

Kentucky Court Of Appeals
Cases of Note
[November-December, 2018](#)

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NEGLIGENCE

Burger v. Wright

[2017-CA-001883](#) 12/07/2018 2018 WL 6423513

Opinion by Judge Nickell; Judge Smallwood concurred; Judge Acree concurred and filed a separate opinion.

The underlying action stemmed from a medical malpractice action filed against appellee for his treatment and care of appellant’s late husband, Clinton Driscoll, after Driscoll sustained a leg fracture in an ATV accident. Driscoll’s leg was surgically repaired by another doctor, who instructed him to avoid weight-bearing activities. However, Driscoll subsequently engaged in weight-bearing activities that opened his wound during a hunting trip. After his wound worsened and he experienced increased pain, swelling, and a fever, Driscoll went to the emergency room, where he was administered antibiotics and discharged with instructions to follow-up with appellee the following day. When he was initially evaluated by appellee, Driscoll’s vital signs were normal, and neither Driscoll nor appellant mentioned Driscoll’s hunting trip or weight-bearing activities to appellee. Nonetheless, appellee was concerned that Driscoll’s leg might be infected and ordered him admitted. Driscoll’s condition continued to deteriorate, and within days he became delirious, was diagnosed with severe sepsis, experienced renal failure, and subsequently perished. Appellant filed the subject suit and the case proceeded to trial, where the jury returned a defense verdict. On appeal, appellant argued that a new trial was merited on grounds that: (1) the circuit court erroneously failed to disqualify a certain juror, and (2) evidence of Driscoll’s negligence was irrelevant and unduly prejudicial, and apportionment instructions should not have been presented to the jury. The Court of Appeals rejected the arguments and affirmed. The Court first held that the circuit court did not err in declining to disqualify the juror. The juror qualification form asked potential jurors about their involvement in prior claims or litigation. During voir dire, no additional questions were posed regarding juror involvement in any type of litigation aside from medical malpractice actions. On the fifth and final day of trial, appellant discovered that the juror had failed to disclose an automobile accident he had been involved in. Appellant was already moving to strike the juror because of questions he had asked during trial. When the discrepancy was addressed by the circuit court, the juror appeared to give truthful answers, and the court found that the juror’s omission was not deliberate, intentional, or material. The Court of Appeals agreed. The Court also noted that appellant’s argument concerning the juror’s prior litigation history was disingenuous considering that another juror was not challenged despite indicating on the qualification form that a personal injury action had been filed against her or a family member. As to appellant’s second argument, the Court cited *Pauly v. Chang*, 498 S.W.3d A. 2017-CA-001883 12/07/2018 2018 WL 6423513 394 (Ky. App. 2015), and held that evidence of Driscoll’s accident, weight-bearing activities, and hunting trip was relevant to his duty to provide an accurate medical history. Thus, the issue of any comparative negligence resulting from the inaccurate medical history he had given to appellee constituted a factual question for the jury. In his concurring opinion, Judge Acree

addressed the issue of Kentucky lawyers continuing to improperly appeal from non-final, interlocutory denials of motions brought pursuant to CR 59.01 and CR 59.05.

INDEMNITY

CLK Multifamily Management, LLC v. Greenscapes Lawn & Landscaping, Inc. **[2017-CA-000577](#) 04/27/2018 2018 WL 1980754 Released for Publication**

Opinion by Chief Judge Clayton; Judges Dixon and D. Lambert concurred.

CLK Multifamily Management, LLC filed a third-party complaint against Greenscapes Lawn & Landscaping, Inc. seeking indemnification in a slip and fall case. The circuit court granted Greenscapes's motion to dismiss the complaint and denied CLK's subsequent motions to alter, amend, or vacate and for leave to amend the complaint. The primary issue on appeal was whether a clause in a snow removal contract between CLK and Greenscapes barred CLK from seeking indemnification. The Court of Appeals held that it did and affirmed. The clause in question read as follows: "Liability: Contractor [Greenscapes] shall only be liable for the gross negligence, bad faith & willful misconduct of the Contractor, its agents or employees. Greenscapes will not be liable for any slip and fall accidents caused by snow, ice or wet conditions." The Court held that even strictly construing the provision against Greenscapes, its meaning was sufficiently clear that CLK knew what it was contracting away. The Court noted that: (1) the clause expressly exonerated Greenscapes from all liability except for instances of gross negligence, bad faith, and willful misconduct; (2) the clause clearly indicated an intent to release Greenscapes from the precise personal injury alleged here: a slip and fall accident; (3) it was virtually impossible to construe the clause as intended to do anything other than provide protection for Greenscapes against negligence claims; and (4) the hazard at issue here, the ice and snow, was clearly within the contemplation of the provision because it was specifically mentioned. Thus, the exculpatory clause unmistakably and clearly set out the negligence for which liability by Greenscapes was to be avoided. The Court also held that because of the valid exculpatory clause in the snow removal agreement, Greenscapes was protected against a common law indemnity claim. The Court also rejected CLK's argument that a vendor service agreement signed by Greenscapes provided the basis for a contractual indemnity claim against Greenscapes. The agreement did not contain any express language imposing a contractual duty on Greenscapes to indemnify CLK for damages resulting from the negligent removal of ice and snow by Greenscapes.

IMMUNITY

Mason v. Barnett

[2016-CA-000778](#) 11/02/2018 2018 WL 5726387

Opinion by Judge Acree; Judges Dixon and Jones concurred.

After appellee John Barnett was injured in an automobile accident, he filed suit against McCracken County Road Supervisor Perry Mason. He claimed that Mason's failures to replace a missing stop sign and to clear overgrown foliage at the intersection where the accident occurred were substantial factors in causing the accident. The circuit court denied Mason's claim to qualified official immunity. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court held that Mason's duty to replace a stop sign was ministerial and, as to that duty, Mason was not entitled to immunity. However, the Court further held that a road supervisor's duty to clear foliage involves discretion and, therefore, the circuit court erred when it found this duty to be ministerial. The Court noted that the General Assembly had provided a window of time of more than seven weeks within which to perform the duty of clearing road

obstructions. Set forth in KRS 179.230(1), the duty is clarified as follows: “The brush, bushes, weeds, overhanging limbs of trees and all other obstructions along the roads shall be removed between July 1 and August 20 of each year” Thus, if there was any duty at all by the road department to clear foliage between August 21 of the year preceding the accident and the date of the accident, June 25, that duty was discretionary. Consequently, in the absence of bad faith, Mason was entitled to qualified official immunity against claims that he had breached his duty to clear foliage.

ESTOPPEL

Williams v. Hawkins

[2017-CA-001977](#) 11/30/2018 2018 WL 6252800

Opinion by Judge Nickell; Judges Kramer and J. Lambert concurred.

Tracie Williams and Charlotte Hawkins were in an automobile collision. Williams subsequently hired counsel, who wrote to Charlotte and requested that she forward the letter to her insurance carrier. Kentucky Farm Bureau (KFB) responded and periodically exchanged pre-suit correspondence with Williams’ counsel. Prior to expiration of the statute of limitations imposed by the Motor Vehicle Reparations Act, Williams filed suit against Charlotte, who - unbeknownst to Williams or KFB - had passed away, with administration of her estate being dispensed with by court order. KFB hired defense counsel who, through a CourtNet search, discovered Charlotte’s estate. Immediately after discovering his client’s death, Charlotte’s counsel contacted Williams’ counsel to relay the information. Charlotte’s counsel moved to dismiss the action as a legal nullity, which was granted. Williams’ counsel later - after expiration of the statute of limitations - moved to re-open Charlotte’s estate, after which this action was filed. The estate moved to dismiss the action as being filed beyond the statute of limitations and the motion was granted. On appeal, Williams argued that the estate should be estopped from asserting a statute-of-limitations defense because of its failure to disclose Charlotte’s death and because no legal entity was available for suit before the statute of limitations expired. The Court of Appeals affirmed. First, the Court held that KFB had no duty to discover or disclose Charlotte’s death. With no evidence that KFB even knew of Charlotte’s death, Williams was unable to prove fraudulent concealment; thus, estoppel was unavailable. Second, Williams failed to adequately explain or support her argument that due to circumstances beyond her control, there was no way for her to file suit against a proper defendant prior to expiration of the statute of limitations. The Court declined to extend *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008), and apply estoppel where Williams had failed to avail herself of information readily available to her in public records.