Kentucky Court Of Appeals
Cases of Note
May-June, 2019

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

Watson v. United States Liability Insurance Company
2018-CA-000475 05/24/2019 2019 WL 2236428
Opinion by Judge Kramer; Judges Jones and K. Thompson concurred. Appellant filed a dram-shop action against various defendants in 2009, approximately one year after he was severely injured in an automobile accident. He settled with one defendant, Pure Country, LLC, in 2012. In August 2017, as his suit continued against other named defendants, appellant amended his complaint to assert a third-party bad faith claim against appellee United States Liability Insurance Company (USLI), Pure Country's insurer. In his tendered amended complaint, appellant alleged that during the on-going dram shop litigation - before his claims against Pure Country ultimately settled - USLI had acted in violation of the Unfair Claims Settlement Practices Act (UCSPA), KRS 304.12-230. USLI moved to dismiss the UCSPA claim on limitations grounds. Citing the five-year limitations period applicable to bad faith claims, it argued that appellant's claim had accrued no later than June 30, 2012, when appellant and Pure Country had "settled in principle" because Pure Country had emailed a negotiated settlement agreement to appellant. Appellant, on the other hand, argued that his bad faith claim had not accrued until December 2012, when he ultimately executed the settlement agreement and was paid the settlement amount. The circuit court granted USLI's motion. Reversing, the Court of Appeals explained that third-party bad faith claims against insurers asserted under the purview of the UCSPA cannot be maintained, and thus cannot accrue, until after: (1) a judgment fixing liability against the insured has been entered; or (2) the insured becomes legally obligated to pay pursuant to terms of the insurance contract. Accordingly, appellant's third-party bad faith claim against USLI accrued in December 2012, when he accepted Pure Country's offer of settlement by executing the settlement agreement and USLI then paid him the consideration, thereby forming a binding contract - a legal obligation. Because appellant asserted his third-party bad faith claim against USLI in August 2017, his claim was within the allotted five-year limitations period and was therefore timely.

Messer v. Universal Underwriters Insurance Company
2017-CA-000293 06/21/2019 2019 WL 2557330
Opinion by Judge Acree; Judges Lambert and Spalding concurred. The Court of Appeals affirmed the circuit court's grant of summary judgment dismissing appellant's bad faith claim brought pursuant to the Kentucky Unfair Claims Settlement Practices Act, KRS 304.12-230. The bad faith claim was abated while the parties litigated the underlying tort action, an auto accident involving appellant and the employee of appellee's insured. The police report indicated that appellant caused the accident. Appellee's insured said that its employee was driving its vehicle without permission, and non-permissive use was excluded from coverage under the policy of insurance. Consequently, appellee denied the claim because it had no contractual obligation under the policy and further disputed the claim because the insured's employee's liability was not beyond dispute. Appellee made nuisance value offers to appellant until a jury resolved the

permission use fact question and appellant was found to have a contractual obligation to cover the accident. However, appellee continued to dispute the claim because liability was not beyond dispute and damages were in doubt. During the five months after the coverage question was resolved, the parties' negotiations led to settlement of the underlying claim for the limits of the liability policy. When litigation of the bad faith claim resumed, appellee moved the circuit court for summary judgment, which was granted. The Court of Appeals affirmed because there was no obligation to pay the claim until the coverage issue was resolved, the insured's employee's liability was never beyond dispute, and appellee's conduct could not, as a matter of law, be outrageous or otherwise constitute bad faith.

NEGLIGENCE

Dexter v. Hanks
2018-CA-000362 05/10/2019 2019 WL 2063925
Opinion by Judge Jones; Judges Goodwine and Nickell concurred. In this premises liability case, appellant was working on appellee's roof when he slipped and fell, suffering two broken ankles. Summary judgment was granted in favor of appellee after the circuit court concluded that there was no breach of duty and after finding appellant to be an independent contractor. In affirming, the Court of Appeals relied primarily upon Auslander Properties, LLC v. Nalley, 558 S.W.3d 457 (Ky. 2018) and addressed the standard of care owed to independent contractors, as opposed to the more lenient standard for ordinary business invitees. A landowner owes ordinary business invites a duty to discover unreasonably dangerous conditions on the land and either eliminate or warn of them. However, a landowner only owes an independent contractor a duty to warn of hidden or latent defects that the landowner has actual knowledge of and that the contractor does not or cannot discover. As the circuit court did not err in finding appellant to be an independent contractor, no duty was breached when appellee did not warn him about the dangers of being on the roof. Appellant had superior knowledge of the condition of the roof, having been on it several times before, and the inherent dangers of working on a roof are readily apparent.

Ford v. Reiss
2017-CA-001656 05/03/2019 2019 WL 1967657 Rehearing Pending
Opinion by Judge Lambert; Judges Maze and Taylor concurred. A patient filed a medical negligence claim against a hospital, asserting that the treating physician negligently failed to diagnose and address a rare neurosurgical emergency, allegedly resulting in permanent injuries to the patient. Following a jury trial and defense verdict, the circuit court entered judgment in favor of the hospital. The Court of Appeals affirmed. Of note, the Court considered and rejected appellant's argument that the circuit court erroneously failed to strike three jurors for cause, forcing her to use peremptory strikes to eliminate them from the jury pool. The Court noted that the argument was not properly preserved for review because the patient's juror strike sheet failed to identify the jurors whom she would have struck. The Court also held that testimony referring to the patient as "sophisticated" because she was an obstetrician/gynecologist was admissible, despite her argument that this was a backdoor approach to place blame on her after the circuit court had already granted summary judgment as to comparative fault. The Court concluded that this argument lacked merit because it was conclusory and unsupported by legal authority. Finally, the Court held that the patient had waived her argument that the circuit court erred in permitting the hospital to advise the jury panel during voir dire that she bore the burden of proof and to describe that burden.

Kentucky Guardianship Administrators, LLC v. Baptist Healthcare System, Inc.
2017-CA-000665 05/03/2019 2019 WL 1967122

Opinion by Judge Dixon; Chief Judge Clayton and Judge Nickell concurred. The conservator of a patient brought an action against a hospital and doctor alleging that a failure to properly administer potassium, combined with the patient's consumption of QT-prolonging medications, resulted in cardiac arrhythmia and cardiac arrest. Following a jury trial, the circuit court entered judgment in favor of the hospital. The Court of Appeals affirmed as to all three appeals brought by the parties. Of note, the Court held that: (1) there was no error in limiting the testimony of the patient's medical expert, a pharmacist, to areas within his expertise; (2) the hospital's incident report was properly excluded pursuant to Pauly v. Chang, 498 S.W.3d 394 (Ky. App. 2015); (3) there was no error in limiting questioning regarding an unauthenticated and unexplained medical "audit trail"; (4) any cross-examination of a nurse regarding rehearsal of her testimony was inadmissible under the attorney-client privilege; (5) any error in allowing the doctor to testify that he would have treated his daughter the same way that he treated the patient was harmless; (6) the record did not indicate that the hospital was guilty of independent negligence; thus, no jury instruction regarding such was required; and (7) any issues regarding proximate cause and ostensible agency were for the jury.

Saufley v. Reed
2017-CA-000050 05/03/2019 2019 WL 1968008
Opinion by Judge Taylor; Judges Jones and Maze concurred. Cattle farmers brought an action against a neighboring property owner for negligence, stemming from an incident in which the farmers' cattle allegedly died from consuming yew bushes growing on the owner's property that had extended across the fence line onto the farmers' property. The circuit court granted the property owner's motion for summary judgment, and the Court of Appeals affirmed. The Court held that the property owner owed no legal duty to the cattle farmers as concerned the poisonous yew bushes growing on his property. The Court concluded that the circuit court properly applied the "Massachusetts Rule," which sets forth that landowners are limited to using only self-help when vegetation from a neighbor's property grows across boundary lines - i.e., trimming the vegetation back to the boundary line. The Court noted that there was no dispute that the farmers failed to trim the branches of the bushes back to the property line; moreover, there was no indication that they had even raised any concern about the bushes.

DAMAGES

Trilogy Healthcare of Fayette I, LLC v. Techau
2017-CA-001841 05/31/2019 2019 WL 2306943
Opinion by Judge Kramer; Judges Acree and Goodwine concurred. Trilogy Healthcare of Fayette I, LLC d/b/a The Willows at Hamburg appealed following a jury trial in which Joel and Neil Techau, individually and as coexecutors of the estate of Kenneth Techau (their deceased father), were awarded compensatory and punitive damages. The Techaus' suit alleged violations of KRS 216.515 (the Residents' Rights statute) during Kenneth's brief stay at the Willows, as well as causes of action for negligence and punitive damages. The circuit court also awarded attorneys' fees to the Techaus pursuant to KRS 216.515(26). The Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the claims under KRS 216.515 did not survive Kenneth's death. Therefore, there was no legal authority for an award of attorneys' fees under KRS 216.515(26). The Court then held that a punitive damages instruction was proper because the record supported the finding of the jury that The Willows acted with gross negligence. Finally, the Court concluded that the punitive damages award was not excessive because: (1) the evidence of the degree of reprehensibility of The Willows was substantial; and (2) the egregious conduct of The Willows, combined with the minimal award of compensatory damages, supported the amount of punitive damages imposed by the jury.

TRIALS

Louisville SW Hotel, LLC v. Lindsey
2017-CA-000856 05/17/2019 2019 WL 2147355
Opinion by Judge K. Thompson; Judges Combs and Lambert concurred.
This action was filed after a minor drowned in a hotel swimming pool. The child's Estate alleged that the pool was overcrowded and so abysmally cloudy that the child's body could not be seen in time to be resuscitated. A jury apportioned 65% fault to the child's mother and 35% to the hotel. It awarded $205,579.25 in medical expenses and $6,191 in funeral expenses. The jury awarded zero damages for the child's power to labor and earn money, for his physical pain and suffering, and for loss of consortium, but it awarded $3 million in punitive damages against the hotel. The Court of Appeals affirmed as to the hotel's appeal but reversed and remanded as to the cross-appeal filed by the Estate and the child's parents. Of note, the Court held that the circuit court did not err when it permitted the Estate to introduce health department reports concluding that the hotel had previously violated pool water testing and logging procedures where the Estate alleged that the same misconduct occurred on the date of the drowning. The Court noted that the reports were relevant to the hotel's knowledge of the need for, and importance of, testing the pool water and keeping required logs. Any issue as to the remoteness of the reports went to the weight to be given to them by the jury. The Court also held that financial records of the hotel from the few months prior to the drowning were admissible to show a need for increased staffing. The Court further concluded that the circuit court did not err in refusing to instruct the jury that the child was a trespasser when he drowned. Although neither he nor his mother was a registered guest when he drowned, he was the guest of a registered guest and it could be reasonably anticipated by the hotel that the child would use the pool. As to damages, the Court held that: (1) there was sufficient evidence to support an award of punitive damages; (2) the award of zero damages for loss of power to labor and earn wages required a new trial because there was an inference that the child would have had some power to earn money; (3) the award of zero damages for the child's pain and suffering also required a new trial because there was expert testimony that drowning victims suffer physical pain, as well as evidence that the child was conscious while struggling to stay afloat; and (4) a new trial was required on the issue of the parents' loss of consortium claim. The Court held that once a parent-child relationship is established, there is an inference that the relationship has intrinsic value and some amount of damages must be awarded.