Kentucky Court Of Appeals
Cases of Note
May-June, 2020

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INSURANCE

Marshall v. Kentucky Farm Bureau Mutual Insurance Company
2019-CA-001059 05/22/2020 2020 WL 2601372
Opinion by Special Judge Buckingham; Judges Combs and Jones concurred.
Appellant's husband was killed in an ATV accident. She filed a wrongful death suit seeking damages against the driver of the ATV. At the time of the accident, the driver was insured under a homeowner's insurance policy issued by Kentucky Farm Bureau that covered his residence. The Farm Bureau policy specifically excluded coverage for the use of "motorized land conveyances," which included ATVs. However, one of the exceptions to the exclusion from coverage was for a vehicle or conveyance not subject to motor vehicle registration which is "used to service an insured's residence[.]" The circuit court concluded that homeowner's coverage did not apply to the ATV, and the Court of Appeals affirmed. The Court first held that the word "service" as used in the exception was not ambiguous. It then agreed with the circuit court's conclusion that the ATV was never used to service the driver's residence. The driver testified that he never used the vehicle, either before or after the accident, to perform yard work or other tasks for his residence. He testified that he used it to give rides to children around the neighborhood, to hunt, and in connection with his landscaping business on one occasion. In light of this evidence, summary judgment in favor of Farm Bureau was appropriate.

Nichols v. Zurich American Insurance Company
2019-CA-000071 05/29/2020 2020 WL 2781705
Opinion by Judge Dixon; Chief Judge Clayton and Judge Taylor concurred. Appellant challenged orders granting summary judgment in favor of Zurich American Insurance Company on appellant's insurance bad faith claims. The Court of Appeals affirmed. Appellant argued he lacked certain critical evidence in responding to Zurich's motion for summary judgment. He sought Zurich's post-litigation claim file and communications. The circuit court compelled production of post-litigation conduct and communications concerning settlement offers and negotiations. Appellant claimed the court's refusal to compel all post-litigation conduct and communications was contrary to Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006). However, Knotts held an insurer's post-filing claims conduct is generally inadmissible. This does not entirely prohibit trial courts from allowing discovery or admission of such evidence but, instead, requires courts to weigh its relevance against the prejudice to the insurer. Appellant also sought Zurich's underwriting file. However, his assertion that the underwriting file could have been used to establish elements of his bad faith claim ignored the evidence in the record. Zurich had a reasonable basis in law or fact for denying appellant's claim based on policy language. Since nothing in the underwriting file negated the reasonable basis for Zurich denying appellant's underinsured motorist claim, the circuit court did not err in finding production of the underwriting file irrelevant. Appellant also moved the circuit court to exclude the introduction of evidence of the case's litigation history at trial, contending it was unfair to disallow discovery of Zurich's post-litigation conduct and communications and then allow Zurich to introduce such

evidence at trial. The Court of Appeals noted that Knotts directs courts to be concerned about prejudice to insurers. The litigation history of this case was equally known to these parties; therefore, the circuit court did not err in denying the motion. Finally, the Court held that the circuit court did not err in granting summary judgment on appellant's claim for interest and attorney's fees.

COURTS

Armstrong v. Estate of Elmore
2019-CA-001084 05/15/2020 2020 WL 2502205 Rehearing Pending
Opinion by Special Judge Buckingham; Judges Combs and Jones concurred.
This case arose out of an automobile accident in 2014 in which two individuals died. The case was previously the subject of an opinion by the Supreme Court of Kentucky wherein issues concerning the ownership of a vehicle were determined. Travelers Indemnity Company v. Armstrong, 565 S.W.3d 550 (Ky. 2018). After appellant filed wrongful death claims in the Warren Circuit Court, the main issues quickly became who was the statutory owner of the vehicle at fault and whose insurance was potentially responsible for damages resulting from the accident. The Supreme Court concluded in Travelers that "Elmore [the driver of the vehicle] was the statutory 'owner' of the vehicle, even though title was still in Martin [Cadillac's] name." Martin Cadillac was the licensed motor vehicle dealer that originally owned the vehicle. Martin subsequently sold the vehicle to DeWalt Auto Sales through an auction, and DeWalt took possession of it. DeWalt then sold the vehicle to Elmore for cash. On remand from the Supreme Court, appellant attempted to argue that DeWalt owned the vehicle; however, the circuit court determined that the law-of-the-case doctrine barred re-litigation of the issue because the Supreme Court had determined that Elmore was the statutory owner of the vehicle. The Court of Appeals agreed that the law-of-the-case doctrine applied and affirmed. The Court noted that the Supreme Court's belief that Elmore was the statutory owner of the vehicle was not essential to its determination in Travelers; it was essential to the Supreme Court's ruling to determine only that Martin Cadillac was not the owner. Nevertheless, because the Supreme Court made that determination, the Court of Appeals concluded that it was bound by it.

NEGLIGENCE

Pringle v. South
2019-CA-000029 05/08/2020 2020 WL 2296997
Opinion by Judge Caldwell; Judges Acree and Kramer concurred.
Appellants challenged the dismissal of Brenda Pringle's medical malpractice claim and her husband's loss of consortium claim for their failure to identify an expert witness who could establish the applicable standard of care. The Court of Appeals affirmed. Appellants attempted to rely on testimony from a doctor who was a contractor-consultant for the Kentucky Board of Medical Licensure and who reviewed allegations Brenda brought against appellee before that agency. Appellants did not hire the doctor, nor does he appear from the record to have been engaged to provide expert testimony. The Board filed a motion to quash the subpoena served on the doctor. The Board argued that the doctor agreed to act, as part of its function, as the regulator of the medical profession, that he was compensated for his time spent on Brenda's complaint to the Board at a reduced fee, and that allowing such contractors to be lassoed into associated court actions would have a chilling effect on the willingness of physicians to provide this service. The circuit court agreed and granted the motion to quash. Appellants did not appeal this decision. The court subsequently granted summary judgment to appellee. In affirming, the Court of Appeals

held that a party to a medical negligence action cannot compel involuntary expert testimony from a physician or other medical professional whose expert opinion, if any, is the product of his or her work for the Board of Medical Licensure pursuant to KRS 311.591 and 201 KAR 9:240 Section 5(5)(a) and (b).

Bramlett v. Ryan
2019-CA-000122 05/01/2020 2020 WL 2095904 DR Pending
Opinion by Judge Dixon; Special Judge Buckingham and Judge Kramer concurred. Appellants' seven-year-old son drowned in appellees' swimming pool during a swim party. At least four adults were providing supervision around the pool at the time of the child's death. Appellants filed a negligence suit, but the circuit court entered summary judgment in favor of appellees. The Court of Appeals affirmed. The Court first held that the child was a licensee - not an invitee - on appellees' property; therefore, they owed a general duty of care to him. The Court compared the case to Grimes v. Hettinger, 566 S.W.2d 769 (Ky. App. 1978), Hanners v. City of Ashland, 331 S.W.2d 729 (Ky. 1959), and Schauf's Adm'r v. City of Paducah, 106 Ky. 228, 50 S.W. 42 (1899), and concluded that children aged seven or eight are considered old enough to appreciate the possible hazards of use of "confined waters," i.e., swimming pools. Thus, there is no duty to warn children as young as seven concerning the hazards of bodies of water, such as private swimming pools, as in this case. There was also no evidence that the pool created an unreasonable risk triggering a duty to warn the child. Consequently, appellees could not be held liable for his death under a general duty to licensees since they had no obligation to specifically warn him of the hazards of swimming in a private swimming pool. Appellants also argued that appellees accepted an additional duty of care by undertaking the duty to supervise the children in the pool "to keep the area safe." The Court rejected this argument, noting that the evidence did not support it, and that appellants failed to present anything suggesting that the guests at the party were engaged in activities that created an unreasonable risk of harm to the child.

Johnson v. City of Versailles
2018-CA-001647 06/12/2020 2020 WL 3116963 Rehearing Pending
Opinion by Judge Maze; Judges Lambert and L. Thompson concurred. While visiting the grave of her son, appellant was injured when the headstone on the grave fell over onto her. She brought this action against the City of Versailles, which had acquired the cemetery in the years following her son's burial. Appellant alleged that the monument had been damaged by a lawnmower and that the Public Works Director had noted that the headstone was loose and offered to repair it. The Public Works Director denied that this conversation took place. The circuit court dismissed the action, concluding that appellant was merely a licensee and, consequently, the City's only duty was to warn her of hazardous conditions of which it had actual knowledge. On appeal, the Court of Appeals agreed with the circuit court that KRS 381.697(1) does not impose an affirmative duty on a cemetery owner to inspect headstones or to proactively repair headstones which have not fallen. However, the Court concluded that the City owed duties to appellant as an invitee, not a licensee. The Court noted that appellant, as the original purchaser of the gravesite, had a business relationship with the cemetery beyond that of an ordinary visitor. Furthermore, her right to visit the grave of her son is an easement, and thus an ongoing property right. As a result, the Court concluded that appellant's interests in the cemetery plot created an ongoing mutuality sufficient to make her an invitee on the day of the injury. As an invitee, the City had an affirmative duty to discover unreasonably dangerous conditions and either eliminate or warn appellant of them. This duty did not make the City an insurer of appellant's safety; however, the Court recognized that there were genuine issues of material fact as to whether the City breached the duties it owed to appellant and, if so, whether that breach was the proximate cause of her injuries. These genuine issues of material fact precluded summary judgment, and the Court reversed and remanded the matter for further proceedings.

TORTS

Hensley v. Traxx Management Company

2018-CA-000928 05/08/2020 2020 WL 2297001 Rehearing Pending

Opinion by Judge Combs; Judges Kramer and K. Thompson concurred.

Laura Frances Hensley, the Administratrix of the Estate of James Elijah Hensley, appealed from pre-trial orders that dismissed the Estate's wrongful death action against Thoroughbred Energy, LLC, and Shell Oil Company. The Estate also appealed from a judgment entered in favor of Traxx Management Company following a second trial. James Hensley robbed a gas station/convenience store in Rockcastle County. As he fled the station, he threatened that he would kill the clerk and his family if the clerk called the police. After the robbery, Hensley headed to a getaway car. The clerk testified that he became upset at Hensley's threat to kill his family and decided to pursue him. Standing outside the station, at the edge of the property, the clerk fired his pistol several times in Hensley's direction. One of the shots struck Hensley in the back, killing him. In affirming in part, the Court of Appeals held that the circuit court did not err by granting summary judgment to Thoroughbred Energy on the basis that it was not the clerk's employer and did not control his actions. Under the undisputed facts of this case, neither Shell Oil nor Thoroughbred Energy exercised control over the clerk's actions following the robbery. Once Hensley fled, the clerk left his post at the store and pursued him in the interests of the clerk's own safety and that of his family. This independent act was his alone. There was also no evidence to support the claim that Thoroughbred Energy was liable under any theory related to the condition of the premises. The Court also rejected the Estate's argument that the circuit court erroneously granted Shell Oil's motion to dismiss the Estate's action against it, without prejudice, based upon improper venue (the action was filed in Fayette County). Shell Oil presented an affidavit to indicate that it had no office, place of business, chief officer, or agent in Fayette County. It also presented documentary evidence to indicate that the station was not its place of business. The Estate offered nothing to establish that venue was proper in Fayette County, and it opposed transfer of the action to Rockcastle County, so dismissal was appropriate. Finally, the Court held that Traxx (which employed the clerk) was entitled to judgment notwithstanding the jury verdict rendered in the first trial in 2015. The act complained of here occurred within the context of an independent course of conduct that was not intended by the clerk to serve any purpose of his employer whatsoever. The clerk pursued, shot, and killed Hensley only after Hensley made a direct threat against the clerk and his family as he fled the scene following the robbery. Under these circumstances, Traxx had no ability to prevent the clerk from acting as he did. The clerk was not acting within the scope of his employment and, consequently, as a matter of law, Traxx could not have been found to be vicariously liable for his actions.

Bardstown Capital Corporation v. Seiller Waterman, LLC

2018-CA-001886 06/12/2020 2020 WL 3108238

Opinion by Judge Lambert; Judges Jones and L. Thompson concurred. Appellants challenged a summary judgment dismissing a wrongful use of civil proceedings claim and an order dismissing an abuse of process claim arising from an underlying appeal by homeowners from a zoning decision. The Court of Appeals reversed the summary judgment dismissing the wrongful use of civil proceedings claim based upon the application of the "sham" exception to the Noerr-Pennington doctrine. The Court agreed with appellants that application of this exception was a question of fact and that there remained disputed issues of material fact regarding whether there was a reasonable basis for the original zoning appeal by the homeowners and what their subjective motivation for filing it was (i.e., whether the homeowners only intended to delay the matter in order to extract a higher purchase price for their properties). Thus, summary judgment was inappropriate. However, the Court affirmed the dismissal of the abuse of process claim as filed outside of the one-year statute of limitations period. It held that such claims accrue at the

time the conduct of the plaintiff occurred, not when the underlying litigation terminates, thereby reaffirming the holding in DeMoisey v. Ostermiller, Nos. 2014-CA-001827-MR and 2014-CA-001864-MR, 2016 WL 2609321 (Ky. App. May 6, 2016). Because appellants filed this claim outside of the limitations period, dismissal was proper.

ARBITRATION

Legacy Consulting Group, LLC v. Gutzman
2018-CA-001580 05/29/2020 2020 WL 2781708
Opinion by Judge Lambert; Judges Goodwine and K. Thompson concurred.
This was an interlocutory appeal from an order denying a motion to compel arbitration in an action by an estate related to the sale of an annuity product to the decedent. The question in this case was whether the product purchased was an insurance product, which would be subject to the McCarran-Ferguson Act and therefore not subject to the arbitration clause the application contained, or whether it was a security product. KRS 417.050 exempts an arbitration clause from applying to insurance contracts. The Court of Appeals agreed with the estate that the product was a fixed annuity, and therefore an insurance product, based upon the 2015 income option election form, which provided that the decedent would receive monthly payments in the same amount from the "Fixed Account" portfolio. Therefore, the Court affirmed the circuit court's order denying the motion to compel arbitration.

IMMUNITY

Saunier v. Lexington Center Corporation
2018-CA-001290 04/17/2020 2020 WL 2781709
Opinion by Judge Lambert; Judge Dixon concurred in result only; Judge Jones concurred in part and filed a separate opinion.
This was an appeal from a personal injury action in which appellant Mark Saunier claimed to have been injured when he tripped over an electrical cable protector and fell at Rupp Arena while attending a University of Kentucky basketball game. The Court of Appeals affirmed. First, the Court held that the circuit court properly held that UK was immune from suit. The concurring opinion discussed whether the agency (UK) was performing an essential governmental function, as opposed to a proprietary function, citing to Schwindel v. Meade County, 113 S.W.3d 159 (Ky. 2003), and the Supreme Court's discussion of a public school interscholastic softball tournament and whether that converted a board of education's function from governmental to proprietary. Second, the Court rejected appellants' evidentiary arguments, including the decisions to permit the lease between the Lexington Center Corporation and UK to be admitted, to permit witnesses to testify about their interpretation of the lease, and to not define "institutional control" but permit the lay witnesses to do so. The Court also held that appellants' argument relating to including a duty or apportionment instruction as to the UK fire marshals on duty at the time of the fall was moot because the jury never reached that instruction. Finally, the Court found no error in the summary judgment dismissing appellants' business and economic loss claim based upon the jury's defense verdict and because a letter of intent to purchase the Sauniers' company was not a contract for sale but was merely a proposal.

Wallace v. Martin
2018-CA-001260 05/29/2020 2020 WL 2781710
Opinion by Judge Dixon; Chief Judge Clayton and Judge Goodwine concurred.

Appellant, who was fired from his job as a school bus driver following a disciplinary incident with a child but was subsequently acquitted of a fourth-degree assault charge resulting from the incident, sued Officer Ben Martin and the school superintendent for malicious prosecution, abuse of process, and defamation. Martin was responsible for the criminal complaint against appellant. The circuit court granted Martin's motion for summary judgment on grounds of qualified immunity, and this appeal followed. The Court of Appeals reversed, rejecting the finding of immunity. The Court noted that qualified immunity is not a blanket shield for all tort claims, but only generally protects negligent acts. It then held that Martin was not entitled to qualified immunity as to appellant's claim of malicious prosecution pursuant to Martin v. O'Daniel, 507 S.W.3d 1 (Ky. 2016). In Martin, the Supreme Court reasoned that one who acts with malice is not entitled to immunity, for if one has no malice, one needs no immunity, since proof of malice is a necessary element to prevail on a claim of malicious prosecution. In an issue of first impression, the Court of Appeals then determined the same reasoning of Martin equally applies to claims of defamation per se. To be entitled to qualified immunity, one must act in good faith. Since liability for defamation per se turns on the necessity of proof of malice, acting with malice and acting in good faith are mutually exclusive. Thus, if Martin acted in good faith, he could not have defamed appellant and there would be no need for immunity. Consequently, the circuit court erred in granting summary judgment to Martin on appellant's defamation claim based on qualified immunity.

WORKERS COMPENSATION

Wonderfoil, Inc. v. Russell
2019-CA-001671 06/05/2020 2020 WL 3022867 N/A Filed in S. Ct.
Opinion by Judge Goodwine; Judges Dixon and Taylor concurred. Wonderfoil, Inc. challenged an opinion of the Workers' Compensation Board reversing and remanding the administrative law judge's denial of compensation for medical expenses. It sought a reversal of the Board's holding that appellee timely submitted medical expenses under 803 KAR 25:096 § 11. Appellee submitted the medical expenses years after the dates of service but before the ALJ entered an award. The ALJ denied appellee compensation for the medical expenses because he did not submit them within 60 days from the dates of service under 803 KAR 25:096 § 11. However, the Board held that the 60-day submission requirement only applies post-award. The Court of Appeals agreed with the Board and held that because medical expenses are not compensable until an award is entered, an employee is not required to submit medical expenses until an interlocutory or final award has been entered.

Note: IIK will be filing an amicus brief in this case.