

Kentucky Court Of Appeals
Cases of Note
July-August, 2016

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TORTS

Mannahan v. Eaton Corporation

2013-CA-002005 07/15/2016 2016 WL 3887037 DR Pending

Opinion by Judge Acree; Judge Clayton concurred; Judge Jones dissented and filed a separate opinion. The Court of Appeals affirmed a mesothelioma victim’s appeal of a summary judgment finding that appellant failed to create a genuine issue of fact as to whether he had actually been exposed to any of the products manufactured by appellees. In a 2-1 vote, the Court held that to prove causation in an asbestos-induced mesothelioma case, the plaintiff or decedent’s estate must show, for each defendant, through direct or circumstantial evidence, that: (1) he was exposed to the defendant’s product, and (2) the product was a substantial factor in causing the plaintiff’s or decedent’s disease. Here, appellant failed to create a genuine issue of material fact regarding the first element - actual exposure. The circuit court concluded that proof of sale of a manufacturer’s asbestos-containing product (amongst many other manufacturers and asbestos-containing products) to the employer of a plaintiff who worked on equipment that might have incorporated such a product was not enough to create a genuine issue that the particular-named defendant manufacturer’s product was the source of asbestos that caused plaintiff’s disease. Plaintiff could not rely on speculation of the mere possibility of asbestos exposure by the particular defendant manufacturer’s product. Proof on defendant’s motion for summary judgment that eliminated the probability of plaintiff’s exposure to the movant’s product was not met with plaintiff’s proof to the contrary. In dissent, Judge Jones argued that appellant’s demonstration of the possibility that the products at issue made their way into the worksite was sufficient under *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991) to survive summary judgment and create a jury question.

Patmon v. Hobbs

2014-CA-001411 07/15/2016 2016 WL 3886831

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred. Appellant, acting individually and on behalf of American Leasing and Management LLC, appealed from a judgment entered after remand from the Court of Appeals. Appellant argued that the trial court awarded inadequate damages on her claims that appellee breached his statutory duties as a managing member of American Leasing and diverted a business opportunity. The Court of Appeals reversed and remanded. As to appellant’s claims for statutory damages under KRS 275.170, the Court held that the trial court erred in reducing appellee’s profit gained by amounts he personally expended and, further, that the trial court erred by permitting appellee to retain a portion of the profit received from his misconduct. Regarding the diversion of business opportunity claim, the Court held that the law-of-the-case doctrine precluded it from reconsidering the application of the claim to LLCs or appellant’s burden to establish American Leasing’s financial solvency. However, the Court also held that the trial court did not make specific findings of fact or separate conclusions of law to allow meaningful review. The Court

further held that appellant must only demonstrate that American Leasing was not financially insolvent to recover, and that the amount of recovery was not limited to appellee's profit but may be in the amount American Leasing would have profited from the diverted opportunity.

Adkins v. Wrightway Readymix, LLC

[2014-CA-001644](#) 08/26/2016 2016 WL 4488161

Opinion by Judge D. Lambert; Judges Combs and VanMeter concurred. In a case that originally began as a debt collection action in district court, the Court of Appeals affirmed a circuit court order dismissing appellant's counterclaim for wrongful use of civil proceedings. Appellee moved to dismiss its complaint on the basis that it was already receiving relief - via bankruptcy proceedings filed by appellant - that it would have received if it had continued this litigation. By failing to dispute appellee's claim and presenting it as part of the plan approved by the bankruptcy court, appellant conceded the legitimacy of the debt in the bankruptcy action. Therefore, the termination of the debt collection action was not in appellant's favor and, as a matter of law, he could not prevail on his counterclaim. The Court of Appeals further held that the circuit court did not err in denying appellant's motion to recuse.

WORKERS' COMPENSATION

Austin Powder Company v. Stacy

[2015-CA-001947](#) 07/15/2016 2016 WL 3886301

Opinion by Judge Combs; Judges Dixon and Stumbo concurred. An employer sought review of a Workers' Compensation Board decision affirming the Administrative Law Judge's award of 50% disability to appellee in a coal workers' pneumoconiosis claim. The Court of Appeals affirmed. The ALJ awarded benefits for 50% disability pursuant to KRS 342.732(1)(c), which provides that there shall be an irrebuttable presumption that the employee has a disability rating of fifty percent (50%) resulting from exposure to coal dust if certain requirements are met. The Court noted that in seeking reversal, the employer was effectively asking it to declare KRS 342.732 unconstitutional in light of the decision reached in *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011). The Court concluded that it could not consider this issue because the employer had failed to comply with the notification requirements set forth in CR 76.25(8) and KRS 418.075(2). Thus, the Court affirmed.

Roby v. Trim Masters, Inc.

[2015-CA-000923](#) 07/22/2016 2016 WL 3962602

Opinion by Judge D. Lambert; Judge VanMeter concurred; Judge Combs concurred and filed a separate opinion. The question before the Court was whether the Workers' Compensation Board erred in reversing and remanding the matter to the Administrative Law Judge with instructions to issue particular factual findings regarding permanent partial disability. The Court held that the Board did err in this regard and reversed. The ALJ issued four opinions in this case, and the Board reversed and remanded each of them on grounds that the ALJ had not fully explained in his opinion how appellant's age and education related to her injury en route to finding her entitled to disability benefits. Notably, there was a clear disconnect and impasse between the ALJ and Board regarding the directives made by the Board in its opinions and the ALJ's efforts to abide by them. Appellant argued that the ALJ's findings were supported by substantial evidence and that the ALJ recited the evidence consistently each time the matter was remanded. In contrast, the employer argued that each time the Board remanded the matter, the ALJ merely "tweaked" his ruling, ignored the Board's directives, and only offered conclusory statements regarding how appellant's age and education played into the determination that she was permanently disabled. In reversing, the Court of Appeals noted that rather than remanding again

for factual findings on the issue of benefits, the Board instead chose to shoehorn the situation into KRS 342.285(c) and (d), so that it could find the ALJ's ruling an abuse of discretion. The Board's ruling essentially ignored the ALJ's factual findings regarding the nature, severity, and duration of appellant's injury, and the effect thereof on her employment prospects, in favor of an overly strict reading of the authority regarding two of the other factors. The Board also focused on the perceived disregard the ALJ afforded its commands to make particular factual findings. The Court concluded that substantial evidence supported the ALJ's factual finding, and the Board's order directing the ALJ to make findings that contradicted his own impermissibly encroached on the role of the ALJ as fact-finder.

Flat Rock Furniture v. Neeley

[2015-CA-001255](#) 08/26/2016 2016 WL 4488152

Opinion by Judge J. Lambert; Judges Acree and Maze concurred. The Workers' Compensation Board affirmed an ALJ's award of permanent total disability benefits to a worker who injured his eye in a work-related incident. The Court of Appeals affirmed, holding that the record attached to the worker's Form 101 substantially met the requirements of the applicable administrative regulations even though it was not submitted on a Form 107-I. The Court further held that the ALJ sufficiently clarified a misstatement regarding a physician's opinion, and that the ALJ's finding of permanent total disability was supported by substantial evidence of record.

Fresenius Medical Care Holdings, Inc. v. Mitchell

[2015-CA-000598](#) 08/26/2016 2016 WL 4488155

Opinion by Judge D. Lambert; Judges Jones and Thompson concurred. In an appeal and cross-appeal taken from a workers' compensation decision, the Court of Appeals affirmed in part and reversed in part. The facts giving rise to the appeals originated in November 2009, when Tamorah Mitchell was in her personal vehicle returning home to Paducah from a work-related meeting in Louisville. Mitchell's husband at the time, Todd Mitchell, drove while Mitchell rode in the front passenger seat. Traveling at an estimated 80-85 miles per hour, Todd swerved to avoid a deer in the road, overcorrected, and lost control. A wreck resulted in which Mitchell suffered several significant injuries, including an orbital "blowout" fracture. There was some question regarding whether Mitchell was wearing a seatbelt at the time. Mitchell later settled a civil action filed against Todd (now her ex-husband) for the vehicle's liability policy limits and subsequently sought workers' compensation benefits. On appeal, Mitchell's employer argued: (1) that the Workers' Compensation Board erred in reversing and remanding the Administrative Law Judge's finding that the determined impairment rating, as it related to Mitchell's eye injury, was insufficiently supported; and (2) that the Board erred in affirming the ALJ's finding that Mitchell's alleged failure to wear a seatbelt did not merit a reduction in benefits under KRS 342.165(1). As to the first argument, the Court of Appeals agreed with the employer that the Board inappropriately substituted its judgment for that of the ALJ when remanding the issue for further proceedings. While the record established an eye injury and permanent symptoms resulting therefrom, including loss of ocular motility and visual acuity, the ALJ justified his ruling on the basis that even Mitchell's medical expert was unsure whether the impairment assessment had been consistent with established AMA guidelines. Thus, while the ALJ's ruling did reject the uncontested medical proof, it did so with sufficient justification. As to the second argument, the employer contended that Mitchell violated KRS 342.165(1) by an alleged violation of KRS 189.125(6). However, the Court agreed with the ALJ and the Board that any alleged negligence on the part of Mitchell in failing to wear a seatbelt did not give rise to the application of the penalty provisions of KRS 342.165(1). The ALJ cited *Tetric v. Frashure*, 119 S.W.3d 89 (Ky. App. 2003), in which the Court held that KRS 189.125(6) did not impose a duty on passengers to wear seatbelts; it merely imposes a duty upon drivers to do so. Absent a duty, there can be no negligence. On cross-appeal, the Court agreed with Mitchell that the employer was not

entitled to a subrogation credit against Mitchell's tort recovery. The Court noted that Mitchell and Todd were married at the time of the accident and that Mitchell B. 2015-CA-000598 08/26/2016 2016 WL 4488155 paid the majority of the premiums securing the vehicle liability policy through their joint account. Because of this, for the purpose of the tort action, Todd was a first-party insured rather than a third-party tortfeasor within the meaning of KRS 342.700. Therefore, the employer was not entitled to a subrogation credit.