Kentucky Court Of Appeals
Cases of Note
January-February, 2022

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REVIVAL OF ACTIONS

CATHY STONE, ET AL. V. DEAN DAIRY HOLDINGS, LLC D/B/A DEAN MILK COMPANY, LLC, ET AL.

2017-CA-1179-MR 01/14/2022 2022 WL 128028

Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS) This appeal was on remand from the Supreme Court of Kentucky for further consideration in light of its recent decision in Estate of Benton by Marcum v. Currin, 615 S.W.3d 34 (Ky. 2021). While the case was pending in federal court, the plaintiff, Cathy Stone, passed away on September 5, 2015. On December 13, 2015, Ms. Stone's counsel filed a statement under FRCP 25(a) noting Ms. Stone's death. On December 21, 2015, Ms. Stone's counsel filed a motion to substitute her husband as the named plaintiff, and the federal court granted the motion on March 21, 2016. Ten days later, the federal court remanded the case back to the Jefferson Circuit Court. On September 14, 2016, Appellants filed a CR 12.02(f) motion to dismiss on the ground that Ms. Stone's husband failed to file an application for revival of the action within one year of her death under KRS 395.275. The trial court granted the motion. Upon further review, the Court of Appeals reversed the Jefferson Circuit Court's order granting Appellees' motion to dismiss for failure to revive the action under KRS 395.278 and remanded for further proceedings. The Court found that, based on Currin, a litigant need not make a separate motion for revival under KRS 395.278 when a decedent party's husband had taken the appropriate steps under federal law to substitute himself as a party in his representative capacity. Thus, because the husband's motion for substitution was ultimately granted by the federal court while the case was still pending there, and because no separate motion for revival was required, the Court of Appeals found that the husband had properly complied with all applicable substitution requirements.

TORTS

MARVIN MORRIS, M.D., ET AL. V. DAVID BOERSTE, AS ADMINISTRATOR OF THE ESTATE OF CAROLYN BOERSTE, ET AL.

2020-CA-0646-MR, 2020-CA-0754-MR, 2020-CA-0755-MR 01/07/2022 2022 WL 67406

Opinion by GOODWINE, PAMELA R.; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS) Appellants, Marvin Morris, M.D. ("Dr. Morris") and University Medical Center ("University Hospital"), appeal a judgment of the Jefferson Circuit Court. At the end of a surgery, Dr. Morris and a surgical team left a surgical sponge in Boerste's abdomen. Boerste filed a medical negligence action, and, ultimately, a jury awarded her $9.5 million in damages and $1.0 million in punitive damages. On appeal, Appellants alleged several errors occurred during trial. The Court of Appeals determined the circuit court correctly found Appellants were not entitled to 2 instructions on apportionment of fault or mitigation of damages against Boerste; Appellants failed to properly preserve their pain and suffering argument; and there was sufficient evidence to support the jury's finding of liability against Dr. Morris. The Court of Appeals also

determined that although Boerste was entitled to an instruction on punitive damages, the circuit court failed to include required language from KRS 411.148(3) in the instruction. This Court affirmed the judgment in part, reversed the punitive damages award, and remanded with instructions to include the language from KRS 411.184(3) in its punitive damages instruction. Boerste cross-appealed, arguing the circuit court should have permitted reference to "never events" and apportionment of liability amongst defendants during the trial. The Court of Appeals determined reference to "never events" was properly excluded under KRE 702 and KRE 403, and discussion of apportionment was not relevant on a retrial for punitive damages.

WORKERS COMPENSATION

QUAD/GRAPHICS, INC. V. ROBERT BARTOLOMEO, ET AL.
2021-CA-1033-WC 01/21/2022 2022 WL 188054

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS) Appellant Quad/Graphics, Inc. petitioned for review of an opinion by the Workers' Compensation Board affirming an opinion and award by the Administrative Law Judge to Appellee Robert Bartolomeo. Prior to his employment with Quad, Bartolomeo worked as an electronics technician and mechanic for more than 18 years. He underwent low back surgeries in 1998, 2001, and 2003. He testified that he improved after each surgery and was able to return to work without restrictions. Bartolomeo began working for Quad in 2013 as an electronic control specialist and then as a master electrician. He testified that he began experiencing pain in his low back, shoulder, and thumbs in 2016. Bartolomeo had an 6 additional surgery to his low back in 2017. He testified that some of his pain improved after the surgery, but he then developed additional symptoms and pain. Bartolomeo filed his claim for Permanent Partial Disability (PPD) benefits after leaving work in March 2020. His physician concluded that Bartolomeo's conditions were caused by cumulative trauma, which manifested into disabling reality as a result of his work activities with Quad. Quad's physician found no evidence of cumulative trauma and would not have imposed any restrictions on his capacity to work. The ALJ found Bartolomeo's physician's conclusions to be more persuasive and awarded PPD benefits based on a 31% impairment rating for the low back and thumb injuries and medical benefits for the low back and thumb conditions. On reconsideration in light of ViWin Tech Windows & Doors, Inc. v. Ivey, 621 S.W.3d 153 (Ky. 2021), the ALJ carved out an additional 13% for the impairment related to the prior low back surgeries and awarded PPD benefits based on a combined 18% rating. The Board affirmed. On appeal to the Court of Appeals, Appellant argued that the Board denied it a meaningful review by failing to address the substantive issues of law it raised and that such failure constituted a denial of due process and the arbitrary exercise of power in violation of the Kentucky Constitution and KRS 342.285(2). He also argued that the ALJ's award was not supported by substantial evidence. The Court concluded that the Board accurately summarized all of the ALJ's findings and addressed all issues that Appellant raised. It further concluded that the ALJ's award was supported by substantial evidence. The Court also addressed the sufficiency of the ALJ's carve out pursuant to Ivey and concluded that the ALJ properly applied the holding of Ivey in determining the carve out in Bartolomeo's case.

PERRY COUNTY BOARD OF EDUCATION V. MARK CAMPBELL, ET AL.
2021-CA-0605 02/25/2022 2022 WL 569216

Opinion by CALDWELL, JACQUELINE M.; CETRULO, J. (CONCURS) AND JONES, J. (CONCURS) Appellant Perry County Board of Education ("Perry") appealed from a Workers' Compensation Board ("Board") opinion, which affirmed the Administrative Law Judge's order resolving a medical fee dispute in favor of Appellee Mark Campbell. In April 2018, Campbell fell at work, causing knee and other injuries. He had arthroscopic meniscal repair surgery on his

right knee in November 2018, but he continued to complain of pain and stiffness in the knee and underwent total knee replacement surgery in December 2019. Campbell filed a workers' compensation claim. He offered medical opinions that did not specifically address issues involved in his claim. They did not, for example, explicitly find a causal relation between the April 2018 work incident and the total knee replacement surgery. Perry, on the other hand, provided evidence from three orthopaedic surgeons who explicitly opined that there was no causal relation between the April 2018 work incident and the total knee replacement surgery and that the knee replacement surgery was not reasonable or necessary. The ALJ entered an order resolving the medical fee dispute in favor of Campbell. The Workers' Compensation Board affirmed. In its petition for review to the Court of Appeals, Perry argued that the Board improperly shifted the burden of proof to it instead of Campbell; that the ALJ could not reasonably conclude that Campbell's need for a total knee replacement was caused by the April 2018 work incident; and that the knee replacement surgery was not reasonable or necessary. The Court of Appeals affirmed. Although the Court agreed with Perry that the Board misapplied C & T of Hazard v. 4 Stollings, No. 2012-SC-0834-WC, 2013 WL 5777066 (Ky. Oct. 24, 2013), and that the burden of proof on a pre-award medical fee dispute was on the claimant under KRS 342.735(3), the error was harmless because there was substantial evidence of record to support a finding in Campbell's favor. The Court further concluded that the ALJ was permitted to make inferences from the more general opinion statements by Campbell's witnesses and that work-related arousal of a pre-existing and previously dormant, asymptomatic condition into a disabling, symptomatic reality is compensable.