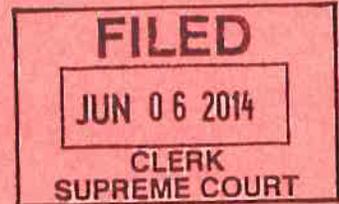


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
FILE NO. 2013-SC-000489-D



BONITA BEAUMONT

MOVANT/APPELLANT

V. ON APPEAL FROM KENTUCKY COURT OF APPEALS  
FILE NO. 2012-CA-000660  
AND FROM JEFFERSON CIRCUIT COURT  
2011-CI-006183

MULUKEN ZERU

RESPONDENT/APPELLEE

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**BRIEF FOR MOVANT/APPELLANT  
BONITA BEAUMONT**

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**CERTIFICATE OF SERVICE**

It is hereby certified that the attached Brief was hand-delivered to Susan Stokley Clary, Clerk of the Supreme Court, 700 Capital Avenue, Room 209, Frankfort, Kentucky 40601; and mailed to Samuel P. Givens, Jr., Clerk of Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. W. Douglas Kemper, Gwin Steinmetz Miller & Baird, PLLC, 401 West Main Street, Suite 1000, Louisville, Kentucky 40202; Hon. Barry Willett, Judge, Jefferson Circuit Court, Division One, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 on this 6<sup>th</sup> day of June, 2014.

AIRHART & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Edward C. Airhart", written over a horizontal line.

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## INTRODUCTION

This case is an automobile accident case in which the Plaintiff appeals from a Summary Judgment entered by the Circuit Court. The Summary Judgment was based on Defendant's contention that the statute of limitations had expired.

The Court must resolve the conflict the Court below has created by its novel construction of the term payment as applied to checks for the purpose of the statute of limitations in KRS § 304.39-230(6). The lower Court's recently adopted statutory construction of relatively recent vintage conflicts with Kentucky's Article 3 of the Uniform Commercial Code as well as this Court's precedent interpreting the term payment under other statutes of limitations which include that term.

**STATEMENT CONCERNING ORAL ARGUMENT**

This appeal concerns the interpretation of the term payment within the automobile action statute of limitations in KRS § 304.39-230(6) applied to payments by check. Oral argument would allow for a greater opportunity to explore and discuss the history, development, and interpretation of the term payment in similarly worded statutes of limitations.

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## JURISDICTIONAL FACTS

1. The Appellant's name is Bonita Beaumont. Senior counsel for Appellant is Hon. Edward C. Airhart and junior counsel for Appellant is Hon. Darren Mayberry, 400 South Seventh Street, Suite 200, Louisville, Kentucky, 40203.

2. The Appellee is Muluken Zeru. Counsel for Appellee is Hon. William D. Kemper, Gwin Steinmetz Miller & Baird, PLLC, 401 W. Main Street, Suite 1000, Louisville, Kentucky, 40202.

3. The Court of Appeals finally disposed of Appellant's case on June 28, 2013.

4. Neither Appellant nor Appellee has a Petition for Rehearing or a Motion for Reconsideration pending in the Court of Appeals. No Petition for Rehearing or Motion for Reconsideration has been filed.

5. No supersedeas bond nor bail on appeal has been executed.

## STATEMENT OF THE CASE

On April 24, 2008, Muluken Zeru ("Zeru") ran a stop sign causing a collision with Appellant Bonita Beaumont's ("Beaumont") vehicle in Jefferson County, Kentucky. As a result of the motor vehicle accident, Bonita Beaumont sustained serious bodily injury to the left side of her neck, left shoulder, left arm, lower back, and burns to her left arm when the airbag deployed. From April 24, 2008 through April, 2009, Bonita Beaumont incurred \$16,275.54 in medical expenses for the treatment of injuries arising from the accident.

Bonita Beaumont's reparation obligor for Personal Injury Protection (PIP)<sup>1</sup> benefits was The Cincinnati Insurance Companies (hereinafter "Cincinnati"). Cincinnati began a series of PIP

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<sup>1</sup> The terms "personal injury protection" (PIP) benefits and "basic reparations benefits" (BRB) are used interchangeably to describe "no-fault" benefits under Kentucky law. *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 124, n. 1 (Ky. 2009).

check disbursements to medical providers on May 15, 2008. (Exhibit A; R. 265). From July 17, 2008 through March 17, 2009, it issued eleven checks to Springhurst Physical Therapy. On March 17, 2009, Cincinnati disbursed a PIP check number 110915750 to Springhurst Physical Therapy. The last check to Springhurst Physical Therapy in the amount of \$400 included the notation "Reversed" on the PIP ledger. The March 17, 2009 check was therefore never paid.

On August 13, 2009, the second-to-last PIP disbursement was made to Jewish Hospital.

On September 15, 2009, a Cincinnati internal email indicates that payee Springhurst Physical Therapy alleged it lost the check. (Exhibit B; R. 259). Kevin O'Donnell of Cincinnati ordered a Stop Pay With Reversal Request on check number 110915750. Thus, Bonita Beaumont's PIP benefits were not exhausted as of September 15, 2009.

Sometime after September 25, 2009, Cincinnati exhausted Bonita Beaumont's PIP benefits when a bank honored check number 111080595. (Exhibit A; R. 265). Cincinnati sent that check to Kentucky Orthopaedic Rehab Team, LLC. Defendant-Appellee asserted that Springhurst Physical Therapy was the assumed name of Kentucky Orthopaedic Rehab Team LLC. *See Def's Reply to Resp. to Mot. Sum. Judg.* ¶ 4 (Mar. 19, 2012); (Exhibit C; R. 300-303). On October 1, 2009, Cincinnati sent a PIP exhaustion letter to medical provider Springhurst Physical Therapy. (Exhibit D; R. 287).

On July 29, 2010, counsel for Plaintiff-Appellant issued a letter to Cincinnati requesting the date of the last PIP payment issued out by Cincinnati on her behalf. (Exhibit E; R. 289). On August 2, 2010, Cincinnati Ins. responded in a letter that its records indicated a \$400 payment was made on September 25, 2009 to Kentucky Orthopaedic Rehab Team, LLC. (Exhibit F; R. 291).

An action for tort liability . . . 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. KRS § 304.39-230(6). (emphasis added).

On September 21, 2011, and within two years of September 25, 2009, Beaumont filed her Complaint in this action requesting damages for injuries arising from the April 24, 2008 accident.

On February 16, 2012, Appellee Zeru filed a Motion for Summary Judgment claiming the statute of limitations had expired because more than two years had passed. On April 2, 2012, the Jefferson Circuit Court signed an order granting the Motion and dismissing the case with prejudice.

On June 28, 2013, the Court of Appeals affirmed the Circuit Court in a 2-1 decision. Hon. Judge Moore wrote the opinion which affirmed the Trial Court's Order of Dismissal. The Court of Appeals unanimously characterized the last PIP payment made as occurring on August 13, 2009. *Beaumont v. Zeru*, No. 2012-CA-660-MR, 3 (Ky. App., June 28, 2013). Hon. Judge Combs dissented based on "sound and time-honored principles of estoppel," and further stated that "date of payment is not involved (and need not be)." *Id.* at 6 (Combs, J., dissenting).

### ISSUES

Does payment occur on a check according to the Kentucky personal injury statute of limitations set forth in KRS § 304.39-230(6) simply because it has been marked as disbursed on the ledger of a reparations obligor? Or does payment occur when the drawee bank accepts or honors the check for the purposes of KRS § 304.39-230(6)? When does payment occur for the purposes of timing?

## ARGUMENT

### *De Novo* Standard of Review

The material facts are undisputed. Therefore, the standard of review for higher courts reviewing an order of summary judgment is *de novo* and owes no deference to the conclusions of the trial court as to questions of law. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). See also *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005).

Under this *de novo* review, Kentucky courts have a duty to liberally interpret the Motor Vehicle Reparations Act (MVRA) in favor of the accident victim.<sup>2</sup> Kentucky statutes are liberally construed to promote their objectives. KRS § 446.080(1). The primary object of the MVRA is to benefit motor vehicle accident victims “by reforming, and in some areas broadening, their ability to make and collect claims.” *Crenshaw v. Weinberg*, 805 S.W. 2d 129, 131 (Ky. 1991).

#### **I. Introduction**

For the purposes of the Motor Vehicle Reparations Act (MVRA) statute of limitations, but only for those purposes, pursuant to the Court of Appeals’s decision below, a lost check was determined to be “paid” upon disbursement, even though it had been lost, possibly never received, even though the reparations obligor ordered ‘Stop Payment,’ and even though the check could never be paid. The Court of Appeals refused to look beyond the disbursement date

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<sup>2</sup> *Fields v. BellSouth Telecommunications*, 91 S.W. 3d 571, 572 (Ky. 2002) citing *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d at 62. The majority in *Fields* adopted the dissent in *Helton San.* See also *Miller v. United Fidelity & Guaranty Company*, 909 S.W.2d 339 (Ky. App. 2005) quoting *Crenshaw v. Weinberg*, 805 S.W.2d 129, 131 (Ky. 1991). (“[t]he primary purpose of the MVRA is to benefit motor vehicle accident victims . . .”) See also *Nat’l Ins. Ass’n v. Peach*, 926 S.W.2d 859, 861 (Ky.App. 1996). (“[T]he MVRA is social legislation that must be liberally construed to accomplish [its] objectives.”) See also *Beacon Ins. Co. of America v. State Farm Mut. Ins. Co.*, 795 S.W.2d 62, 63 (Ky. 1990). (“The MVRA is remedial legislation and thus is to be construed to accomplish its stated purposes.”) See also *LaFrange v. United Services Auto Ass’n.*, 700 S.W.2d 411 (Ky. 1985), citing *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981).

the reparations obligor recorded on its PIP ledger. This bizarre construction of the term “payment,” beyond violating Kentucky statute and precedent, also manages to contravene Aristotle’s law of non-contradiction<sup>3</sup> and invoke the ghost of *Regina v. Ojibway*, as cited in *R.J. Stevens, et al. v. City of Louisville*, 511 S.W.2d 228 (Ky. 1974). As a result, the accident victim’s statute of limitations in this case, and in many other cases around the state, can change erratically depending on whether a medical provider lost a check, and on whether a reparation obligor chooses to disburse another one in its place.

The statute of limitations for victims of automobile crashes in the MVRA reads:

“[a]n 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.” KRS § 304.39-230(6).

Cincinnati Insurance disbursed Appellant's last check on September 25, 2009. Payment on this check exhausted Appellant's \$10,000 PIP limit. Appellant filed suit on September 21, 2011. Appellant's suit was timely regardless of whether payment occurred either upon delivery of the check to the medical provider, or later, either upon presentment of the check to the bank or once the bank finally honored the check. Should this Court decide that payment occurs immediately when the reparations obligor disburses a valid check, Appellant's automobile tort suit would still be timely.

Appellant's suit would be time-barred only if this Court adopts Appellee's convoluted principle which ignores a subsequent check in the same amount as an earlier check which was also disbursed to the same medical provider for the same services provided. Appellee's proposed principle is logically absurd, without sound legal basis, and produces an unjust result for Appellant and other automobile tort victims. Unlike the shifting limitations period itself, the

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<sup>3</sup> Aristotle: “It is impossible to suppose the same thing to be and not to be.” (*Metaph IV 3 1005b24 cf.1005b29–30*).

effect of Appellee's novel interpretation is readily apparent: it undoes the purpose of the legislature. Appellee's special principle to ignore paid checks shortens the statute of limitations and makes it uncertain, creating a trap for the unwary. For the wary, it frustrates the purposes of the entire statutory scheme of the MVRA. Plaintiffs who file within two years of the last actual PIP payment may still have their meritorious claims dismissed. As a result, prudent plaintiffs's attorneys will file all car accident cases within two years of the accident, even when their client has not fully recovered, and even though the express language of the MVRA extends the statute of limitations to two years after the last payment. Such a construction would violate the MVRA's clear mandate to "reduce the need to resort to bargaining and litigation." KRS § 304.39-010(5).

Appellant's construction is simple. A check must be honored and paid by the bank upon which it is drawn. Otherwise, it is a bad check. A bad check has no value and therefore cannot be the equivalent of money or some other valuable thing. A check must be honored to be paid and no payment can occur unless the drawee bank pays it.

Timing remains a separate matter from actual payment. A paid check may be considered paid, for the purposes of timing, at one of multiple stages: when disbursed, when delivered, or when the bank honors it. For the purposes of timing, plain meaning indicates that a good check, just like cash money, is conditionally paid on delivery. Whether a check is paid or not can only be determined upon presentment or some time thereafter when the bank finally honors the check, and the timing of payment would relate back to delivery only if the check were actually proven or accepted as an instrument for value. Therefore, this Court must hold that for the purposes of KRS § 304.39-230(6) the reparation obligor's check was paid on September 25, 2009 or later.

## **II. This Court's interpretations of Payment as to checks**

### **1. Payment ultimately requires the presentment and honoring of a check**

Kentucky has long recognized that delivery of a check, let alone mere disbursement, does not alone guarantee ultimate payment. Long prior to Article 3 of the UCC, Kentucky's highest court stated, "To constitute in law a payment by check, the check must be accepted **and actually paid** by the bank upon which it is drawn." *Breathitt County Board of Education v. Cockrell*, 38 S.W. 2d 660, 662 (Ky. 1931). (emphasis added). *Breathitt* resorted to payment's plain meaning, and stated "The term 'payment' means a payment in money, and, in order to constitute a payment, the debtor must give something either in money or something which is the equivalent of money." *Id.* Kentucky rejected the theory that merely mailing a check could constitute payment for several other reasons, including:

(2) it was not shown that appellee's agent received or accepted the check in payment; (3) the check was not in fact paid, nor presented to the bank upon which it was drawn; nor (4) did the appellant have at the time . . . enough funds in the bank to his credit to have paid the check. *Id.* quoting *In Walls v. Home Insurance Co. of N.Y.*, 71 S.W. 650, 652 (Ky. 1903).

Kentucky law is clear; a check is only paid when the bank accepts it and actually pays on it.

### **2. As to timing, payment occurs upon delivery of the check**

Various Kentucky Statutes of Limitations for Workman's Compensation and Retirements benefits resemble KRS § 304.39-230(6). In these benefits aspects, the limitations period tolls according to when payment was issued or delivered directly to the applicants for benefits. Cases interpreting timing of payment resolved that term payment according to plain meaning.

Kentucky's highest court followed the plain meaning of 'payment.' *Sturgill Lumber Co. v. Maynard*, 447 S.W.2d 638 (Ky. 1969). In the 1960s, KRS 342.270 required that workman's compensation applications be filed "within one year after the cessation of voluntary payments, if

any have been made.” *Id.* at 639. The Court rejected Appellant's argument that if the check was disbursed on September 10, courts should deem payment as ceased on August 31 because that was the last day of the period for which payment had been made. *Id.* at 639. The Court disagreed and affirmed, setting the timing for the statute of limitations on "receipt by the workman of an instrument of payment.” *Id.* The Court explained, “payment will be deemed to have ceased as of the day the last instrument of payment was received. The voluntary payments to Maynard thus must be held to have ceased when he received the September 10 check.” *Id.*

An unpublished Workman's Compensation case also resolved the term "suspension of income benefits" according to plain meaning. *Transcraft Corp. v. Lovely*, No. 02-00970 and 99-59956 (2003). *Lovely's* factual parallels to this case and its parallels to Appellee's argument merit serious consideration for this court, even though published authority adequately addresses the issues before the court. According to KRS 342.185(1), compensation payment tolls an application for adjustment of claim for two years following the latest of either the suspension of income benefits or the date of the accident. *Lovely* filed his application no later than June 13, 2002, and *Transcraft Corp.* mailed final payment on June 27, 2000. Some confusion arose because *Transcraft* believed it had disbursed its last payment to *Lovely* on November 22, 1999, and the Commissioner sent notice of the limitations statute to *Lovely* in March, 2000. Later, *Transcraft* discovered it had underpaid and therefore disbursed the last payment on June 27, 2000. The *Transcraft* Court decided *Transcraft's* June \$500.29 "good faith satisfaction for an underpayment . . . was sufficient to extend *Lovely's* two-year time frame." *Id.* The Court explained its decision:

Based upon the plain meaning of KRS 342.185(1), the fact that the final single payment *Transcraft* made to *Lovely* was not for any new period of TTD, but was only intended by the petitioner as a corrective "reimbursement" relating back to his original period of voluntary payments ending November 22, 1999, is of no

consequence. The June 27, 2000, payment was nevertheless Transcraft's final voluntary payment and as such, suspension of payments did not occur until that time. *Id.*

The *Transcraft* Court interpreted suspension of payments in its most natural and simple sense rather than add a restrictive special meaning to the statute and accept *Transcraft's* novel "reimbursement" theory.

In a 2009 opinion written by Justice Noble, the Supreme Court interpreted payment as occurring on delivery, even though the relevant statute, KRS 61.590, limited alterations in retirement plans to before "payment has been issued." *Lawson v. Kentucky Retirement Systems*, 291 S.W.3d 679, 680 (Ky. 2009). The Supreme Court looked to plain meaning for the term payment, but Justice Noble and four justices also considered Kentucky's UCC to define 'issued' as 'delivered.'<sup>4</sup> The entire Court rejected Lawson's arguments that he had been misled and the majority rejected that the statute was void for vagueness, but the entire Court still ruled against KERS. The Court majority looked to a 1990 version, and then a 2004 version, of Black's Law dictionary:

"The term 'payment' is defined as '[a] discharge in money or its equivalent of an obligation or debt owing by one person to another, and is made by debtor's delivery to creditor of money or some other valuable thing, and creditor's receipt thereof, for purposes of extinguishing the debt . . .

More recently, it has been defined as '1. Performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation. 2. The money or other valuable thing so delivered in satisfaction of an obligation.' *Id.* at 681. [internal citations omitted]

The Court explained further that "while a benefits check is 'money or its equivalent' or 'money or some other valuable thing' it must be delivered to the beneficiary to be a 'payment.'" *Id.* It then looked to Kentucky's UCC for the term 'issue:'

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<sup>4</sup> *Id.* (Cunningham, Schroder, Scott and Venters, JJ., concurring with the opinion of Noble, J., with Abramson and Minton, JJ. concurring in the result by separate opinion)

"In order to be 'issued' under the UCC, a check must be delivered to the person to be paid: 'Issue' means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.' KRS 355.3-105(1). 'Delivery' of an instrument, such as a check, requires a 'transfer of possession . . .' KRS 355.1-201(2)." *Id.*

The Court summarized and stated, "Clearly, printing a check at some unknown point in time does not make it issued. The payee is not able to access the money it represents, and obviously has not notice that it has been printed." *Id.* at 682.

For the purposes of timing, the most recent Supreme Court precedent has determined that a check, provided it is the equivalent of money or a valuable thing, is considered paid once delivered to the payee.

### **3. Payment timing at Disbursement**

Kentucky's lower courts have timed payment at disbursement only within the MVRA's statute of limitations in KRS § 304.39-230(6). The lower courts felt bound to the text of the so-called PIP ledger, which is the reparation obligor's accounting sheet for tracking when checks were disbursed to which medical provider.

The Supreme Court touched on payment timing under the MVRA when it principally addressed the question of whether Med-Pay coverage tolled the two-year limitations period for an automobile tort claim. *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52 (Ky. 2000). The *Helton San.* Court incidentally characterized PIP payment according to the dates on the reparations obligor's PIP worksheet. *Id.* at 56. In *Helton San.*, the last PIP disbursement to exhaust \$10,000 in PIP benefits occurred on May 3, 1993, while the Med-Pay was disbursed on July 9, 1993. The Plaintiff filed suit on June 26, 1995, more than two years after the last PIP disbursement. In *Helton San.*, although the timing of the PIP payments was relevant, its use of a PIP worksheet was mere *obiter dictum* aside from the main issue of whether Med-pay benefits

tolled the statute of limitations in KRS § 304.39-230(6). Another construction of payment for PIP purposes appeared unavailable from the trial record, and in any case, the gap in timing was so great that a presumptive delay after disbursement was unlikely to save Lawson's \$195,156.22 verdict from the four-vote majority. Nothing in *Helton San.* suggests striking certain disbursed checks from the PIP ledger.

Nevertheless, in 2003 the Court of Appeals pronounced “the date the PIP provider issued the check is the date the PIP provider ‘made’ the payment.” *Wilder v. Noonchester*, 113 S.W. 3d 189, 191 (Ky. App. 2003). The *Wilder* court, relying entirely on *obiter dictum*, refused to go beyond the dates the reparations obligor entered onto the PIP worksheet. *Id.*, citing *Helton San.*, 34 S.W.3d at 56-57 (Ky. 2000).

**III. The Court of Appeals’s restrictive interpretation of “payment” as “issuance”—and particularly the “issuance” of only certain types of BRB checks— is entirely inconsistent with this Court’s precedent.**

Notwithstanding precedent, the court below has created their own standard for the statute of limitations in KRS § 304.39-230(6). In 2003, the Court of Appeals below pronounced “the date the PIP provider issued the check is the date the PIP provider ‘made’ the payment.” *Wilder v. Noonchester*, 113 S.W. 3d 189, 191 (Ky. App. 2003).

It did not address the holding in *Breathitt*, which held, “To constitute in law a payment by check, the check must be accepted and actually paid by the bank upon which it is drawn.” *Breathitt Co*, 38 S.W. 2d at 662.

The Appellee must continue to rely on an unpublished case in which a lower court erroneously concluded:

[T]he date a check is received or deposited had nothing to do with the date of final payment.

...

The [second] check was not a check “made” for additional services, but a replacement check between MRI and State Farm. *Wehner v. Gore*, 2006 WL 2033894 (Ky. App. 2006) (2005-CA-689-MR).

The *Wehner* Court ignored a subsequent check in the same amount as an earlier check which was also disbursed to the same medical provider, for the same services provided, even though the reparations obligor entered the subsequent check on the PIP ledger and the subsequent check exhausted the \$10,000 PIP limit. The court actually rewrote the PIP ledger, which *Wilder* went to great lengths to avoid doing. Appellee has to rely entirely on *Wehner* to prevail.

Beaumont filed suit on September 21, 2011, within two years of the last check Cincinnati disbursed on September 25, 2009, and within two years of Beaumont's exhaustion of her \$10,000 in PIP. Appellee characterizes this 09/25/09 check not made for additional services as a 'replacement check' to the 03/17/09 check. The dubious term 'replacement check' appears nowhere in the MVRA or in Kentucky's Article 3, KRS § 355.3-103, *et seq.* Worse yet, the term 'replacement check' itself mistakes a kind of draft for cash.<sup>5</sup> A draft is a three-party instrument<sup>6</sup> whereas cash is a fungible and easily substitutable medium of exchange. The deceptively tidy term 'replacement check' obscures the convoluted consequences which the *Wehner* Court believed should result when a check which is cut does not go out in the mail, never arrives at its destination, or suffers some other misfortune prior to final presentment.

The *Wehner* Appeals Court deferred too much to the trial court. “Wehner argues without authority . . . that the date a check is received or deposited has nothing to do with the date of final payment.” *Id.* *Wehner* erroneously concluded, “There is no contrary authority, thus, we agree with

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<sup>5</sup> "Check' means a draft . . . payable on demand and drawn on a bank." KRS § 355.3-104(f)

<sup>6</sup> A "Drawee' means a person ordered in a draft to make payment." KRS § 355.3-103(a)(4). The "Drawer' means a person who signs or is identified in a draft as a person making payment." KRS § 355.3-103(a)(5). The third party is the payee.

the circuit court's interpretation." *Id.* Not only does contrary authority abound, but even the common understanding of payment cries out against *Wehner's* result.

The same year, a car crash victim in another unpublished case did summon contrary authority, but to no avail. The victim asserted that "the limitations period provided by KRS 304.39-230(6) should run from the date the check for payment was actually cashed, rather than the date it was issued. *Aleshire v. Berenbroick*, 2006 WL 1714810 (Ky. App. 2006). Notably, all checks were paid in *Aleshire*, and the Appellant had simply filed two years after the disbursement date, but within two years of the cash check date. *Id.* The *Aleshire* Court affirmed and clung to *Wilder's* deformed conclusion:

A limitations period may curtail a plaintiff's right to sue. An easily documented final date is appropriate after which a defendant is suit. Although the *Wilder* case differs factually from the present action, we believe that the principle of law set out therein, i.e. the date the insurer issues payment, is the date from which the limitations period begins to run. *Id.*

The *Aleshire* Court failed to explain how a 'principle of law' overcomes the statutory requirement of payment found in KRS 304.39-230(6). In short, the lower courts are obliging inventive principles of law instead of looking to the plain understanding of payment.

*Pro se* Wilder had little chance against one such creative principle in law. Wilder erroneously instructed the court as to wire transfers under KRS § 355.4A-401, not payments of checks under KRS § 355.3-408, *et seq.*<sup>7</sup> The *Wilder* Court held "the date the PIP provider issued the check is the date the PIP provider 'made' the payment."<sup>8</sup> The *Wilder* Court thus ignored the adjacent Kentucky statutes and instead followed the PIP worksheet strictly based on *obiter*

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<sup>7</sup> *Wilder*, 131 S.W. 3d at 191. ("Wilder directs us to KRS 355.4A-401 in support of her proposition that the statute of limitations began to run on November 2, 1999, the date the service provider deposited the check issued by the PIP provider; however, Wilder's reliance on KRS 355.4A-401 in determining the date of payment is improper. 'Payment orders,' as defined in KRS Chapter 355 (Kentucky's Uniform Commercial Code), Article 4A, refer to direct funds transfers, commonly known as 'wire transfers,' between banking institutions rather than payment of medical bills by drafts issued by insurers.")

<sup>8</sup> *Id.* (McAnulty, Combs, Schroder, JJ.)

*dictum. Id., citing Lawson v. Helton Sanitation*, 34 S.W.3d 52, 56-57 (Ky. 2000). In *Helton San.*, although the timing of the PIP payments was relevant, its use of a PIP worksheet was mere *obiter dictum* aside from the main issue of whether Med-pay benefits tolled the statute of limitations in KRS § 304.39-230(6).

Muluken Zeru and counsel approached this hodgepodge of principles of law and advanced another such principle of law, stare decisis. *Beaumont v. Zeru*, No. 2012-CA-000660-MR 4 (App. Ct. 2013). Strangely, the Court's ostensible application of stare decisis below rejected Kentucky opinion establishing that "to constitute in law a payment by check, the check must be accepted and actually paid by the bank." *Id.* at 3-4, *citing Breathitt County Bd. Of Educ. v. Cockrell*, 38 S.W.2d 660, 662 (Ky. 1931). This contradictory outcome reveals how Muluken Zeru's counsel actually defeated stare decisis below and lured the Appellate Court away from a natural statutory construction which might construe payment as actual payment. Under *Beaumont's* secondary argument and her interpretation of *Wilder*, both the 9/25/09 check and the 03/17/09 checks were paid once disbursed, and therefore both tolled the statute of limitations, even though only the 9/25/09 would actually be paid. *See Id.* at 4. The lower court rejected this remedial theory too, and while it admitted *Wehner* was an unpublished opinion and therefore did not bind the court, it affirmatively adopted the theory from *Wehner* which strikes from the PIP ledger a subsequent check in the same amount as an earlier check which was also disbursed to the same medical provider for the same services provided. *Id.* at 5. Such a draconian outcome conflicts with Kentucky jurisprudential understanding of stare decisis in two ways. First, as the Court confessed, unpublished opinions have no precedential authority.<sup>9</sup> Second, Kentucky's Courts are to eschew "imitation of the past or unquestioned acceptance" when faced with

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<sup>9</sup> *See* CR 76.28(4)(c). *See also Com. v. Wright*, 415 S.W.3d 606 (Ky. 2013) ("as a general rule" the Court is not "greatly influenced by unpublished" appellate decisions.)

"statutory construction of relatively recent vintage," such as novel interpretations of *Wilder* as concerns its possible construction of payment under KRS 304.39-230(6). See *Matheney v. Com.*, 191 S.W.3d 599, 604 (Ky. 2006). In *Matheney*, this Court quoted *Morrow v. Com.* and stated:

"the doctrine of stare decisis does not commit us to the sanctification of ancient or relatively recent fallacy. While we recognize this Court should decide cases with a respect for precedent, this respect does not require blind imitation of the past or unquestioned acceptance ad infinitum. Rather, in many ways, respect for precedent *demand*s proper reconsideration when we find sound legal reasons to question the correctness of our prior analysis.' *Id.* quoting *Morrow v. Com.*, 77 S.W.3d 558, 559 (Ky. 2002), *overruling Gray v. Com.*, 979 S.W. 2d 454 (1998).

*Morrow*, like this case, concerned statutory construction of a relatively recent vintage. *Matheney* concluded, "And when we found that construction wanting, we ruled, as we do here, that stare decisis must give way." *Id.* at 604. Stare decisis mandates respect for precedent, and does not bind courts in any absolute manner.<sup>10</sup> In its efforts at statutory construction, the lower courts have totally abandoned and forgotten the most important word in the statute of limitations codified as KRS § 304.39-230(6). That word is payment.

In light of true purposes of stare decisis, Appellee's own arguments for its special theory from *Wehner* appear hollow. After citing CR 76.28(4)(c), Appellee stated, "*Wehner* is the only Kentucky decision that appears to squarely address the effect of a replacement check on the MVRA's statute of limitations." *Brief for Appellee*, p. 10. (Nov. 12, 2012). Appellee flatly denied the applicability of instrument payment law or any other decisions, and stated "there is no need to look outside of the MVRA to interpret and apply the statutes contained therein."<sup>11</sup>

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<sup>10</sup> See *Thomas v. Com.*, 931 S.W.2d 446 (Ky. 1996) quoting *Hanks v. McDanell*, 307 Ky. 243 210 S.W. 2d 784, 787 (1948) ("The strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error . . . the authority of precedents must often yield to the force of reason and to the paramount demands of justice as well as the decencies of civilized society . . ."). See also *Chestnut v. Com.*, 250 S.W.3d 288 (Ky. 2008) quoting *Payne v. City of Covington*, 123 S.W.2d 1045, 1050-1051 (Ky. 1938) ("[S]tare decisis . . . does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason.")

<sup>11</sup> *Id.* at 6 citing *Progressive Northern Ins. Co. v. Corder*, 15 S.W.3d 381 (Ky. 2000) (the MVRA is a "self-contained Act and its provisions must be read consistently")

Unfortunately, Appellee never truly looked within the MVRA, nor did it look to the other use of "paid" in KRS 304.39-070(2). Consider the subrogation structure under which reparations obligors recover their PIP funds. The no-fault carrier's subrogation rights are wholly derivative of the injury victim's rights. If the accident victim cannot pursue a liability claim, then the no-fault carrier cannot collect BRB either. *Cole v. Fagin*, 419 S.W.3d 747, 750 (Ky. App. 2013). Assume Appellant filed suit within two years of the March 17, 2009 check, so suit would be timely under Appellee's theory. The no-fault carrier intervenes and asserts a right of recovery for BRB that the carrier "paid or may become obligated to pay" under KRS 304.39-070(2). Which check is subject to reimbursement in that action -- the 03/17 check or the 09/25 check? The answer would be the 09/25 check because the 03/17 check is void. If "payment made" in KRS 304.39-230(6) is interpreted logically and consistently with "paid" under KRS 304.39-070(2) a check must be honored no matter what date controls for the purpose of limitations (issuance, delivery, or honor). If the rule were otherwise, the no-fault carrier would have greater rights in subrogation than the automobile crash victim would have to bring the claim in the first place.

Instead of Appellee pursuing a consistent reading of the MVRA, after some scattered policy arguments, Appellee descended to attacks on Appellant's due diligence:

Indeed, if Appellant's review of the PIP ledger would have also included some simple math, this issue could have been avoided altogether. Even a cursory review of Appellant's PIP ledger establishes a total amount paid of \$10,400.00 . . . [t]he PIP ledger also clearly shows that the March 17, 2009 payment for \$400.00 was "reversed," and a \$400.00 payment was reissued on September 25, 2009. These inclusions on the PIP ledger should have at least prompted Appellant to conduct further inquiry in regard to the PIP payments. Apparently, no such inquiry was conducted and, as a result, Appellant filed her claim outside the two-year statute of limitations. *Brief for Appellee* at 11-12.

Two members of the court below found Appellant's attacks persuasive.<sup>12</sup> The majority below simply overlooked stare decisis's demand for proper reconsideration. Justice Combs was on the *Wilder* court and yet even she resisted majority's indifference towards the facts; she dissented on the principle of estoppel. *Id.* Justice Combs's explicit motivations, if not her conclusion, demonstrate the facts here merit reconsideration of *Wilder*. The lower courts require instruction on the meaning of 'payment' under KRS § 304.39-230(6).

**IV. Whether a BRB payment is determined at the time of presentment to the bank, the time of delivery, or the time of issuance, the check must be actually be honored by a bank**

In the case of a check payment which impacts a statute of limitations period, two separate questions arise; whether the check is paid, and when is the check paid?

Whenever the MVRA considers a check paid for the purposes of its statute of limitations in KRS 304.39-230(6), the drawee bank must honor and pay on the check. That determines whether a check has been paid. At a minimum, a check must have some value for its delivery to constitute payment. Therefore, unless the bank honors it and pays on it, a check is not the equivalent of money or some valuable thing.

Timing is a separate question for payment. Timing for payment may either occur on the check's delivery by the reparations obligor to the medical provider or it may occur only when the drawee bank assigns the reparations obligor's funds to the medical provider.

Two statutory interpretation principles apply particularly to the MVRA. Kentucky courts interpret the MVRA using the rule of plain meaning construction:

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<sup>12</sup> *Id.* ("Although we are not bound by the holding of this unpublished opinion, we see no reason to deviate from its reasoning. Although it is unfortunate that Cincinnati Insurance provided the date of the reissued check as the date of final payment in responding to Beaumont's attorney's inquiry, the PIP ledger shows a total amount paid of \$10, 400, which should have prompted further inquiry into the sequence of payments.")

We are required to give the words of the statute written by the legislature their plain meaning. To do so restricts us from adding restrictive language to KRS 304.39-230(6) [the two-year statute of limitations] where it does not now exist. *Troxell v. Tramell*, 730 S.W.2d 525, 527-528 (Ky. 1987).

Therefore, this Court must overturn recently invented restrictive language such as 'replacement check.' Additionally, when necessary, Kentucky courts may liberally interpret the MVRA in favor of the accident victim.<sup>13</sup> This is because all Kentucky statutes are liberally construed to promote their objects. KRS § 446.080(1). The primary object of the MVRA is to benefit motor vehicle accident victims "by reforming, and in some areas broadening, their ability to make and collect claims." *Crenshaw v. Weinberg*, 805 S.W. 2d 129, 131 (Ky. 1991).

For these reasons, the statute of limitations in KRS § 304.39-230(6) cannot permit *Wilder's* unrestrained and unsupportable determination that "the date the PIP provider issued the check is the date the PIP provider 'made' the payment." *Wilder*, 113 S.W. 3d at 191. Even if it could, *Wilder's* construction of payment clashes with more recent Supreme Court reasoning that states, "Clearly, printing a check at some unknown point in time does not make it issued. The payee is not able to access the money it represents, and obviously has not notice that it has been printed." *Lawson v. KRS*, 291 S.W. 3d at 682.

Kentucky statutory construction leads to one of three possibilities for interpreting the term 'payment' under KRS § 304.39-230(6); plain meaning, technical meaning, or both, i.e., a harmony of both plain and technical meaning. Statutory words and phrases are accorded their common usage, unless they have a technical meaning or appropriate meaning in the law. KRS §

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<sup>13</sup> *Fields v. BellSouth Telecommunications*, 91 S.W. 3d 571, 572 (Ky. 2002) citing *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d at 62. The majority in *Fields* adopted the dissent in *Helton San.* See also *Miller v. United Fidelity & Guaranty Company*, 909 S.W.2d 339 (Ky. App. 2005) quoting *Crenshaw v. Weinberg*, 805 S.W.2d 129, 131 (Ky. 1991). ("[t]he primary purpose of the MVRA is to benefit motor vehicle accident victims . . .") See also *Nat'l Ins. Ass'n v. Peach*, 926 S.W.2d 859, 861 (Ky.App. 1996). ("[T]he MVRA is social legislation that must be liberally construed to accomplish [its] objectives.") See also *Beacon Ins. Co. of America v. State Farm Mut. Ins. Co.*, 795 S.W.2d 62, 63 (Ky. 1990). ("The MVRA is remedial legislation and thus is to be construed to accomplish its stated purposes.") See also *LaFrangé v. United Services Auto Ass'n.*, 700 S.W.2d 411 (Ky. 1985), citing *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981).

446.080(4). Payment as plain meaning means delivery of 'money or its equivalent,' i.e. a check. *Lawson v. KRS*, 291 S.W.3d at 681.

Since checks are statutory instruments, understanding their payment should also reflect their technical rules contained in KRS § 355.3-103, *et seq.* Checks are three-party instruments.<sup>14</sup> Delivery of an instrument only suspends the underlying obligation "until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check." KRS § 355.3-310. Furthermore, 'issue' is defined as "the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person." KRS 355.3-105(1). Final payment on a check occurs only after the check is accepted and actually paid by the bank upon which it was drawn, and not immediately when the check is disbursed. KRS § 355.3-408. Article 3 of the UCC, as Kentucky has adopted it, further states:

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payments, and the drawee is not liable on the instrument until the drawee accepts it. KRS § 355.3-408.

The timing of payment on a check may be determined at the date of its delivery or when the payee presents it to the bank. Since the check is a third-party instrument, the drawee must accept the check and assign funds. Therefore, a dishonored or lost check can never be paid, regardless of the timing of its delivery.

Kentucky may understand payment through plain meaning and payment via check through its technical meaning. A check's delivery constitutes payment, just as does cash, but only if it is later honored. A check lost, never received, or dishonored becomes dead paper without any worth and cannot be considered the equivalent of money.

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<sup>14</sup> "Check' means a draft . . . payable on demand and drawn on a bank." KRS § 355.3-104(f).

Pennsylvania's highest court addressed the "[t]he deceptively simple question" of "what constitutes payment when [workman's compensation] benefits are made in the form a check?" *Romaine v. Workers' Compensation Appeal Board*, 901 A. 2d 477, 480, 587 Pa. 471 (Pa, 2006). In *Romaine*, the Pennsylvania Workman's Compensation statute provided "a petition [be] filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition." *Id.* at 480, ft. 2, *citing* Section 413(a), 77 P.S. § 772.

The *Romaine* Court encountered some Pennsylvania precedent which acknowledged that "a check does not constitute payment until it has been honored by the drawee bank."<sup>15</sup> Kentucky has the same binding precedent.<sup>16</sup> The *Romaine* Court considered principally whether payment by check occurred on delivery or at presentment, as there did not appear to be any Pennsylvania authority which had held that payment occurred once a payor had cut or mailed the check.<sup>17</sup> The *Romaine* Court held:

"the only date of import is the date upon which the check is received. That date constitutes the last payment of compensation and, although payment is conditional on that date, the condition is satisfied when the check is honored and payment relates back to the date of its receipt." *Id.*

Just as did *Lawson v. KRS*, *Romaine* resorted to Black's Law Dictionary to define payment. *Id.* at 483. But the *Romaine* Court also considered the effect of a dishonored check, which *Lawson v. KRS* did not. *Id.* The *Romaine* Court therefore reasoned:

[P]ayment by check constitutes a conditional payment of the obligation once it is received, the condition being its collectibility from the bank on which it was drawn. When the check is paid on presentment, the condition to which the

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<sup>15</sup> *Id.* at 481-482, *citing* *Kauffman v. United Eng'g & Foundry*, 153 Pa. Super. 67, 33 A. 2d 85 (1943); *also citing* *Aetna Electroplating Co. v. Workman's Compensation Appeal Bd. (Steen)*, 116 Pa. Cmwlth. 66 542 A.2d 189 (1988); *see also* *Morris & Bailey Steel Co. v. Bank of Pittsburg*, 277 Pa. 81, 120 A. 698, 699 (1923).

<sup>16</sup> *See* *Breathitt Co.*, 38 S.W. 2d at 662 ("To constitute in law a payment by check, the check must be accepted and actually paid by the bank upon which it is drawn.")

<sup>17</sup> *But see* *Romaine*, 901 A. 2d at 486 ("Five dates in the life of a check are significant, being the date the check is cut, the date it is mailed, the date it is received, the date it is cashed or deposited, and the date upon which it is honored or dishonored.")

payment was subject is performed and, what had been a conditional payment at the time of delivery of the check becomes an absolute payment. Such payment then relates back to the date the check was delivered. The date of payment for purposes of the obligation or the running of the statute of limitations becomes the date the check was delivered to the payee and note the date that the check was cashed or deposited or the date that the funds were transferred by the bank from which it was drawn. *Id.*

*Romaine* establishes two principles here. First, delivery of the check constitutes only conditional payment. Second, only successful presentment can satisfy this conditional payment, but upon acceptance and honor by the bank, the date of payment relates back to the date the payee received delivery of the check.

*Romaine's* understanding of conditional payment matches Kentucky statute. Kentucky's Article 3 regards negotiation of a check as the suspension an obligation. In Kentucky, a "'Check' means a draft . . . payable on demand and drawn on a bank." KRS § 355.3-104(f). Indeed, an order would not be a check if it were payable at a definite time or at a fixed date. *See* KRS § 355.3-108. Checks only suspend the obligation "until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check." KRS § 355.3-310. Therefore, *Romaine's* reasoning on its first point is particularly persuasive because it derives from direct statutory language common to Kentucky. *See* 13 Pa. Cons. Stat. § 3310.

*Romaine's* description of the timing of payment on a check aligns with Kentucky precedent. Drawee banks must accept and pay the check before Kentucky considers it paid. *Breathitt Co*, 38 S.W. 2d at 662. On the other hand, even if a check is the instrument of payment, payment occurs upon receipt. *Sturgill Lumber Co.*, 447 S.W.2d at 639. After all, "a benefits check is 'money or its equivalent' or 'money or some other valuable thing'" which is "so delivered in satisfaction of an obligation." *Lawson v. KRS*, 291 S.W.3d at 681. For the check to hold value,

the drawee must pay on it. Yet, timing for payment relates back to delivery, because a good check was valuable upon receipt, but a bad check either became worthless or never held value at all.

## V. Conclusion

When Appellant Bonita Beaumont filed suit on her automobile crash on September 21, 2011, when had Kentucky law determined payment occurred on a check? In all but one context, Kentucky had definitively decided that timing for payment occurred upon delivery of the check. *Sturgill Lumber Co.*, 447 S.W.2d at 639 (Ky. 1969). Payment occurred upon delivery of the check even when the Kentucky Retirement Systems statute stated the timing would be set when "payment has been issued." *Lawson v. KRS*, 291 S.W.3d at 682 (Ky. 2009). The *Wilder* Court held that for the sole purpose of the MVRA's statute of limitations in KRS § 304.39-230(6), "the date the PIP provider issued the check is the date the PIP provider 'made' the payment." *Wilder*, 113 S.W. 3d at 191. Appellant had to file suit within two years because "[a]n 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." KRS 304.39-230(6). According to *Wilder's* treatment of KRS § 304.39-230(6), Appellant's suit was timely, because her reparations obligor disbursed, or issued, her last check for payment on September 25, 2009. It should have been a simple matter.

Yet, even the one Justice below who opined that Appellant's suit should be allowed to proceed stated, "Date of payment is not involved (and need not be) since the question posed and answered was date of issuance of the final check. That is the sole question before us." *Beaumont* at 6. (Combs, J. dissenting). How could this have become so complicated?

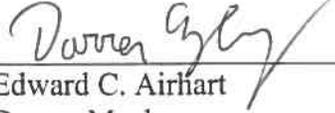
For good reason, Pennsylvania's highest court called what constitutes check payment a deceptively simple question. *Romaine*, 901 A. 2d at 480. Confusion arises because two separate questions have been conflated as one. In most matters, the question of being and the question of timing coincide. For payment on a check, the answers to being and timing may diverge. Therefore, we must ask two questions. First, was the check paid? Second, if so, when was it paid? A check is a three-party instrument, and it reveals itself as worthless should the drawer issue a 'Stop Payment' order or should the drawee refuse to accept it or honor it. So, the question of a check's worth resolves well after delivery. Nevertheless, for every good check the date of delivery appears to be the date of actual payment, and certainly not issuance.

It cannot be reasonably disputed that Appellant's last check to exhaust her \$10,000 in PIP benefits was disbursed on September 25, 2009. This check was subsequently honored, and therefore paid. Appellant Beaumont filed suit on September 21, 2011. So, she was well within the two-year statute of limitations period set forth in KRS § 304.39-230(6).

No court can erase Appellant's 9/25/09 check from the PIP ledger simply because a previous check was lost and was made in the same amount for the same services. Allowing the Court of Appeals to erase such a check, and do so without any sound legal basis, imperils the entire objective of the Legislature. The Kentucky Legislature enacted KRS § 304.39-230(6) to extend the statute of limitations and allow automobile crash victims two years after their last PIP payment to decide whether to settle their case, file suit, or not to file suit.

For these reasons, this Court must reverse the decisions of the trial court and the Court of Appeals below. Appellant's action was timely filed, and this action must be allowed to proceed.

Respectfully Submitted,



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APPENDIX

		EXHIBIT
06/28/2013	Court of Appeals Opinion Affirming the Judgment of the Trial Court	1
04/02/2012	Trial Court's Order Granting Summary Judgment to Defendant-Appellee	2
		EXHIBIT
	PIP Ledger for Appellant Bonita Beaumont (R. 265)	A
09/15/2009	Emails from and to Kevin O'Donnell Re: Online Stop Pay (R. 259)	B
03/19/2012 06/07/2007	Affidavit of W. Douglas Kemper Certificate of Assumed Name Organization search for KORT-Springhurst Physical Therapy (R. 300-303)	C
10/01/2009	Letter to Springhurst P.T. from Kevin O'Donnell at The Cincinnati Insurance Companies (R. 287)	D
07/29/2010	Letter to Kevin J. O'Donnell from The Cincinnati Insurance Companies from Edward C. Airhart (R. 289)	E
08/02/2010	Letter to Edward C. Airhart from Kevin J. O'Donnell from The Cincinnati Insurance Companies (R. 291)	F