Kentucky Court Of Appeals
Cases of Note
July-August, 2019

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INSURANCE

Joiner v. Kentucky Farm Bureau Mutual Insurance Company
2017-CA-000473 08/02/2019 2019 WL 3987764
Opinion by Judge Acree; Judges Kramer and Taylor concurred.
The Court of Appeals affirmed the circuit court's dismissal of appellant's claim that appellee violated the Kentucky Motor Vehicle Reparations Act by failing to pay basic reparations benefits (BRB). The Court held that KRS 304.39-230(1) establishes the limitations period for filing suit when no BRB have been paid. It also held that the same statute operates as a statute of repose when the reparations obligee is a third-party insured such as a pedestrian. Furthermore, for such reparations claimants, proof of net loss must be submitted to the reparations obligor within the same limitations period established by KRS 304.39-230(1). Appellant's submission of a billing statement showing a "zero" balance did not constitute the predicate proof of loss that would have created the insurer's obligation under KRS 304.39-040 or that would have entitled appellant to reparations under KRS 304.39-030. The Court also held that when the medical expenses of a tort claimant are paid by the Kentucky Medical Assistance Program, the tort claimant shall be deemed to have made to the Cabinet for Health and Family Services an assignment of his rights to third-party payments to the extent of the medical assistance paid on his behalf.

Shackelton v. Estate of Fries
017-CA-000121 08/02/2019 2019 WL 3987760
Opinion by Judge Acree; Judge Kramer concurred; Judge K. Thompson concurred in part, dissented in part, and filed a separate opinion.
In this review of the circuit court's dismissal of appellant's claims against a tortfeasor for personal injuries and against the tortfeasor's insurer for failure to pay underinsured motorist (UIM) benefits, the Court of Appeals addressed two primary issues: (1) relation back of an amended complaint under CR 15.03; and (2) the viability of a UIM claim when the underlying claim against the tortfeasor can no longer be maintained. Reluctantly applying Gailor v. Alsabi, 990 S.W.2d 597 (Ky. 1999), the Court affirmed the dismissal of appellant's claims against the tortfeasor because the complaint was filed after the tortfeasor died (and before the existence of the tortfeasor's estate) and because the amended complaint - which was filed after the limitations period expired - did not relate back under CR 15.03. Although the Court followed Gailor, it criticized its rationale as unjust when applied to the facts of this case and urged the Supreme Court of Kentucky to consider advancing Kentucky jurisprudence to address that issue. Judge K. Thompson dissented, in part, on grounds similar to the majority's criticism of Gailor, stating that reversal was appropriate to allow limited discovery regarding whether the tortfeasor's insurer, which negotiated with the tort claimant after the insured's death and before the existence of the estate, engaged in conduct that would justify estopping application of Gailor to the extent of insurance coverage. The Court was unanimous regarding the second issue and held that a UIM claim against an insurer was not dependent upon the pursuit or even the viability of the underlying tort claim. Such a claim could go forward independently. However, the Court

reiterated the holding in Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1993) that "proof the offending motorist is a tortfeasor and proof of the amount of damages caused by the offending motorist are … essential facts that must be proved before the insured can recover judgment in a lawsuit against" an insurer for UIM benefits.

TORTS

Littrell v. Bosse
2018-CA-001137 07/26/2019 2019 WL 3367196
Opinion by Judge Spalding; Judges Dixon and Taylor concurred.
Appellant, a former police officer and instructor at Georgetown College, challenged the summary disposition of his claims of contractual interference, outrage, witness intimidation, harassment, and official misconduct against Georgetown Police Chief Michael Bosse and the City of Georgetown. The Court of Appeals affirmed. The claims stemmed from a conversation in which appellant and Chief Bosse discussed appellant's Facebook posts concerning pending litigation between the police department and an officer who worked with appellant when he was with the department. Appellant contended that Chief Bosse attempted to get him to lie during his upcoming testimony in that litigation and that he refused to do so. Appellant's attorney subsequently sent Chief Bosse a letter about their conversation and warned him about interfering with his job at the college. However, either because he had already done so, or because he was undeterred by the letter, Chief Bosse contacted counsel for the college with information about the Facebook posts that eventually reached a provost. The college took no action against appellant, assuring him that the college would protect his First Amendment rights so long as he abided by the college handbook and even renewing his contract, but he resigned from his teaching position the following year. In affirming, the Court of Appeals first held that the circuit court did not err in refusing to apply the Restatement (Second) of Torts §766A to appellant's claim that Chief Bosse had intentionally interfered with his contractual relations with the college. The Court noted that Kentucky had yet to adopt that section of the Restatement. Moreover, even if Chief Bosse had attempted to interfere with appellant's contractual relationship with the college, the fact remained that he was unsuccessful because the college renewed appellant's contract. Harm without injury is not a tort. The Court also rejected appellant's arguments relating to his intentional infliction of emotional distress claim, holding that summary judgment was appropriate because his claim was not supported by expert medical or scientific proof. Finally, the Court rejected appellant's arguments relating to his claims that Chief Bosse had violated KRS 524.040, 525.080, and 522.030(1)(a).

Stanziano v. Cooley
2017-CA-001430 07/05/2019 2019 WL 2896037
Opinion by Judge Nickell; Judges Combs and K. Thompson concurred.
A former mental patient of Eastern State Hospital shot and killed attorney Mark Stanziano approximately six weeks after being discharged. Stanziano's widow and estate sued Eastern State and mental health professionals who had treated the patient on claims of wrongful death and medical malpractice. The circuit court determined that the physicians were shielded from liability by the provisions of KRS 202A.400 and further concluded that Stanziano had failed to carry her burden of proof to proceed against Eastern State. A claim of sovereign immunity by Eastern State was denied as moot. On appeal, Stanziano asserted that the circuit court erred in concluding that the physicians were entitled to summary judgment under KRS 202A.400 absent a showing that they had treated the patient in good faith and within acceptable professional guidelines (as required by KRS 202A.301) and further erred in concluding that the personal immunity granted by KRS 202A.400 extended to cover Eastern State. On cross-appeal, Eastern

State asserted that it was entitled to sovereign immunity. The Court of Appeals affirmed as to the direct appeal and concluded that the cross-appeal was moot. The Court concluded that because the patient had not communicated to anyone at Eastern State an actual threat to inflict harm on Mark Stanziano, the statutory duty to warn under KRS 202A.400 was not triggered. Moreover, Stanziano failed to establish the applicability of any common law duty and failed to produce evidence that the physicians had breached the standard of care. Thus, summary judgment in their favor was appropriate. The Court next rejected Stanziano's assertion that the circuit court erroneously applied the provisions of KRS 202A.400 to a noncovered entity. The circuit court made no mention of the statute in granting summary judgment to Eastern State and instead relied on the doctrine of respondeat superior. As its servants had not been negligent, no liability could be imputed to Eastern State

WORKERS COMPENSATION

Morgan v. Bluegrass Oakwood, Inc.
2019-CA-000423 07/26/2019 2019 WL 3367190
Opinion by Judge Kramer; Judges Nickell and L. Thompson concurred.
On February 17, 2014; June 14, 2015; and April 19, 2016, appellant respectively sustained three work-related injuries while employed by Bluegrass Oakwood, Inc. as a "residential associate." Ultimately, the Workers' Compensation Board affirmed an order of an Administrative Law Judge (ALJ) that considered appellant's three injuries and awarded her permanent partial disability (PPD) income benefits enhanced by the double multiplier set forth in KRS 342.730(1)(c)2. On appeal, appellant argued that the ALJ misapplied the law to his own factual findings relating to the enhancement of her award, and that her award should have instead been enhanced by the triple multiplier set forth in KRS 342.730(1)(c)1. The Court of Appeals agreed. According to the ALJ's findings and the evidence that he specifically deemed credible, when appellant returned to work at various times after sustaining her February 17, 2014 injury, she returned to a type of work (i.e., that of a residential associate) that she lacked the physical capacity to perform. There was no proof in the record that appellant had been paid any wages - much less weekly wages equal to or greater than what she had earned as a residential associate (as required by KRS 342.730(1)(c)2) - since April 19, 2016, the date the ALJ determined that appellant's work injuries had eventually caused her to stop working in that position. Because the ALJ was not at liberty to speculate that appellant could work in some other type of position for an equal or greater wage, there was no meaningful difference between appellant's situation and the situation in which a claimant who lacked the physical capacity to return to her pre-injury employment decided not to return to work at all. The Court reversed with directions that appellant's award be enhanced by the triple multiplier set forth in KRS 342.730(1)(c)1.