2022

Kentucky Law Summary

Rendigs
ATTORNEYS AT LAW

Contents

PROCEDURAL ISSUES

1. **Jurisdiction**
   - **District Court**
     K.R.S. § 24A.120 - the District Court has exclusive jurisdiction in:
     (1) Civil cases up to $5,000, exclusive of interest and costs;

     (2) Matters involving probate, except matters contested in an adversary proceeding. Adversary proceedings must be filed in Circuit Court;

     (3) Matters not provided for by statute to be commenced in Circuit Court shall be deemed to be non-adversarial and within the jurisdiction of the District Court.

   - **Circuit Court**
     K.R.S. § 23A.010 -
     (1) The Circuit Court is a court of general jurisdiction; it has original jurisdiction of all causes with more than $5000 in controversy and not exclusively vested in some other court;
     (2) The Circuit Court has appellate jurisdiction over appeals of Declaratory Judgments;
     (3) The Circuit Court may be authorized by law to review the actions or decisions of administrative agencies, special districts or boards.

2. **Initial Pleadings**
   - CR 12.01- A defendant has 20 days after service of the summons to file an Answer. A party served with a cross claim has 20 days after service to file an Answer. The plaintiff must reply to a counterclaim in the Answer within 20 days after service of the Answer or within 20 days after service of court order.

   - If the Court grants a Defendant's Motion for a More Definite Statement, the responsive pleading must be served within 10 days after the defendant is served with the "more definite" statement. If the Court denies the motion, the responsive pleading shall be served within ten (10) days after entry of the Court's order.

3. Removal to Federal Court

Generally, a defendant may remove a civil case brought in state court to federal court if it could have been brought in federal court originally. 28 U.S.C. 1441(a). A federal district court has diversity jurisdiction over any civil action where the matter in controversy exceeds $75,000, exclusive of interests and costs, and is between citizens of different states. 28 U.S.C. 1332(a).

If the plaintiff seeks to recover some unspecified amount of damages that is not self-evidently greater or less than the federal amount-in-controversy requirement, the defendant must prove by a preponderance of the evidence, i.e., it is "more likely than not," that the plaintiff's claims meet the federal amount in controversy requirement. *Gafford v. General Elec. Co.,* 997 F.2d 150, 158 (6th Cir. 1993) (*overturned on other grounds by Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010)).

The removal procedure requires a defendant to file a Notice of Removal within thirty days after he receives a copy of the initial pleading setting forth the claim for relief upon which the action is based. 28 U.S.C. § 1446(b). Section 1446(b) allows a time extension only for cases where removability cannot be ascertained until the defendant receives subsequent information from the plaintiff.

In Kentucky, determining whether grounds for removal are present is complicated because the state rules prohibit plaintiffs from specifying an amount of damages in the pleadings. Even where the amount of damages is not specified, if the defendant is able to ascertain from a fair reading of the complaint or other papers filed that the minimum jurisdictional amount exists, he cannot "sit idly by" while the statutory period runs. *McCraw v. Lyons*, 863 F. Supp. 430, 434 (W.D. Ky. 1994)

Practice Pointer – *The removing party bears the burden of establishing that the amount in controversy is met.*

4. Savings Statute

K.R.S. §413.270- If suit is brought prior to expiration of the applicable statute of limitations and the court rules that it has no jurisdiction, the plaintiff may within 90 days of judgment commence a new action in the proper court. This applies to any Kentucky court (including federal courts), but it does not apply where the action is commenced in an out of state court and proper jurisdiction lies in Kentucky. *Blair v. Peabody*, 909 S.W.2d 337 (Ky. Ct. App. 1995); *Nicely v. Pliva Inc.*, 181 F. Supp. 3d 451 (E.D. Ky. 2016)

5. Discovery

- CR 30.01- There are no limitations on the number of depositions (unless the Court follows the civil rules for the Economical Litigation Docket).

- CR 33.01- Each party may propound a maximum of 30 interrogatories and 30 requests for admissions. Each subpart of an interrogatory or request is to be counted as a separate interrogatory or request. Not included in the maximum are interrogatories requesting: the name and address of the person answering; the names and addresses of the witnesses; whether the person answering is willing to supplement his answers if information subsequently becomes available. Any party may ask the court for permission to propound interrogatories and requests in excess of the limit of 30.

- CR 34.01- There are no limitations on the number of document requests.

- CR 36.01- A defendant shall not be required to serve answers or objections to requests for admission before the expiration of 30 days after service of the requests upon him (45 days from service of summons).

6. Offer of Judgment

- CR 68- At any time more than 10 days before trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property, with costs then accrued.

- If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. Case law in Kentucky is undeveloped as to whether "costs" includes attorney fees. But see *Childers v. Childers*, 2006 WL 1560746 (Ky. Ct. App. 2006) (Court upheld CR. 68 award of attorney fees in divorce proceeding). Federal courts in Kentucky have determined that Federal Rule Civil Procedure 68 (F.R.C.P. is virtually identical to Ky. CR. 68) allows recovery of attorney fees only where the underlying statute so provides. *See generally Zackaroff v. Koch Transfer Co.*, 862 F.2d 1263 (6th Cir. 1988).

7. Standard for Motion for Summary Judgment

- CR 56.03 provides in pertinent part: "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

- However, contrary to the liberal interpretation given by Federal courts to Fed. R. Civ. Pro. 56, Kentucky courts strictly interpret CR 56.03. To this end, summary judgment will not be granted unless movant shows that jury could only find for the movant. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991).

Practice Pointer – Consider expressing any "final" settlement proposal as an Offer of Judgement.

CLAIMS

1. **Premises Liability**

As a general rule, a premises owner has a duty to exercise reasonable care under the circumstances for the safety of persons whose presence might reasonably be anticipated on the premises. A person will be deemed an invitee (1) if he or she enters the premises with permission, whether express or implied; (2) entry is connected with the owner's business; and (3) there exists a mutuality of benefit or benefit to the owner.

A property owner has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and warn invitees of dangers that are latent, unknown or not obvious. *Lucas v. Gateway Cmty. Services Org., Inc.*, 343 S.W.3d 341, 343-44 (Ky. Ct. App. 2011). The duties are based on the land possessor's unique position as the only person who can fix the dangers. In Kentucky, "the duty of reasonable care may require precautions other than a warning, including employing durable precautions that eliminate or reduce the risk posed." *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W. 3d 891, 898 (Ky. 2013); *Grubb v. Smith*, 523 S.W. 3d 409 (Ky. 2017).

- **"Foreign Substances"**
  There is a burden shifting test for foreign substances on the floor of a business premises that causes a customer to fall and be injured. The existence of that unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition. Once a plaintiff establishes he or she fell because of the foreign substance, a rebuttable presumption of negligence is created, and the burden shifts to the premises owner to demonstrate reasonable care was used in the maintenance of the business. Thus, the customer retains the burden of proving that he or she had an encounter with a foreign substance on the floor, the encounter was a substantial factor in causing the accident and subsequent injuries, and by reason of the presence of the substance on the floor or the condition of the business premises, the business premises were not in a reasonably safe condition for use by business invitees. *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003). Plaintiffs no longer have to prove how long a substance was on the floor in order to avoid summary judgment. *Id.*

2. **Negligent Entrustment**

In Kentucky, automobiles are "dangerous instrumentalities in the hands of an incompetent driver" and one who entrusts his vehicle to another whom he knows, or in the exercise of ordinary care should have known, to be inexperienced, careless, or reckless, or given to excessive use of alcohol while driving, is liable for the natural and probable consequences of the entrustment. *Ruble v. H.T. Stone*, 430 S.W.2d 140, 143 (Ky. Ct. App. 1968); *McGrew v. Stone*, 998 S.W.2d 5 (Ky. 1999). However, the previously cited cases are not applicable unless there is a showing that the driver was in fact incompetent.

3. **Wrongful Death**

K.R.S. 411.130(1) states that whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

Damages for a wrongful death claim are based on the destruction to the decedent's power to labor and earn money. Damages flow naturally from the wrongful death of a person unless there is evidence from which the jury could reasonably believe that the decedent possessed no power to earn money.

The Estate is entitled to the recovery of funeral expenses. Medical bills incurred between time of injury and time of death would also be recoverable as damages. The Estate also has a claim for any conscious pain and

suffering the decedent may have suffered. A damages award for pain and suffering will be sustained where there is substantial evidence establishing that pain and suffering actually occurred.

The surviving spouse has a claim for loss of consortium for the death of a spouse. The loss of consortium damages do not cease at the death of the injured spouse. Consortium means the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife. The surviving spouse may recover damages against a third party for loss of consortium resulting from a negligent or wrongful act of such third person. Consortium does not necessarily include financial support, but can be read to cover only the emotional and physical elements of a relationship between husband and wife, such as love, companionship, and sexual relations.

There is no cause of action for loss of consortium if, at the time of the accident causing injury, the spouse was not married to the injured party. *Angelet v. Shivar*, 602 S.W.2d 185 (Ky. Ct. App. 1980); K.R.S. 411.145.

Decedent's children have a claim for loss of consortium. K.R.S. 411.135 states that in a wrongful death action in which the decedent was a minor child, the surviving parent may recover for loss of affection and companionship that would have been derived from such child during its minority. Likewise, Kentucky case law has expanded such a claim to a minor child seeking a loss of parental consortium. The claim of loss of parental consortium is a reciprocal of the claim of a parent for loss of a child consortium. Subsequent Kentucky case law limits this to actionable claims by a minor child for loss of parental consortium in wrongful death actions. Thus, a minor child only has a cause of action for loss of consortium for injuries sustained by a parent in those cases when there is likewise an action for the wrongful death of a parent.

4. Emotional Distress Claims

- Intentional Infliction of Emotional Distress - A plaintiff may recover for intentional infliction of emotional distress if the following elements are proved:
  (1) Defendant's conduct was intentional or reckless;
  (2) That the conduct was so outrageous and intolerable as to offend generally accepted standards of morality and decency;
  (3) A causal connection exists between the conduct complained of and the distress suffered; and
  (4) The resulting emotional stress was severe.
- Kentucky Law requires that the claim be supported by expert, medical or scientific proof.
- Negligent Infliction of Emotional Distress - The "physical impact" rule is no longer the threshold standard in Kentucky law for a negligent infliction of emotional distress claim. A plaintiff must now show that the defendant was negligent and that the plaintiff suffered mental stress or an emotional injury, acknowledged by medical or scientific experts, that is greater than a reasonable person could be expected to endure given the circumstances. *Osborne v. Keeney*, 399 S.W.3d 1, 6 (Ky. 2012).

5. Employer Intentional Tort

An injured employee may waive a workers' compensation claim and make a claim against any employer with an allegation of intentional conduct. K.R.S. 342.690(1). This is also known as the intentional act exception of the Workers' Compensation Act. The standard is very high and the case law holds that the only exception to the exclusive remedy provision is for willful and unprovoked physical aggression of a co-employee . The Estate of an injured/deceased worker may file an intentional tort claim.

6. Course and Scope of Employment

To hold an employer vicariously liable for the actions of an employee, the doctrine of *respondeat superior* requires a showing that the employee's actions were in the course and scope of his employment and in

furtherance of the employer's business. The doctrine does not apply to "personal and private trips" which have no connection with his or his mater's business. *Sharp v. Faulkner*, 292 Ky. 179, 166 S.W.2d 62, 63 (1942).

7. Contribution Claims and Apportionment

- The Kentucky Supreme Court has abolished contributory negligence as a defense and adopted comparative negligence. *Hillen v. Hays*, 673 S.W.2d 713 (Ky. 1984); *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998); K.R.S. 412.030.

- K.R.S. 454.040 is Kentucky's apportionment statute. The statue permits a jury to apportion damages among the joint tortfeasors. The present form of the statute reads as follows: "in actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs."

  Although the statute states that it applies in trespass cases it has been interpreted to apply to all tort cases. See *Stratton v. Parker*, 793 S.W.2d 817 (Ky. 1990).

- K.R.S. 411.182– In 1988, the General Assembly passed a second statute to change the theories of jury apportionment of damages among joint tortfeasors. *City of Covington v. Westbay*, 156 Ky. 839, 162 S.W. 92, 93 (1914); *Saad v. Brown*, 144 Ky. 178, 137 S.W. 834, 836 (Ky. 1911).

  By statute, the jury is to apportion the damages among each claimant, defendant, third-party defendant, and person who has already been released. K.R.S. 411.182(1). *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 29 (Ky. 1990), overruling *Nix v. Jordan*, 532 S.W.2d 762 (Ky. 1975). However, no judgment may be entered against a released tortfeasor.

  Under Kentucky's "active assertion rule," only persons who are or who have been parties to the litigation are to be named in the jury instructions. The jury is not allowed to apportion damages among people who were never parties or those who are immune from liability. *Jefferson Cnty. Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001). The proper basis of apportionment is percentage of causation and not some comparison of fault.

  The apportionment statute also applies to intentional tort cases and in Kentucky, comparative fault is an appropriate partial defense to intentional torts. K.R.S. 411.182(1); *Hillsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006); *In re Wallace's Bookstores, Inc.*, 317 B.R. 709, 713 (Bkrtcy. E.D. Ky. 2004).

  Where the action is one based on negligence, the jury must also apportion the fault between the plaintiff and defendants and reduce the plaintiff's award by his or her percentage of fault. *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984).

8. Indemnity Claims

Kentucky recognizes contractual and common law claims of indemnity.

- Indemnity provisions that cover the indemnitee's own negligence are valid and enforceable if the intention is expressed in unequivocal terms. *Blue Grass Restaurant v. Franklin*, 424 S.W.2d 594, 599 (Ky. 1968).

- Common law indemnity applies when one is exposed to liability because of the wrongful act of another with whom he or she is not in pari delicto (joint tortfeasor). Indemnity claims exist in two classes of

cases: (1) where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. *Botkin v. Tokio Marine & Nichido Fire Ins. Co., Ltd.*, 2013 WL 3489469 at *2-3 (E.D. Ky. July 10, 2013) (quoting *Degener v. Hall Contracting Corp.*, 27 S.W. 3d 775, 780 (Ky. 2000)).

9. Comparative Negligence

Kentucky follows a Pure Comparative Fault rule of law. K.R.S. 411.182. This means that liability for any particular injury is in direct proportion to fault. Comparative negligence shifts the focus from liability to damages and divides the damages between the parties who are at fault. Thus, a plaintiff who is 99% negligent can still collect 1% of his/her damages awarded by a jury or the court.

EVIDENTIARY ISSUES

1. Use of Criminal Conviction in Subsequent Civil Proceeding

KRE 609 holds that for the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless denied by the witness.

With respect to the admissibility of guilty pleas in a subsequent civil proceeding, the guilty plea would have to satisfy hearsay exception and the requirement of relevancy.

2. Collateral Source Rule

The Collateral Source Rule provides that benefits received by an injured party for his injuries from a source wholly independent of, and collateral to, the tortfeasor will not be deducted from or diminish the damages otherwise recoverable from the tortfeasor. *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky. Ct. App. 2005).

STATUTES OF LIMITATION

Claim	Limitations Period	Statute/Reference
Professional Malpractice	1 year from the date that the injury is first discovered or in the exercise of reasonable care should have been discovered, but in any case not later than 5 years from the date on which the alleged negligent act or omission occurred.	K.R.S. 413.140 (physician, surgeon, dentist, or hospital). K.R.S. 413.245 (all others).
Assault & Battery	1 year.	K.R.S. 413.140
Contribution/Indemnity	5 years.	K.R.S. 413.120
Personal Injury (non motor vehicle accident)	1 year after the cause of action accrued.	K.R.S. 413.140; *Michaels v. Baxter Health Corp., et al.*, 289 F.3d 402, 406 (6th Cir. 2002).
Personal Injury (motor vehicle accident)	2 years after the injury, or the death, or the last PIP payment, whichever is later.	K.R.S. 304.39-230(6)
Personal Property Damage	2 years from the date the cause of action accrued.	K.R.S. 413.125
Consumer Protection Act	2 years from the date of violation of K.R.S. 367.170 (unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce).	K.R.S. 367.220
Wrongful Death	2 years. The estate of the deceased has 1 year from date of death to appoint a personal representative. The personal representative then has 1 year from the date of his appointment to file suit.	K.R.S. 413.140; 413.180; *Conner v. George W. Whitesides Co.*, 834 S.W.2d 652 (Ky. 1992).
Taking of Personal Property (conversion)	2 years from the date the cause of action accrued.	K.R.S. 413.125
Trespass of Real/Personal Property	5 years from the date the cause of action accrued.	K.R.S. 413.120
Tort Claim for Real Property Damage (Negligence)	5 years from the date the cause of action accrued.	K.R.S. 413.120
Fraud or mistake	5 years.	K.R.S. 413.120
Breach of Contract (oral)	5 years.	K.R.S. 413.120
Breach of Contract (written)	15 years for contracts executed before 7/15/2014 10 years for contracts executed after 7/15/2014	K.R.S. 413.090 K.R.S. 413.160
Libel/Slander/Defamation	1 year.	K.R.S. 413.140
Malicious Prosecution/False Arrest/Conspiracy	1 year.	K.R.S. 413.140
Product Liability	1 year from the date of the injury.	K.R.S. 413.140; *Bridgefield Cas. Ins. Co. v. Yamaha Motor Mfg. Corp. of Am.*, 385 S.W.3d 430, 434 (Ky. Ct. App. 2012).

DEFENSES

1. Seatbelt Defense

- Failure of any person to wear a seatbelt shall not constitute negligence per se. K.R.S. 189.125(5).
- If there is relevant and competent evidence that the plaintiff was contributorily at fault by failing to wear an available seatbelt and that such fault was a substantial factor in contributing to or enhancing the plaintiff's injuries, then the issue of the plaintiff's fault is submitted to the jury for determination. *Geyer v, Mankin*, 984 S.W.2d 104 (Ky. Ct. App. 1998). However, the failure to wear a *child* passenger restraint shall not be considered as contributory negligence, nor shall such failure to wear said passenger restraint system be admissible in the trial of any civil action. KRS 189.125.
- To qualify as an expert witness concerning the seatbelt defense, the witness must possess sufficient training, special knowledge, or skill to testify on the subject dealing with the effect of non-usage of seatbelts in collisions. What must be shown is a causal relation between the claimant's failure to wear a seatbelt and the degree of subsequent injury. *Tetrick v. Frashure*, 119 S.W.3d 89 (Ky. Ct. App. 2003).

2. "Open and Obvious"

The Kentucky Supreme Court's decision in *Shelton v. Kentucky Easter Seals Society, Inc.*, 2013 WL 6134212 (Ky. Nov. 21, 2013) made it extremely difficult for a land possessor to prevail on a motion for summary judgment based solely on the "open and obvious" doctrine. See also *Auslander Properties, LLC v. Nally,* 558 S.W. 3d 457 (Ky 2018).

Shelton overrules in part the Kentucky Supreme Court's 2010 decision in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). *McIntosh* held that the existence of an open-and-obvious danger is a legal question that goes to the issue of duty and can thus be decided by the court as a matter of law. *Shelton* overruled this holding from *McIntosh* and held instead that the existence of an open-and-obvious danger is a factual question that goes to the issue of fault and thus should normally be decided by a jury.

Shelton thus established a new rule: duty exists. The only relevant question is whether the landowner breached that duty. Because breach is largely a factual question decided by juries, summary judgment will now be difficult to obtain. Juries will now be permitted to assess the comparative fault of the landowner and the invitee.

However, *McIntosh*'s foreseeability factors remain operative. Thus, courts and juries analyzing whether a land possessor is at fault for failing to eliminate or warn of an unreasonably dangerous condition (i.e., a foreseeable condition) must consider: (1) whether the land possessor has reason to expect that an invitee will encounter the condition (2) while distracted by an outside force, or while acting under time-sensitive or stressful circumstances. *McIntosh*, *supra*, at 389–390; *Moore v. St. Joseph Health Sys., Inc.*, 2012 WL 1886660 (Ky. Ct. App. May 25, 2012). Conditions that meet these factors are "foreseeable."
In *McIntosh*, supra, it was foreseeable that an emergency paramedic, rushing to transport critically ill patients, would be distracted when encountering a curb located between the ambulance dock and the emergency room door. *Id.* at 393-395.

On the other hand, the fact an invitee fails to pay attention or to look at the ground while walking is not a foreseeable "distraction." In *Lucas v. Gateway Cmty. Services Org., Inc.*, 343 S.W.3d 341, 345-46 (Ky. Ct. App. 2011), the plaintiff fell on crumbling gravel while attempting to locate her car in a parking lot. *Id.* at 346. The plaintiff had been to the store before and knew there were uneven conditions in the lot. Unlike the plaintiff in *McIntosh*, the plaintiff was not distracted by some outside force, such as rushing an ill patient into the hospital and was not acting under time-sensitive or stressful circumstances. *Id.* Rather, she was following her friend around the lot and simply failed to pay attention to the condition of the ground. *Id.* at 342.

DAMAGES

1. Caps on Non-Economic Losses

- The Kentucky Constitution prohibits the legislature from limiting the amount to be recovered for injuries resulting in death, personal injuries, and property damages. Ky. Const. § 54. This restriction applies only to tort actions and not to a contract liability. *Milner Hotels, Inc. v. Lyon*, 302 Ky. 717, 721 (Ky. 1946).

- An artificial cap on damages may be imposed at trial. CR 8.01(2). *Fratzke v. Murphy*, 12 S.W.3d 474 (Ky. 1999). *LeFleur v. Shoney's Inc.*, 83 S.W.3d 474 (Ky. 2002). Under these rules, the unliquidated damages claimed at trial should not exceed the last amount of damages stated in answers to interrogatories by the plaintiff(s). Without an amount stated or claimed for pain and suffering in the answer to interrogatories the amount for such damages a plaintiff would be entitled to recover would be zero. In order for this to occur, a defendant must make a motion at the proper time at trial.

Practice Pointer – *Always propound written discovery requesting an itemization of damages.*

2. Attorney Fees

Attorney fees can only be awarded if there is a contract with a fee provision or if based upon a statute. *Gibson v. Kentucky Farm Bureau Mut. Ins. Co.*, 328S.W.3d 195 (Ky. Ct. App. 2010).

3. MVRA- NO FAULT

- The MVRA requires that owners, registrants and operators of motor vehicles procure "no-fault" insurance coverage (basic reparation benefits) as well as legal liability coverage for claims arising out of ownership, operation or use of such motor vehicles. K.R.S. §304.39-110. Non-residents are entitled to benefits and are subject to the MVRA. K.R.S. §304.39-030.

- The MVRA abolishes liability for economic losses, including lost wages and medical expenses, against the party who causes such injuries to the extent that the losses do not exceed amounts payable to the injured party as basic reparations benefits. K.R.S. §304.39-060(2)(a). Since the MVRA limits the amount payable as basic reparation benefits to $10,000, tort liability for economic damages is abolished to the extent that they do not exceed that amount. *Stone v. Montgomery*, 618 S.W.2d 595 (Ky. Ct. App. 1981).

- These rules apply regardless of whether basic reparation benefits are actually paid to the injured party, so long as they were entitled to such benefits. *Henson v. Fletcher*, 957 S.W.2d 281 (Ky. Ct. App. 1997). However, if it elects to do so, the injured party's insurer or other reparation obligor may intervene as the real party of interest to recover from the responsible party or its insurer the sums paid as reparations benefits. *Carta v. Dale*, 718 S.W.2d 126 (Ky. 1986).

- The MVRA does authorize tort suits for non-economic damages, such as pain and suffering and inconvenience, provided that the medical expenses incurred from the accident exceed $1,000.00 or the injuries result in permanent disfigurement, fracture to a bone, loss of a body member, permanent

injury, or death. K.R.S. §304.39-060(2)(b). Additionally, the MVRA only applies to personal injury and, therefore, does not affect liability for resulting property damage. *McGrew v. Stone*, 998 S.W.2d 5 (Ky. 1999).

4. Diminished Value

The owner of a vehicle which was damaged by the negligence of another party is entitled to recover either the difference in the vehicle's market value before and after the accident or the cost to repair the car, whichever is appropriate. *American Premier Insurance Co. v. McBride*, 159 S.W.3d 342, 348 (Ky. Ct. App. 2004). For instance, if one has a $400.00 automobile and sustains damages that would cost $1,000.00 to repair, the vehicle is a total loss and an insurer, or tortfeasor, must pay only the total value.

5. Loss of Use

Loss of use of a motor vehicle is a distinct measure of recovery from property damage to a motor vehicle. A claim can be made to recover the reasonable value of the loss of use of the car during the time reasonably necessary to repair the damage. Loss of use of a motor vehicle, regardless of the type of use, shall be recognized as an element of damage in any property damage liability claim. Such a claim for loss of use of a motor vehicle shall be limited to reasonable and necessary expenses for the time necessary to repair or replace the motor vehicle. K.R.S. §304.39-115.

6. Punitive Damages

- Punitive damages may be awarded if the plaintiff proves by "clear and convincing" evidence that the defendant acted with "oppression, fraud, or malice." K.R.S. 411.184.
  - "Oppression" means conduct specifically intended to subject the plaintiff to cruel and unjust hardship. K.R.S. 411.84(a).
  - "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff. *Id.* at (b).
  - The Kentucky Supreme Court found K.R.S. 411.184's malice requirement to be unconstitutional. *Williams v. Wilson*, 972 S.W. 2d 260 (Ky. 1998).

- Punitive damages cannot be assessed against a principal or employer for the act of an agent or employee unless the principal or employer authorized or ratified or should have anticipated the conduct in question. K.R.S. 411.184(3).

- Punitive damages are not available for ordinary negligence; they are awarded under the heightened standard of gross negligence. Kentucky courts define gross negligence as "wanton or reckless disregard for the safety of others." *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. Ct. App. 2004).

- To prove that defendant acted with oppression or fraud evidence of culpability may be implied from the facts of the situation or by express intent. *Turner v. Werner Enters.*, 442 F. Supp. 2d 384, 386 (E.D. Ky. 2006). A party is entitled to have the jury instructed on the issue of punitive damages if there is any evidence to support an award of punitive damages. *Univ. Med. Ctr., Inc. v. Beglin*, 375 S.W.3d 783, 793 (Ky. 2011).

- The jury may, but is not required, to award punitive damages. K.R.S. §411.186. If the trier of fact determines that punitive damages should be awarded, they shall consider the following factors when determining the amount to be assessed:
  (1) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

  (2) The degree of the defendant's awareness of that likelihood;

  (3) The profitability of the misconduct to the defendant;

(4) The duration of the misconduct and any concealment of it by the defendant; and

(5) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

7. Pre-Judgment Interest/Post-Judgment Interest

- Pre-Judgment Interest: The longstanding rule is that pre-judgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands. *Nucor Corp. v. General Electric Company*, 812 S.W.2d 136, 141 (Ky. 1991). Liquidated means made certain or fixed by agreement of the parties or by operation of law. Unliquidated damages are damages which have not been determined or calculated, not yet reduced to a certainty in respect to amount.

- Post-Judgment Interest: A judgment shall bear six percent (6%) interest, compounded annually from its date. K.R.S. 360.040.

COVERAGE ISSUES

1. **Minimum Liability Limits**

   $25,000/$50,000/$10,000 which is $25,000 per person in bodily injury coverage, subject to an aggregate of $50,000 bodily injury coverage for all persons injured in one accident, and $10,000 available to cover property damage. UM/UIM automobile coverage is required to be offered by insurers. An insured may elect not to have either of these coverages.

2. **PIP Subrogation**

   PIP subrogation is allowed, less the first $1,000 of medical expense per occurrence (only for arbitration).

3. **UM/UIM Insurance Coverage**

   Uninsured Motorist (UM) and Underinsured Motorist (UIM) are contract-based first-party coverages. All motor vehicle insurance policies sold in Kentucky must include UM coverage unless specifically rejected by the insured in writing. K.R.S. 304.20-020. On the other hand, UIM coverage is optional unless an insured specifically requests it, at which time it becomes mandatory. K.R.S. 304-39-320. These statutes apply to bodily injury claims, not property damage claims.

4. **UM/UIM Stacking**

   Stacking is allowed if a separate premium is paid per vehicle.

5. **Court Approval of Minor Settlements**

   In settlements over $10,000 on behalf of minor, there is a requirement for appointment of guardian in strict compliance with statutes and K.R.S. 387. If the settlement is less than $10,000, then the Court can, but is not required to, and generally does not need to, approve settlement to a person having custody of minor. Any release signed by custodian has same effect as being signed by a guardian. K.R.S. 387.280.

6. **Preservation of UIM Subrogation Rights**

   A plaintiff wishing to settle with an underinsured motorist must send a written notice of the proposed settlement by certified or registered mail to all applicable UIM carriers. The UIM carrier then has thirty (30) days to either consent or refuse to consent to the settlement.

   If the UIM carrier either consents or fails to respond, the injured party may then finalize the settlement, releasing both the underinsured motorist tortfeasor and his liability carrier, without prejudice to the UIM claim, even if the settlement was for less than the liability limits.

   The purpose of the option given to the UIM carrier is to allow it to avoid the release of the underinsured motorist and his liability carrier, if it so chooses. If the UIM insurer refuses to consent to the settlement, it thereby preserves its subrogation claim against the liability carrier and/or the underinsured motorist. To do so, however, it must self-pay the injured party the amount of the underlying settlement, reserving the subrogation matters until the UIM claim is finally resolved. It may then pursue both the underinsured motorist and his liability carrier. This comes into play when the UIM carrier believes the tortfeasor has substantial personal assets from which to collect, it can preserve its subrogation rights by substituting its own payment for the policy limits payment tendered by the liability carrier. *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993).

7. **Liability for Accident Caused by Permissive Driver**

   When a non-insured is given permission to use a vehicle and subsequently is involved in an accident, then the vehicle insurer is deemed the primary insurer and the permissive driver's insurer the excess insurer. *Kentucky Farm Bureau v. Shelter Mutual Insurance Co.*, 326 S.W.3d 803 (Ky. 2010).

CLAIMS HANDLING

1. **Duty to Defend**

   An insurance company must defend any suit in which the language of the complaint would bring it within the policy coverage regardless of the merit of the action. The determination of whether a defense is required must be made at the outset of the litigation; this duty to defend continues to the point of establishing that the liability upon which the plaintiff is relying is in fact not covered by the policy and not merely that it might not be, a duty separate and distinct from the obligation to pay any claim. . *James Graham Brown Found., Inc. v. St. Paul Fire & Martine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991).

2. **Bad-Faith**

   Kentucky recognizes both the common law bad faith claim and a statutory bad faith claim under the Unfair Claims Settlement Practices Act.

3. **Bifurcation of Bad Faith Claims**

   Claims for violation of the Unfair Claims Settlement Practices Act against an insurance company should be bifurcated from the negligence claims which are the basis of the underlying litigation. It is reversible error for the court to not bifurcate any bad faith or Unfair Claims Settlement Practices Act claims from the negligence claims in an underlying case. *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993).

4. **Kentucky's Unfair Claims Settlement Practices**

   - Kentucky has both a statute (K.R.S. 304.12-230) and an administrative regulation (806 KAR 12:095) dealing with unfair claims settlement practices.

   - K.R.S. 304.12-230, provides, in part, that it is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:

     (1) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

     (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

     (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

     (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

     (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

     (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

     (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

     (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(9) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(10) Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;

(11) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;

(15) Failing to comply with the decision of an independent review entity to provide coverage for a covered person as a result of an external review in accordance with K.R.S. 304.17A-621, 304.17A-623, and 304.17A-625;

(16) Knowingly and willfully failing to comply with the provisions of K.R.S. 307-17A-714 when collecting claim overpayments from providers; or

(17) Knowingly and willfully failing to comply with the provisions of K.R.S. 304.17A-708 on resolution of payment errors and retroactive denial of claims.

- Insurers and agents shall not misrepresent or conceal from first party claimants any pertinent benefits, coverage, or other provisions of any insurance policy. 806 KAR 12:095, Section 4(1).

- Every insurer, upon receiving notification of a claim, shall within 15 days acknowledge the receipt of the notice unless payment is made within that period of time. 806 KAR 12:095, Section 5(1).

- An insurer shall affirm or deny any liability on claims within a reasonable time and shall offer any payment due within 30 calendar days of receipt of due proof of loss. 806 KAR 12:095, Section 6(1)(a).

- If the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall so notify the first party claimant within 30 calendar days after receipt of the proof of loss, giving the reasons more time is needed. 806 KAR 12:095, Section 6(2)(a). If the investigation remains incomplete, the insurer shall, 45 calendar days from the date of the initial notification and every 45 calendar days thereafter, send to the first party claimant a letter stating the reasons additional time is needed for investigation. 806 KAR 12:095, Section 6(2)(b).

- Insurers shall not continue negotiations for settlement of a claim directly with a first party claimant who is not legally represented if the first party claimant's rights may be affected by a statute of limitations or a time limit in a policy, certificate, or contract, unless the insurer has given the first party claimant written notice at least 30 calendar days before the date on which the time limit expires. 806 KAR 12:095, Section 6(4).

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