

Kentucky Supreme Court
Cases of Note
[September-October, 2015](#)

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ARBITRATION

[Extencicare Homes, Inc., Etc., et al. v. Belinda Whisman, Etc. et al. AND Kindred Nursing Centers Limited Partnership, Etc., et al. v. Janis E. Clark, Etc. AND Kindred Nursing Centers Limited Partnership, Etc., et al. v. Beverly Wellner, Etc. 2013-SC-000426-I](#) September 24, 2015
[2013-SC-000430-I](#) September 24, 2015
[2013-SC-000431-I](#) September 24, 2015

Opinion of the Court by Justice Venters. Barber, Cunningham, and Keller, JJ., concur. Abramson, J., dissents by separate opinion in which Minton, C.J., and Noble, J., join. Noble, J. dissents by separate opinion in which Minton, C.J., joins. Questions presented in these three cases consolidated for resolution in a single opinion because of their common issues: 1) Whether the wrongful death beneficiaries are bound to arbitration agreement made by or on behalf of the wrongful death decedent; 2) Whether any language in the power of attorney documents in three cases authorized attorneys-in-fact to sign pre-dispute arbitration agreement binding the principal to arbitrate any disputes with nursing home facility, thus waiving constitutional right of access to courts in any future claims against nursing homes; 3) Whether the principal’s assent to waiver of the fundamental rights of access courts and trial by jury will be inferred from power of attorney document that does not explicitly authorize such waivers. Held: 1) the power to “institute or defend suits concerning [the principal’s] property rights” does not confer upon the attorney-in-fact the power to provide principal’s assent to a pre-dispute arbitration agreement because the act of signing a pre-dispute arbitration bears no relationship to the act of instituting or defending a lawsuit but is instead inconsistent with instituting a lawsuit; the power “to draw, make and sign any and all checks, contracts...agreements” and the power to “demand, sue for, collect, recover, and receive all debts, monies” belonging to the principal do not confer upon the attorney-in-fact the power to provide principal’s assent to a pre-dispute arbitration agreement because those powers relate expressly to handling of the principal’s financial concerns; the power to “make...contracts of every nature in relation to both real and personal property” does not confer upon the attorney-in-fact the power to provide principal’s assent to a pre-dispute arbitration agreement because a pre-dispute arbitration agreement is not a transaction relating to the principal’s property or property rights; 2) Under Kentucky law the right to recover damages in a wrongful death action belongs exclusively to the wrongful death beneficiaries; the wrongful death decedent has no authority to bind claims in which he has no legal interest; 3) the authority to 2 waive a principal’s fundamental constitutional rights of access to the courts and trial by jury must be unambiguously expressed in a power of attorney document and will not otherwise be inferred.

CERTIFICATION OF LAW

Nancy J. McCarty, et al. v. Convol Fuels No. 2, LLC, etc.

[2014-SC-000589-CL](#) October 29, 2015

Opinion of the Court by Justice Venters. All sitting; all concur. The United States Court of Appeals for the Sixth Circuit requested certification of Kentucky law as to this question: May a subcontractor injured while installing a garage door on an unfinished building at a mine site maintain a claim against a mine operator under a negligence per se theory for alleged violations of Kentucky mine safety statutes, KRS Chapters 351–352, and mining regulations, KAR §§ 805–825? HELD: The traditional concept of negligence per se, codified by KRS 446.070, provides a cause of action to persons injured by the violation of a statute if: 1) the plaintiff comes within the class of persons intended to be protected by the statute; 2) the statute was specifically intended to prevent the type of injury that occurred; and 3) the violation of the statute was a substantial factor in causing the result. Negligence per se extends to violations of an administrative regulation if the enabling statute for the regulation expressly mandate compliance with regulation. Based upon the language of the applicable statutes and regulations, the Court concluded that the legislature intended statutes to impose duties on mine operators to protect miners and other workers routinely associated with the process of extracting coal and to prevent injuries caused by dangers inherent to the mining environment and the extraction of coal. The subcontractor injured while installing a garage door on an unfinished building at a mine site did not suffer the kind of injury addressed by the mining statutes and thus could not rely upon a negligence per se theory to sustain his claim against the mine operator.

INSURANCE LAW

Tower Insurance Co. of New York v. Brent Horn, et al.

[2014-SC-000015-DG](#) October 29, 2015

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, Barber, Cunningham, Keller, and Venters, JJ., concur. Noble, J., concurs in result only. B & B Contracting (B & B) permitted Brent Horn, a non-employee, to drive one of its trucks when it was short-staffed. Bradley Stafford, an employee of B & B, fell from the truck Horn was driving and was fatally injured. Stafford's estate brought a wrongful death action against Horn, and Horn sought indemnification and defense from B & B's commercial automobile liability insurer: Tower Insurance Company of New York (Tower). Tower filed an intervening complaint, seeking a declaration of rights. The trial court granted summary judgment in favor of Tower and denied coverage to Horn. The Court of Appeals reversed. The Supreme Court affirmed the opinion of the Court of Appeals. In doing so, the Court determined that Horn was not an employee of B & B but was a volunteer permissive user. As such, under Tower's policy, Horn was an insured 6 and entitled to indemnification and defense. Next, the Court considered the applicability of the policy's "Employee Indemnification And Employer's Liability" provision, which excluded any coverage for bodily injury to an employee of the insured. The Court held that this exclusion did not apply to Horn because the policy's severability clause applied coverage separately to each insured. In other words, because the insured, Horn, was not Stafford's employer, the exclusion did not negate Horn's coverage. To arrive at this holding, the Court considered and distinguished case law from this jurisdiction and others.

PERSONAL INJURY

James Carter v. Bullitt Host, LLC, Etc.

[2013-SC-000325-DG](#) September 24, 2015

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Barber and Keller, JJ., concur. Venters, J., dissents by separate opinion in which Abramson and Cunningham, JJ., join. Carter sued hotel operator Bullitt Host for injuries suffered as a result of a fall on ice on the hotel property, alleging negligence in the maintenance of the hotel's entryway during or soon after a severe snow storm. Summary judgment was granted in favor of the hotel on the grounds that the icy patch on which Carter fell was a naturally occurring open-and-obvious hazard for which there can be no liability under *Standard Oil Company v. Manis*, 433 S.W.2d 856 (Ky. 1968). The Court of Appeals affirmed. In reversing the Court of Appeals, the Supreme Court held that the *Manis* rule is no longer viable and that all open-and-obvious-hazard cases, including cases involving obvious naturally occurring outdoor hazards, are subject to the comparative fault doctrine, which requires apportionment of fault among all parties to an action.

PRODUCTS LIABILITY

Nissan Motor Company, Ltd., et al. v. Amanda Maddox

[2013-SC-000685-DG](#) September 24, 2015

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Abramson, Keller, and Noble, JJ., concur. Barber, J., dissents by separate opinion in which Venters, J., joins. Amanda Maddox (now Gifford) and her then-husband, Dwayne Maddox, were traveling in their 2001 Nissan Pathfinder when their vehicle was hit, head on, by a drunk driver who was driving on the wrong side of the road. The drunk driver was killed on impact and Amanda sustained severe injuries. She filed suit against the drunk driver's estate and Nissan, and specifically alleged that her injuries were caused by Nissan's defectively designed restraint system and failure to warn her about the system's limitations. A Lincoln County Circuit Court jury found Nissan responsible for approximately \$2.6 million in compensatory damages and \$2.5 million in punitive damages. Nissan appealed several rulings, including the denial of its directed verdict motion. The Court of Appeals affirmed on all issues. The Kentucky Supreme Court reversed the judgment of the Court of Appeals on the issue of punitive damages, and vacated the Lincoln County Circuit Court's judgment assessing punitive damages against Nissan. The Court held that while Amanda's injuries were monumental, the evidence presented at trial failed to indicate that such an outcome was the result of Nissan's reckless or wanton disregard for Amanda or those similarly situated. In support, the Court specifically noted that Nissan met and exceeded federal regulatory safety standards.

WORKERS COMPENSATION

Consol of Kentucky, Inc. v. Osie Daniel Goodgame, Jr., Honorable Jeanie Owen Miller, Administrative Law Judge; and Workers' Compensation Board AND

Osie Daniel Goodgame, Jr. v. Consol of Kentucky, Inc., Honorable Jeanie Owen Miller, Administrative Law Judge; and Workers' Compensation Board

[2014-SC-000305-WC](#) September 24, 2015

[2014-SC-000333-WC](#) September 24, 2015

Opinion of the Court by Justice Keller. All sitting; all concur. Goodgame worked for Consol in Kentucky from 1999 through July 2009, when Consol closed its Kentucky operations. Pursuant to an offer from Consol, Goodgame went to work at one of Consol's Virginia mining operations.

In January 2010, Goodgame resigned from that job and took early retirement. In January 2012, Goodgame filed a claim alleging that he had suffered cumulative trauma injuries to his extremities and back. The ALJ dismissed Goodgame's claim, finding that he had not filed it within two years of the date he last worked in Kentucky. The Board 9 reversed and remanded the case to the ALJ for a finding regarding when Goodgame's cumulative trauma became manifest. The Court of Appeals and the Supreme Court affirmed. In doing so, the Supreme Court noted that KRS 342.185 provides that the "date of accident" triggers the running of the statute of limitations. However, because cumulative trauma does not arise from a single accident, the statute in those claims begins to run when the injury becomes manifest, i.e. when the claimant is advised by a physician that he/she suffers from a work-related cumulative trauma injury. Therefore, the ALJ erred by finding that Goodgame's statute of limitations began to run on the day he last worked for Consol in Kentucky. The Court went on to hold that, as set forth in *Manalapan Mining Co. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006), KRS 342.185 acts as both a statute of limitations and a statute of repose. However, the Court overruled Lunsford's holding that the statute of repose in cumulative trauma claims begins to run on the date a claimant was last exposed to the repetitive trauma. Rather, the statute of repose begins to run when the statute of limitations begins to run - when the claimant is advised by a physician that he/she suffers from work-related cumulative trauma.

Sheila Woosley Kingery v. Sumitomo Electric Wiring, et al.

[2014-SC-000422-WC](#) October 29, 2015

Opinion of the Court by Justice Noble. Abramson, Cunningham, and Venters, JJ., concur. Minton, C.J., dissents by separate opinion in which Barber and Keller, JJ., join. The employer, Sumitomo, moved to reopen Kingery's original award of benefits for a work-related strain injury to her neck in 1989 to dispute current medical treatment on grounds that it was neither reasonable and necessary nor related to the original work injury. Sumitomo supported its motion with a medical 7 report and deposition testimony of its medical expert. Kingery filed no medical proof in response. The Supreme Court held that the evidence in the case compelled finding the treatment non-compensable and that the ALJ's decision in favor of Kingery was not based on substantial evidence. Because the medical questions in this case fell within the sole province of expert medical opinion, it was error to disregard the uncontradicted medical evidence in favor of Kingery's lay testimony.

Ronnie Hale v. CDR Operations, Inc., et al.

[2014-SC-000062-WC](#) October 29, 2015

Opinion of the Court by Justice Barber. All sitting. Cunningham, Keller, Noble, and Venters, JJ., concur. Minton, C.J., concurs in result only by separate opinion in which Abramson, J., joins. Appellant/Cross-Appellee, Ronnie Hale was employed by Appellee/Cross-Appellant, CDR Operations, Inc., for approximately three months as a bulldozer operator. Before that, Hale had worked as a bulldozer operator for various other employers for approximately 30 years. Hale filed a workers' compensation claim against CDR alleging cumulative trauma and an injury date of February 7, 2012. The administrative law judge ("ALJ") concluded that Hale sustained cumulative trauma injuries which became manifest on February 7, 2012, while he was employed at CDR, and that he was permanently and totally disabled. The Workers' Compensation Board ("Board") vacated and remanded, concluding that February 7, 2012, could not be the date of manifestation and that *Southern Kentucky Concrete Contractors, Inc. v. Horace W. Campbell*, 662 S.W.2d 221 (Ky.App.1983), required apportionment of liability based upon the percentage of Hale's impairment attributable to the three months he worked at CDR. The Court of Appeals affirmed. Hale appealed to the Kentucky Supreme Court contending that Southern Kentucky Concrete was inapplicable. CDR cross-appealed, contending that the evidence failed to establish

that Hale sustained a cumulative trauma injury during his three-month employment there. The Court refused to resurrect the apportionment scheme of Southern Kentucky Concrete, holding that it has no application under the current statutory scheme. Furthermore, the Court held that the parties had stipulated the date of manifestation of Hale's injuries, and, even if the ALJ's decision were vacated, the stipulation would still be binding. Finally, the Court held that the evidence presented to the ALJ was sufficient to support his decision. Therefore, the Court affirmed the Court of Appeals in part and reversed in part and reinstated the ALJ's decision.