

Kentucky Court Of Appeals

Cases of Note

[September-October, 2020](#)

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

NEGLIGENCE

SANDRA PORTER VS EVAN HUNTER ALLEN

[2019-CA-0115](#) 10/09/2020 2020 WL 5987508

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND KRAMER, J. (CONCURS)

Appellant challenged a judgment entered upon a jury verdict in the personal injury tort action she brought against appellee. The action stemmed from an automobile accident. She alleged that the circuit court erred by: (1) preventing her from presenting evidence of an impairment rating; and (2) improperly instructing the jury on KRS 304.39-060’s threshold requirements for pursuing a tort claim. The Court of Appeals held that the circuit court properly excluded evidence of appellant’s impairment rating because it could have misled the jury or confused the issues under KRE 403, as impairment ratings are primarily used in workers’ compensation actions. Additionally, the Court concluded that sufficient evidence was presented to warrant an instruction on the threshold requirements for pursuing a tort claim because there was conflicting evidence on whether appellant met the \$1,000 threshold under the Kentucky Motor Vehicle Reparations Act and whether her injury was permanent. Thus, the Court affirmed.

TRIALS

JORDAN CURTIS VS PRICE HOLDINGS, INC. D/B/A FRANKLIN DRIVE-IN

[2018-CA-1777](#) 09/04/2020 2020 WL 5264772

Opinion by ACREE, GLENN E.; COMBS (CONCURS) AND MAZE (CONCURS) Appellant slipped and fell at a drive-in theater owned by appellee. As part of routine maintenance, appellee repaved the area where appellant fell. After a jury verdict in favor of the theater owner, appellant asked the Court of Appeals to review two of the circuit court’s rulings: (1) excluding evidence of appellee’s subsequent remedial measures as not fitting an exception to KRE 407, and (2) failing to give a missing evidence instruction. Appellant claimed appellee controverted the feasibility of the precautionary measures and that proof of subsequent remedial repairs should have been allowed to refute that testimony. Appellant also argued the evidence would impeach the credibility of appellee’s owner’s testimony that no one knew where appellant fell. The Court of Appeals affirmed the circuit court’s ruling. Appellee’s owner did not testify that additional precautionary measures were unfeasible and did not testify that the location of the fall could not be identified; the record showed the appellee’s owner’s testimony and his own photographs established the approximate area where appellant fell and that the ground may have been disturbed there before she fell. Although he believed he had done all he could to assure safety, he testified that it was not perfect. The Court also affirmed the circuit court’s refusal to give a missing evidence jury instruction, holding: (1) appellant did not put appellee on notice to preserve the ground as it was on the night of her fall; (2) sufficient evidence was submitted (testimony and photographs) to establish the condition of the ground on the night of the fall; and

(3) appellee's repairs were made in the normal course of maintenance procedures. Accordingly, there was no evidence of spoliation.

CARRIERS

ANDRIA KENDALL VS COMMUNITY CAB COMPANY, INC., ET AL

[2019-CA-1074](#) 10/02/2020 2020 WL 5849102

Opinion by DIXON, DONNA L.; CALDWELL, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Appellant, a passenger who was sexually assaulted by her cab driver, sued the cab company for breach of the warranty of safe passage. The circuit court dismissed appellant's suit because it was filed past the one-year statute of limitations for personal injuries under KRS 413.140. The circuit court determined that although appellant had sued on a contract theory, her claims sought damages for personal injuries and, therefore, the five-year statute of limitations pursuant to KRS 413.120(2) was inapplicable. The Court of Appeals disagreed and reversed. The Court first noted that appellant's theory of liability was based upon an old and unique duty imposed on common carriers for the protection of their passengers. This contractual duty arises from the purchase of a ticket of passage with the carrier. After noting this duty continues to exist, the Court concluded that the type of damages sought is not determinative of a cause of action, but rather it is the theory of liability that governs the applicable statute of limitations. According to prior Supreme Court precedent, damages for personal injury are recoverable for breach of the warranty of safe passage.

CIVIL PROCEDURE

BRAYDEN MICHAEL JONES, A MINOR, BY AND THROUGH HIS MOTHER AND DULY APPOINTED CONSERVATOR VS IC BUS, LLC, ET AL

[2018-CA-1440](#), et al. 10/09/2020 2020 WL 5987523 Rehearing Pending

Opinion by DIXON, DONNA L.; ACREE, J. (CONCURS) AND CLAYTON, C. J. (CONCURS)

These appeals were brought on behalf of preschool children from a judgment against them for claims arising out of a school bus rollover crash in which two of the children were killed and several were injured. The parties raised numerous issues on appeal stemming from various summary judgment decisions, directed verdict denials, instructional error, and a jury verdict. On an issue of first impression, the Court of Appeals reversed the circuit court's order joining Jones, one of the children injured who had not filed suit, under CR 19.01 and requiring him to file a complaint against his wishes. Comparing the near identical federal rule for joinder, the Court first determined that Jones was not a necessary party to the litigation. Under cases analyzing the federal rule, the inconvenience of the trial court and defendants, as well as added trial expense, were not factors to be considered in support of joinder under the rule. Rather, the test is whether the interests of those already parties are separable from the non-party. Herein, the interests were clearly separable. Neither does the possibility of inconsistent judicial rulings—should the non-party file suit later—require joinder. The purpose of CR 19.01 is to prevent inconsistent obligations, not inconsistent results. The Court further held that even had Jones been properly determined a necessary party, the trial circuit exceeded its authority by requiring Jones to file a complaint under the Rule. CR 19.01 permits a trial court to join an unwilling non-party as “a defendant, or in a proper case, an involuntary plaintiff.” Forcing a nonparty to file suit against his will is violative of CR 11, which requires counsel to certify that reasonable inquiry has been made and that all pleadings filed are well grounded and warranted by existing law. Next, the

Court considered the circuit court's rulings concerning appellants' strict liability claims against the bus manufacturer. Observing that Kentucky requires proof of feasible design alternative in crashworthiness claims, the Court reversed the circuit court's dismissal of Appellants' claim of defective roof design, determining that appellants had offered sufficient proof of feasible alternatives to present such a claim to the jury. The Court held that the circuit court erred by determining there was insufficient proof of practicability of the design alternatives proffered. Here, appellants had presented proof of safer design, lessened injuries by safer design, and a method of establishing enhanced injuries attributable to defective design. The Court also reversed the defense jury verdict on appellants' defective bus clip design claim due to instructional error. The Court further determined that the circuit court erred by dismissing appellants' failure to warn claim. The Court affirmed the circuit court's dismissal of appellants' claims for breach of warranty and breach of the Kentucky Consumer Protection Act.