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

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INSURANCE

Thomas v. Perkins
2017-CA-001875 01/03/2020 2020 WL 34592
Opinion by Judge L. Thompson; Judges Combs and Jones concurred.
The Court of Appeals affirmed a circuit court's finding that both Jerry Perkins and his wife, Bessie Perkins, were involved in child care services at their home. Therefore, a homeowner's liability policy issued by State Farm Fire & Casualty Company did not apply to injuries sustained by children being cared for at the home due to a "child care services exclusion" term in the insurance policy.

Davis v. Progressive Direct Insurance Company
2019-CA-000850 02/28/2020 2020 WL 962360
Opinion by Judge Kramer; Judge Dixon and Special Judge Buckingham concurred.
In a direct appeal from the circuit court's grant of summary judgment to appellee, the Court of Appeals affirmed. While riding her motorcycle in Barren County, Kentucky, appellant collided with a horse-drawn buggy. She thereafter sought uninsured motorist coverage under her policy with appellee. Appellant presented two arguments on appeal: (1) the circuit court erroneously concluded that a horse-drawn buggy did not qualify as a "motor vehicle" under the Motor Vehicle Reparations Act (MVRA), KRS 304.39-010 et seq.; and (2) the circuit court erroneously concluded that the horse-drawn buggy did not qualify as a "motor vehicle" as defined by the language of her insurance policy with appellee. The Court of Appeals upheld the grant of summary judgment. First, the MVRA defines a "motor vehicle" as one which is "propelled by other than muscular power." KRS 304.39-020(7). Second, a horse-drawn buggy does not qualify as a motor vehicle for purposes of uninsured motorist coverage, consistent with the previous Court of Appeals' opinion in Rosenbaum v. Safeco Ins. Co. of America, 432 S.W.2d 45 (Ky. 1968), and in conformity with the principle that terms used in insurance contracts should be afforded their ordinary and usual meaning.

Kentucky Farm Bureau Mutual Insurance Company v. Brewer
2018-CA-000736 02/21/2020 2020 WL 857073
Opinion by Judge K. Thompson; Judges Jones and Kramer concurred.
Kentucky Farm Bureau Mutual Insurance Company appealed from an order denying its motion for declaratory judgment. The circuit court ruled that Kentucky Farm Bureau was estopped from denying insurance coverage on a claim by appellee against William Walters. The Court of Appeals reversed and remanded, concluding that the circuit court erred. Kentucky Farm Bureau defended Walters after giving him timely notice that it was defending under a reservation of rights. The Court held that the circuit court erroneously concluded that the mere passage of time between the reservation of rights and the filing of a declaratory judgment action was sufficient to preclude Kentucky Farm Bureau from asserting a no-coverage defense. The circuit court did not address whether Kentucky Farm Bureau had misrepresented to Walters that it was no longer defending under a reservation of rights or whether Walters had been prejudiced by Kentucky

Farm Bureau's failure to earlier assert a no-coverage defense. Thus, the case required remand for further findings.

DISCOVERY

Reynolds Consumer Products, LLC v. Commissioner of Department of Workplace Standards

2018-CA-000821 01/03/2020 2020 WL 34590

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

When the appellee state agency, investigating an industrial accident in Kentucky, subpoenaed appellant's report prepared in anticipation of litigation over a separate accident in Virginia, appellant claimed work-product privilege. Declining to recognize the privilege, the circuit court ordered compliance with the subpoenas. The Court of Appeals first rejected appellant's argument that the state agency lacked subpoena power. The harder question was whether the work-product privilege applied. Appellee argued that the privilege only prevented discovery in the Virginia litigation in anticipation of which the work product was prepared. The Court disagreed. Drawing implications from O'Connell v. Cowan, 332 S.W.3d 34 (Ky. 2010), the Court noted the non-case-specific, over-arching purpose of the privilege, stated by the Supreme Court of Kentucky as follows: "The work-product doctrine is designed to protect an adversary system of justice, and is rooted in the United States Supreme Court's decision in Hickman v. Taylor[, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)]." The Court then adopted from O'Connell the principles that: (1) work-product protection applies to materials prepared for any litigation, and (2) the protection survives the termination of the litigation for which it was prepared. After noting that our courts had already rejected appellant's final argument urging adoption of the self-critical analysis privilege, the Court reversed and remanded. The circuit court was given instructions and guidance to apply existing jurisprudence to determine which specific documents were prepared in anticipation of litigation anywhere, and then to determine whether such privileged documents might nevertheless be discoverable on the ground that appellee is unable to obtain its substantial equivalent without undue hardship.

WORKERS COMPENSATION

Dixie Fuel Company, LLC v. Wynn

2018-CA-000984 01/31/2020 2020 WL 499736

Opinion by Judge Lambert; Chief Judge Clayton and Judge Jones concurred.

Appellant filed an interlocutory appeal pursuant to Breathitt County Board of Education v. Prater, 292 S.W.3d 883 (Ky. 2009), seeking review of an order denying its motion for summary judgment. In the motion, appellant sought up-the-ladder immunity from a personal injury claim filed by appellee Jacob Wynn pursuant to the exclusive remedy provision set out in KRS 342.690(1) of Kentucky's Workers' Compensation Act. The Court of Appeals reversed, holding that the circuit court erred in denying the motion. The Court agreed with appellant that it only had to establish that it met the statutory definition of contractor under KRS 342.610(2)(a) to be entitled to immunity, not that it also had to establish that the work was regular or recurrent pursuant to subsection (2)(b), because of the use of the word "or" between the two subsections. The Court also held that this interpretation of the statute did not violate public policy or Wynn's equal protection rights.

Lone Mountain Processing v. Turner

2018-CA-001011 01/17/2020 2020 WL 251583

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellee filed a claim against Lone Mountain (his most-recent employer) seeking benefits for coal workers' pneumoconiosis. The Administrative Law Judge found, and the employer agreed, that appellee established the presence of complicated coal workers' pneumoconiosis. In awarding benefits, the ALJ found that the tier-down provisions in the pre-1996 version of KRS 342.730(4) were applicable to appellee's award. On appeal, the Workers' Compensation Board affirmed, pointing to the then-recent opinion in Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). While the petition for review was pending, the General Assembly enacted amendments to KRS 342.730(4) which provided that income benefits would terminate when the employee reached the age of 70 or 4 years after the date of last exposure, whichever last occurred. The amendment further provided for retroactive application to all claims that had not been fully adjudicated or were in the appellate process as of the effective date of July 14, 2018. The Supreme Court of Kentucky concluded that the amendments clearly provided for retroactive application. Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). Likewise, the Court of Appeals held that the 2018 amendments satisfied the conditions for retroactive application. Consequently, the Court reversed and remanded the matter to the ALJ for entry of an award applying the 2018 version of KRS 342.730(4).

Maysey v. Express Services, Inc.
2018-CA-001121 02/21/2020 2020 WL 856439
Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Combs concurred.
Appellant challenged the decision of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ's) decision not to grant him a 30% enhancement of benefits for a safety violation pursuant to KRS 342.165(1) against Express Services, Inc., a temporary help service agency. The agency placed appellant at Magna-Tech Manufacturing, LLC, where his left arm was amputated above the elbow by a centrifuge machine. At issue was whether Express Services could be liable for the statutory penalty for the safety violations of Magna-Tech, the host employer. The Court of Appeals reluctantly affirmed. KRS 342.615(5) sets forth that a temporary help service shall be deemed the employer of a temporary worker; it does not permit a temporary employee to be viewed as being the client's employee. Thus, in the absence of evidence that the agency had knowledge of, approved of, or acquiesced in the host employer's actions, Express Services could not be liable for the penalty. The Court noted that given the nature of the relationship between a temporary help service and the host employer and that the host employer controls the day-to-day-operations of the workplace, that is a highly unlikely situation. The Court concluded by urging the General Assembly and Supreme Court to address the issue.