

Kentucky Court Of Appeals
Cases of Note
May-June, 2017

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

LIMITATIONS ON ACTIONS

Hearn v. Family Dollar Holdings, Inc.

2015-CA-001540 05/05/2017 2017 WL 1788090

Opinion by Judge Combs; Judges Maze and Stumbo concurred. Appellant challenged an order dismissing her personal injury action against appellees based upon appellant’s failure to commence the action within the applicable period of limitations. On March 28, 2014, appellant filed a complaint alleging that she had suffered personal injuries on March 30, 2013, while shopping at a Family Dollar Store as a result of Family Dollar’s negligence. Although summonses were issued, service of process was never attempted. Counsel for appellant advised the trial court that because settlement negotiations were under way, summonses had not been served. After these alleged negotiations foundered, counsel had summonses reissued and served. However, the trial court dismissed the case because the one-year statute of limitations had run in the meantime. The Court of Appeals affirmed dismissal based on the literal mandate of CR 3, which provides that a civil action “is commenced by the filing of a complaint with the court and the issuance of a summons ... in good faith.” In this case, the initial summons was issued on March 28, 2014, the same day on which the complaint was filed. However, appellant did not attempt to serve any of the defendants with the summons. She acknowledged to the trial court that she intended to postpone commencement of the litigation because the parties were attempting to negotiate a settlement. (Family Dollar denied that such negotiations had occurred.) Under these circumstances, appellant’s delay constituted a lack of good faith that prevented the action from being commenced until summonses were reissued on May 18, 2015 - well outside the limitations period. The Court further noted that the trial court could not, sua sponte, extend the statute of limitations. Thus, dismissal was merited

NEGLIGENCE

Brooks v. Seaton Place Homeowners Association, Inc.

2016-CA-001112 06/16/2017 2017 WL 2605206

Opinion by Judge Combs; Judges D. Lambert and Thompson concurred. This appeal stemmed from a personal injury case arising from the alleged negligence of homeowners in maintaining a sidewalk in front of their house. The homeowners were part of a community-wide yard sale. Appellant fell on the sidewalk in front of their home and subsequently sued both the homeowners and the homeowners association, alleging that they owed her a duty of care to maintain the sidewalk in good repair. In affirming the summary judgment of the circuit court finding no liability, the Court of Appeals held that the pertinent covenants regulating the homeowners association did not include the sidewalk at issue among the “common areas” for which the association was responsible. As to the homeowners, the Court held that mere participation in a yard sale was not the kind of affirmative conduct that created a duty of care on their part with respect to appellant.

Hayes v. D.C.I. Properties-DKY, LLC

[2016-CA-001189](#) 06/16/2017 2017 WL 2605193

Opinion by Judge Combs; Judges D. Lambert and Nickell concurred. This appeal arose from a personal injury case filed by the parents of a minor, who was more than sixteen years of age at the time of his accident. While inebriated, the young man boarded and started up a sheepsfoot roller - a piece of heavy equipment - at a residential construction site. He subsequently overturned the roller and injured his leg. The parents premised the lawsuit against the construction company on the attractive nuisance doctrine. The circuit court entered summary judgment in favor of the construction company, and the Court of Appeals affirmed. The Court noted that while it is true that the attractive nuisance doctrine may impose liability upon an owner of premises for the trespass of a child who is injured, if the child is fourteen years of age or more, the presumption is that he is beyond the protection afforded by the "tender-years" element of the doctrine. Even disregarding this presumption, the Court held that there was still no evidence to suggest that the minor, a licensed driver, could not appreciate the risk involved in his operation of heavy construction equipment. The presence of the roller on the construction site posed an unreasonable risk of harm that he should have been able to appreciate. In light of his age and status as a licensed driver, no reasonable argument could be made to the contrary.

STATUTE/RULE INTERPRETATION

American General Life Insurance Company v. DRB Capital, LLC

[2016-CA-000395](#) 06/09/2017 2017 WL 2491662 DR Pending

Opinion by Judge D. Lambert; Judge Dixon concurred; Judge Clayton dissented and filed a separate opinion. This appeal was taken from an order approving the transfer of payment rights in a workers' compensation structured settlement to appellee DRB Capital, LLC (DRB). Appellee Ray Thomas, Jr. settled a workers' compensation claim with his employer and its insurers. Under the settlement agreement, the parties agreed that Thomas would receive periodic payments through the purchase of an annuity. His employer's insurer assigned its obligation to make those payments to appellant American General Annuity Service Corporation (AGASC) via qualified assignment. AGASC then purchased the annuity from American General Life Insurance Company (AGLIC) to fulfill the obligation. Following these events, Thomas sought to transfer his rights in the periodic payments to DRB in exchange for one lump-sum payment. DRB in turn filed an application to approve the transaction, which AGASC and AGLIC (collectively "American General") contested. American General argued that the language of the settlement agreement, the qualified assignment to AGASC, and the annuity contract each proscribed an assignment of Thomas' payment rights. They also argued that the provisions of Kentucky's Structured Settlement Protection Act (SSPA), found at KRS 454.430 et seq., do not apply to structured settlements resulting from workers' compensation claims. The circuit court ultimately approved Thomas' assignment to DRB, concluding that the SSPA applies to workers' compensation settlements and that the assignment was in Thomas' best interest. By a 2-1 vote, the Court of Appeals affirmed. The Court first noted that in *Kentucky Employers' Mut. Ins. v. Novation Capital, LLC*, 361 S.W.3d 320 (Ky. App. 2011), the Court held that KRS 454.435 conferred jurisdiction on circuit courts to approve the transfer of a workers' compensation award. The Court next considered whether the anti-assignment provisions provided in the contracts between the payee, the insurer, and the annuity issuer were enforceable. Citing to *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680 (Ky. 2012), the Court held that the anti-assignment provisions were void as a matter of public policy and, therefore, unenforceable. In a lengthy dissent, Judge Clayton set forth why she believed the anti-assignment provisions were enforceable.

TORTS

Brown v. Fournier

[2015-CA-001429](#) 06/02/2017 2017 WL 2391709 DR Pending

Opinion by Judge Acree; Judge Nickell concurred; Judge Clayton concurred and filed a separate opinion. Appellant claimed battery and false imprisonment by a police officer. The jury returned a verdict of no liability. The Court of Appeals affirmed, finding that under the facts of the case the instructions satisfactorily stated the law regarding the degree of physical contact a police officer is permitted to use with a person, without arresting the person, while managing the scene of an automobile accident.

WORKERS' COMPENSATION

Cunningham v. Quad/Graphics, Inc.

[2016-CA-001485](#) 06/16/2017 2017 WL 2605189

Opinion by Chief Judge Kramer; Judges D. Lambert and Nickell concurred. A worker's compensation claimant who sustained a compensable injury to his right shoulder contended that the opinion of the independent medical evaluator who arrived at the impairment rating ultimately utilized by the Administrative Law Judge (ALJ) in calculating his award of benefits did not qualify as substantial evidence. The claimant pointed out that the evaluator utilized passive range of motion measurements rather than active range of motion measurements as part of her overall assessment of the impairment to his right shoulder. He argued that the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), required the evaluation of his right shoulder to be based only upon active range of motion measurements. Thus, he reasoned that the evaluator effectively disregarded the AMA Guides and, consequently, the ALJ had no right to rely upon her opinion in determining his award. The Workers' Compensation Board affirmed the ALJ, and the Court of Appeals likewise found no error. The Court held that the Guides themselves permitted the evaluating physician to discount the active range of motion measurements that she obtained from the claimant and to modify his impairment rating if she believed, in light of other medical evidence and in the exercise of her entire range of clinical skill and judgment, that the claimant's measurements were implausible, indicative of poor effort, and insufficient to verify that an impairment of a certain magnitude existed. Here, the evaluating physician testified that she did exactly that. The claimant did not challenge her testimony to that effect, nor did he challenge that the evaluator adequately explained and justified her reasons for modifying his impairment rating from what he would have otherwise received from only an assessment of his active motion measurements. The evaluating physician's use of medical evidence she gleaned through passive range of motion measurements as one of her several bases for modifying the claimant's impairment rating, as well as her understanding that the AMA Guides permitted it, did not reflect that she impermissibly disregarded the AMA Guides. Rather, it reflected her interpretation of the AMA Guides and her assessment of the claimant's impairment, both of which are medical questions.