AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002).

Death Benefits. When death results from compensable injury or occupational disease, a lump sum death benefit is payable to the estate. The amount of the death benefit is adjusted annually. For 2010, the amount was set at \$69,916.52. Additionally, survivorship benefits are payable to surviving spouse based upon 50% of the employee's average weekly wage, unless there are surviving dependent children, in which case the spouse receives 45% (or 40% if children not living with spouse) and each dependent child receives 15% of the average weekly wage, but not to exceed 30% for more than two children. Other relatives may qualify to receive income benefits during periods of dependency. KRS 342.750.

Dual Capacity. "Dual capacity doctrine" whereby an employer is liable in tort to his employee in addition to being liable for the employee's workers' compensation benefits is prohibited under KRS 342.690 and KRS 342.700 since such language evinces an intent to maintain the exclusivity of remedy principle intact. *Borman v. Interlake, Inc.*, 623 S.W.2d 912 (Ky. App. 1981).

Exclusive Remedy. Generally, liability of employer, so long as payment of compensation was secured, is exclusive and in place of all other liability of

such employer to employee, his or her legal representative, spouse, parents, dependents, next of kin and anyone else otherwise entitled to recover damages from employer on account of injury or death. KRS 342.690(1). The Unfair Claims Settlement Practices Act does not create an exception to exclusive remedy provision of The Workers' Compensation Act. *Traveler's Indem. Co. v. Reker*, 100 S.W.3d 756 (Ky. 2003). Exclusive remedy provision does not preclude worker injured in auto accident from recovering UIM benefits. *Philadelphia Indem. Ins. Co. v. Morris*, 990 S.W.2d 621 (Ky. 1999). Likewise, workers' compensation law did not bar medical malpractice suit although treatment was for work-related injury. *Wymer v. J.H. Properties, Inc.*, 50 S.W.3d 195 (Ky. 2001).

Injuries by Co-workers. Injuries caused by co-workers are generally compensable unless injury was result of injured worker's involvement in horseplay, assault (so long as the cause of the assault was not causally connected to the employment), and/or willful violation of safety policy. KRS 342.690(1).

Arising out of and in the course of employment. A miner with pneumoconiosis was entitled to benefits from his last in-state employer, although he had worked subsequently for coal mine in another state, after the doctor testified that the illness dated back to the miner's in-state employment. KRS 342.316(1)(a); *Coal Dust Coal Co. v. Stiltner*, 905 S.W.2d 859 (Ky. 1995). Worker who fell asleep at the wheel on the way to work, but on employer's access road, was entitled to benefits. *Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29 (Ky. 2004).

Statute of Limitations. Claim for benefits must be filed within two years of date of injury or death or the last voluntary temporary total disability benefit made by the employer, whichever is later. KRS 342.185.

Workers' Compensation Liens. Injured party's right to compensation under the Workers' Compensation statute has same priority as a lien filed against assets of employer for unpaid wages. KRS 342.175.

Attorneys Fees. All fees of attorneys are subject to approval by an ALJ. KRS 342.320(1). Attorney's fees are allowed on a sliding scale with several factors determining the final amount of the award. KRS 342.320(2). Fees are allowed even if the compensation award does not exceed what the claimant would have received if he had not employed an attorney. *See Ford Motor Co. v. Stewart*, 762 S.W.2d 817 (Ky. App. 1988). The date of injury governs the allowable attorney fee for an original claim and reopening of that claim. *Dotson v. Southern Hills Coal Co.*, 896 S.W.2d 610 (Ky. 1995).