

Kentucky Court Of Appeals
Cases of Note
July-August, 2018

Note: To open hyperlink, take one of the following steps:

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

INSURANCE

Auto Club Property-Casualty Insurance Co. v. Foreman
2016-CA-001949 08/10/2018 2018 WL 3798395 Rehearing Pending

Opinion by Judge Kramer; Judge Jones concurred; Judge Combs dissented and filed a separate opinion. Appellees’ home was determined to be have been intentionally damaged by fire after their teenage son set fire to the basement. They submitted a claim for the damages to their homeowner’s insurance provider, which denied their claim, citing an “intentional acts” exclusion within their policy. Appellees filed an action for a declaration of rights under the terms of their policy. Ultimately, they moved for summary judgment, which the circuit court granted. By a 2-1 vote, the Court of Appeals reversed and remanded, holding that under the pertinent language of the “intentional acts” exclusion, it was undisputed that the objective component of that provision had been satisfied. Appellees’ son was considered an “insured person” under the policy, lighting a fire was considered an “action,” and it was reasonably foreseeable that a fire lit in a basement could spread to the other parts of the home and cause a “loss.” Accordingly, summary judgment was improper.

TORTS

Feltner v. PJ Operations, LLC
2016-CA-001536 07/06/2018 2018 WL 3312127

Opinion by Judge Nickell; Judges Dixon and Kramer concurred. On the way home after clocking out from work, a Papa John’s pizza delivery driver struck a pedestrian, who subsequently died. The decedent’s estate sued appellees alleging negligence; vicarious liability; negligent hiring, supervision, and retention; and franchisor liability. The circuit court granted appellees’ motions for summary judgment, and the Court of Appeals affirmed. The case primarily presented the question of whether the driver was acting in the scope and course of his employment at the time of the accident, thereby making his employer vicariously liable. Appellant contended that the trip was within the “service to employer exception” to the well-established “going and coming rule.” Appellant argued that because the driver’s travel to and from work in a required vehicle was subject to his employer’s control and was serving a purpose of the employer (i.e., bringing an instrumentality to use to make deliveries), he was acting within the scope of his employment. The Court disagreed and held that the determinative factor was whether the driver was operating his vehicle in furtherance of the employer’s business or his own. Because the driver was at liberty at the time of the accident and no longer providing a benefit to the employer, the Court declined to apply the “service to employer exception.” The Court also affirmed the dismissal of appellant’s other claims because there was no causal relationship between the employment and the accident. Any imposition of liability would serve to render the employer responsible for the personal conduct of the driver, which it had neither the right nor the opportunity to control.

TRIALS

City of Nicholasville Police Department v. Abraham

2017-CA-001071 07/27/2018 2018 WL 3595308

Opinion by Judge Acree; Judges Combs and Maze concurred. Burke Rhoads, a police officer with the City of Nicholasville, died as a result of a three-car accident. A jury apportioned most of the fault for the accident to Rhoads, though it also apportioned some to the other two drivers. Rhoads's estate and the City of Nicholasville Police Department claimed that the circuit court erred by refusing to give a "sudden emergency" instruction and by limiting the testimony of an expert witness. They also raised several arguments about the collateral source rule. The Court of Appeals vacated and remanded. The Court first held that the circuit court abused its discretion by refusing to give a sudden emergency instruction. The circuit court determined that Rhoads caused the sudden emergency; however, conflicting evidence about the reasonableness of his speed entitled appellants to the instruction on their theory of the case. The Court also held that the circuit court erred in prohibiting testimony from appellants' expert regarding the speed of Rhoads' vehicle at the time of the first of two impacts, having previously allowed similar testimony regarding the speed at the time of the second impact. Finally, the Court held that the circuit court properly applied the collateral source rule.

NEGLIGENCE

Catholic Health Initiatives, Inc. v. Wells

2016-CA-001919 08/10/2018 2018 WL 3798562

Opinion by Judge Kramer; Judges Acree and Taylor concurred. Dr. Anis Chalhoub implanted a pacemaker in Kevin Wells at Saint Joseph Hospital in London, Kentucky. Thereafter, Wells filed suit against Dr. Chalhoub, arguing that the pacemaker implantation had been medically unnecessary; that it had become a detriment to his health; and that Dr. Chalhoub, prior to implanting the pacemaker, had failed to secure his informed consent to do so. Wells also filed suit against the Hospital, arguing that Dr. Chalhoub never would have had the opportunity to implant the pacemaker absent the Hospital's failure to properly supervise physicians at its facility. Wells ultimately settled with Dr. Chalhoub. At trial, six claims were submitted for the jury's consideration: (1) negligence (relating to whether Dr. Chalhoub violated medical standards of care by implanting Wells' pacemaker); (2) lack of informed consent (also relating to Dr. Chalhoub); (3) negligent supervision (relating to the Hospital); (4) "conspiracy"; (5) "joint venture"; and (6) an alleged violation, on the part of the Hospital, of the Kentucky Consumer Protection Act (KCPA), codified in KRS 367.110 et seq. The jury found in Wells' favor with respect to all six of the claims. On appeal, the Court of Appeals held as follows. First, Wells' claim of "conspiracy" should have been dismissed at the directed verdict phase. Conspiracies require specific intent (i.e., an agreement) and are not formed through negligence or recklessness. Second, Wells' claim of "joint venture" should have been dismissed at the directed verdict phase. Where a plaintiff settles with or covenants not to sue the primarily liable party (in this case Dr. Chalhoub), the secondarily liable party is likewise released from any claim that depends upon vicarious liability. Third, the remainder of Wells' claims against the Hospital required a new trial due to evidentiary error. Specifically, before the jury had made any determination that Dr. Chalhoub had acted negligently toward Wells, the circuit court allowed Wells to introduce evidence of Dr. Chalhoub's alleged negligence with respect to other patients. This "prior bad acts" evidence may have been relevant to Wells' claim against the Hospital for negligent supervision, but it was irrelevant and unduly prejudicial with respect to Wells' claim that Dr. Chalhoub had acted negligently toward him - a claim Wells was required to prove before the Hospital could be assessed with derivative liability for negligent supervision. The circuit court also erred by admitting into evidence a report detailing the Hospital's failure to comply

with various federal certification requirements and reimbursement guidelines relating to participation in Medicaid and Medicare. These regulations and guidelines are not relevant to common law negligence and malpractice actions, and claims of negligence in Kentucky cannot be based A. 2016-CA-001919 08/10/2018 2018 WL 3798562 upon violations of federal statutory or regulatory law. On cross-appeal, Wells asserted that the circuit court erred by reducing his award of punitive damages to conform with a pre-trial itemization of damages he filed in this matter pursuant to CR 8.01(2) because, in his view, punitive damages were not considered “unliquidated damages” within the meaning of the rule. The Court of Appeals disagreed and affirmed as to this issue.

WORKERS COMPENSATION

Taylor v. McCoy Elkhorn Coal Corporation **[2017-CA-000137](#) 07/27/2018 2018 WL 3595313**

Opinion by Judge D. Lambert; Judge Combs concurred; Judge Nickell concurred and filed a separate opinion. Appellant challenged an order of the Workers’ Compensation Board that affirmed the denial of benefits for an allegedly work-related neck injury. Appellant argued that the evidence relied upon by the Administrative Law Judge contained sufficient inaccuracies to preclude the ALJ from such reliance. The Court of Appeals held that the ALJ improperly relied on unsubstantial evidence and reversed. The Court noted that the independent medical examination (IME) primarily relied upon by the ALJ began with an assumption that appellant may have been exaggerating his symptoms and that he must have lied regarding both of his work accidents. The IME spent significant time justifying this assumption and in actively ignoring any evidence contradicting this opinion. The Court ultimately determined that the IME did not reflect a measured examination of all evidence available and that its conclusion was based purely on assumption and “a willfully incomplete examination of the facts.” As a result, the IME was too corrupt to constitute substantial evidence and reversal was merited.

Mullins v. Rural Metro Corp. **[2016-CA-001152](#) 08/10/2018 2018 WL 3797571**

Opinion by Judge Nickell; Chief Judge Clayton and Judge Dixon concurred. Mullins petitioned and Rural Metro Corp. cross-petitioned for review of a Workers’ Compensation Board opinion vacating in part and remanding an Opinion, Award, and Order and an order denying reconsideration entered by the Administrative Law Judge. The ALJ found that Mullins was entitled to permanent total disability (PTD) income benefits and medical benefits. The Court of Appeals reversed and remanded. Mullins was injured while working for Rural Metro, experiencing pain and symptoms in his shoulder and neck. In its order denying the petition for reconsideration, the ALJ found that Mullins had experienced a cervical and shoulder injury; however, because the underlying opinion stated that the ALJ did not find a separate and distinct shoulder injury, the Board reversed and remanded, finding that it was improper for the ALJ to rely on work restrictions based on Mullins’ shoulder symptoms. The Court of Appeals held that the Board erred by disregarding or misapprehending the ALJ’s well-founded factual finding of a disabling medical condition involving disc protrusion and degenerative processes in the cervical spine, with radiculopathy impacting the left shoulder and left upper extremity, all caused or aroused into disabling symptomology by a stipulated injurious traumatic “injury.” The Court held that it was imperative to apply a correct understanding of the medical term, “radiculopathy.” The ALJ found that Mullins’ cervical condition was sufficient, by itself, to cause the left shoulder and left upper extremity symptoms, absent any separate or distinct underlying left shoulder injury. The Court further held that the ALJ was justified in weighing all permanent work restrictions in awarding PTD income benefits.