Kentucky Court Of Appeals
Cases of Note
September-October, 2017

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INSURANCE

Comley v. Auto-Owners Insurance Company
2016-CA-001305 10/06/2017 2017 WL 4448528
Opinion by Judge J. Lambert; Judges Combs and Johnson concurred. A homeowner challenged a summary judgment dismissing his complaint against his homeowners' insurer. The homeowner sought recovery under his homeowners' policy for water damage caused to his house following a water main break. The Court of Appeals affirmed, holding that the homeowner's claim was excluded from coverage under his policy's water damage exclusion, which stated that water damage from a flood or surface water was excluded, "regardless of the cause." The Court rejected the argument that the exclusion was limited to natural occurrences and held that the policy language was not ambiguous or unreasonable. The Court also declined to consider the homeowner's argument that the explosion exception to the water damage exclusion applied in this case because the argument was not properly preserved below.

NEGLIGENCE

Breedlove v. Smith Custom Homes, Inc.
2016-CA-000173 09/22/2017 2017 WL 4182960
Opinion by Judge J. Lambert; Judge Jones concurred; Judge Maze concurred in result only. Appellant challenged a summary judgment dismissing her claim for personal injury arising from her fall from the front porch of her residence. Appellant alleged that the owners of the home were negligent in maintaining the home, which caused the front entrance to be in an unsafe condition, and alleged that the builder was negligent in designing and/or constructing the home. Appellant also alleged negligence per se based upon an alleged building code violation in constructing the porch. The Court of Appeals affirmed the dismissal of the complaint. First, the five-year statute of limitations set forth in KRS 413.120(13) barred the action as the house was built in 2002 (when the cause of action was deemed to have accrued pursuant to the statute) and the injury happened in 2014. The Court rejected appellant's argument that Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) extended the limitation period because the defect was latent, not non-latent as in Saylor, and declined to address the constitutionality of the statute because appellant failed to notify the Attorney General. The Court further held that appellant's negligence per se claim for a building code violation was also barred by the statute of limitations as set forth in KRS 198B.130(2). Finally, the Court determined that appellant's claims against the homeowners were properly dismissed because they did not breach their duty of care to her.

Chamis v. Ashland Hospital Corporation
2015-CA-001071 10/13/2017 2017 WL 4558459
Opinion by Judge Nickell; Judge Maze concurred; Judge Jones dissented and filed a separate opinion. A patient who suffered from right-side paralysis brought a negligence action against a

hospital after he fell from his hospital bed. The patient alleged that hospital staff failed to follow a care plan that required all four of his bed rails to be raised. Following the patient's death, his widow - the executrix of his estate - was substituted as the plaintiff in the action. The circuit court granted summary judgment to the hospital because the estate offered no expert testimony as to the applicable standard of care. In so doing, the circuit court rejected the estate's argument that this was an ordinary negligence case - as opposed to a more complex medical malpractice action - and that the doctrine of res ipsa loquitor applied because the widow testified that the decedent had limited mobility and could not get over the bed rails had they been in the "up" position. By a 2-1 vote, the Court of Appeals affirmed, holding that whether expert testimony is required in a hospital fall case depends on whether hospital personnel were exercising professional judgment as opposed to rendering nonmedical, administrative, ministerial or routine care, or simply carrying out doctor's orders. In this case, determining whether the decedent was at a high risk of falling, what position the bed rails should have been in, and what other measures and precautions were needed required an exercise in professional judgment. Jurors would not automatically know of other options and whether they were advisable. Therefore, expert testimony as to the standard of care was necessary and, in the absence of such, summary judgment was appropriate. In dissent, Judge Jones argued that to the extent the estate argued that the hospital's failure to follow its own care plan was the proximate cause of the decedent's fall, the claim sounded in ordinary negligence; therefore, no expert medical testimony was necessary to establish the standard of care. Judge Jones further contended that based on conflicting testimony, it should have been left to a jury to determine whether the decedent had the ability to get himself over the rails had they been up.

WORKERS' COMPENSATION

First Class Services, Inc. v. Hensley
2016-CA-001367 10/13/2017 2017 WL 4557936
Opinion by Judge J. Lambert; Judges Dixon and Stumbo concurred. Employee, a truck driver, was injured in a motor vehicle accident on his way home from work. The rig belonged to the employer; the truck driver worked from home, receiving his dispatches there. On the day of the accident, the driver had fallen ill and returned home earlier than usual. The employer argued that this was a departure from the employee's routine, thus relieving the employer of liability. The Workers' Compensation Board ultimately ruled in the employee's favor, and the employer appealed. The Court of Appeals affirmed, holding that the employer failed to meet its burden of demonstrating "overwhelming favorable evidence" in support of its position that the employee was not providing a service to it or that the employee was not a "traveling employee." Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W.3d 456 (Ky. 2012). Because the employee's route began and ended at home, returning home early because of illness did not introduce a significant departure from that routine. The Court further distinguished this case from the unpublished decision, cited by the employer, of Cole v. Cardinal Country Stores, Inc., No. 2013-CA-000787-WC, 2013 WL 5522800 (Ky. App. Oct. 4, 2013). Not only were the factual situations different, but there were published decisions on the issue; therefore, there was no need to rely on an unpublished decision. CR 76.28(4)(c).

McCoy Elkhorn Coal Corporation-Insolvent Employer v. Sargent
2017-CA-000449 10/13/2017 2017 WL 4557808
Opinion by Judge Dixon; Judges Acree and Jones concurred. The Court of Appeals affirmed a decision of the Workers' Compensation Board determining that the Kentucky Coal Employers Self-Insurance Fund (KCESIF) was responsible for payment of enhanced benefits awarded because of intentional safety violations by the insolvent employer, McCoy Elkhorn. KCESIF

argued that it was a guaranty fund rather than an insurance carrier; consequently, the assessment of enhanced benefits pursuant to KRS 342.165(1) unfairly penalized KCESIF because McCoy Elkhorn was insolvent. However, the Court held that KCESIF could not escape responsibility for the enhanced benefits that would have been the obligation of the insolvent employer. The Court relied on AIG/AIU Ins. Co. v. South Akers Mining Co., LLC, 192 S.W.3d 687 (Ky. 2006), which established that an award of benefits pursuant to KRS 342.165(1) was increased compensation owed to the worker, not a penalty against the employer. The Court concluded that because AIG/AIU established that KRS 342.165(1) did not impose a "penalty," KCESIF could not rely on the language of KRS 342.910(2) exempting guaranty funds from liability for assessed penalties.

ARBITRATION

Genesis Healthcare, LLC v. Stevens
2015-CA-000166 09/22/2017 2017 WL 4182977
Opinion by Judge Maze; Chief Judge Kramer and Judge Stumbo concurred. Genesis Healthcare, LLC and affiliated entities (Genesis) appealed from an order denying its motion to compel arbitration of personal injury claims brought by Mable Stevens, as executrix of the estate of Reba Kathryn Price. Genesis argued that the circuit court erred in finding the arbitration agreement to be unenforceable due to the unavailability of the designated arbitrator. The Court of Appeals held that the circuit court erred by addressing this issue without first considering whether Stevens had the authority to execute the arbitration agreement on Price's behalf. The Court further concluded that the power-of-attorney (POA) at issue did not authorize Stevens to execute an arbitration agreement. Citing to Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012), the Court held that the POA only authorized Stevens to act on Price's behalf in matters involving financial and healthcare decisions. Thus, since there was no valid arbitration agreement, the circuit court properly denied Genesis's motion to compel arbitration. Therefore, the Court affirmed the circuit court's order and remanded for additional proceedings on the merits of the case.

Preferred Care Partners Management Group, L.P. v. Alexander
2015-CA-000563 09/22/2017 2017 WL 4182973
Opinion by Judge Taylor; Chief Judge Kramer and Judge Thompson concurred. Appellants challenged an order denying in part their motion to compel arbitration in a wrongful death action. At issue was whether a wrongful death claim could be litigated by the estate of a nursing home resident and his beneficiaries against the nursing home where the decedent entered into a valid arbitration agreement during his residency. The Court of Appeals affirmed, holding that the U.S. Supreme Court's decision in Kindred Nursing Centers Ltd. Partnership v. Clark, ___ U.S. ___, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) did not overturn the precedent set forth in Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012) and Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015) with respect to the derivative claims asserted by wrongful death beneficiaries under KRS 411.130. The Court further held that Ping was not preempted by the Federal Arbitration Act.