

Kentucky Court Of Appeals
Cases of Note
January-February, 2019

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INSURANCE

Auto-Owners Insurance Company v. Spalding

2017-CA-001474 01/18/2019 2019 WL 254517

Opinion by Judge Dixon; Judges Combs and Taylor concurred.

Appellee was allegedly told by her insurance agent that she had no underinsured motorist (UIM) coverage after she had been injured in an accident. However, after appellee settled her claim with the other driver’s insurance company, she learned that UIM coverage did exist. Because appellee was unaware of the UIM coverage, no notice of settlement was given to appellant, her UIM insurer, as required by *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993) and KRS 304.39-320(3). As a result, appellant filed a declaratory judgment action seeking a ruling that it did not owe appellee UIM coverage. The circuit court ultimately entered summary judgment in favor of appellee, ruling that: (1) the inquiry made to the agent regarding whether appellee had UIM coverage was a simple question of fact rather than law; (2) the agent’s erroneous answer constituted non-feasance; (3) the agent was acting on behalf of appellant when she made the misstatement; (4) the non-feasance was attributable to appellant; and (5) the non-feasance was sufficient to trigger a waiver and estoppel of the requirements of KRS 304.39-320(3) and *Coots*. The Court of Appeals reversed and remanded on grounds that a material issue of fact existed as to whether the conversation in which appellee was allegedly told that she did not have UIM coverage had actually occurred. However, the Court then held - agreeing with the circuit court – that where an insurer has initially denied coverage, whether the denial is based upon an erroneous coverage determination or, as in this case, a misrepresentation that a policy providing coverage even exists, the insurer cannot be allowed to subsequently assert a defense to liability based upon a provision requiring the insured to notify it prior to settlement, regardless of whether that provision is statutory or contractual.

WORKERS' COMPENSATION

Cabrera v. JBS USA, LLC

2017-CA-001658 02/08/2019 2019 WL 489076

Opinion by Judge Kramer; Judges Dixon and Lambert concurred.

After collecting workers’ compensation benefits for injuries suffered while on the job, appellant then asserted negligence and/or strict liability claims against several entities that were not his direct employer, but were associated in various ways with the pork processing facility where he was injured. The circuit court dismissed most of appellant’s claims after determining that each of the sued entities qualified as his statutory employers under the Worker’s Compensation Act and were therefore entitled to workers’ compensation immunity. The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first agreed that appellant’s claims were properly dismissed against the entity that had directly contracted for the sanitation services that he was performing when he was injured. For the same reasons, the Court also agreed that appellant’s

claims were properly dismissed against a second entity that owned the pork processing facility where he performed sanitation services. However, the Court then held that the circuit court should not have dismissed appellant's claims against a wholly-owned subsidiary of the company that owned the processing facility. Prior to when it became a subsidiary, this entity had designed, fabricated, manufactured, and installed the conveyor system that had injured appellant. The subsidiary argued that it was entitled to summary judgment based on workers' compensation immunity because its parent company was entitled to such immunity. Specifically, it noted that where an entity considered an employer under the Act is also a manufacturer of equipment used by its statutory employees, any statutory employee injured by that equipment in the course and scope of his or her work cannot sue the employer in tort (i.e., based upon the employer's "dual capacity" as a manufacturer). Rather, the statutory employee's exclusive remedy remains workers' compensation. As the Court explained, however, that rule only applies where one entity functions in two or more roles or capacities, such as "employer" and "manufacturer." It does not apply in cases dealing with two separate entities. Thus, unless the subsidiary qualified as appellant's employer or up-the-ladder contractor, it was not entitled to immunity from tort liability for its own, independent acts of negligence. Because the subsidiary never argued that it qualified as appellant's statutory employer for purposes of workers' compensation immunity, the circuit court erred in dismissing the claims against it. The Court likewise reversed regarding an entity whose name had been changed. In general, a mere change of a corporation's name does not create a new corporation, destroy the identity of the corporation, nor in any way affect the corporation's rights and obligations. Consequently, the Court reversed to this extent, but qualified its decision by noting that appellant was nevertheless limited to only one potential recovery.

IMMUNITY

Carucci v. Northern Kentucky Water District

[2017-CA-000941](#) 01/18/2019 2019 WL 254518

Opinion by Judge Maze; Judges Kramer and D. Lambert concurred.

Appellant tripped over a water meter owned by appellee, a water district created pursuant to KRS Chapter 74. Appellant then filed suit against the water district for negligence. The water district moved for summary judgment, arguing that it was entitled to governmental immunity. The circuit court granted the motion based on *South Woodford Water District v. Byrd*, 352 S.W.3d 340 (Ky. App. 2011), which held that water districts are entitled to such immunity. However, on appeal the Court of Appeals concluded that *Byrd* had been implicitly overruled by the Supreme Court of Kentucky in *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855 (Ky. 2015), which held that sanitation districts providing similar services are not entitled to governmental immunity. Based on *Coppage*, the water district's provision of clean water for private consumption and use could not be considered a function integral to state government. Accordingly, governmental immunity did not protect the district from appellant's negligence claims, and the circuit court's order granting summary judgment was reversed.

Hicks v. Young

[2017-CA-000925](#) 01/25/2019 2019 WL 321069

Opinion by Judge J. Lambert; Judges Dixon and D. Lambert concurred.

This interlocutory appeal concerned whether certain employees of the Louisville/Jefferson County Metro Government (Louisville Metro) were entitled to qualified official immunity in a negligence action. The claim arose from a car accident that was allegedly caused by overgrown trees obstructing signage in an intersection. The plaintiffs alleged that Louisville Metro, Louisville Metro's Department of Public Works and Assets, and the employees were negligent in

failing to maintain the trees and signage in a safe and reasonable manner, in failing to warn of the hazardous condition, and in failing to supervise and train employees to counteract hazardous roadway conditions to comply with Kentucky law. The Court of Appeals affirmed the denial of summary judgment in favor of the Louisville Metro employees, holding that there existed genuine issues of material fact as to whether the employees were entitled to qualified official immunity. In affirming, the Court interpreted KRS 179.070's use of the term "county engineer" to impose the ministerial duties of that position on any official who performs the same functions if a county engineer has not been employed. In other words, the duties of the county engineer are delegable. The Court agreed with the circuit court that factual issues remained as to which of the subject employees assumed the duties and responsibilities of the county engineer prior to the accident.

SUMMARY JUDGMENT

Embry v. Mac's Convenience Stores, LLC

[2016-CA-001047](#) 01/25/2019 2019 WL 321074

Opinion by Judge Lambert; Judges Maze and L. Thompson concurred.

The circuit court entered summary judgment in favor of appellee in a personal injury action after the court deemed admitted requests for admission that appellant failed to answer. The Court of Appeals reversed and held that the circuit court abused its discretion in deeming the requests to be admitted. The discovery requests were served the same day the circuit court permitted appellant's counsel to withdraw and provided him with 45 days to retain new counsel. Appellant's new counsel was unaware of the discovery request until appellee filed its motion for summary judgment and to deem the requests to be admitted. The Court further noted that the circuit court's order failed to reflect that new counsel had filed a response to the discovery requests, albeit late, despite the fact that the response appeared in the certified record prior to the entry of summary judgment.

APPEALS

Koester v. Koester

[2018-CA-000270](#) 02/01/2019 2019 WL 405498

Opinion dismissing by Judge Goodwine; Judges Dixon and Maze concurred.

Appellant challenged an order awarding appellee \$1,270.52 for damages to an automobile. The Court of Appeals did not rule on the merits of the appeal and instead dismissed it for appellant's non-compliance with briefing requirements set forth in CR 76.12. Specifically, the Court held that appellant's brief did not comply with CR 76.12(4)(c)(iii), (iv), and (v) or common appellate procedure.