

Kentucky Court Of Appeals
Cases of Note
May-June, 2016

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INSURANCE

Brown v. Mitsui Sumitomo Insurance Company

2013-CA-001191 05/06/2016 2016 WL 2609303

Opinion by Judge Nickell; Judges Dixon and Kramer concurred. Appellant was injured in a work-related motor vehicle accident while riding in his employer’s vehicle. Appellant filed for and received workers’ compensation benefits from his employer’s workers’ compensation carrier. Knowing the Workers’ Compensation Act provides an exclusive remedy, appellant mistakenly believed that his employer, Trim Masters, Inc., and its underinsured motorist (UIM) carrier, Mitsui Sumitomo Insurance Company, were immune from suit. However, KRS 342.690(1) does not prohibit suit against a UIM carrier after payment of a workers’ compensation claim. Two days shy of two years from the collision, appellant filed suit against the tortfeasor and against his own UIM carrier, State Auto; he did not file suit against Mitsui. In response, State Auto asserted that its UIM coverage was secondary to that provided by Mitsui and sought leave to file a third-party complaint against Mitsui. Appellant initially opposed the motion, but then conceded that Mitsui should have been named as a defendant and moved to file an amended complaint to add them. State Auto also moved for summary judgment. The circuit court sustained both motions and named Mitsui as a defendant. Mitsui answered the complaint asserting that Trim Masters’ insurance policy required a UIM claim to be filed within two years of accrual and moved for judgment on the pleadings since the amended complaint was filed nearly three years after the collision. The circuit court found that: (1) two years was a reasonable contractual window in which to file suit; (2) appellant’s failure to name Mitsui as a defendant when he filed against the tortfeasor and his own personal UIM carrier was fatal because he had to exhaust UIM benefits from Mitsui (the primary carrier) before he could pursue benefits from State Auto (the secondary carrier); and (3) as a third-party beneficiary under his employer’s policy, appellant could enforce the policy’s terms, but he had to enforce all of its terms and not only the ones that benefitted him. Thus, UIM benefits had to be claimed within two years of accrual. The Court of Appeals affirmed. Since appellant had filed suit against the tortfeasor and his own UIM carrier within two years, there was no reason he could not have filed against his employer’s UIM carrier at the same time. The Court noted that appellant’s counsel need not have waited until his investigation was complete before filing suit; so long as he did due diligence to believe Mitsui was potentially liable, the complaint could have been filed.

Eberle v. Nationwide Mutual Insurance Co.

2013-CA-000898 05/06/2016 2016 WL 2609311

Opinion by Judge Jones; Judges J. Lambert and Stumbo concurred. This appeal concerned coverage under a homeowner’s insurance policy issued by Nationwide Insurance Company to Michael Bishop. The circuit court determined that Nationwide was not obligated to provide coverage for injuries appellant sustained when Bishop shot him because the injuries were caused by conduct expressly excluded from coverage in Nationwide’s policy. On appeal, the Court of

Appeals determined that Nationwide's criminal acts exclusion applied to an "act or omission which is criminal in nature" such that it constituted a felony or misdemeanor under Kentucky's Penal Code. Under this definition, offenses punishable only by a fine would not be covered by the criminal acts exclusion because such offenses are violations, not misdemeanors or felonies. See KRS 500.080; KRS 431.060. Traffic infractions are likewise excluded from Kentucky's definition of a misdemeanor. See KRS 500.080. Bishop pled guilty to wanton endangerment in the first degree, a Class D felony. The Court noted that intentionally pointing a gun at an unarmed child is the type of conduct every citizen should know is wanton and criminal. The Court refused to accept that Bishop could have reasonably expected such core criminal conduct to fall outside of Nationwide's criminal acts exclusion. Accordingly, the Court held that the exclusion applied in this case. The Court then determined that Bishop's Alford plea collaterally estopped him from denying civil liability and that the conviction established Bishop's factual guilt irrespective of the fact that the conviction was obtained through entry of an Alford plea.

TORTS

Burchett v. Burchett

[2015-CA-000198](#) 05/13/2016 2016 WL 2855384

Opinion by Judge D. Lambert; Judges Combs and VanMeter concurred. This appeal was brought from an order finalizing dismissal of a wrongful death suit against an automotive dealer and his insurer. Amanda Burchett and Erick Blair (Blair) bought an automobile from David Perry, d/b/a Louisa Auto Mart (Perry). Blair crashed the automobile six days later while driving intoxicated. Amanda Burchett and Benjamin Burchett II were riding with Blair at the time. Benjamin was killed in the crash. Sandra Burchett, as the representative of Benjamin's estate, later filed a wrongful death action against Blair and Perry. In the complaint, she alleged: (1) that Perry violated KRS 186A.220 because he sold the automobile to Blair and Amanda and neither one had insurance; (2) that Perry violated KRS 186.620 by authorizing and permitting a person without a driver's license to drive an automobile; (3) that Perry negligently entrusted the automobile to Blair and Amanda; and (4) that Perry remained the owner of the automobile because he sold it to individuals who did not have insurance in violation of KRS 186A.220. The circuit court granted Perry's motion for summary judgment as to the violations of KRS 186A.220 and held a jury trial to decide two issues: whether Perry delivered title documents to Blair and Amanda on the day of the sale (yes), and whether Amanda had a driver's license (no). Based on the jury's determination, the circuit court ruled that title to the automobile transferred on the day of the sale, eliminated any issues relating to Perry's alleged liability, and dismissed Perry from the action. On appeal, Sandra argued: (1) that Perry breached a statutory duty of care by authorizing or knowingly permitting Blair to drive the automobile because Blair did not have a driver's license; (2) that Perry had a duty to verify that Blair and Amanda were insured; and (3) that a jury issue remained as to whether Perry negligently entrusted the vehicle to Blair and Amanda because he should have known that neither Blair nor Amanda had a driver's license or insurance. The Court of Appeals rejected all three arguments and affirmed. Because Perry delivered the necessary title documents to Blair and Amanda on the day of sale, Blair and Amanda became the owners of the automobile on that day. Moreover, since Perry was no longer the owner, he was under no duty to prevent either Blair or Amanda from driving the automobile on the day of the accident. Finally, because Perry transferred the title documents to Blair and Amanda directly, and did not retain the certificate of title with the consent of the new owners to file it with the county clerk, he did not have to verify whether Blair or Amanda was insured. The Court further held that because the accident occurred after the sale, the negligent entrustment claim against Perry failed as a matter of law.

DeMoisey v. Ostermiller**[2014-CA-001827](#) 05/06/2016 2016 WL 2609321**

Opinion by Judge Jones; Chief Judge Acree and Judge Clayton concurred. This appeal and cross-appeal arose out of a civil action wherein appellants/cross-appellees, J. DeMoisey Fox and the DeMoisey Law Office, PLLC (“DeMoisey”), asserted claims against appellee/cross-appellant, attorney Peter L. Ostermiller, for tortious interference with contractual relations, tortious interference with prospective contractual relations/business advantage, and abuse of process. The claims arose out of Ostermiller’s advice to and representation of Infocon Systems, Inc. (“Infocon”), a former client of DeMoisey. The Court of Appeals held that DeMoisey could not rely on an alleged contingency fee agreement that had previously been determined to violate the Kentucky Rules of Professional Conduct to support a tortious interference with contractual relations claim. The Court also held that DeMoisey had failed to allege a cognizable tortious interference with prospective contractual relations/business advantage claim because in the absence of a valid contingency fee agreement, his only expectancy was to receive a fee in quantum meruit. With respect to the cross-appeal, the Court determined that the abuse of process claim should have been dismissed with prejudice because it was time barred. The Court held that successful termination of the underlying action is not an element of an abuse of process claim and, therefore, the statute of limitations on such a claim begins to run when the conduct comprising the abuse takes place.

Goins v. Lafoe**[2014-CA-001476](#) 05/27/2016 2016 WL 3050234**

Opinion by Judge Dixon; Judges Combs and D. Lambert concurred. The Court of Appeals affirmed an order granting summary judgment for appellees on the grounds that appellant’s tort claims were time-barred. Appellant asserted that the five-year limitations period set forth in KRS 413.120(2) applied to her claims, which she characterized as statutory violations of the penal code. The Court held that appellant could not circumvent the applicable statute of limitations (KRS 413.140(1)(a)) by characterizing her tort claims in this manner. Appellant’s cause of action concerned physical injuries she allegedly suffered at the Lexington-Fayette Urban County Government Detention Center. Consequently, the one-year statute of limitations applicable to personal injury actions applied. Since appellant waited nearly five years before filing suit, her claims were time-barred. The Court also held that appellant’s plea agreement in a related criminal action barred her subsequent claim of malicious prosecution as a matter of law.

WORKERS' COMPENSATION**Austin Powder Company v. Stacy****[2014-CA-000918](#) 05/20/2016 2016 WL 3024188**

Opinion by Judge J. Lambert; Judges Combs and Taylor concurred. In this workers’ compensation case, both the employee (Stacy) and the employer (Austin Powder) petitioned the Court of Appeals for review of the Workers’ Compensation Board’s decision. In his petition, Stacy asserted that the Board erred in remanding for findings related to the date of manifestation and for a determination of the percentage of his cumulative trauma that was attributable to his work for Austin Powder. The Court agreed and held that this was improper pursuant to the *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129 (Ky. 2015), in which the Supreme Court of Kentucky held that the apportionment scheme set forth in *Southern Kentucky Concrete Contractors, Inc.*, v. *Campbell*, 662 S.W.2d 221 (Ky. App. 1983), did not apply under the current version of the Workers’ Compensation Act and that the Board may not set aside a valid stipulation of fact (date of manifestation) sua sponte. The Court then rejected the arguments Austin Powder raised in its petition, holding that the administrative law judge was within his discretion in relying upon

certain medical evidence and that Stacy was entitled to medical benefits for his hearing loss claim, even though his impairment rating did not rise to the level that he was entitled to income benefits.

Belcher v. Manpower of Indiana

2015-CA-001781 06/03/2016 2016 WL 3136903 Released for Publication

Opinion by Judge Combs; Judges Dixon and Stumbo concurred. Appellant sought review of a decision of the Workers' Compensation Board, which instructed the Administrative Law Judge to recalculate appellant's average weekly wage ("AWW") in accordance with KRS 342.140(1)(d). Appellant was held to be an employee of Manpower, a job placement agency, for purposes of calculation of his AWW as distinguished from his being an employee of the various entities to which he was temporarily assigned and placed. Appellant's injuries occurred while he was working on one of these assignments and, citing to *Nesco v. Haddix*, 339 S.W.3d 465 (Ky. 2011), he contended that KRS 342.140(1)(e) should be used to calculate his AWW. The Court of Appeals disagreed and concluded that appellant's status as an employee of the agency was evidenced by his inability to pick and choose his assignments, as well as by his retention by Manpower after his injury. This continuity of employment was the essential factor in the calculation of his AWW.