

Kentucky Court Of Appeals
Cases of Note
[January-February, 2015](#)

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TORTS

J.S. v. Berla

[2013-CA-001792](#) 02/06/2015 456 S.W.3d 19

Opinion by Judge VanMeter; Chief Judge Acree and Judge J. Lambert concurred. In an action brought against Berla by the father of children involved in a custody proceeding in which Berla was a psychologist appointed by the court to conduct a custody evaluation, the circuit court concluded that Berla was immune from civil and criminal liability for statements made to the Cabinet for Health and Family Services and the circuit court. On appeal, the Court of Appeals affirmed. The Court held that KRS 620.050 protects mandatory reporters of child abuse or neglect from civil or criminal liability as long as they are acting in good faith, or when they subjectively believe they are discharging a duty imposed on them by law. Next, the Court held that Berla, as a court-appointed psychologist, was entitled to quasi-judicial immunity and that her written report was further protected by the judicial proceedings privilege since the report was made during the course of a judicial proceeding and the content was relevant to the proceedings. Lastly, the Court held that the father failed to state a claim upon which relief could be granted when he alleged that Berla breached her contract under the UCC by becoming an advocate for the mother. Berla’s court-appointed task did not fall under the authority of the UCC and, further, breach of good faith does not give rise to an independent cause of action under either the UCC or Kentucky law.

NEGLIGENCE

Ward v. JKP Investments, LLC

[2013-CA-001706](#) 01/23/2015 2015 WL 293332 DR Pending

Opinion by Judge VanMeter; Judge Kramer concurred; Judge Maze dissented via separate opinion. In this premises liability case, the Court of Appeals affirmed the circuit court’s grant of summary judgment in favor of the landlord/property owner on appellant’s personal injury claim. The Court held that under the redefined approach to the “open and obvious” defense as outlined in *Shelton v. Ky. Easter Seals Soc’y, Inc.*, 413 S.W.3d 901 (Ky. 2013), the visitor to the property at issue (who tripped on an outdoor step which was obviously in deteriorating condition, fell, and injured herself) failed to present affirmative evidence, viewed in a light favorable to her, showing that the property owner should have reasonably foreseen that visitors would be distracted, would be engaging in some activity while traveling on the deteriorating step, or would otherwise not proceed with caution given the surrounding area. Appellant’s deposition testimony revealed that she attended the tenant’s party at the location in question for approximately six hours; she had traversed the staircase in question three times that day without difficulty before falling; it was daylight when she fell; she was not looking or paying attention to where she was stepping; she placed her foot in the far corner of the step where cement was crumbling rather than walking up

the middle of the relatively wide step; and she was not sharing the step with anyone. Nothing in the record indicated that under the circumstances, the property owner had reason to expect that visitors' attention might be distracted or that visitors would proceed to encounter an obvious danger. The property owner's duty of care is limited to foreseeable harm. The Court concluded that this case presented the scenario contemplated in Shelton in which summary judgment is viable and appropriate. In dissent, Judge Maze argued that the issues presented should have been put before a jury.

Horsley v. Smith

[2011-CA-002202](#) 02/13/2015 2015 WL 602813 DR Pending

Opinion by Chief Judge Acree; Judge VanMeter concurred; Judge Dixon dissented without separate opinion. The Court of Appeals affirmed a jury verdict in favor of a physician in a medical malpractice case despite appellant's claim that the jury was improperly instructed. The trial court instructed the jury that a physician owes a duty to his patient to exercise the degree of care and skill of a reasonably competent ophthalmologist acting under similar circumstances. However, the trial court declined to instruct that obtaining a patient's informed consent to surgery was a separate and additional legal duty. The Court of Appeals held that obtaining informed consent to surgery is just one of the many medical responsibilities expected of a physician who must abide by a standard of care defined by the medical profession itself for each of those medical responsibilities; the failure to obtain informed consent, like the failure of any of those medical responsibilities, constitutes the breach of a single legal duty. While there may be many such breaches, there is only one legal duty, just as the trial court had instructed. The Court also held that the trial court did not err in excluding appellant's exhibit, did not err in denying appellant's directed verdict motion, and did not err in declining to strike appellee's answer to the complaint.

INSURANCE

Indiana Insurance Company v. Demetre

[2013-CA-000338](#) 01/30/2015 2015 WL 393041 DR Pending

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. The Court of Appeals affirmed a jury verdict and judgment awarding appellee \$925,000 for emotional pain and suffering and \$ 2.5 million in punitive damages in this first-party insurance bad faith claim. The Court first held that appellee made a claim for benefits under his homeowners insurance policy when he notified Indiana Insurance of a personal injury claim against him (the claim alleged injuries from gasoline vapors emanating from appellee's vacant land), since "claim" included a demand for benefits under the policy. Thus, this claim for benefits triggered Indiana Insurance's duties under the Unfair Claims Settlement Practices Act, Consumer Protection Act, and common law. Although Indiana Insurance ultimately provided a defense and indemnification as to the personal injury claim filed against appellee, it was not absolved from liability where there was evidence it acted in bad faith. Specifically, there was evidence showing that Indiana Insurance immediately set in motion a defense of no coverage and did nothing to protect appellee's security through prompt investigation of the merits of the personal injury claim; Indiana Insurance did not retain an expert or investigate the claim even after being informed it had no merit; Indiana Insurance investigated and quickly resolved the claim only after appellee hired his own attorney in the personal injury action and the insurer's declaratory judgment action; and the evidence supported a conclusion that the attorney provided by Indiana Insurance was not functioning as independent legal counsel, but was at all times controlled by adjusters who had the intent of denying coverage. The Court then concluded that because appellee testified that he incurred legal fees to defend against Indiana Insurance's litigation of the coverage issue, there was sufficient

evidence of an ascertainable loss to submit the case to the jury under the Consumer Protection Act. The Court also held that appellee was not required to produce expert testimony that his emotional distress was severe. A heightened standard of proof is not required when damages are sought in a statutory action in which compensatory damages for mental anguish and anxiety have been traditionally permitted. The Court also found no error in the jury instructions where the breach of contract and tort elements were intertwined but the jury was instructed to only award punitive damages on the statutory claims. Further, the instructions were not required to include any reference to the severity of appellee's emotional distress. Finally, the Court held that the punitive damage award was not excessive and that the issue of attorneys' fees was moot.

ARBITRATION

Stanton Health Facilities, LP v. Fletcher

[2014-CA-001015](#) 01/09/2015 454 S.W.3d 312

Opinion and order granting petition for a writ of mandamus by Judge Kramer; Judges Lambert and Taylor concurred. A patient's daughter brought a medical negligence action against a healthcare provider arising out of treatment provided to the patient. When the provider moved to compel arbitration, the circuit court deferred ruling on the motion and ordered the parties to proceed with pretrial discovery on the merits of the claim. The provider then petitioned the Court of Appeals for a writ of mandamus to require the circuit court to rule on the motion to compel arbitration. In granting the petition, the Court noted that the plain language of KRS 417.060 directs that a trial court "shall proceed summarily" to the determination of a motion to compel arbitration. KRS 417.060(4) further requires a trial court to stay "[a]ny action or proceeding" pending the determination of a motion to compel arbitration. Therefore, the circuit court acted erroneously and threatened irreparable injury in requiring the parties to proceed with pretrial discovery as to the merits while a motion to compel arbitration was pending.