Kentucky Court Of Appeals
Cases of Note
September-October, 2016

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INSURANCE

Houchens v. Government Employees Insurance Company
2014-CA-002017 09/09/2016 2016 WL 4709168 DR Pending
Opinion by Judge Dixon; Judges Combs and Stumbo concurred.
The Court of Appeals reversed an order granting summary judgment in favor of GEICO and finding that nothing in Kentucky's Motor Vehicle Reparations Act, KRS 304.39-010 *et seq.*, prohibits a reparations obligor from denying or terminating basic reparations benefits based solely upon a third-party paper review of an insured's medical records. The trial court agreed with GEICO's argument that the phrase "may petition the court" contained in KRS 304.39-270(1) means that a reparations obligor may, but is not required, to seek a court order for an independent medical exam (IME) prior to terminating or denying benefits. Disagreeing, the Court of Appeals noted that whether KRS 304.39-270(1) provides the sole statutory mechanism for a reparations obligor to challenge an insured's medical bills has yet to be addressed by a Kentucky court. However, in examining the decisions in *Grant v. State Farm Mutual Automobile Insurance Co.*, 896 S.W.2d 24 (Ky. App. 1995), *Miller v. United States Fidelity & Guaranty Co.*, 909 S.W.2d 339 (Ky. App. 1995), and *White v. Allstate Insurance Company*, 265 S.W.3d 254 (Ky. App. 2007), the Court observed that there is a distinct difference between the use of a paper medical records review by a reparations obligor for the purpose of establishing good cause for a court-ordered IME and the use of a medical records review by that obligor for the purpose of unilaterally denying or terminating an insured's benefits. As is evidenced by the case law, the legislature enacted KRS 304.29-270(1) as a safeguard against the misuse of IMEs. Not only must the obligor demonstrate good cause for the IME, but the court is then required to set the time, place, manner, conditions, scope of the examination, and the physician by whom it is to be made. The Court of Appeals opined that it would violate the intent and purpose of Kentucky's MVRA to hold that the legislature would require court oversight of an IME of an insured yet would condone that insured's benefits being terminated or denied solely based upon a unilateral paper review of his or her medical records. Thus, the Court concluded that under KRS 304.39-270(1), a reparations obligor who questions the veracity of an insured's medical bills may petition the court for an IME. The obligor also has the prior option of requesting that the insured voluntarily undergo an IME, which the insured may or may not agree to. However, if the obligor chooses to do neither, it must pay the claim, as medical bills are statutorily presumed to be reasonable and the burden is on the obligor to prove otherwise.

TORTS

Memorial Sports Complex, LLC v. McCormick
2013-CA-001788 09/02/2016 2016 WL 4575676 Released for Publication
Opinion by Judge Thompson; Judge D. Lambert concurred; Judge Maze concurred and filed a separate opinion.
A baseball player brought a personal injury action against a sports complex for an injury he received after his arm slid under a fence while diving for a foul ball. The sports complex subsequently filed third-party complaints against the player's coach, the player's father, and the fencing company, seeking indemnity, contribution, or apportionment. The circuit court dismissed the third-party defendants and the Court of Appeals affirmed. The Court held that the sports complex was the primary cause of the injury sustained by the player and, thus, was not entitled to indemnification from the coach, father, or fencing company. In reaching this decision, the Court noted that the complex made the decision not to install a warning track, colored piping at the top of the fence, or additional reinforcement at the bottom of the fence. The Court further noted that it was the configuration of the field and fence that allowed the injury to take place, that any failure to supervise on the part of the coach or father was a lack of action in the face of an ongoing adverse condition caused by the complex, and the subcontractor built the fence to specifications supplied by the complex. The Court additionally held that contribution was not available against the coach, father, or fencing company because an apportionment instruction was available and required under KRS 411.182. In his concurring opinion, Judge Maze expressed the view that the Supreme Court of Kentucky should take the opportunity to sort out the continued viability of contribution and indemnity and their proper relationship to the statutory apportionment of fault.

Maupin v. Tankersley
2015-CA-001259 09/16/2016 2016 WL 4934283
Opinion by Judge Maze; Judge Nickell concurred; Judge Jones dissented and filed a separate opinion.
Appellant brought an action alleging that appellee was strictly liable for injuries appellant sustained when she was attacked by appellee's dogs while walking on a dirt path on appellee's property. The circuit court entered judgment in favor of appellee and denied appellant's motions for judgment notwithstanding the verdict and for a new trial on damages. By a 2-1 vote, the Court of Appeals affirmed, holding that the general negligence standard - not strict liability - applied to the determination of appellee's statutory liability for appellant's injuries. In dissent, Judge Jones argued that the plain language of KRS 258.235 and the decision of the Supreme Court of Kentucky in *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012), compelled the application of strict liability.

Pursifull v. Abner
2015-CA-000879 09/23/2016 2016 WL
Opinion by Judge Clayton; Judges Combs and Stumbo concurred.
Two Kentucky State Police troopers were sued in their individual capacities for negligence that allegedly occurred during a high-speed automobile chase that ended with the death of a sheriff's deputy. The high-speed chase exceeded speeds of 100 miles per hour and occurred over almost 15 miles of highway roads. At the chase's conclusion, the deputy was stationed in his vehicle off the road at a T-juncture waiting for the troopers and the suspect. When the suspect approached the juncture, he veered his car off the road while traveling approximately 70 miles per hour and slammed head-on into the deputy's vehicle's side. The deputy and his canine unit were instantly killed. The suspect survived and later pled guilty to murder and first-degree fleeing and evading. The Court of Appeals concluded that entry of summary judgment in favor of the troopers was

appropriate because the causation element of a negligence tort could not be proven. The case of *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) held in a nearly-identical situation that the suspect's criminal act was an intervening cause that made the officer's actions in pursuing the suspect neither the legal nor the proximate cause of the resulting damages. Here, there was no evidence that the officers' conduct in any way caused the suspect to intentionally, or wantonly with extreme indifference to human life, veer his car off the road and into the deputy's cruiser. A dash-cam video of the incident revealed that the suspect did not lose control of his vehicle, nor did his break lights engage indicating that he was attempting to stop or slow down. The officers were not acting negligently when the suspect veered off the road and rammed the deputy's cruiser. Under these facts, appellants could not prove the causation element of their claim. Thus, summary judgment was appropriate.

WORKERS' COMPENSATION

Commonwealth of Kentucky, Uninsured Employers' Fund v. Crayne
2016-CA-000284 09/30/2016 2016 WL 5485212
Opinion by Judge Clayton; Judges Combs and Stumbo concurred.
The Uninsured Employers' Fund petitioned for review of a Workers' Compensation Board opinion that affirmed an Administrative Law Judge's order awarding appellee benefits and ordering the UEF to pay the benefits. The UEF disputed whether appellee proved that his injury was work-related and gave adequate notice. Further, the UEF maintained that the ALJ improperly determined appellee's average weekly wage. In affirming, the Court of Appeals noted that the ALJ has the sole authority to determine the weight and credibility of, and the inferences to be drawn from, the evidence. Given the ALJ's role, the Court concurred with the Board that substantial evidence supported the ALJ's decisions regarding the work-related nature of the injury, adequacy of notice, and average weekly wage. The Court also noted that the purpose of the UEF is to provide compensation to workers when their employers fail to provide such compensation.

Podgursky v. Decker
2015-CA-001390 10/21/2016 2016 WL 6134898
Opinion by Judge Jones; Judges Clayton and Taylor concurred.
This appeal presented an issue regarding the scope and meaning of the language "person employed for not exceeding twenty (20) consecutive work days" as used in KRS 342.650(2). The ALJ interpreted this language to mean that an individual had to perform actual services for his employer for twenty consecutive days. The Workers' Compensation Board reversed. On appeal, the Court of Appeals affirmed the Board. The Court relied upon the definition of "work" set forth in the Workers' Compensation Act, *i.e.*, that "work" means "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34). Based on the record, the Court concluded that there was clearly an implied (if not express) agreement in place between Decker and Modern Woodworking that Decker would "provide services to [Modern Woodworking] on a regular and sustained basis" in exchange for remuneration. The fact that there was not always work for Decker to perform every day was not determinative of his employment status. Even though Decker did not report to Modern Woodworking every day, he certainly performed work for Modern Woodworking on a regular basis over a sustained period of time for a period of over twenty consecutive days, thereby removing him from the scope of KRS 342.650(2).