

Kentucky Court Of Appeals
Cases of Note
September-October, 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

Mosley v. Arch Specialty Fire Insurance Company

[2017-CA-001252](#) 09/28/2018 2018 WL 4649846

Opinion by Chief Judge Clayton; Judges Dixon and Jones concurred. Appellants Crystal Mosley, individually and as administratrix of her husband’s estate, and Rhett Mosley, Jr., her son, brought bad faith claims against Arch Specialty Insurance Company and National Union Fire Insurance Company arising out of a wrongful death action filed after Rhett Mosley was killed while driving a truck at a surface coal mine. Appellees were insurance companies for various parties involved in the underlying wrongful death suit. The bad faith claims were based on appellees’ conduct during the pendency of the litigation, specifically during two mediations in 2013. Appellants also asserted civil conspiracy claims. The circuit court granted Arch’s motion for judgment on the pleadings and National Union’s summary judgment motion. The Court of Appeals affirmed. The Court noted that appellants’ bad faith claims rested entirely on confidential settlement offers and appellees’ conduct during mediation sessions. Citing to *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846 (Ky. 2016), *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643 (Ky. App. 1995), *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), KRE 408, and Model Mediation Rule 12, the Court held that because mediation is confidential, the bad faith claims failed because none of appellees’ conduct during the mediation sessions was admissible. The Court further held that there was insufficient proof to support the civil conspiracy claims.

NEGLIGENCE

Howard v. Spradlin

[2017-CA-001478](#) 10/26/2018 2018 WL 5304188

Opinion by Judge Thompson; Judges Jones and J. Lambert concurred. This appeal concerned a building owner (appellant) whose commercial property was destroyed when a truck parked on the property ignited and caught the eaves of the building on fire. The truck had been parked in the building’s parking lot after the building - which was being leased for use as a grocery store - had closed. The issues presented were whether the truck’s owner (appellee) was a trespasser and whether he could be liable for negligence when the fire was set by an unknown third party who had broken into the truck. The building owner argued that appellee could be liable under the theory of negligence per se because he was a criminal trespasser in violation of KRS 511.080(1). The circuit court entered summary judgment in favor of appellee, and the Court of Appeals affirmed. The Court first held that there was no material issue of fact regarding whether appellee had permission to park in the parking lot. The grocery store operators filed affidavits stating that appellee was not trespassing on the night of the fire and that they had never objected to him parking his truck on the grocery store lot after hours. Additionally, there was no signage to indicate to anyone that a vehicle could not be parked on the lot after hours. Consequently, the

Court held that summary judgment was properly granted on the theory of trespass and negligence per se. The Court further held that appellee could not be liable for common-law negligence. Parking a truck does not pose a foreseeable risk of harm, and the act could not breach any duty owed to the premises owner. Moreover, the third party's act of burning the truck was an intervening superseding cause.

WORKERS COMPENSATION

Conley v. Super Services, LLC

[2018-CA-000709](#) 09/07/2018 2018 WL 4261727

Opinion by Judge Combs; Chief Judge Clayton and Judge Jones concurred. Appellant challenged an opinion of the Workers' Compensation Board affirming the denial of proposed caudal epidural steroid and sacroiliac injections. The Court of Appeals affirmed in part, vacated in part, and remanded. The Administrative Law Judge disallowed coverage for the epidural injection on the basis that it failed to provide "improved functioning." The Court held that the ALJ applied an erroneous standard and that the proper standard had been met according to the testimony of the injured worker - namely, that the injection contributed to the "cure and relief" of the effects of his work-related injury. However, the Court affirmed the denial of the sacroiliac injection, holding that the ALJ reasonably inferred from the medical evidence presented that the procedure was unproductive or outside the type of treatment generally accepted by the medical community.

Holcim v. Swinford

[2018-CA-000414](#) 09/07/2018 2018 WL 4261757 Rehearing Pending

Opinion by Chief Judge Clayton; Judges Kramer and Nickell concurred. The employer appealed from a Workers' Compensation Board opinion affirming an award of permanent partial disability benefits to an employee, aged 75, who injured his neck while operating a bulldozer. The Court of Appeals affirmed. The employer argued that the employee, who had cervical surgery approximately 20 years before the accident, had a pre-existing and active impairment not resulting from the accident. The Court agreed with the Board that the ALJ properly relied on the claimant's testimony that he worked twelve-hour shifts five days per week for years prior to the accident without difficulty, as well as the opinion of one medical expert who diagnosed a disc herniation caused by the bulldozer accident. Additionally, none of the medical experts assessed a pre-existing active impairment. The Court also addressed the applicability of KRS 342.730(4). The version of the statute in effect at the time of the injury terminated workers' compensation benefits for employees, like the claimant, qualifying for old-age Social Security retirement benefits. This provision was subsequently held unconstitutional in *Parker v. Webster Cty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). In response, the General Assembly amended the provision, while this appeal was pending, to terminate benefits upon the date the employee reaches the age of 70 or four years after the injury, whichever last occurs. The Court held that this provision could not be applied retroactively to limit the duration of the employee's benefits here because, although retroactivity language was included in the text of the House Bill, the legislature chose not to include it in the amended statute. The Court also agreed with the Board that the Administrative Law Judge's application of the 1994 version of KRS 342.730(4) was erroneous.