Kentucky Court Of Appeals
Cases of Note
March-April, 2016

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INSURANCE

Davis v. Kentucky Farm Bureau Mutual Insurance Company
2014-CA-001609 03/11/2016 2016 WL 929362
Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred. Appellants' child died after choking on a push-pin while in the care of Kentucky Farm Bureau's insured, Trina's Treehouse Childcare, LLC. The claims against Trina's and its employees were resolved except for the amount of available insurance coverage. The parents maintained that each act of negligence by Trina's and its employees contributing to their child's death was a separate occurrence providing coverage under the Farm Bureau policy for the aggregate maximum of $1,000,000. Farm Bureau maintained that there was a single occurrence - the child's choking on a push-pin - and that the maximum "per occurrence" limit of $500,000 applied. The Court of Appeals agreed with Farm Bureau's position, holding that Kentucky applies the cause approach in determining the number of occurrences when "occurrence" is defined synonymously with "accident" in the insurance policy. Therefore, coverage was limited to $500,000. Merely because multiple negligent acts combine to cause a single injury or multiple causes of action may be asserted does not mean there are multiple occurrences.

LANDLORD/TENANT

Higdon v. Buisson Investment Corporation
2013-CA-001908 03/04/2016 2016 WL 834651
Opinion by Judge Jones; Judges Combs concurred; Judge VanMeter concurred and filed a separate opinion. In a slip-and-fall premises liability case, appellant, a tenant, appealed from an order granting summary judgment in favor of appellee, her landlord, upon a finding that the ice that appellant slipped on outside her apartment building was an open and obvious hazard and, as such, that appellee owed no duty to warn of or to remedy the walkway area in which appellant fell. The Court of Appeals reversed and remanded. The Court held that the circuit court's opinion and order focused solely on appellee's duty (or lack thereof) to warn of or to remedy the condensation and dampness on the walkway. In doing so, the circuit court ignored the fact that appellant's allegations were much broader. The Court noted that appellant expressly pointed out that her case was "not about fog and accompanying dampness." Instead, it was "about a sloping bare wood ramp with no slip-resistant paint or adhesive applications that was ill-equipped to safely accommodate pedestrians with even the slightest natural accumulation." As such, the Court held that the "open and obvious" nature of the fog and ensuing condensation was an inappropriate basis upon which to grant summary judgment as the surface at issue was located within the common area of the apartment complex. The Court concluded that given appellee's heightened duty as a landlord, the circuit court should have allowed this matter to go to the jury to decide whether appellant knew or should have known that a dangerous condition existed with

respect to the construction and maintenance of the walkway and, if so, whether appellee breached its duty to maintain the walkway in a safe condition for its tenants. Judge VanMeter concurred with the result reached by the majority based on recent decisions of the Kentucky Supreme Court that he believed mandated that this case was inappropriate for summary judgment. See, e.g., Carter v. Bullitt Host, LLC, 471 S.W.3d 288 (Ky. 2015).

NEGLIGENCE

Johnson v. Norfolk Southern Railway Company
2014-CA-001298 04/15/2016 2016 WL 1534275 DR Pending
Opinion by Judge Dixon; Judges Combs and D. Lambert concurred. In a premises liability action brought by a police officer against a railway company, the Court of Appeals reversed a directed verdict in favor of the railway company entered on the grounds that the Firefighter's Rule barred the officer's recovery as a matter of law. Under the Firefighter's Rule, firefighters and public protection agents such as police officers are required to assume the ordinary risks of their employment, a dangerous occupation, to the extent necessary to serve their public purpose; the Rule operates as a defense for those who are the owners or occupiers of the property the agents are employed to protect. Sallee v. GTE South, Inc., 839 S.W.2d 277 (Ky. 1992), sets forth three prongs necessary to the application of the Firefighter's Rule as adopted in Kentucky: (1) the purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk; (2) the policy bars public employees (firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; and (3) the policy extends only to that risk. The Court concluded that in this case appellee did not fit within the first prong of the Rule. Appellant had responded to a call about an individual acting in a disorderly manner at the end of a street adjacent to Centre College. After the individual fled the scene, appellant and another officer chased him on foot across a field and through a tree line located on appellee's property. At the end of the pursuit, appellant fell to the bottom of a steep embankment located on the other side of the tree line, suffering injuries to her wrist and eye. The Court noted that there was no evidence that appellee had placed the call regarding the suspect or was even aware of the incident, the company did not create the risk that necessitated or caused appellant's presence on the property, and appellant was injured by a risk different in both kind and character than the one she was called upon to engage. Ultimately, appellant's entering onto the property and subsequently falling down the embankment was the result of wholly independent factors not involving appellee. Although appellant assumed all of the risks inherent with being a police officer, she "was not injured by the risk [s]he was called upon to engage, but by a risk different in both kind and character." Sallee, 839 S.W.2d at 279. Accordingly, on remand determination of appellee's liability for appellant's injuries would depend not upon the Firefighter's Rule, but rather upon those considerations which generally govern the relationship between possessors of real property and those who are injured on it.

TORTS

Bryant v. Jefferson Mall Company, L.P.
2014-CA-000264 05/08/2015 2015 WL 2153209 Released for Publication
Opinion by Judge D. Lambert; Chief Judge Acree and Judge Nickell concurred. The circuit court dismissed appellant's premises liability action against Jefferson Mall Company via summary

judgment. On appeal, the Court of Appeals affirmed. As a part of her routine, appellant walked in the mall every other weekday morning before the mall's individual shops opened. The mall began allowing this practice in 1998 and had never charged a fee for this convenience. Appellant walked a usual route for multiple laps during the designated walking time. At approximately 9:50 a.m. on the rainy morning of January 11, 2012, appellant allegedly slipped on a puddle of water and fell. She and two fellow mall walkers were on their fourth lap at the time. She did not see any water in the floor on the three previous laps and did not notice any signs or warnings posted in the vicinity alerting her of a wet floor. Appellant was not shopping at the time of her fall, as the individual shops within the mall were closed, but she did intend to shop after finishing her walk. Appellant subsequently filed suit against the mall for injuries sustained in her fall. The mall countered in a summary judgment motion that it did not have a duty under KRS 411.109 - the recreational use statute - to warn mall walkers of dangerous conditions on the premises or otherwise make the premises safe for them. The circuit court granted the mall's motion on this ground. In affirming, the Court of Appeals concluded that the mall could raise KRS 411.190 as a defense because mall walking qualified as a "recreational purpose" and the mall's interior qualified as "land" under the statute. The Court further noted that nothing showed that the mall acted with indifference by failing to warn of or guard against the puddle of water.

WORKERS' COMPENSATION

Steel Creations by and through Kentucky Employer's Safety Association v. Injured Workers' Pharmacy

2015-CA-000218 03/25/2016 2016 WL 1166224

Opinion by Judge VanMeter; Judges Combs and Nickell concurred. Upon review of a Workers' Compensation Board opinion, the Court of Appeals affirmed, holding: (1) that pharmacies are "medical providers" for purposes of the employee choice of provider rule, KRS 342.020(1), and (2) that commercially-published Average Wholesale Prices ("AWPs") for prescription drugs may be considered in determining the actual average wholesale price for a certain prescription drug pursuant to the Workers' Compensation pharmacy reimbursement fee schedule contained in 803 KAR 25:092 §1(6) & §2(2). KRS 342.020(1), commonly known as the "employee choice rule," states that in the absence of a managed healthcare system, an injured worker may choose his or her "medical provider" to treat his or her injury or occupational disease. The Court determined that pharmacists provide medical services in the treatment of injury and disease and therefore fall into the category of "medical providers." Accordingly, injured employees may choose the pharmacy at which they fill their prescriptions, and employers/workers' compensation payers may not dictate which pharmacies employees may patronize. With respect to the amount pharmacies may charge to fill injured workers' prescriptions, 803 KAR 25:092 §1(6) & §2(2) direct that the maximum price a pharmacy can require a workers' compensation payer to pay for a prescription drug is the average of actual prices paid to wholesalers for that drug plus a $5 dispensing fee. The Court declined to hold that commercially published AWPs, which appellants alleged to be inflated, should be abolished from the workers' compensation reimbursement scheme. Instead, the Court ruled that AWPs may be utilized in determining the average actual prices paid to wholesalers for prescription drugs as long as they actually represent what pharmacies pay to wholesalers for the drug(s) at issue. The Court held that this regulatory fee schedule set forth by the Department for Workers' Claims was fair, current, and reasonable, and therefore appropriate.

Finke v. Comair, Inc.
2014-CA-000624 04/29/2016 2016 WL 1719311
Opinion by Judge Jones; Chief Judge Acree and Judge J. Lambert concurred. Appellant challenged the determination of the Workers' Compensation Board that she did not have an unfettered right to have her father present during an Independent Medical Examination, and that the Administrative Law Judge did not abuse his discretion in determining that appellant failed to present a "compelling reason" why she could not submit to the examination without her father present. The Board also upheld the ALJ's decision that appellant was not entitled to receive any benefits during the time of her noncompliance. The Court of Appeals affirmed, holding that upon request an ALJ has discretion to order deviations in IME protocol so long as the examinee demonstrates a "good cause" basis for the requested deviation. However, vague allegations of "general discomfort," as offered here, are insufficient to show good cause. If the examinee has privacy concerns, she may request an ex parte communication with the ALJ or leave to file her concerns under seal. Finally, the Court held that benefits properly suspended under KRS 342.205(3) cannot be retroactively restored