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Kentucky Law Survey: Insurance

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Insurance

BY RICHARD H. UNDERWOOD*

INTRODUCTION

Kentucky courts have recently decided a number of cases that have a significant impact on insurance law. Several decisions dealt with the assertion of rights at variance with contract provisions and the degree to which the law will recognize the reasonable expectations of the insured. The courts also considered novel questions concerning cancellation by substitution, the application and validity of various exclusions in homeowners and automobile liability policies, the application and validity of the escape clause in automobile liability policies, and the stacking of automobile liability coverages. This Survey will examine those questions, as well as the growing body of law relating to the application and construction of the Kentucky Motor Vehicle Reparations Act (MVRA).¹

I. THE CONTRACTUAL COMMITMENT

A. Rights at Variance with Contract Provisions

Insurance contracts often pose traps for the unwary. In the preface to a new student text on insurance, Professor John F. Dobbyn opines: “[C]ases in Insurance Law frequently read like a chapter out of Alice in Wonderland . . . [T]he contract (policy of insurance) is only one [factor] that work[s] to swing a decision either to the insured or the insurer.”²

A growing body of judicial opinions and legislation regulating the insurance industry reflects several underlying principles

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¹ This Survey uses the format followed in the two previous Surveys of Kentucky insurance law, Savage, Kentucky Law Survey—Insurance, 66 Ky. L.J. 631 (1977-78), and Straub, Kentucky Law Survey—Insurance, 68 Ky. L.J. 587 (1979-80).

² J. DOBBYN, INSURANCE LAW IN A NUTSHELL xix (1981).
regarding the assertion of rights at variance with policy provisions. These equitable principles turn the usual meaning of contract clauses into something quite unexpected, and the insured and insurer, like Alice, may find that things are not always as they seem. The first principle would deny an insurer unconscionable advantages resulting from the insurer's superior bargaining position. The second would honor the reasonable expectations of the applicant. These two principles are related to a third: redress ought to be provided to the insured for detrimental reliance on the action or inaction of the insurer. Several recent Kentucky cases are consistent with the application of these principles, although recognition of these doctrines has not always been candidly expressed.

In Anderson v. Zurich Insurance Co., the insured applied to Zurich, through an independent agent, for broad form insurance coverage for his construction equipment. Without the applicant's knowledge or consent, Zurich's underwriter changed the application to one for specific perils coverage, and a specific perils policy was issued. Two subsequent losses were rejected by Zurich as being outside the policy coverage, whereupon the insured filed an action to reform the policy to provide for the broader coverage requested in the original application.

The trial court granted reformation, but the Court of Appeals of Kentucky reversed and remanded, concluding that reformation could be granted only if there was a mutual mistake in integration. The Kentucky Supreme Court reversed, relying on Kentucky Revised Statutes (KRS) section 304.14-090 which statesin pertinent part:

(1) Any application for insurance in writing by the applicant shall be altered solely by the applicant or by his written consent . . . .

(3) An insurer issuing a policy upon an application which has been unlawfully altered by its officer, employe, or agent

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4 Id. at 342.
5 Id.
6 614 S.W.2d 246 (Ky. 1980).
7 Id. at 247.
shall not have available in any action arising out of such policy, any defense based upon the fact of such alteration, or as to any item which was so altered.

The Court in *Anderson* concluded that this statute stripped the insurer of any defense based upon the restricted specific perils coverage of the policy that was actually issued.\(^8\)

Whether the customer applies for insurance through a broker,\(^9\) a soliciting agent,\(^10\) or a general agent of the insurer, he or she ought to be permitted to expect that the policy that issues will conform to what was requested in the application, absent notice to the contrary. If the insurer is on notice of the applicant's desired coverage and deliberately or negligently issues a policy that differs from the one for which application was made, without notice to the insured, then the insurer should bear any loss attributable to a lack of coverage.\(^11\) Moreover, the insured's failure to read the policy should not preclude the remedy of reformation.\(^12\) Although there was no mutual mistake in *Anderson*,\(^13\) the denial of coverage on the facts of that case would have amounted to a constructive fraud. The Court did not express its holding in these terms, but reformation fulfilled the insured's reasonable expectations and redressed a loss that otherwise would have fallen on him due to his detrimental reliance. The insured in *Anderson* assumed, quite naturally, that the insurer would provide the requested coverage or notify him of the re-

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\(^8\) *Id.* One could argue that the statute was enacted for a more limited purpose: to eliminate the misrepresentation defense when the insurer's agent is responsible for false answers in the application.

\(^9\) A broker is the agent of the insured. In at least one case, a demand for reformation was denied on the ground that the broker's assurances of coverage could not be attributed to the insurer, and on the additional ground that the applicant is obliged to read the policy upon receipt. *Watson v. United States Fidelity and Guar. Co.*, 427 F.2d 1355 (9th Cir. 1970).

\(^10\) A soliciting agent does not have the power to bind coverage, and more than one court has refused to impute the errors or representations of such an agent to the insurer for the purpose of reformation in the absence of ratification. 13A J. *APPLEMAN, INSURANCE LAW AND PRACTICE* § 7609 n.25 (1976).


\(^12\) 13A J. *APPLEMAN, supra* note 10, at § 7610 n.51. *Contra id.* at § 7610 n.48.35.

\(^13\) The Court did not specifically address the issue of whether there was a mutual
duced coverage of the policy that issued. The Court relied on the language of KRS section 304.14-090 subsections (1) and (3) to reach an equitable result, but it could have decided the case on the broader grounds of detrimental reliance and reasonable expectations.

The same currents can be identified in *Continental Casualty Co. v. Smith.* In that case, Milton and Cora Smith operated a floral shop out of their residence. They applied for personal disability income protection under their trade association's group policy with Continental. They were induced to apply for the policy by advertisements and materials provided by Continental. No agent or salesperson called upon them. Cora applied for a $1,000 monthly benefit plan, and in so doing answered the following question in the negative: "Does the indemnity for loss of time herein applied for together with all other income protection policies you have or are applying for exceed 75% of your wage or salary?"

After the approval of the application, Cora suffered a disabling accident, and collected $1,000 per month for the next thirteen months, during which time Continental continued to accept premiums despite the policy's waiver of premium provision. More than a year after the accident, Continental demanded a return of all benefits previously paid on the ground that the benefits Cora had requested exceeded seventy-five percent of her wage or salary. No member of the family business was paid a wage or salary; instead, they lived from the income of the business, which was what they thought they had insured.

The Smiths brought an action against Continental demanding that the policy benefits be made current and continue for the duration of her disability. Although the jury agreed with the insurer that Cora's answer on the application was substantially untrue and that the insurer would not have accepted the application had Cora answered the question affirmatively, it nonetheless rejected the misrepresentation defense. The court of appeals

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14 *617 S.W.2d 48, 49 (Ky. Ct. App. 1980).*

affirmed a judgment for the insureds on the basis that the promotional material was ambiguous and induced the Smiths' reasonable belief that the income of the business was insured rather than Cora's individual wage or salary. The court of appeals concluded that the pamphlets and fliers supplied by Continental became part of the policy, stating: "To hold otherwise 'would be sustaining a [constructive] fraud that no court of conscience could sanction.'"\(^{17}\)

The court found support for its decision in earlier cases in which the insurer was estopped from making the misrepresentation defense when the insured, through ignorance or good faith, was misled by the company's agent into believing his or her answers were truthful.\(^{18}\) The court of appeals went further, however, and clearly recognized the insured's right at variance with the policy provisions by taking into account reasonable expectations and detrimental reliance upon marketing devices selected by the carrier.\(^{19}\)

Not every expectation of the insured will be fulfilled, however. In *Flowers v. Wells*,\(^{20}\) the insureds alleged that they had requested full coverage, although their agent testified later that they had asked for "the cheapest thing they could get by with."\(^{21}\)

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Misrepresentations, omissions and incorrect statements shall not prevent a recovery under the policy or contract unless either:

1. Fraudulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would . . . not have issued the policy . . .

\(^{16}\) Continental Cas. Co. v. Smith, 617 S.W.2d at 50. The court of appeals also properly rejected the insurer's argument that Kentucky's entire contract statute, KRS § 304.14-180 (1981), precluded reliance on the insurer's promotional materials. *Id.* Such statutes were enacted in many states in response to the device of incorporation by reference, which was used by some companies to include the insurer's bylaws (which the insured never saw) and other conditions in the policy of insurance. W. YOUNG, CASES AND MATERIALS ON INSURANCE 123 n.9, 264 (1971).

\(^{17}\) 617 S.W.2d at 51 (citing Southern Mut. Life Ins. Co. v. Montague, 2 S.W. 443 (Ky. 1887)).

\(^{18}\) Pennsylvania Life Ins. Co. v. McReynolds, 440 S.W.2d 275 (Ky. 1969); Sovereign Camp v. Alcock, 117 S.W.2d 938 (Ky. 1933).

\(^{19}\) Cf. Fritz v. Old Am. Ins. Co., 354 F. Supp. 514 (S.D. Tex. 1973) (illustrating how the use of the mail as a marketing device can affect the rights of the insurer and insured).

\(^{20}\) 602 S.W.2d 179 (Ky. Ct. App. 1980).

\(^{21}\) *Id.* at 180.
The insureds were injured in an automobile accident, and the responsible driver's insurance was insufficient to cover all their damages. They sued their own insurer, State Farm, claiming that the policy should have provided underinsured motorist coverage pursuant to their request for full coverage. To bolster their argument, they claimed that such coverage was mandatory under KRS section 304.39-320, which requires underinsured motorist coverage to be made "available upon request." In affirming a summary judgment for the insurer, the court of appeals concluded that underinsured motorist coverage is optional and need be furnished only upon request, and that a request for full coverage could not be construed as a request for such optional coverage.22

B. Cancellation by Substitution

The court of appeals addressed a novel question concerning the cancellation of a binder in Potomac Insurance Co. v. Motorist Mutual Insurance Co.23 According to the majority rule, the mere procuring of substitute insurance with an intent to replace an existing permanent policy, but without an intent to acquire additional insurance, does not cancel the existing policy.24 But what if the existing insurance was procured in the form of a binder which, by definition, is a temporary contract of insurance providing immediate coverage until a permanent policy can be obtained?

In Potomac, the insureds were partners in a sporting goods business. They obtained a builder's risk policy covering a new building during its construction. When the building was completed, they obtained a binder from Potomac insuring the building and its contents while they solicited bids for a permanent policy. Motorist Mutual's bid for a permanent policy was accepted, and an application for that policy was approved on December first. The building was destroyed by fire on December four-

22 Id.
23 598 S.W.2d 461 (Ky. Ct. App. 1979).
teenth, before the insureds were notified of Motorist Mutual's approval of their application. Motorist Mutual demanded that Potomac pay half of the loss, but Potomac balked, relying on the doctrine of cancellation by substitution. The trial court rejected the doctrine and entered a summary judgment for Motorist Mutual. The court of appeals reversed, noting that the owners did not intend to have duplicate coverage, and the binder, a temporary contract of insurance, was intended as a stop-gap measure. Therefore, the court concluded that the doctrine of cancellation by substitution applied in this narrow class of cases. The binder expired upon the issuance of the permanent policy.

C. Policy Exclusions

1. Intentional Acts

Liability and homeowners frequently contain an exclusion which provides that the policy will not apply to cover bodily injury or property damage which is either expected or intended from the standpoint of the insured. Some courts have labored mightily to interpret these exclusions in such a way as to make the policy proceeds available to a third party claimant, and decisions interpreting the exclusion are of considerable importance to the plaintiff's bar. An example of a strict interpretation of such clauses includes a recent Florida case which arose from a family quarrel in which X, a participant in the quarrel, intended to shoot Y, but hit a passerby. The court construed the provision of X's homeowners policy, which excluded coverage for bodily injuries that were either expected or intended by the insured, as applying only where the wrongful act is “intentionally

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26 Id. The court did not discuss the niceties of whether the permanent policy had issued and become effective prior to policy delivery, and Motorist Mutual appears to have conceded the point. Accordingly, the court found some additional support for its position in KRS § 304.14-220(2) (1981), which provides: “No binder shall be valid beyond the insurance of the policy with respect to which it was given, or beyond ninety (90) days from its effective date, whichever period is the shorter.”
27 See generally Bardenwerper, Intentional Act an “Occurrence” Under the CGL Policy, 18 FOR THE DEFENSE 166 (1977).
directed specifically toward the person injured by such act."29
Another example of the minority approach involves an Ohio case.30 An insured driver saw her boyfriend standing on the corner lost in conversation with another woman. The insured attempted to run down her rival but instead struck a bystander. Her insurer was compelled to compensate the victim because the insured did not have the specific intent to cause the particular injury that was suffered.31

The Court of Appeals of Kentucky decision in Willis v. Hamilton Mutual Insurance Co.32 suggests that a different interpretation of exclusionary clauses will be made if a similar case arises in the Commonwealth. In that case, the court rejected the minority, or specific intent rule, and adopted the majority approach which excludes coverage if the insured intended the act and it caused some kind of bodily injury. The court ruled that "[i]ntent may be actual or inferred by the nature of the act and the accompanying reasonable foreseeability of harm,"33 and held that it is "immaterial that the actual harm caused is of a different character or magnitude than that intended."34 The case did not deal with an unintended victim, but the application of the majority rule adopted in Willis would bar recovery in such a case. Although the specific intent rule has the virtue of insuring that tort victims will be compensated from some source, the construction of the exclusionary clause adopted in Willis does more justice to the language and purpose of the standard exclusion.

2. The Household Exclusion

A generation of personal injury lawyers has been vexed by the household exclusion in the standard automobile liability policy. This exclusion usually takes the following form: "This insurance does not apply under (i) Coverage A, to bodily injury to the insured or any member of the family of the insured residing in

29 Id. at 159.
31 Id. at 696.
32 614 S.W.2d 251 (Ky. Ct. App.), discretionary rev. denied, 617 S.W.2d 393 (Ky. 1981).
33 Id. at 252.
34 Id.
It is often said that the purpose of the household exclusion is to protect the insurer from the moral hazard of collusion between members of the same household, but it has led to some surprising results when coupled with the standard omnibus clause. Such clauses typically define the insured as including: "(1) the named insured . . . [and] (4) any other person while using the owned automobile, provided the operation and the actual use of such automobile are with the permission of the named insured . . . ." The combination of these clauses poses an intriguing question when the named insured is a passenger in his or her own vehicle and is injured due to the negligence of an unrelated omnibus insured: May the named insured recover from his or her own insurer?

The Court of Appeals of Kentucky applied the household exclusion in Withers v. Meridian Mutual Insurance Co., a case in which both the named insured and her permittee, the omnibus insured, were killed and therefore hardly in a position to participate in collusive litigation. The court was persuaded by the insurer's arguments that the household exclusion serves legitimate purposes aside from protecting the insurer from collusive suits between members of the same household. First, if the exclusion were not applied, the insurer would find itself defending the named insured's permittee under the omnibus clause while resisting the named insured's claim, although the company and the named insured had agreed that she would have no such claim. Second, an automobile liability policy is intended to provide the insured with protection from the claims of third parties.

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35 State Farm Mut. Auto. Ins. Co. v. Xaphes, 384 F.2d 640, 641 (2d Cir. 1967) (citing the household exclusion clause in a State Farm policy).
37 State Farm Mut. Auto. Ins. Co. v. Xaphes, 384 F.2d at 641 (citing an omnibus clause in a State Farm policy).
38 626 S.W.2d 214 (Ky. Ct. App. 1980) discretionary rev. denied, 609 S.W.2d 366 (Ky. 1980).
39 Id. at 215.
40 Id.
41 Id.
low the named insured to recover from its liability insurer notwithstanding the household exclusion would convert the automobile liability policy into a first party policy for accident and death benefits.\textsuperscript{42}

The \textit{Withers} case is within the mainstream of current decisions,\textsuperscript{43} but it did not deal with the potential conflict between the household exclusion and the Commonwealth's compulsory insurance law, the Kentucky Motor Vehicle Reparations Act (MVRA).\textsuperscript{44} The issue was ultimately presented to the Kentucky Supreme Court in \textit{Bishop v. Allstate Insurance Co.}\textsuperscript{46} Ruth Ann Bishop was injured in a single-car accident in which she was the sole passenger in an automobile driven by her husband. At the time of the accident, Mr. Bishop had an automobile liability policy with Allstate that contained a household exclusion. In an action by the Bishops against Allstate, the trial court granted the insurer's motion for judgment on the pleadings based upon the exclusion.

The court of appeals affirmed the trial court and rejected the Bishops' contention that the exclusion conflicted with the mandatory insurance provisions of the MVRA. The court reasoned that (1) the exclusion did not affect the availability of basic reparation benefits (BRB); (2) the effect and validity of the household exclusion were known to the legislature when it adopted the MVRA in 1974; and (3) the commissioner of insurance had approved the form of contract pursuant to KRS section 304.39-150.\textsuperscript{48} The Supreme Court reversed. The late Justice Lukowsky, writing for the Court, reasoned that the MVRA, by its very terms, established a system of compulsory insurance requiring owners, registrants and operators of motor vehicles to procure insurance with a minimum coverage for tort liability of $10,000 per person and $20,000 per accident for personal injuries, in addition to BRB.\textsuperscript{47} The Court also stated that both the Kentucky legislature and the drafters of the Uniform Motor

\textsuperscript{42} Id. at 216-17.
\textsuperscript{43} See 12 COUCH ON INSURANCE §§ 45:484, 45:486 (2d ed. 1984).
\textsuperscript{44} KRS §§ 304.39-010 to -340 (1981).
\textsuperscript{45} 623 S.W.2d 865 (Ky. 1981).
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 865-66.
Vehicle Accident Reparations Act, upon which the MVRA was patterned, knew how to provide for exceptions to the minimum coverages relative to BRB and tort liability. Since the legislature did not explicitly provide for exceptions, the Court presumed that it did not intend that “the minimum tort liability coverage be diluted or eliminated by any exceptions or exclusions.” When the legislature set forth the policy behind the MVRA and its minimum requirements, it specified, and therefore permitted, no exclusions from the minimum coverage. The Court’s earlier cases upholding the validity of a household exclusion were overruled by Bishop to the extent that those decisions allowed the exclusion to eliminate the minimum coverage required by the MVRA.

D. The Non-Standard Escape Clause

Insurers have attempted to avoid the moral hazard associated with overinsurance and cumulative coverages by inserting various forms of “other insurance” clauses in their policies. These clauses eliminate or reduce the coverage otherwise provided by the policy if the insured has obtained another policy on the same risk, or if another policy applies for some other reason. Frequently, the “other insurance” clauses of two policies will conflict, presenting the trial judge with a circuitous question of contract construction.

In Royal-Globe Insurance Co. v. Safeco Insurance Co., the

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48 Id. at 866. The Kentucky legislature did not adopt sections 12, 14 and 15 of the uniform act which provided that BRB may be subject to certain exclusions. Moreover, neither the uniform act nor the MVRA includes provisions permitting exclusions to the minimum tort liability. Id. In Couty v. Kentucky Farm Bureau Mut. Ins. Co., 608 S.W.2d 370 (Ky. 1980), the Court held that the legislature did not allow for any exceptions to the minimum BRB coverage. See the text accompanying notes 83-89 infra for a discussion of Couty.
50 Id. Justice Lukowsky also relied upon a Michigan decision, Allstate Ins. Co. v. DeFrain, 265 N.W.2d 392 (Mich. 1978).
51 Such clauses come in one of two forms, the “excess clause” and the “escape clause.” A typical excess clause provides: “the insurance . . . shall be excess over other collectible insurance.” A typical escape clause provides: “but only if no other valid and collectible automobile liability insurance, either primary or excess . . . is available to such person.” State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co., 261 N.E.2d 128, 129 (Ohio 1970) (citing a State Farm policy).
52 560 S.W.2d 22 (Ky. Ct. App. 1977).
insured had a policy with Safeco insuring her "owned automobile" and any "temporary substitute automobile." The policy contained an excess clause that made the policy coverage into excess insurance with respect to any temporary substitute automobile. The owner's car was damaged in an accident, and she took it to a garageman, who provided her with a temporary substitute vehicle insured under a garage liability policy with Royal-Globe. The garageman procured the insurance policy in order to comply with KRS section 190.033, which provides:

The bond or policy shall provide public liability and property damage coverage for the operation of any vehicle owned or being offered for sale by the said dealer or wholesaler when being operated by the owner or seller, his agents, servants, employees, prospective customers or other persons. The amount of said insurance shall be ten thousand dollars ($10,000) for bodily injury or death of any one person; and twenty thousand dollars ($20,000) for bodily injury or death in any one accident; and five thousand dollars ($5,000) property damage.

The Royal-Globe policy contained an escape clause that provided: "If there is other valid and collectible insurance whether primary, excess or contingent, available to the garage customer and the limits of such insurance are sufficient to pay damages up to the amount of the applicable financial responsibility limit, no damages are collectible under this policy."53

The owner's temporary substitute automobile was involved in an accident while driven by her permittee, Wickly, an omnibus insured under both the Safeco and Royal-Globe policies.54 The two insurers litigated their respective liabilities in a declaratory judgment action, in which Safeco argued that the escape clause was in conflict with the minimum requirements of KRS section 190.033. The Court of Appeals of Kentucky upheld the validity of the escape clause, giving it priority over the excess clause in the Safeco policy. The court reasoned that the compulsory garage liability insurance provision in KRS section 190.033 was intended to protect members of the public, not insurers, and

53 Id. at 24 (emphasis added).
54 See the text accompanying note 37 supra for an example of an omnibus clause.
noted that "[w]hen the controversy is between two insurers, the liability for a loss should be determined by the terms and provisions of the respective policies without regard to the rights injured third parties might assert under a compulsory insurance law." The opinion did not speak directly to the validity of the escape clause when the dispute was between an insurance company and a member of the public—the tort claimant who might otherwise suffer injury at the hands of an uninsured motorist.

The latter question was presented in Universal Underwriters Insurance Co. v. Veljkovic. Veljkovic was driving a temporary substitute automobile supplied by White Chevrolet-Pontiac when she was involved in a collision with a second vehicle occupied by Owens. Owens was killed, and his administratrix brought a wrongful death action against Veljkovic. Veljkovic had a policy with Kentucky Farm Bureau which provided only excess coverage in the case of an accident involving a temporary substitute automobile. White Chevrolet-Pontiac’s garage liability policy with Universal Underwriters provided umbrella coverage of $1 million, but it contained a non-standard escape clause which included among “[p]ersons [i]nsured” “any other person while actually using an AUTOMOBILE covered by this coverage part with the permission of the NAMED INSURED, provided, that such person (a) has no automobile liability insurance of his (her) own, either primary or excess.”

Both insurers refused to defend Veljkovic and she filed a third-party complaint against them in which she sought to establish their duty to defend and indemnify her for any judgment in the Owens case. The trial court held that the escape clause in the garage’s policy with Universal violated the public policy reflected in KRS section 190.033 and required Universal to provide primary coverage under the $1 million umbrella policy. The court of appeals upheld this portion of the trial court’s judgment and distinguished the case from Royal-Globe on the ground that Royal-Globe only involved a suit between rival insurance com-

56 613 S.W.2d 426 (Ky. Ct. App. 1980).
On the other hand, it reversed the judgment of the trial court with respect to the amount of coverage Universal was obligated to provide. The public policy expressed in the statutory requirement of a minimum coverage of $10,000 per person invalidated the escape clause only to the extent that Universal would be required to provide the minimum coverage.

E. Stacking

In Butler v. Robinette, the Kentucky Supreme Court ruled on the validity of a policy provision prohibiting stacking of liability insurance policies. The facts of the case were not in dispute. Flossie Robinette was injured when her car was struck by a 1965 Chevrolet owned by Mason Butler and driven by his son, Donald Butler. Donald's negligence was the sole cause of the accident. What complicated the case was the fact that four separate policies were arguably involved. Donald owned two cars that were not involved in the accident. Both were insured with Kentucky Farm Bureau, but under separate policies for which Donald paid separate premiums. Each policy had a $10,000 limit per person. Mason Butler had insured the automobile that was involved in the accident, as well as his pickup, with separate policies identical to Donald's, for which Mason paid separate premiums. Both of Mason's policies were also with Kentucky Farm Bureau. Kentucky Farm Bureau agreed to pay $10,000 on behalf of Mason Butler under the policy covering the 1965 Chevrolet, $10,000 under Donald's policy on one of his automobiles, and an additional $10,000 on the other two policies if and only if it was judicially determined that the coverage of those policies could be stacked or pyramided. Each policy contained the following provision:

If coverage under more than one policy issued by the Company is applicable to any one accident for the benefit of an insured, the total liability of the Company, under this Division and like Divisions of other policies with this Company, shall not be increased beyond the limits of liability stated in the declaration

57 Id. at 426 n.1.
58 Id.
59 614 S.W.2d 944 (Ky. 1981).
of the policy of this Company which affords the maximum applicable limits of liability, irrespective of the number of policies in this Company which may be applicable to such loss.

The trial court determined that the plaintiff could not recover under the terms of Mason Butler's policy covering the pick-up, but permitted the stacking of the other three policies. The court of appeals affirmed, reasoning that policy provisions prohibiting stacking were in conflict with the Financial Responsibility Law in effect at the time of the accident. The Kentucky Supreme Court reversed, holding that the court of appeals had erred in construing the law as mandating that each policy on each vehicle provide a minimum amount of insurance. The Court noted that sections (9) and (10) of the statute permitted an insurer to limit its liability and prorate its coverage, as long as the total amount from all policies equalled the minimum amount of insurance required by the statute. This now repealed statute is in sharp contrast to KRS section 304.20-020 (formerly KRS section 304.682(1)) which requires that each policy provide minimum benefits and therefore mandates the stacking of uninsured motorist benefits. Stacking may otherwise be prohibited by an exclusion in the automobile liability policy.

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The owner's policy of liability insurance:
(a) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and
(b) Shall insure the person named therein and any other person, as insured, using any such motor vehicle with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: Ten thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars because of injury to or destruction of property of others in any one accident.
61 Butler v. Robinette, 614 S.W.2d at 947.
62 See, e.g., Meridian Mut. Ins. Co. v. Siddons, 451 S.W.2d 831 (Ky. 1970), noted in Savage, supra note 1, at 632, and Straub, supra note 1, at 597. But see State Farm Fire & Cas. Co. v. Short, 603 S.W.2d 496 (Ky. Ct. App. 1980) (where insured was issued a policy covering two vehicles, but the policy limited the insurer's liability for uninsured motorists
II. MOTOR VEHICLE REPARATIONS ACT

Cases decided during the survey year relating to the interpretation and construction of the Motor Vehicle Reparations Act will be analyzed by organizing them according to their subject matter.

A. Application—Operation or Use

A 1976 survey of the MVRA stated that one of the most confusing aspects of the statute is whether a minor injured as a pedestrian will be subject to the limitation of tort rights set forth in KRS section 304.39-060(1), which provides: "Any person who registers, operates, maintains or uses a motor vehicle on the public roadways of this Commonwealth shall, as a condition of such registration . . . be deemed to have accepted [the limitation of his or her tort rights]." A child does not own, operate, or maintain a motor vehicle. On the other hand, KRS section 304.39-020(15) formerly defined "user" as "a person who is a basic reparation insured or would be a basic reparation insured if such person had not rejected the limitations upon his tort rights as provided in KRS section 304.39-060(4)." On account of this definition, the authors of the survey suggested that a minor would be a user whose tort rights would be limited by the statute if the minor were a basic reparation insured on his parents' policy or if the parents failed to reject the limitation on tort rights pursuant to KRS section 304.39-060(4).

This reading of the statute was adopted by the Court of Appeals of Kentucky in Lawrence v. Risen. In that case, Risen's automobile struck a fifteen year old minor who was a passenger on a bicycle. The victim's injuries were insufficient to satisfy the threshold requirements of the MVRA, and when suit was filed, coverage to $10,000 regardless of the number of automobiles insured under the policy, there could be no stacking of $10,000 per vehicle.

66 Id. at 495. The definition of a basic reparation insured includes minors in the custody of the named insured. KRS § 304.39-020(3) (1981).
67 See the text accompanying notes 130-53 infra for a discussion of the threshold re-
the defendant moved for summary judgment. The plaintiff alleged that he was not a user and that his tort rights could not be limited. The court of appeals affirmed a summary judgment for the defendant. Since the minor’s parents failed to reject no-fault limitations, his tort rights were barred. Citing the language of KRS section 304.39-060(4), the court opined that the plaintiff had been presented with the opportunity to establish that he was a non-user by virtue of his parents being uninsured motorists. The plaintiff failed to present such evidence in response to the defendant’s motion for summary judgment, and could not be heard to suggest for the first time on appeal that a material issue of fact existed concerning his status as a user.

The definition of user was amended in 1978 to include any “person who resides in a household in which any person owns or maintains a motor vehicle.” This amendment should dispel any confusion regarding the status of minors who are injured as pedestrians.

B. Coordination of Benefits

1. Survivor’s Benefits

The MVRA provides a decedent’s survivors with benefits for any compensation (survivor’s economic loss) or services (survivor’s replacement services loss) the decedent would have provided them had he or she not died. In United States Fidelity and Guaranty Co. v. McEnroe, the Kentucky Supreme Court ruled

68 A rejection on behalf of one under a legal disability may be filed by a natural parent or guardian within six months of the date upon which the statute becomes applicable to him or her. KRS § 304.39-060(4) (1981).
69 Lawrence v. Risen, 598 S.W.2d at 475.
70 Id. Under the definition of user in KRS § 304.39-060(4), an uninsured motorist is a nonuser, exempt from the MVRA. Dixon v. Cowles, 562 S.W.2d 639 (Ky. Ct. App. 1978).
71 Lawrence v. Risen, 598 S.W.2d at 475.
76 610 S.W.2d 593 (Ky. 1980).
that the administrator of an estate is not the real party in interest to seek survivor's benefits under the MVRA. If an injury causes death, payments made pursuant to the Act are limited to "survivor's economic loss" and "survivor's replacement service loss," and are payable only to those persons identified in KRS section 411.130, which does not include the decedent's estate.  

In Howard v. Hamilton, 78 the decedent's wife was appointed administratrix of his estate. She contacted her husband's insurer, Kentucky Farm Bureau, concerning the accident in which her husband had been killed. At that time, it was agreed that she would receive $1,000 for funeral expenses under the policy. She also was paid $4,000 as a lump sum settlement for claimed survivor's economic loss and replacement services loss. Her children then brought an action demanding that they receive one-half of the sum she received. The court of appeals held that the decedent's wife had dealt with the insurance company as an individual survivor rather than as a representative of other survivors. 79 Accordingly, she was entitled to keep the $4,000. That payment did not prevent the children from demonstrating that they also had suffered a survivor's economic loss or replacement services loss, which would be paid from the $6,000 remaining in the insurer's fund.

It must be remembered that the MVRA does not provide a $10,000 accidental death benefit payable to the survivors. The particular survivor claiming the loss must have suffered an actual and compensable loss. The difference between benefits recoverable under the MVRA and damages recoverable under Kentucky's wrongful death statute is illustrated by Aetna Insurance Co. v. Thompson. 80 The deceased was a widower without children at the time of his death at age eighty. His only heirs were an elderly brother and sister who sought recovery of $7,688 for survivor's economic losses. The figure was computed by multiplying

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77 Id. at 594. See also Gregory v. Allstate Ins. Co., 618 S.W.2d 582 (Ky. Ct. App. 1981) (benefits for work loss are not recoverable in a death case, and a personal representative cannot prosecute an action for such benefits).
79 Id. at 347.
the deceased's social security benefits by his life expectancy. In other words, the demand for relief was based upon the damages sustained by the decedent's estate as if the action had been brought pursuant to the wrongful death statute.81

The court of appeals rejected this measure of recovery. The court held that in the absence of evidence that the decedent contributed things of economic value to his brother and sister during his lifetime (or would have done so), it could not be said that they had lost any compensation as a result of his death since his death did not cause them any survivor's economic loss.82

Nonetheless, recovery for survivor's economic losses and survivor's replacement services losses is not limited to losses already accrued. Nor is recovery limited to expenses which the survivor has actually paid or become obligated to pay. In Couty v. Kentucky Farm Bureau Mutual Insurance Co.,83 the Kentucky Supreme Court held that a survivor may recover not only expenses the survivor had actually paid, but also an amount for the loss of future services which it was reasonably probable the decedent would have rendered to the survivor.84 The Court noted that the Kentucky legislature had omitted the words "survivor's economic loss" and "survivor's replacement services loss" when it adopted section 23(a) of the Uniform Motor Vehicle Accident Reparations Act, which provides:

Basic and added reparation benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as work loss, replacement services loss, survivor's economic loss, survivor's replacement services loss, or allowable expense is incurred. . . .

Commissioner's Comment:

This Section describes what is intended to be customary practice—paying basic reparation benefits monthly as loss ac-

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81 KRS § 411.130 (1981). Recovery under the wrongful death statute is based upon the amount the deceased would have accumulated during his or her lifetime "but for" his or her death. Although the action was brought by the decedent's executrix in Thompson, the insurance company did not press its challenge to her right to bring the action for the benefit of the survivors on the appeal.

82 Aetna Ins. Co. v. Thompson, 27 KLS 9, at 11.

83 608 S.W.2d 370 (Ky. 1980).

84 Id.
crues—contrasted to the customary practice of paying tort claims in lump sum settlements or judgments.85

The Court concluded that the effect of these omissions was to exclude such losses from the practice of paying benefits only as they accrue each month.86 Put another way, the legislature intended that death benefits be paid in a lump sum settlement or judgment.

Under the MVRA, survivor’s economic loss and survivor’s replacement services loss accrue to the survivor only if a net loss is established. Social security or worker’s compensation benefits are subtracted in calculating such net loss.87 For example, in American States Insurance Co. v. Colville,88 no net survivor’s economic loss accrued to the deceased’s infant son when the son’s economic loss of eighty dollars per month child support was more than offset by social security benefits of $421 per month. The court also ruled that in disputes involving a determination of survivor’s economic loss, the jury should determine gross economic loss, and the trial court should then determine the net economic loss by subtracting any social security or worker’s compensation benefits from that amount.89

2. Limitations

The MVRA sets forth a number of time limitations affecting actions brought under the no-fault act. If no BRB payments have yet been made for a personal injury, the injured person has two years to file an action.90 The statute is triggered at the time the loss is sustained or when the injured person knows or should have known that the injury was caused by the accident, but in no event more than four years after the accident.91 If a BRB payment already has been made, an action for additional benefits

89 Id.
91 Id.
must be brought within two years of the last payment. If neither the decedent nor the survivor has received BRB, an action for survivor’s benefits must be filed within one year after death or four years after the accident, whichever comes first. If either the decedent or survivor has received BRB, any action for additional benefits must be filed within two years of the last payment. If the decedent received BRB prior to his or her death, but the survivor has received no BRB, the survivor’s action must be filed within one year of the death or four years after the last payment of BRB to the decedent, whichever comes first.

However, if a claimant has been injured in an automobile accident which would otherwise be subject to no-fault, but has damages that exceed the thresholds of KRS section 304.39-060(2), thereby making tort recovery possible, the claimant will have two years to commence his or her action pursuant to KRS section 304.39-230(6). That statute provides: “An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.” Absent this statute, the injured party’s claim would be governed by the one year statute of limitations provided by KRS section 413.140(1) which covers general tort actions.

In 
*Everson v. Miller,* the plaintiff was injured in an automobile accident that occurred on May 20, 1975. The complaint was filed sixteen months later. The trial court dismissed the complaint pursuant to the general tort one year statute of limitations set forth in KRS section 413.140. On appeal, the plaintiff-appellant contended that KRS section 304.39-230(6), which had come into effect July 1, 1975, had extended his filing deadline to May 21, 1977. The Court of Appeals of Kentucky held that the plain-

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92 *Id.*
94 *Id.*
95 *Id.*
tiff was not entitled to claim benefits under the no-fault statute since it applied prospectively. The plaintiff could not claim the benefit of the statute of limitations contained in the MVRA if he could not claim any other benefit under the MVRA. Moreover, the court held that KRS section 304.39-230(6) did not repeal the general statute of limitations for tort actions. The court stated that the statute only abrogated the one year period of limitations for personal injuries sustained in automobile accidents which would be subject to no-fault were it not for KRS section 304.39-060.

Time limitations also were at issue in Gray v. State Farm Mutual Automobile Insurance Co. The court of appeals addressed the question of whether the two year statute of limitations in KRS section 304.39-230 subsections (1) and (6) applies to a basic reparations obligor who paid BRB, but who failed to commence an action to recoup such payments within two years from the date of its last payment. In a subrogation action brought by State Farm, Gray and her insurance company, Kentucky Farm Bureau, had been adjudged liable for BRB in the amount of $9,640.41. This amount had been paid by State Farm to the injured party. The accident occurred on December 18, 1975. The injured party filed the original tort action within two years of the accident, but State Farm did not intervene until more than two years had elapsed from the date of the accident and from the date it had made its last BRB payment.

The court refused to apply the two year period of limitations to bar State Farm's claim for subrogation. The court noted that KRS section 304.39-070(2) provides that a reparation obligor is subrogated to all of the rights of the injured party to the extent of its obligation. In addition, a reparation obligor may assert a claim for benefits paid by joining as a party in any action com-

98 Id. at 154.
99 Id. at 155.
100 Id.
101 See Note, supra note 63, at 510 (raising, but not answering, this question).
102 605 S.W.2d 775 (Ky. Ct. App. 1980).
103 As the secured person, Gray could not be liable for subrogation, but failed to raise the issue on appeal. See KRS § 304.39-070(2) (1981).
104 Gray v. State Farm Auto. Ins. Co., 605 S.W.2d at 776.
menced by the injured party or by seeking reimbursement pursuant to KRS section 304.39-030 within sixty days after the claim was presented to the reparations obligor of the secured tort-feasor. Because the statute is silent as to the time within which the reparations obligor must join in the action as a party, the court of appeals ruled that the subrogated insurer may do so at any time prior to judgment, so long as the intervention occurs within the five year period set forth in KRS section 413.120(2).

3. Interest and Attorney Fees

Several provisions of the MVRA encourage the insurer to make prompt payment of BRB. Specifically, payments are overdue if not paid within thirty days after the reparations obligor receives reasonable proof of the fact and amount of loss realized. Overdue payments bear interest at twelve percent per annum, and if the obligor's delay was without reasonable foundation, the rate of interest is increased to eighteen percent per annum. In addition to these penalties, a court may award the claimant a reasonable attorney's fee if overdue benefits are recovered after a denial or delay without a reasonable foundation.

In Automobile Club Insurance Co. v. Lainhart, the court of appeals held that eighteen percent interest and attorney fees may not be recovered unless the reparations obligee has actually provided reasonable proof of loss. A mere offer to furnish proof of loss, if requested, was held not to satisfy the obligee's burden, and the proof of loss requirement is not waived by the obligor's denial of the claim. In addition, the court held that the assertion of a legitimate and bona fide defense by the reparations obligor constitutes a reasonable foundation for delay, although the case is ultimately decided against the obligor.

In contrast to Lainhart, both an eighteen percent penalty

105 Id.
106 Id.
110 609 S.W.2d 692 (Ky. Ct. App. 1980).
111 Id. at 694.
112 Id. at 695.
and attorney fees were awarded to the reparations obligee in *Kentucky Farm Bureau Mutual Insurance Co. v. Roberts*\textsuperscript{113} after the reparations obligor delayed processing a claim because certain medical reports were not returned to the insurer. The obligor had received copies of all outstanding physicians' bills as well as a complete medical authorization form. The court held that the injured party had fulfilled his obligation to furnish any medical reports and that the duty to search out additional reports or have them prepared fell on the insurer.\textsuperscript{114}

### 4. Subrogation

In *Progressive Casualty Insurance Co. v. Kidd*,\textsuperscript{115} the Kentucky Supreme Court ruled that if a reparations obligor fails to assert its claim for subrogation by joining as a party in an action commenced by the injured party or fails to seek reimbursement pursuant to KRS section 304.39-030 sixty days after the claim has been presented to the reparation obligor of the secured person, then it may not otherwise recover its BRB payments by way of equitable subrogation or any judicial policy against double recovery. Ordinarily, the reparations obligor will intervene in the injured party's action, and damages may be awarded for benefits already paid by the intervenor-insurer to the injured party as BRB. However, the Court in *Kidd* held that the insurer is the real party in interest and the only party that may be awarded such damages.\textsuperscript{116} If, as in *Kidd*, the insurer does not intervene or otherwise prosecute its claim for subrogation, its rights are not reassigned to the injured party. Nevertheless, in *Kidd* the injured party was awarded a double recovery, and the Supreme Court "reluctantly" held that the injured party could keep it.\textsuperscript{117}

Is the requirement that the reparation obligor join in an action commenced by the injured party satisfied if a reparations obligor is joined as a party defendant and thereafter participates in the suit? The Supreme Court answered this question in the af-

\textsuperscript{113} 603 S.W.2d 498 (Ky. Ct. App. 1980).
\textsuperscript{114} *Id.* at 500.
\textsuperscript{115} 602 S.W.2d 416 (Ky. 1980).
\textsuperscript{116} *Id.* at 418.
\textsuperscript{117} *Id.* at 417. Cf. Hargett v. Dodson, 597 S.W.2d 151 (Ky. Ct. App. 1979).
firmative in *State Farm Mutual Automobile Insurance Co. v. Waldeck.* In that case, Emma and James Waldeck were injured in an accident in January, 1976. Their automobile was insured by State Farm, which paid Emma $10,000 in BRB and $1,440 for damages to her automobile. The company paid James $1,677.23 in BRB. The Waldecks then sued the tort-feasor, Frozen Food Express, Inc., which was insured by Excalibur Insurance Company. The case was settled prior to trial. Excalibur issued two checks as part of the settlement—one for $1,677.23 payable to State Farm, James Waldeck and the Waldecks’ counsel. Another check was made payable to State Farm, Emma Waldeck and the same attorney for $11,550. State Farm refused to endorse the checks, claiming that it was entitled to all of the proceeds of the checks as reimbursement for amounts it had paid the Waldecks.

The Waldecks moved the trial court to restore their action to the docket and added State Farm as a defendant so that the court could adjudicate the respective rights of the parties to the checks. State Farm answered the Waldecks’ amended complaint and filed a counterclaim for the total of the two checks. The trial judge awarded the Waldecks’ counsel one-third of the total with accrued interest as attorney fees. The Waldecks received the remainder, less an amount equal to the payment State Farm had made for Emma’s property damage.

The court of appeals reversed that part of the judgment awarding attorney fees, but affirmed the trial court’s refusal to reimburse State Farm for its BRB payments on the ground that State Farm had not asserted its right to subrogation by one of the two exclusive methods provided in KRS section 304.39-070(3). The Supreme Court reversed, awarding State Farm the entire amount of the two Excalibur checks, with accrued interest. This equaled State Farm’s payments to the Waldecks for BRB and property damage. Although the court of appeals correctly held that KRS section 304.39-070(3) ordinarily establishes the exclusive procedural means by which the reparations obligor can recover BRB previously paid to an injured person from the reparations obligor of a secured person, the Court concluded that it

118 619 S.W.2d 494 (Ky. 1981).
would be wasted effort to require State Farm to intervene in an action in which it already was a party. 119 By “joining” and participating in the action, State Farm satisfied the procedural requirements of the statute. 120

In Fireman’s Fund Insurance Co. v. Bennett, 121 the court of appeals considered the question of whether an insurance carrier which had paid BRB has a right to recover its payments from the tort-feasor in an action for indemnity independent of its right of subrogation under KRS section 304.39-070. The case arose from a two-car accident involving Floyd Bennett and Lillian Bennett. 122 Floyd’s liability carrier, Fireman’s Fund, paid him more than $9,000 in BRB. He sued Lillian, who had a $10,000 liability limit on a policy with Government Employees Insurance Company. Although Floyd’s claims exceeded these policy limits, he settled the claim with Lillian and Government Employees for $10,000. Prior to settlement, Fireman’s Fund had intervened to assert its subrogation rights. Its claim was dismissed by the trial court and the court of appeals affirmed based upon KRS section 304.39-070 subsections (3) and (4) and KRS section 304.39-140(3).

These provisions limit subrogation recovery to the amount of liability insurance coverage available and also give the injured party priority to the policy proceeds to the extent that his or her injuries were not compensated by BRB. The court of appeals held that the basic reparations obligor could not frustrate settlement by demanding that the issue of damages be submitted to a jury solely to preserve the obligor’s right to subrogation. 123 The court also rejected the contention of Fireman’s Fund that it should be allowed to recover its reparations payments by way of

119 Id. at 495.
120 Id. The court distinguished Progressive Cas. Ins. Co. v. Kidd, 602 S.W.2d 416, where the insurer sought to recover BRB in a declaratory judgment action separate and distinct from the one commenced by the injured person, and Smith v. Earp, 449 F. Supp. 503 (W.D. Ky. 1978), where the insurance company entered into a settlement agreement with the parties to the tort suit providing for reimbursement of any final award. 619 S.W.2d at 495.
122 Lillian Bennett was married to Lawrence Bennett. Id. Their relationship with Floyd, if any, was not noted in the opinion.
123 Id.
an action for indemnity, free of the limitations on subrogation contained in the MVRA. The court held that the purpose of the MVRA was to provide speedy settlement of claims where damages do not exceed the threshold. The indemnity theory advanced by Fireman's Fund, the court noted, would open the door to an indemnity claim for every BRB payment caused by the negligence of a third party, whether or not the threshold was exceeded. This possibility convinced the court that the method of subrogation provided for in the MVRA should be exclusive.

Attorney fees in a subrogation action was the subject in Meridian Mutual Insurance Co. v. Walker. Walker, the injured party, collected BRB from Meridian in the amount of $6,037.76. She then pursued an action against the tortfeasor, having established the threshold figure required under the MVRA. Meridian intervened and sought subrogation for the $6,037.76 it had previously paid Walker. The trial court found that the involvement of counsel for Meridian was so limited that any fee for collecting the subrogated amount should be paid to Walker's counsel. The court of appeals noted that a reasonable attorney fee is to be granted to "[a]n attorney representing a secured person" in such an action, but agreed with the trial court that "representation" suggests some participation that influences the opinion of the lower court. Meridian's counsel had not even appeared at the hearing on his own motion for a fee award. Accordingly, the fee award to Walker's counsel was affirmed.

C. Threshold

It has been suggested that the threshold requirements of KRS section 304.39-060(2)(b) are often ignored by plaintiff's counsel

124 Id.
125 Id.
127 602 S.W.2d 181 (Ky. Ct. App. 1980).
128 See the text accompanying notes 130-53 infra for a discussion of the threshold requirements which, if met, permit a tort action.
130 The statute exempts a tort-feasor from suit to the extent BRB is available to the injured party, as well as for "damages for pain, suffering, mental anguish and inconve-
in a tort action, and that this failure to meet the threshold is an affirmative defense. Arguments are persuasive that "a case should [not] go to trial unless there's something in the record that . . . [would] support a jury finding that the threshold has been exceeded, or economic expenses have exceeded the PIP payments." Although no Kentucky cases directly support this proposition, some practical guidance can be gleaned from a series of decisions involving motions for summary judgment.

In *Duncan v. Beck*, a husband and wife were injured in an automobile accident. The plaintiff husband sustained cuts and bruises on his right knee which left several small scars, and he also suffered from pain in his neck and back. His wife complained of "pain throughout most of her body." They brought a tort action, and the defendant moved for summary judgment, contending that the plaintiffs had not met the requirements of KRS section 304.39-060(2)(b). The court of appeals affirmed the grant of a summary judgment for the defendant on this issue, reasoning that since the undisputed evidence of record did not suggest a permanent injury, it was incumbent upon the plaintiffs to present some evidence that another exception to KRS section 304.39-060(2)(b) applied. The court rejected the husband's contention that some small scars on his knee amounted to "permanent disfigurement" within the meaning of the statute.

Similarly, the court of appeals ruled in *Higgins v. Searcy* that a plaintiff must produce some evidence of permanent injury

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132 *Id.*

133 553 S.W.2d 476 (Ky. Ct. App. 1977).

134 *Id.* at 477.

135 The case was reversed and remanded for a trial solely on the issue of property damages. *Id.*

136 *Id.*

137 *Id.*

when the record fails to show that medical expenses exceed $1,000. At the time the defendant filed her motion for summary judgment, the plaintiff had not been treated for twenty months. The court held that her action could not pend indefinitely while she sought medical services for the purpose of accumulating additional expenses to meet the threshold unless evidence of permanency was offered.\textsuperscript{139}

On the other hand, the defendant has some initial burden of showing that KRS section 304.39-060(2)(b) has not been met. In \textit{Davis v. Dever},\textsuperscript{140} the trial court entered summary judgment for the defendant. The plaintiff appealed, contending that he had sustained a permanent injury within a reasonable degree of medical probability based upon the deposition of his physician, who testified: "I think it would be a reasonable probability in saying that it has been going on now for at least two and a half years, that it's probably—if it hasn't gotten better by then, it's probably not going to get any better. That's the usual case."\textsuperscript{141}

The court of appeals reversed the judgment for the defendant. Although the court referred to the deposition of the plaintiff's physician, it based its decision on the fact that the defendant had not met its initial burden of presenting evidence showing no genuine issue of fact existed as to the permanency of the plaintiff's injury.\textsuperscript{142} The court held that, in such circumstances, the plaintiff had no duty to make any showing whatever to defeat the motion.\textsuperscript{143}

A passenger also must meet the threshold requirements of KRS section 304.39-060(2). In \textit{D. e-B. Coal Co. v. Farmer},\textsuperscript{144} the Kentucky Supreme Court ruled that a passenger in a motor vehicle on the public roadways of this state "uses" a motor vehicle, although he or she may not be a user within the meaning

\textsuperscript{139} \textit{Id.} at 624.
\textsuperscript{140} 617 S.W.2d 56 (Ky. Ct. App. 1981).
\textsuperscript{141} \textit{Id.} at 58.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} The court pointed out that a party opposing a motion for summary judgment \textit{may} file opposing affidavits, but Kentucky Rule of Civil Procedure 56.03 does not require him or her to do so. The motion may be denied if the \textit{moving party} has not sustained his or her burden under the rule.
\textsuperscript{144} 613 S.W.2d 853 (Ky. 1981).
of the present KRS section 304.39-020(15). Therefore, a passenger is deemed to have accepted the provisions of the no-fault statute, including its limitation on tort recovery. According to this logic, defendant is entitled to judgment unless the plaintiff passenger presents evidence that he or she has rejected the provisions of the MVRA, or has met the statutory threshold set forth in KRS section 304.39-060(2).

An uninsured motorist who meets the threshold requirements of KRS section 304.39-060(2) can maintain a tort action under the ruling of Gussler v. Damron despite the fact he or she has failed to reject the tort limitations of the MVRA. The court of appeals distinguished a line of cases barring an uninsured plaintiff's tort action by noting that the uninsured motorist in those decisions had failed to allege that the threshold had been exceeded. The court noted that other penalties could be applied for the uninsured motorist's failure to comply with the Act other than the forfeiture of all tort rights.

In Stone v. Montgomery, the Kentucky Court of Appeals addressed a question left unanswered by Gussler: can an uninsured motorist recover medical expenses from the insured tort-feasor once the MVRA threshold is met?

The uninsured plaintiff satisfied the jury that he had incurred $1,509.82 in medical expenses and therefore met the threshold. The jury awarded him the full amount of these expenses, as well as $10,000 for pain and suffering. The court held that he was entitled to recover damages over and above the BRB that would be payable to an insured motorist (the $10,000 for pain and suffering) under the rule set down in Gussler. However, since the uninsured motorist had not rejected the limitation on

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145 "User" formerly was defined in KRS § 304.39-020(14) (1978).
147 599 S.W.2d 775 (Ky. Ct. App. 1980).
149 Gussler v. Damron, 599 S.W.2d at 777.
150 Id. at 778. An uninsured motorist may have his or her license suspended and be fined pursuant to KRS § 304.99-060 (1981). In addition, BRB payments will not be recoverable. Id.
his tort rights in writing, pursuant to KRS section 304.39-060(4), he was deemed to have accepted the provisions of the MVRA abolishing his right to recover economic losses, including medical and hospital expenses, that would have been paid to him as BRB had he been insured. The court also said his right to recover these items of damage was not restored when he met the threshold.\footnote{152}{\textit{Id.} at 598.} Once the medical expenses threshold is met, the uninsured motorist may recover noneconomic damages (pain and suffering), but no damages defined as BRB may be recovered except to the extent that they exceed the $10,000 minimum personal injury protection required under the MVRA.\footnote{153}{\textit{Id.}}