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## *A. SIGNIFICANT KENTUCKY COURT DECISIONS*

### 1. Supreme Court Decisions

#### a. Insurance Coverage Decisions

*State Farm Mut. Auto. Ins. Co. v. Adams*, No. 2015-SC-000366-DG, 2017 Ky. LEXIS 361 (Aug. 24, 2017)
http://opinions.kycourts.net/sc/2015-SC-000366-DG.pdf

Coverage – Examination Under Oath

Insurer can take Examination Under Oath (EUO) of no-fault/basic reparations benefit claimant as a valid provision of the insurance contract. The court put a limitation on the EUO to include only "accident-related" questions but still allows insurers to query further regarding medical-related questions through the state's Motor Vehicle Reparations Act (MVRA). The Court acknowledged that in the investigation of the claims medical and accident related questions may be intermingled.

*Thiele, et al. v. Rockcastle Kentucky Growers Ins*., No. 2015-SC-00158-DG (June 15, 2017)
http://opinions.kycourts.net/sc/2015-SC-000158-DG.pdf

Homeowner's Insurance – Collapse

Insured made a claim under her homeowner's policy following the discovery of damage from termite infestation. The claim was denied as insured made a claim under the policy provision concerning collapse due to insects. Collapse has a specific meaning in connection with a structure; to break down or to go to pieces suddenly, especially by falling in of sides; to cave in. The Court determined damage to insured property could not be classified as "collapse" based on the definition above, despite being substantial. The Court found the damage was not covered under the language of the insurance policy.

*Indiana Ins. Co. v. Demetre*, No. 2015-SC-000107-DG (Aug. 24, 2017)
http://opinions.kycourts.net/sc/2015-SC-000107-DG.pdf

Bad Faith – Damages for Emotional Distress

Insurer issued a policy to insured for a vacant property (formerly a gas station) which allegedly caused harm to the adjacent neighbor. The insurer handled a settlement with the neighbors. The insured filed a bad faith action against the insurer. The Court held there was sufficient evidence for a jury to conclude insurer acted unreasonably in various aspects of the claims process. There was evidence to show the insurer prohibited the insured from receiving adequate representation, and that insurer had the specific intent to deny coverage.

### b. Employment Decision

*Commonwealth of Kentucky, Uninsured Employers' Fund v. Sidebottom, et al*.
No. 2016-SC-000249-WC, 2017 Ky. LEXIS 2 (Feb. 16, 2017)
http://opinions.kycourts.net/sc/2016-SC-000249-WC.pdf

Workers Compensation- Average Weekly Wage

Employee was a waitress who was originally paid an hourly salary plus tips until she retained additional job responsibilities then her pay structure became a weekly rate plus tips. Despite the employee reporting her tips to the employer, the employer failed to report her income from tips to the Internal Revenue Service (IRS). After a major work-related injury, when attempting to determine the appropriate compensation, it was determined she was a variable wage employee paid a salary plus unreported tips as a waitress. The Supreme Court held that the average weekly wage of a claimant receiving weekly salary plus tips not reported to IRS was to be calculated as if claimant were a variable, rather than fixed, wage employee.

*Commonwealth v. Brock*, No. 2016-SC-000111-WC, 2017 Ky. LEXIS 1 (Feb. 16, 2017)
http://opinions.kycourts.net/sc/2016-SC-000111-WC.pdf

Workers Compensation: Up-The-Ladder Liability

Neither property owners nor their companies qualified as contractors with up-the-ladder liability for injuries sustained by a construction worker because they were not up-the-ladder contractors subject to liability for injuries workers sustained on construction project. To be adjudged as liable, an entity must fit the statutes' descriptions of a "contractor" and for that to occur the companies must be regularly engaged in the same or similar type of work as the work the subcontractor was hired to perform. The Supreme Court held that neither property owners nor their companies met the relevant statutory criteria to qualify as "contractors" laden with up-the-ladder liability for injuries sustained by worker hired by general contractor on a construction project.

### c. Governmental Immunity Decision

*Univ. of Louisville v. Rothstein*, No. 2016-SC-000220-DG, 2017 Ky. LEXIS 449 (Nov. 2, 2017)
http://opinions.kycourts.net/sc/2016-SC-000220-DG.pdf

Waiver of Immunity by State University

A professor of medicine brought an action against a state university, alleging that the university breached the professor's contract granting tenure and appointing him as a distinguished university scholar. The Court held Ky. Rev. Stat. Ann. §45A.245, codified within the Kentucky Model Procurement Code (KMPC), that waives governmental immunity for actions on contract, waived immunity of the university as to all claims arising from lawfully authorized written contracts with the Commonwealth and its agencies. This waiver of immunity included written employment contracts.

## 2. Appellate Court Decisions

### a. Insurance Coverage Decisions

*Homestretch Logistical Solutions, Inc. v. Johnson Lawrence Walker Ins. Co.*, No. 2014-CA-01255-MR (Ky. Ct. App. Feb. 24, 2017)
http://opinions.kycourts.net/coa/2014-CA-001255.pdf

Coverage and Agency Actions

Insured obtained insurance for its semi-truck fleet through the agency. An error was made, removing the incorrect truck from the policy. Insured's truck which was incorrectly removed got into an accident. When insured sought coverage under the policy it was denied. Insured claims agency was negligent. The only duty the agency had to the insured was to ensure insured's insurance needs were satisfied. Since it was the actions of the insured which caused the subject truck to be removed from the policy there is no negligence on the part of the agency.

*Khazai Rug Gallery, LLC. v. State Auto Casualty & Property Ins. Co*., No. 2016-CA-00129-MR (Ky. Ct. App. March 10, 2017)
http://opinions.kycourts.net/coa/2016-CA-000129.pdf

Inventory Computation Exclusion

Insured rug seller sued its insurer after the denial of rug seller's insurance claims for losses resulting from alleged employee thefts pursuant to the policy's exclusion of employee theft claims proven only by inventory or profit-and-loss computations. The Court found the rug seller failed to produce *prima facie* evidence, other than inventory computations, establishing that employees stole seventy-nine rugs and cash. The Court also determined the insurer could not be held liable for misrepresentation arising out of its alleged failure to inform rug seller of the inventory computation exclusion.

*Robertson v. Westfield National Ins. Co.* No. 2016-CA-00477-MR (Ky. Ct. App. May 12, 2017)
http://opinions.kycourts.net/coa/2016-CA-000477.pdf

All-Terrain Vehicle as "Motor Vehicle"

Injured was operating an all-terrain vehicle (ATV) on a public road when he collided with an insured vehicle. Injured was not insured but made a basic reparation benefits claim against the insurer as injured claims he was a pedestrian at the time of the accident. The Court found that injured's ATV was not a motor vehicle under Kentucky's Motor Vehicle Reparations Act (MVRA) therefore; his claim for basic reparation benefits need be reconsidered.

*Romans v. Kentucky Farm Bureau Mut. Ins. Co.*, No. 2015-CA-001253-MR
(Ky. Ct. App. May 19, 2017)
http://opinions.kycourts.net/coa/2015-CA-001253.pdf

One-Year Contractual Provision – Valid

Homeowner's policy did not cover vandalism and insured's claim was brought after the one-year contractual limitation period. Insured claims he was not made aware of the limitation provision which should render it invalid. The Court found the limitation provision to be clear and unambiguous and that other similar contractual provisions have previously been upheld. There was no interference on the part of the insurer and the opportunity to conduct discovery would likely not have provided additional relevant facts in connection with the claim. Therefore, the claim by insured is invalid as untimely filed.

### b. UM/UIM Decisions

*Hettler v. State Farm Mutual Auto. Ins. Co.*, No. 2015-CA-001207-MR
(Ky. Ct. App. Feb. 24, 2017)
http://opinions.kycourts.net/coa/2015-CA-001207.pdf

UIM - Loss of Consortium Claims

Claimant's mother brought claims on behalf of her minor daughter for UIM benefits under grandmother's policy. The claims arose from death of the girl's father as a result of a motorcycle accident. The deceased father was insured by a different carrier, did not live with the grandmother, did not live with the girl, and was not operating a vehicle listed on the grandmother's insurance policy. The Court found there is no reasonable expectation that an insured may bring claims against its insurer arising from the death of someone who is not an insured under any interpretation of the policy.

*Weird v. State Farm Mutual Auto. Ins. Co.*, No. 2012-CA-000326-MR
(Ky. Ct. App. Feb. 10, 2017)
http://opinions.kycourts.net/coa/2012-CA-000326.pdf

UIM: Two-year Contractual Statute of Limitation Valid

A drunk driver hit the insured. The insured had UIM coverage through his insurer and the drunk driver's insurer paid out its policy limits. Insured then added own insurer to the lawsuit for UIM coverage. The insurer complains its addition was untimely and it should not be a party based on the contractual two-year statute of limitations. In defense, the insured claimed the two-year statute of limitations for UIM claims was unreasonable. The Court found the two-year contractual limit period is valid, and insured should have added his insurer to the suit within the two-year period following the final basic reparation benefits payment.

### c. Employment Decisions

*Memorial Hospital v. Morgan*, No. 2015-CA-001596 (Ky. Ct. App. Jan. 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001596.pdf

Workers Comp- Past-Due Benefits & Attorney Fees

The employee in this case settled with the employer for a lump sum amount of past-due benefits, and the employee's attorney was awarded fees. When the employer mailed a check to the attorney he deducted litigation expenses, and forwarded the remainder to the client employee since the stub on the check noted "past due benefits." Two years later the attorney sued the employer for not paying the attorney fees. The employer presented clear evidence that contrary to the attorney's belief, the check sent indicating "past due benefits" actually included the attorney fees.

*Ford Motor Company (LAP) v. Curtsinger*, No. 2016-CA-001423 (Ky. Ct. App. Feb. 02, 2017)
http://opinions.kycourts.net/coa/2016-CA-001423.pdf

Workers' Compensation

An Administrative Law Judge (ALJ) dismissed a worker's claim for benefits due to an alleged work-related injury to the left shoulder. In doing so, the ALJ explained that the worker's alleged injury was, at most, an exacerbation of a pre-existing condition. The Court needed to determine whether the worker did indeed sustain an exacerbation of a pre-existing injury and, if so, whether the exacerbation was work related. The Court explained that a work-related exacerbation of a pre-existing condition qualifies as a new and separate "injury" within the meaning of KRS 342.0011(1), even if it does not warrant an impairment rating. The work-related exacerbation supplies a basis for an award of medical benefits, per KRS 342.020(1), at least until the date the worker returns to his or her pre-exacerbation baseline state of health.

*Powers v. Keeneland Association, Inc.*, No. 2015-CA-001868 (Ky. Ct. App. March 31, 2017)
http://opinions.kycourts.net/coa/2015-CA-001868.pdf

Employment – Independent Contractor or Employee

Injured was found to be not an employee, but rather an independent contractor. Therefore, he was unable to invoke the protections of the Kentucky's Civil Rights Act (KCRA). The Court noted the definition of an employee simply as "an individual employed by an employer." KRS 344.030(5). The Court then considered the common-law agency test to determine whether an individual was an agent or an independent contractor under the KCRA. After considering all of the factors the court agreed that injured was an independent contractor. While injured may have received some benefits traditionally associated with being an employee, the freedom he enjoyed over his schedule, duties, and general work life was more typical of an independent contractor.

*Teno v. Ford Motor Co.*, No. 2015-CA-001903 (Ky. Ct. App. April 28, 2017)
http://opinions.kycourts.net/coa/2015-CA-001903.pdf

Workers' Compensation

An Administrative Law Judge (ALJ) found the employee failed to prove a work-related injury. The Court held the ALJ had misconstrued the evidence of one of the physicians and reversed. The Court found the ALJ had "flagrantly erred in her discounted assessment" of one doctor's opinion that employee had not been experiencing active impairment at the time of her work injury and that her work activities caused her to experience pain. The Court further noted that "universally recognized" to be caused by repetitive work is not enough to create a causal connection between the diagnosis and the work injury before it can be found to be work-related.

*Voith Industrial Services, Inc. v. Gray*, No. 2016-CA-001083 (Ky. Ct. App. March 24, 2017)
http://opinions.kycourts.net/coa/2016-CA-001083.pdf

Workers' Compensation

Janitor assigned to clean the paint shop facility at an auto manufacturing plant was injured after inhaling fumes of a chemical solvent. An Administrative Law Judge (ALJ) awarded permanent partial disability benefits based on a finding that he sustained occupational asthma, RADS, and sleep apnea as a result of the injury. The ALJ also found that the employee was entitled to an enhanced benefit pursuant to a multiplier. The Board affirmed the ALJ's findings regarding the application of the multiplier and the work-related sleep apnea. The Court held that the board properly concluded that the lay and medical evidence supported an award of enhanced benefits. The Court also held that the board properly determined that substantial evidence supported the ALJ's finding that the employee sustained work-related sleep apnea.

### d. Premises Liability Decisions

*McCoy v. Fam. Dollar Store of Ky., Ltd.*, No. 2015-CA-000926-MR, 2017 Ky. App. LEXIS 2 (Ct. App. Jan. 6, 2017)
http://opinions.kycourts.net/coa/2015-CA-000926.pdf

Premises Liability: Parking Lot Wheel Stops

Injured fell on a wheel stop in a store parking lot after stepping off a sidewalk onto the wheel stop while loading her purchases into her vehicle. Injured's expert engineer opined the wheel stop was an unsafe trip hazard placed in front of the store and injured would not have been harmed had the hazard not been present. The Court refused to consider the engineer's opinion because the expert report was not properly presented. Therefore, the court found the store had not breached its duty of care by the existence of the wheel stop in the parking lot. Since the wheel stop was not defective, damaged, it did not create an unreasonably dangerous condition requiring a warning to invitees nor did it require correction. Similarly, since there was no properly presented evidence to the contrary the wheel stops were not considered unreasonably dangerous.

*Brooks v. Seaton Place Homeowners Assoc*., No 2016-CA-001112-MR
(Ky. Ct. App. June 16, 2017)
http://opinions.kycourts.net/coa/2016-CA-001112.pdf

Premises Liability - Homeowners Association

A personal injury allegedly arose from negligence of homeowners in maintaining the sidewalk in front of their home during a community-wide garage sale. Injured fell then sued two homeowners and the homeowners association alleging that all three owed injured a duty of care to maintain the sidewalk in good repair. The Court found no liability on the part of the homeowners association as the covenants concerning "common areas" did not include the sidewalk. The Court found, regarding the homeowners, that the mere fact they were participating in a yard sale did not create a duty of care which extended to the injured.

*Hayes v. DCI Properties- DKY, LLC.*, No. 2016-CA-001189-MR (Ky. Ct. App. June 16, 2017)
http://opinions.kycourts.net/coa/2016-CA-001189.pdf

Premises Liability – Construction

An intoxicated minor was injured when he attempted to operate heavy equipment at a nearby residential construction site. During the operation, he overturned the piece of equipment onto his leg. His parents claimed the equipment was an attractive nuisance and therefore the construction company was liable. The Court reasoned that since the injured boy was over the age of fourteen he could not be afforded the tender-years element of the attractive nuisance doctrine. Since he was a licensed driver and could appreciate that the equipment on the construction site posed an unreasonable risk, there is no liability on the part of the construction company.

### e. Governmental Immunity Decisions

*Nelson County Board of Ed v. Newton*, No. 2015-CA-001292 (Ky. Ct. App. Jan. 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001292.pdf

Qualified Immunity – Childcare Providers

Claims were asserted against two childcare facility administrators and two care providers who were employees of the county board of education. The Court concluded the duties of the care providers were not discretionary therefore they were not entitled to qualified official immunity from the negligence claims asserted against them. Discretionary acts include "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." Claims arose that the care providers were negligent in supervising and caring for claimant's son following the application of sunscreen during an outdoor event. Sun block had been applied to the boy previously but not under his shirt. From this lack of sun protection he suffered serious burns on his back and shoulders. Otherwise, the Court found the two administrators involved were entitled to qualified official immunity from the negligence claims asserted.

*Richardson v. Queen*, No. 2015-CA-001585 (Ky. Ct. App. Jan. 20, 2017)
http://opinions.kycourts.net/coa/2015-CA-001585.pdf

Qualified Immunity-Claim for Child's Death During Physical Fitness Class at School

A mother, individually and as next friend to her son, filed a complaint against the principal, superintendent, substitute gym teacher and others after her son fell while playing basketball in physical education class and sustained a traumatic brain injury. All defendants were dismissed on summary judgement excluding the substitute teacher. The Court held that substitute gym teacher's act of supervising students playing basketball during physical education class constituted a ministerial function; therefore she was not entitled to qualified immunity.

*City of Brooksville v. Warner*, No. 2015-CA-000975 (Ky. Ct. App. March 17, 2017)
http://opinions.kycourts.net/coa/2015-CA-000975.pdf

Qualified Immunity – Police Chief

The city and chief of police alleged that negligent driving during a police pursuit entitled the chief to qualified official immunity. The Court concluded the safe operation of a police vehicle is a ministerial act and noted that the city's general policies and procedures required officers to operate official vehicles in a careful and prudent manner and to obey all laws and all departmental orders pertaining to such operation. Those procedures also warned officers that despite being able to drive at emergency speeds the law is still enforceable against those who may be criminally or civilly responsible for his or her actions. The Court concluded that officers have discretion to decide the circumstances surrounding an emergency pursuit, but officers do not have discretion for the manner of operating the police vehicle during the emergency pursuit. Driving is a matter of duty and training; it is not subject to deliberation or judgment. Therefore, the chief was not entitled to qualified official immunity.

### f. Other Significant Decisions

*Cales v. Baptist Healthcare Sys.*, No. 2015-CA-001103-MR, 2017 Ky. App. LEXIS 10 (Ct. App. Jan. 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001103.pdf

Medical Products Liability & Federal Preemption

A patient brought claims for negligence and product liability against a hospital and manufacturer. Patient alleged improper *off-label use* of an implantable device, and failure to warn the patient of the *off-label use*. *Off-label use* is when a medical device is used for a purpose unapproved by the FDA. The Court found the FDA approval of devices pre-empted product liability claims, but did not pre-empt medical negligence claims, did not establish the hospital's standard of care as to failure to inform, and noted the claim against the manufacturer did not preclude the alternative claim against the hospital.

*Bryant v. Allstate Indemnity Co.*, No. 15-CA-001451-MR (Ky. Ct. App. Feb. 24, 2017)
http://opinions.kycourts.net/coa/2015-CA-001451.pdf

Pre-litigation Depositions – Not Allowed

To allow for pre-litigation testimony, the testimony or information must be at risk of loss and consequently have a valid reason for preservation. Insurer filed an unverified petition, though verification is required, concerning proceedings to perpetuate testimony. The insurer also did not serve the petition on injured parties; there was no notice, nor hearing for the parties to respond. The Court concluded the insurer did not provide the proper notice and response time of the petition, nor did it have standing to bring the petition to force the deposition testimony.

### 3. Federal Court Decision

*Chiropractors United for Research & Educ., LLC v. Conway et al.*, No. 3:15-CV-00556-GNS, 2015 U.S. Dist. LEXIS 133559 (W.D. Ky. Oct. 1, 2015)
https://law.justia.com/cases/federal/district-courts/kentucky/kywdce/3:2015cv00556/95067/32/

Prior Solicitation Statute - Valid

The Commonwealth of Kentucky enacted an updated prior solicitation statute after its original was found unconstitutional. The new solicitation statute was constitutionally challenged by Chiropractors United as a regulation of commercial speech, equal protection violation under the U.S. Constitution and the Kentucky Constitution, and an unconstitutional prior restraint on speech. The Court found that the speech was uncontestably protected under the First Amendment, that there was a substantial government interest in regulating licensed healthcare providers, ensuring they do not overreach or abuse the PIP system, and in protecting the privacy of motor vehicle accident victims from inappropriate solicitation. The Court then found that the new solicitation statute is not a prior restraint but instead as a subsequent punishment, because it later "punishes those who engage in a particular form of speech at a particular time."

## *B. SIGNIFICANT CASE PENDING BEFORE THE KENTUCKY SUPREME COURT*

*American Mining Ins. Co. v. Peter Farms, LLC.*, No. 2017-SC-000066-DG

Interpretation of "Occurrence" and Measure of Damages

The issue present on appeal deals with the proper interpretation of the word "occurrence" in an insurance policy in relation to coverage for mistaken mining. A second issue in this case is the correct measure of damages; reasonable royalty rate or market rate minus cost.

*Travelers Indemnity Company v. Armstrong*, No. 2017-SC-41-DG

Transfer of Automobile and Subsequent Liability

The issues present on appeal include: (1) whether a car dealership complied with statutory requirements to transfer a vehicle so the dealer was no longer the owner at the time of a later accident; (2) whether there is a bona fide sale despite not receiving a valid transfer of title; (3) whether a prior auto dealer is absolved from liability when the subsequent dealer complies with the statutory transfer requirements.

*Cales v. Baptist Healthcare System, Inc.*, No. 2017-SC-57-DG

Medical Product Liability & Federal Pre-emption

There are two issues pending before the Court in this case. First is a matter of first impression in Kentucky regarding dismissal of a state product liability claim due to federal pre-emption involving *off-label use* of medical devices. Second is the applicable standard of care of the hospital when a medical device is used off-label.

*Baker v. Fields*, No. 2017-SC-144-DG

Qualified Immunity – School Administrators

There are three issues pending before the Court. First, whether an act or omission regarding sexual abuse of a student by a teacher is discretionary, warranting qualified immunity. Second, whether potential bad faith by the administration abrogated the claim for qualified immunity, even if the act or omission is discretionary. Finally, whether the duty to report child abuse is discretionary, if so, then should administrators be immune even if being convicted of violating the duty to report statute.

*American General Life Ins. Co. v. DRB Capital, LLC*, No. 2017-SC-329-DG

Anti-assignment Provisions in Settlement Agreements. KRS 454.430

The sole issue here is whether one can prohibit the assignment of annuity payments from a settlement agreement to a third-party, based on an anti-assignment provision in the settlement agreement.

**These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in this case, we invite you to visit our website at http://www.smithrolfes.com.**