RECENT DEVELOPMENTS IN MOTOR VEHICLE ACCIDENT LITIGATION

Sponsor: Young Lawyers Division
CLE Credit: 1.0
Friday, June 20, 2014
8:30 a.m. - 9:30 a.m.
Ballroom C
Northern Kentucky Convention Center
Covington, Kentucky
A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.
# TABLE OF CONTENTS

The Presenter .................................................................................................................................................. i

Recent Developments in Motor Vehicle Accident Litigation ................................................................. 1

   Kentucky Supreme Court Decisions ................................................................................................. 1

   Kentucky Court of Appeals Decisions .............................................................................................. 3

   Kentucky Trial Court Cases ............................................................................................................ 13
NANCY B. LOUCKS is a member of Frost Brown Todd, LLC's Louisville office, and practices in the areas of insurance coverage and trucking and transportation, both providing risk management and regulatory advice, as well as litigating cases throughout the region. Prior to coming to Frost Brown Todd, Ms. Loucks served as law clerk to Chief Justice Robert F. Stephens, after serving as an intern at the Kentucky Supreme Court during law school. She then litigated against insurance companies on behalf of Westinghouse Electric Corporation in Pittsburgh in complex insurance coverage matters involving multiple policies and layers of coverage. Ms. Loucks is currently a member of the Louisville, Kentucky, and American Bar Associations, the Defense Research Institute, the Kentucky Motor Transport Association, and a past member of the National Society of Professional Insurance Investigators and the Transportation Lawyers Association. She received her undergraduate degree from the University of Kentucky and her J.D. from the University of Kentucky College of Law.
This session is intended to be a survey and analysis of the trial and appellate court cases involving motor vehicles in Kentucky during the calendar year 2013, and 2014 to date.

I. KENTUCKY SUPREME COURT DECISIONS

A. Insurance/Basic Reparations Benefits


A horse and its rider were struck by an uninsured motor vehicle operated by an insured driver. The rider, Samons, recovered liability policy limits from the driver's carrier in settlement after bringing an action against him, and the trial court ordered Kentucky Farm Bureau to also pay basic reparations benefits.

On appeal, the order was reversed. The Kentucky Supreme Court, however, held that a pedestrian struck by an uninsured vehicle being driven by an insured driver can indeed recover basic reparations benefits from the driver's insurance company. Just as an injured person riding in a motor vehicle looks first to the insurance covering the vehicle, and then to that of the driver when seeking basic reparations recovery, so should a pedestrian. The Court focused upon the language of the MVRA requiring both owners and operators to be insured, and read the statute as remedial and designed to provide compensation to injured persons, including those on horseback. Samons, therefore, was able to collect BRB from the driver's carrier.

B. Punitive Damages

Gibson v. Fuel Transport, Inc., 410 S.W.3d 56 (Ky. 2013)

The Fuel Transport truck overturned and spilled coal on a highway while attempting to negotiate a sharp curve. Roger Russell came around the curve, and upon the coal, but was unable to stop, resulting in an accident that caused injuries and the ultimate death of Gibson, a passenger in Russell's pickup. The primary issue on appeal of the verdict and judgment for Gibson was the award of punitive damages.

On appeal, punitive damages were set aside. The Supreme Court agreed, reminding Gibson that punitive damages may be awarded upon a finding of gross negligence, but there must first be a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others. Moreover, this must be proven by the
elevated standard of clear and convincing evidence. The Court essentially found that there had been no evidence of why the truck overturned and spilled its coal, thus it could not be proved it was negligent, much less grossly negligent, warranting punitive damages.

C. Piercing the Corporate Veil/Discovery Sanctions

**Turner v. Andrew, 413 S.W.3d 272 (Ky. 2013)**

Turner was driving a feed-truck when a movable auger swung loose and struck a dump truck owned by Andrew. Andrew brought a suit against Turner, but ignored discovery requests to the extent that Turner filed motions to compel, then motions to dismiss. After a variety of different dispositive and pretrial motions, judgment was granted in favor of Turner. This was essentially because Andrew would not be able to present any evidence of damages, after having failed to produce the damages discovery.

The Court of Appeals did not agree. Some of the dispute hung upon the nature of Andrew's business, which was not a named party, although he was sole owner of the LLC. In a discussion of the nature of limited liability companies and piercing the corporate veil, the Supreme Court stated that "an LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim." In short, Andrew could not claim lost business income – only the LLC could claim that, and he had no proof to present.

With regard to dismissal as a discovery sanction, the Supreme Court recognized the trial court had the discretion to do so, but failed to render the required findings of fact to support the dismissal. The Court stated that when such a severe sanction is imposed, values of consistency and predictability, reviewability, and deterrence, outweigh the values of economy and efficiency that may be promoted by allowing inarticulate decisions. Further, without findings of fact, a meaningful appellate review of the propriety of discovery sanction is seriously constrained, if not impossible.

D. UIM/Choice of Law/Public Policy

**State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick, 413 S.W.3d 875 (Ky. 2013)**

Hodgkiss-Warrick was injured in an automobile accident in Kentucky, along with three other friends who had come from Pennsylvania. Her daughter, also from Pennsylvania, was driving, and they all sued her and recovered the limits of her liability coverage. Hodgkiss-Warrick also sought UIM coverage from State Farm based upon a policy on her own vehicle and another policy on her husband and the vehicle he drives. State Farm denied coverage on both policies, one because Hodgkiss-Warrick and her daughter were living together, and as a "resident relative," her daughter's vehicle did not qualify under the policy's definition.
of an "underinsured motor vehicle," and the other because she was excluded from her husband's policy when they separated and she moved out. The trial court denied coverage, and the Court of Appeals reversed.

The Supreme Court applied the "most significant relationship" test, to determine which state's law should apply, and found Pennsylvania law was appropriate, because the parties were from Pennsylvania, the insurance policies were purchased in Pennsylvania and refer to Pennsylvania law, and the policies cover vehicles in Pennsylvania. With this information, it was not difficult for the Court to apply Pennsylvania law. The only question remaining was whether any public policy of Kentucky would require a different result than the denial of UIM coverage resulting from that application of Pennsylvania law. Recognizing that courts are not to enforce contracts in contravention of public policy, the Supreme Court nevertheless found no violation of Kentucky public policy by allowing State Farm to deny UIM coverage. The judges rejected an argument that the MVRA promotes a policy of UIM coverage for injured motorists in Kentucky, on the ground that there is no such policy clearly stated, and UIM coverage is optional.

Justice Scott dissented strongly, focusing upon the fact that Hodgkiss-Warrick was being penalized for things outside her control. She had no control over the amount of liability coverage her daughter purchased, and therefore could not manage the risk of her need for UIM coverage. He found the parallels to other public policy limitations on insurance language excluding liability coverage to be strong in this case, and therefore the UIM coverage should have been allowed, in spite of the language in the policies. Justice Cunningham agreed.

II. KENTUCKY COURT OF APPEALS DECISIONS

A. UIM/Choice of Law


Bandy was injured in an automobile accident with Bevins, but her Virginia insurance carrier would not pay her UIM coverage, based upon both policy provisions and Virginia law which required an offset for payments made by the tortfeasor's liability policy, and an identical amount was available under that policy. The trial court examined Kentucky's choice of law rules for contract matters, using the "most significant relationship test," and found the state with the most significant relationship to the parties was Virginia. Bandy was from Virginia, and the policy was her parents' who resided in Virginia. Taking all of that into consideration, the trial court considered that Virginia law applied. The Court of Appeals agreed, and the policy provision was upheld, denying Bandy any UIM coverage. (Note: See inconsistent treatment of identical facts in Ward v. Nationwide Assur. Co., No. 2012-CA-809-MR, 2013 WL 5051677 (Ky. App. September 13, 2013))
B. Umbrella Coverage/Car Sale


The matter in dispute in this case is whether the umbrella policy maintained by a car dealership owner can apply to Masters, who was involved in a serious accident while she was driving a vehicle purchased from that dealership, but without having yet transferred legal ownership. The trial court determined that the dealership's policy did cover the accident, but the Court of Appeals found differently.

By the strict language of the umbrella policy, the only named insured was Delmus Gross, the owner of the dealership. The appellate court recalled that where the terms of an insurance policy are clear and ambiguous, the policy will be enforced as written. Providing a detailed explanation of the insurance coverage following the purchase and transfer of legal ownership of a car, the Court determined that when the statutory requirements for the transfer of title have not been met, the dealer remains the owner, and the dealer's insurance is primary to the new almost-owner driver's. This permissive driver does not, however "stand in the shoes" of the dealer, and any policy of insurance covering the dealer individually does not automatically provide coverage to the purchaser of the car. Masters was therefore not covered by the dealer's umbrella policy.

C. Statute of Limitations/Med Pay/Basic Reparations


The Hamptons and Watkins were involved in an accident in Boone County. The Hamptons were from Ohio, and insured by Ohio Mutual Insurance Group, which does not provide Basic Reparations Benefits, but did provide med-pay coverage. Within two years of this med-pay payment, but more than two years from the date of the accident, the Hamptons brought an action against Watkins. The trial court granted Watkins summary judgment and dismissal on the ground that the Hamptons' suit was untimely.

The Court of Appeals agreed. In spite of the Hamptons' argument that med-pay was the Ohio equivalent to basic reparations benefits, neither court was convinced. In addition to settled law stating that med-pay insurance does not toll the statute of limitations, Hampton could have, but evidently chose not to, seek BRB recovery through Kentucky's assigned claims plan. In light of this omission, and the fact that there was no other legal reason to extend the statute of limitations beyond two years, they remained dismissed.
D. Summary Judgment/Appeal


In a collision between Moore and Lynn-Taylor Howell, a teenager who was driving her boyfriend's mother's car with her permission, Moore was injured. The insurance covering the car, Kentucky Farm Bureau, tendered its liability limits to Moore. Moore thereafter amended her complaint to assert a declaration of rights action against Howell's carrier, Metropolitan Direct. Cross motions for summary judgment resulted in an order and judgment that there was coverage. The trial court's order and judgment were designated "final and appealable."

On appeal, the Court of Appeals was first challenged to determine whether the order was indeed final and indeed appealable, which it did. Finding that the trial court's summary declaratory judgment contained all of the language required by the rules, including stating specifically that "there is no just reason for delay," the Court of Appeals determined that it was within the trial court's discretion to decide whether or not its orders are appealable. Once that issue was resolved, the Court of Appeals proceeded to vacate the trial court's summary judgment order on the ground that the coverage questions raised by the parties could not be answered as a matter of law; instead various inferences might reasonably be drawn from the facts, and summary judgment is proper only where the movant shows that the adverse party could not prevail under any circumstances.

E. Basic Reparations Benefits/Payee


The dispute here was about basic reparations benefits, and to whom they should be sent. Medlin was injured in an automobile accident, and requested that his BRB payments, rather than being sent to his providers, instead be sent directly to him. Progressive Direct provided him an application that included language that required all drafts would include both his name and the name of the provider as payees. Bills were presented for his care, but Medlin did not pay them, and demanded that all funds be paid only to him. Relying upon the application, and their procedures, Progressive refused, declining to pay him directly any sums other than those he was actually out of pocket. In the declaratory judgment action Medlin filed, the trial court agreed with Progressive.

The Court of Appeals also agreed with Progressive, holding that the MVRA only required reimbursement to Medlin his actual economic losses, i.e., his out of pocket expenses. The statute allows for direct payment to either providers or for payments directly to the insured for reimbursement,
but only for those expenses which have been incurred. Medlin incurred no expenses, and therefore was entitled to no direct payment of benefits.

F. Sudden Emergency Doctrine


Carroll was injured when the trailer of Wright's truck swung into her lane as he slammed on his brakes to avoid colliding with two vehicles that had stopped at an intersection. The trial court denied Carroll's motion for a directed verdict on liability, a jury verdict and judgment for Wright followed.

The Court of Appeals agreed that a directed verdict would have been improper, but also determined that the sudden emergency doctrine, which had been included in the instructions, was improperly applied, so the case was sent back for a second trial. Another defense verdict and judgment sent Carroll back to the Court of Appeals, but this second time, the opinion was that the directed verdict should have been granted.

Finding that the "law of the case" did not apply, because there was new and different evidence in the second trial, this second appellate panel held that the undisputed fact that the trailer was in the wrong lane meant Wright was negligent. They were not impressed by the argument that this was a "sudden emergency," because that does not apply when Wright's presence in the wrong lane is brought about by his own negligence, or where the situation causing his departure from the correct lane could reasonably have been anticipated. (Note: See consistent – and more detailed – treatment of sudden emergency doctrine in _Smith v. Turner_, No. 2011-CA-1525-MR, 2013 WL 2359726 (Ky. App. May 31, 2013)).

G. Negligence Per Se


In this consolidated appeal of defense verdicts against CSX, the Court of Appeals addressed a variety of claims of error resulting from the trial of this automobile accident near the train tracks in Gallatin County. Of particular note is the discussion of the proper application of a negligence _per se_ instruction. The appellate court did not find it appropriate to apply a negligence _per se_ instruction, because it can only be applied to the violation of a Kentucky statute, and Berry tried to apply it to certain federal statutes. In addition, the injuries must be caused by the violation of the statute in question, and for the statutes proposed to have been violated, that did not appear to be the case. Finally negligence _per se_ is not appropriate when it requires the jury to rely upon speculation and supposition to conclude that the statute has been violated, and the injuries are the result.
H. Statute of Limitations/Basic Reparations Benefits/Med Pay


The dispute in this case was whether a payment was basic reparations benefits or med-pay, and if so, how that impacted the running of the statute of limitations. Cole was injured in an automobile accident with Fagin and paid by her own carrier just under $4,000 in med-pay, although she did have BRB coverage. When Cole later filed suit against Fagin, it was dismissed as untimely, having been filed over two years from the date of the accident.

The Court of Appeals disagreed, finding that Kentucky's MVRA mandates the utilization of BRB prior to accessing any med-pay coverage; therefore the payment (in spite of the characterization from the carrier) was considered to be BRB payments instead of med-pay, and since the action filed against Fagin was within two years of the payment, the action was deemed timely.

I. KRE 403/Seat Belt Defense/Sudden Emergency Doctrine


A grain truck collided with Smith, and after a jury verdict in Turner's favor, Smith alleged a variety of errors on appeal, including: (1) photos of Turner's other, well-cared-for trucks should not have been shown to the jury, (2) the seat belt defense was improperly supported by expert evidence, and (3) the sudden emergency doctrine was improperly applied. The Court of Appeals agreed.

Relying on KRE 403, the appellate court determined that the probative value of the photos was substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury. Showing pictures of other trucks might confuse the jurors into thinking that they were looking at a picture of the truck involved in the accident.

With regard to the seat belt defense, the Court of Appeals found the failure of the defense expert to clearly provide an opinion as to which injuries were because of the secondary impact caused by the lack of seat belt resulted in a failure to prove that there was a causal relationship between plaintiff's failure to wear a seatbelt and the degree of subsequent injury.

The Court also discussed the "sudden emergency" doctrine, in its determination that it was improperly applied. In short, the doctrine cannot be applied where one seeking to invoke it has created the emergency by his own negligence. The doctrine is appropriate when the defendant was suddenly confronted with a choice between alternative courses of action.
and voluntarily chooses one over the other, it later appearing that such choice may have been the wrong one. It does not apply when the defendant had no choice but was forced to take the course he did. (Note: See consistent treatment of sudden emergency doctrine in Carroll v. Wright, No. 2012-CA-787, 2013 WL 1365941 (Ky. App. Apr. 5, 2013))

J. Scope of Employment


Carberry was assaulted by his ex-wife's new boyfriend, Brian Scott Ivey, when they all met at a motel to exchange belongings. Ivey was a driver for Golden Hawk, and arrived with the ex-wife in one of their trucks. The trial court granted summary judgment on Carberry's claims against Golden Hawk for negligent hiring, retaining, training, and supervising. After the order granting summary judgment, Carberry undertook additional discovery and investigation to discover that Ivey had a criminal record and Golden Hawk failed to discover and inquire into some previous employment history. The trial court denied Carberry's motion to reconsider, and the Court of Appeals affirmed.

Both courts found that Ivey and Carberry met as private citizens at a location chosen by them, and Golden Hawk could not have foreseen that Carberry would assault someone. They recognized that there was no legal requirement for Golden Hawk to conduct a full criminal background check, and that his job duties were not such that he was put into situations where he could be expected to become violent. Moreover, Golden Hawk did not send him to the motel where he met and assaulted Carberry, and a master is only liable for the acts of his servant committed in the course or scope of the latter's employment and not for the acts of the servant committed by him while not serving the master and outside the scope of his employment. The Court of Appeals found that Ivey was well outside the scope of his employment with Golden Hawk when he drove his girlfriend to a motel to meet her ex-husband, and therefore they had no legal responsibility for his actions.

K. UIM/Identification of Insurer at Trial


The Psihountakis and Moore collided with their motor vehicles, and the occupants of the Psihountakis vehicle brought an action against Moore and Psihountakis' UIM carrier to recover for their damages. The UIM carrier cross-claimed against Moore. Moore tendered her liability limits, the UIM carrier substituted pursuant to Coots, and the trial proceeded to an ultimate verdict for Moore. At trial, the UIM carrier was identified as a party, its status as the Psihountakis' UIM carrier was explained, and all attorneys had the opportunity to say something to the jury about the UIM
carrier and Psihountakis' claims against it. The Psihountakis appealed on the ground that this was not sufficient.

The Court of Appeals disagreed. Relying upon Earle v. Cobb, 156 S.W.3d 257 (Ky. 2004), the appellate court stated that Earle stands only for the proposition that when the Coots procedure is used, the UIM carrier that participates at trial must be identified to the jury. This was done, and even more information was provided than merely identifying the carrier. Since proof of fault is essential to be entitled to recover from a UIM carrier in a lawsuit against that carrier, and the only issues at trial were fault and damages, references to or evidence concerning the UIM carrier other than its identity would serve only to confuse and prejudice the jury. Nevertheless, the jury was not confused, reaching a verdict for Moore. The trial court judgment was affirmed.

L. Statute of Limitations/Basic Reparations Benefits


Beaumont and Muluken were involved in an automobile collision where Beaumont was injured. She received basic reparations benefits from her insurer, and brought an action against Muluken within two years of the date she believed was the last payment. Unfortunately, it turned out to be merely a re-issued check from a previous payment, making her suit untimely. The trial court dismissed her action upon summary judgment, and the Court of Appeals affirmed.

Even though Beaumont was provided the date of her last payment from her own carrier, it made no difference to either court. It was not the last payment, and her claim was therefore untimely.

M. UIM/Basic Reparations Benefit and Liability Offset


Jamison was injured in an automobile collision with Lori Humble. Humble's carrier settled with Jamison for $15,000 (less than her $25,000 liability limits). Jamison's UIM carrier, Progressive, made a Coots election and trial proceeded. The jury found Humble liable and awarded damages of just under $38,000. A judgment in that amount followed. Progressive moved to offset the verdict by the amount paid for basic reparations and the total amount of Humble's liability limits, totaling $35,000. Progressive also sought a judgment in its favor on its cross claim against Humble. The trial court denied all of these motions. The Court of Appeals disagreed, and reversed.
Recalling that the MVRA abolished tort liability to the extent basic reparations benefits are paid or payable, up to $10,000, Jamison could not recover what Humble could not have been expected to pay. It would also be a double recovery, and the purpose of UIM coverage is to place the insured in the same position he would have occupied had the tortfeasor been fully insured. The appellate court also found that the verdict and judgment should have been offset by Humble's full liability limits of $25,000. The tortfeasor's liability insurance is the primary coverage, and the UIM coverage is excess, requiring the primary coverage to be exhausted before the excess is accessed. If the injured party chooses to settle for less than the limits, he or she does so at his or her own risk, because the purpose of UIM benefits is to compensate the injured party only for those damages that exceed the limits of the tortfeasor's liability insurance policy. Progressive was therefore allowed a full offset of the verdict, leaving about $2,000, and a judgment against Humble.

N. Statute of Limitations/UIM


Riggs was injured in an automobile collision and filed suit against the other driver. Three years after the accident, he amended his complaint to include State Farm, seeking UIM coverage. The State Farm policy contained a contractual limitations period which prohibited actions commenced more than two years from the date of the accident, or the last basic reparation benefit payment, whichever was later. The trial court applied the policy language and granted summary judgment to State Farm.

On appeal, the Court of Appeals determined that the two years provided by the State Farm policy was unreasonably short, and instead applied the statutory fifteen year statute of limitations for a written contract dispute. In coming to this decision, the Court of Appeals was not swayed by the argument that the language in the policy exactly matched that of the MVRA, but instead considered it unreasonable to require a party to bring a claim for UIM coverage, before being aware if there was a claim, since the statute of limitations for bringing an action against the tortfeasor was two years, and only when the insured discovered the tortfeasor's coverage was inadequate after discovery would he or she know she had a UIM claim. Both parties made an attempt to show the Court of Appeals how federal case law supported their positions, but the judges were not convinced, and reversed the trial court, allowing Riggs to pursue his claim.
O. UIM/Choice of Law


Ward was injured in an accident with Hannah Hardy in Jefferson County. Hardy settled for her liability limits, but Ward's UIM carrier, Nationwide, would not pay him UIM benefits, because both the policy language and Virginia law offset UIM with any liability payments, and since they were the same amount – $25,000 – Ward could collect nothing. The trial court applied Virginia law and denied Ward any recovery. The Court of Appeals disagreed.

They found that while Kentucky choice of law rules followed the "most significant relationship test" for contractual disputes, which requires the court to apply the law of the state with the most significant relationship to the transaction and the parties, and Ward was a Virginia resident, driving a vehicle purchased and registered in Virginia, and the insurance policy was issued in Virginia, Kentucky also has a public policy exception to this rule, and they chose to apply it here. In this case, Kentucky law does not allow an offset of UIM coverage by the amount of the liability coverage. Therefore, the Court of Appeals determined that the Virginia insurance policy language violated Kentucky public policy, and could not be enforced, allowing Ward to collect UIM benefits. (Note: see inconsistent treatment of identical facts in Bandy v. Bevins, No. 2011-CA-000020-MR, 2013 WL 44027 (Ky. App. Jan. 4, 2013)).

P. Sovereign Immunity/Governmental Immunity


Bibelhauser was a pedestrian struck by a TARC bus. He sued the driver and TARC, but TARC immediately claimed sovereign and governmental immunity, moving for summary judgment. This was denied by the trial court, and the Court of Appeals agreed, explaining the differences and applications of sovereign and governmental immunity.

Sovereign immunity affords the state absolute immunity from suit and extends to public officials sued in their representative capacities, when the state is the real party against which relief in such cases is sought. Sovereign immunity does not apply to TARC, if only because its enabling statute states that it has the power to "sue and be sued." Governmental immunity is granted to agencies that have been established by an immune entity and that perform a function integral to state government. TARC was established by the Louisville Metro government, an immune entity, but it does not perform a function integral to state government. Instead, TARC engages in a quintessentially locally proprietary venture –
local transportation. Bibelhauser therefore was allowed to proceed against TARC.

Q. Joinder of Multiple Claims


Hughes' complaint was dismissed for misjoinder, because she chose to combine into one single action claims against parties in two separate and unrelated automobile accidents, occurring months apart. On appeal, the order was vacated.

The Court of Appeals held that the rules do permit joinder of two automobile accidents which have nothing more in common than a common claimant. The argument was essentially one of judicial economy, for they expected that every defendant in each action would ask Hughes the same questions regarding her injuries and physical condition before and after both accidents, and the treating physicians' testimony would be all the same. They determined that were permissive joinder to be prohibited in cases of aggravated, successive injuries, separate trials would afford each defendant the opportunity to impute the bulk of liability to the other tortfeasors.

R. Application of Multiple UM Policies


An uninsured motorist collided with the truck in which Sharon Bartley was a passenger. Bartley was injured, and sought coverage from the UM policy covering the truck, issued by United Financial, and the UM policy issued to her husband by Countryway. Both policies contained mutually repugnant "other insurance" clauses, and the trial court decided to prorate the loss between them. On appeal, this decision was reversed.

The Court of Appeals deemed the Countryway policy to be primary. This was based upon a variety of factors. While it has been the law, and appears to remain the law regarding non-motor vehicle-related coverages, that when two policies have the same excess coverage language, they are to both apply to the loss, with their payments pro-rated according to their limits and coverage. With regard to UM coverage, however, the Court focused upon the personal nature of the policy, and that it follows the insured regardless of whether the insured is injured as a motorist, a passenger, or as a pedestrian. It was also relevant to the Court of Appeals that UM coverage is not mandatory, unlike liability coverage, and a passenger can therefore have no reasonable expectation that the driver of the vehicle he or she is riding in has procured the coverage. For that reason, UM coverage is procured
individually, to protect the individual. Interestingly, this is the opposite approach when mutually repugnant liability policies are analyzed. In that circumstance, the policy on the vehicle is deemed primary.

III. KENTUCKY TRIAL COURT CASES

In 2013, there were very few significantly high verdicts. On February 18, 2013, a Rockcastle County jury awarded $3,638,888, $3,000,000 of which was pain and suffering, to a plaintiff rear-ended by a truck, for broken bones and a brain injury. Merritt v. Super Service, No. 11-CI-27. Another $3,000,000 plus verdict was awarded in Russell County on March 13, 2013, where a drunk driver t-boned a plaintiff, causing broken bones and soft tissue injuries. The bulk of this $3,488,729 verdict was the $2,500,000 in punitive damages. The defendant, however, had only minimal limits, and presumably no assets sufficient to satisfy the judgment. Wilson v. Walters, No. 11-CI-32. In McCracken County, on January 24, 2013, a jury awarded $774,237 for whiplash, Windsor v. Schugel Trucking, No. 10-CI-973, and a University of Louisville basketball player recovered $488,767 from a Jefferson County jury for injuries she received as a pedestrian struck in a crosswalk. Wright v. U of L Parking Enforcement, No. 10-CI-4572, August 9, 2013.

Of the forty cases surveyed, there were thirteen defense verdicts, and two more verdicts in UIM cases where the ultimate payout was zero (three if you count one with a defense verdict), making a claim for UIM benefits a gamble (there were five where the gamble paid off and the verdict exceeded the underlying coverage).

Most of the cases were for soft-tissue injuries and resulted in low verdicts.

There were quite a few rear-end collisions – sixteen – but vehicles pulling out from stop signs or side streets or otherwise into the path of other vehicles were as popular – also sixteen. In one case the vehicle was a child on a bicycle, and although the argument was the driver he struck was distracted by his job delivering papers, and the standard of care applied to the child was only that of a ten-year-old, the Kenton County jury found for the defense. Julick v. Coyle, No. 12-CI-1161, March 13, 2013.

Fewer cases involved trucks than might be expected, and with the notable exception above, of the six, four were defense verdicts.

Finally, in two interesting cases, two different riders on two different TARC buses in Louisville claimed to have been thrown to the floor as a result of the driver's poor driving skills, but neither was able to convince a Jefferson County jury, and the verdicts were for the defense in each case.

• Craig v. TARC, No. 10-CI-7578, October 16, 2013
• Snodgrass v. TARC, No. 07-CI-5089, January 15, 2014

1 Data from the Kentucky Trial Court Review, January-December 2013 and January-February 2014.
A few cases had some interesting results or issues. In what was described as a severe crash involving three teenagers, on May 7, 2013, a Floyd County jury awarded $6,233, $3,484, and $7,774, for their medical expenses. No future impairment or pain and suffering was included. This was not the only case where medical expenses were awarded (or a portion of the medical expenses was awarded), but the jury did not believe pain and suffering damages were appropriate.

- Curtis v. Grigsby, No. 12-CI-30, February 27, 2013, Perry
- Leport v. Allstate, No. 11-CI-234, April 10, 2013, Greenup
- Humphrey v. McCollum, No. 12-CI-394, October 14, 2013, McCracken
- Hall v. Muncy, No. 12-CI-510, December 3, 2013, Floyd

The lack of pain and suffering damages was not the only interesting point about Hall v. Muncy. In this case, the defendant slid on ice into the plaintiff, but did not contest liability for what appears to have been a sudden emergency.

Another defense appeared to be missing in Massey v. Perry, January 29, 2013, No. 11-CI-967, Laurel, where the plaintiff was evidently not wearing a seat belt, but no attempt to address this as a defense seems to have occurred at trial.

One interesting issue arose in Jefferson County, where two judges turned to the doctrine of additur, to remedy what they perceived to be incorrect (and inadequate) verdicts. In Hale v. Sayed, No. 10-CI-4245, April 17, 2013, a soft tissue injury from a rear-end collision yielded a verdict of some of the medical expenses incurred, but no other damages. The Jefferson County judge decided to add another few thousand for pain and suffering. In Drane v. Allstate, No. 12-CI-377, July 18, 2013, a different Jefferson County judge granted a new trial following an additur motion after discovering the jury had evidently misunderstood the instructions and unintentionally shorted the plaintiff by $30,000.

In another Jefferson County case, Treat v. Mehmadovic, No. 10-CI-6385, September 25, 2013, plaintiff received soft tissue injuries when defendant turned in front of her. The verdict totaled $19,663, including medical bills, lost wages, and $6,000 for pain and suffering. What was interesting is that the judge asked the parties to brief the issue whether there should be a PIP set off to the extent the medical bills were paid, or for the full $10,000.

And finally, in Duncan v. West American Insurance, No. 10-CI-6519, November 22, 2013, Jefferson, plaintiff claimed pain following a minor damage rear-end collision. His UIM carrier made the Coots election, but at trial was not permitted to argue it was a contractual dispute.