Kentucky Court Of Appeals
Cases of Note
March-April, 2022

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INSURANCE

JOHN BYRNES V. NATIONWIDE MUTUAL INSURANCE COMPANY
2021-CA-0706-MR 03/11/2022 2022 WL 728037
Opinion by CETRULO, SUSANNE M.; CLAYTON, C.J. (CONCURS) AND GOODWINE, J. (CONCURS) Appellant John Byrnes appeals from an order of the Jefferson Circuit Court granting summary judgment to the appellee insurer on a claim by Byrnes, an attorney, for fees under KRS 304.39-070. This case arose out of an automobile accident that occurred in November 2015. Attorney Byrnes represented his client against the at-fault party and settled the case with the at-fault party's carrier. His client's carrier (Nationwide), which had paid basic reparation benefits, then was able to recover those sums from at-fault party's insurer. Attorney Byrnes filed an action claiming attorney's fees from Nationwide under the authority of KRS 304.39-070. The circuit court granted summary judgment to Nationwide and dismissed the claim. On appeal, the Court of Appeals found that the holdings in Baker v. Motorists Ins. Companies, 695 S.W.2d. 415 (Ky. 1985), and MFA Insurance Company v. Carroll, 687 S.W. 2d 553, 555 (Ky. App. 1985), supported the trial court's denial of any attorney's fee in this case because Byrnes did not prove that he conferred a benefit upon Nationwide, which pursued its own claim for subrogation rights.

TORTS

WILMA STEPP, ET AL. V. CITY OF PIKEVILLE, ET AL.
2021-CA-0028-MR 03/11/2022 2022 WL 727320
Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS) Appellants Wilma and Kenneth Stepp appeal from the Pike Circuit Court's order granting summary judgment to Appellee the City of Pikeville on their claim for personal injury and loss of consortium. Wilma Stepp was injured when she fell in a landscaped area situated between two streets in Pikeville, Kentucky. After the Stepps filed an action against the City and the landscaping company responsible for the area where she fell, the City filed a motion for summary judgment and stated as grounds that the Stepps failed to comply with KRS 411.110, which requires, as a prerequisite to filing an action against a city, notice to the city of any injury arising out of any defect in the condition of a bridge, street, sidewalk, alley, or other public thoroughfare. The Pike Circuit Court agreed that the Stepps should have given notice to the City within 90 days of the injury and granted its motion for summary judgment. On appeal, the Stepps argued that the property in question was not a "public thoroughfare" and did not, therefore, require notice under the statute. The Court of Appeals affirmed, holding that notice under KRS 411.110 was required, and the circuit court properly granted summary judgment to the City. The Court of Appeals distinguished the facts in this appeal from those in Krietemeyer v. City of Madisonville, 576 S.W.3d 157 (Ky. App. 2018).

MARY EVANS V. BAPTIST HEALTH MADISONVILLE
2021-CA-0201-MR 03/18/2022 2022 WL 815420
Opinion by COMBS, SARA W.; CALDWELL, J. (CONCURS) AND L. THOMPSON, J. (CONCURS) Appellant Mary Evans appeals from an order of the Hopkins Circuit Court dismissing (without prejudice) her lawsuit against Appellee Baptist Health Madisonville (the "Hospital"). Evans was a patient in the Hospital's emergency room. She was suffering from seizures and was placed in a wheelchair, but when she asked for assistance to go to the restroom, she was told to walk. She fell and sustained serious injuries. She filed a negligence action against the Hospital, and the Hospital filed a motion to dismiss under CR 12.02, arguing, among other things, that she failed to comply with the mandatory, simultaneous filing requirements of KRS 411.167. This statute requires a plaintiff bringing a negligence or malpractice claim against a hospital to file with the complaint a certificate of merit or an affidavit stating that no cause of action is asserted for which expert testimony is required. The circuit court granted the motion, and the Court of Appeals affirmed, holding that regardless of whether Evans' action against the Hospital was for ordinary negligence or malpractice, KRS 411.167 6 required the filing of a certificate of merit or an affidavit stating that no cause of action was asserted requiring expert testimony, and Evans filed neither. The Court did not address Evans' argument that KRS 411.167 is unconstitutional because she did not state how it was preserved for review and because she failed to notify the Attorney General of the constitutional challenge as required by KRS 418.075.

GARY R. PLACEK V. JOHN ELMORE, ET AL.
2021-CA-0373-MR 03/18/2022 2022 WL 815465
Opinion by MAZE, IRV; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS) Appellant Gary R. Placek appeals from a summary judgment of the Hart Circuit Court, dismissing his claims for personal injury from an automobile accident as time-barred. Placek filed an action for damages in connection with a collision between his motor home and a tractor-trailer operated by Appellee Elmore and owned by Appellee Gibco Motor Express. The trial court granted Appellees' motion for summary judgment on the ground that Appellant's claim was barred by KRS 304.39- 230(6)'s two-year statute of limitations. On appeal, Appellant argued that because Med Pay was a basic or added reparations benefit and his last payment was made on October 14, 2014, his action was timely filed on October 13, 2016. Appellees argued that Med Pay is neither a basic nor added reparations benefit; therefore, because the last basic or added reparations benefit payment was made on September 5, 2012, Appellant's complaint was filed outside the applicable limitations period. The Court of Appeals affirmed on the grounds that in Lawson v. Helton Sanitation, Inc., 34 S. W. 3d 52 (Ky. 2000), the Supreme Court found that Med Pay payments are not the equivalent of basic or added reparations benefits and do not toll the limitations period.

MARIO SANCHEZ V. RODNEY MCMILLIN, M.D., ET AL.
2020-CA-0052-MR 04/01/2022 2022 WL 981843
Opinion by JONES, ALLISON E.; LAMBERT, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)
Appellant Mario Sanchez appealed from the order of the Jefferson Circuit Court dismissing with prejudice his medical malpractice claim for failure to file a certificate of merit with his complaint as required by KRS 411.167. In response to a motion to dismiss, Sanchez argued before the trial court that the statute was inapplicable to claimants represented by counsel. He argued that the Kentucky Rules of Civil Procedure already required counsel to sign client pleadings and that the attorney's signature satisfied the requirements of the statute. Additionally, Sanchez asserted he had substantially complied with the statute's requirements, arguing he submitted responses to discovery requests that contained the same sort of information that would be provided in the

certificate of merit. Finally, in the alternative, Sanchez requested an extension of ten days to provide a certificate of merit. The trial court disagreed with Sanchez's interpretation of the statutory requirements. Furthermore, the trial court denied Sanchez's request for an extension to comply with the statute, ruling that the statute requires a certificate of merit to be "filed with the complaint" and that nothing in the statute permitted the trial court to extend the time to file it. The trial court then dismissed Sanchez's claim with prejudice. On appeal, the Court of Appeals agreed with the trial court that Sanchez's reading of KRS 411.167 was fundamentally incorrect. However, the Court also determined that the trial court erred when it found dismissal was required under these circumstances. Instead, the Court held that the trial court retained discretion to grant an extension for "excusable neglect" under CR 6.02(b). Accordingly, the Court vacated the trial court's dismissal of the case and remanded to the trial court for a determination of whether Sanchez was entitled to an enlargement of time pursuant to CR 6.02(b).

WORKERS COMPENSATION

CHRISTOPHER RYAN CUNNINGHAM V. KROGER LIMITED PARTNERSHIP I

2021-CA-0704-MR 03/25/2022 2022 WL 880150

Opinion by CLAYTON, DENISE G.; CETRULO, J. (CONCURS) AND GOODWINE, J. (CONCURS) Appellant Christopher Ryan Cunningham appeals from a Boyle Circuit Court order granting summary judgment to Appellant Kroger Limited Partnership I ("KLP I"), which owns and operates a Danville, Kentucky Kroger grocery store, on the basis of "up-the-ladder" immunity under the Kentucky's Workers' Compensation Act. Cunningham was employed by Penske Logistics, LLC, which had a shipping contract with Kroger Limited Partnership II ("KLP II"), a dairy producer. Cunningham made regular deliveries of milk from KLP II to the Danville Kroger. KLP II is a subsidiary of The Kroger Co., which in turn is a limited partner of KLP I. Cunningham was injured when a dock door fell on him during a delivery to the Danville Kroger. He received workers' compensation benefits from Penske and then filed a tort action against KLP I. KLP I raised the defense of employer's immunity under Kentucky Revised Statutes (KRS) 342.610(2)(b), which extends tort immunity up-the-ladder from a subcontractor that employs an injured worker to the entities that contracted with the subcontractor. Cunningham argued that this defense was unavailable to KLP I because it did not have a contract 7 with Penske; it was a sibling, rather than a "parent" of KLP II; and the summary judgment undermined the policy of narrowly construing statutes which are in derogation of common law rights. The Court of Appeals affirmed because, for purposes of up-the-ladder immunity, a formal contract is not necessary, nor is the sibling v. parent distinction dispositive. The Court emphasized a fact-specific approach that looks beyond formal corporate structures to the functional interaction of the different entities. The record showed that KLP I and KLP II had an ongoing, mutually beneficial business relationship. Relying on Cabrera v. JBS USA, LLC, 568 S.W.3d 865 (Ky. App. 2019), the Court held that when KLP II contracted with Penske to deliver milk to KLP I, it did so as a representative and for the benefit of KLP I and that the work under the contract was a regular or recurrent part of the business of operating the grocery store. As to Cunningham's policy argument, the Court stated that this fact-specific approach is not intended to shield employers from tort liability but to ensure that contractors and subcontractors provide workers' compensation coverage.

GREGG ROBERTS V. COMMONWEALTH DODGE, ET AL.

2020-CA-0627-WC 04/22/2022 2022 WL 1194170

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Appellant Gregg Roberts petitioned the Court of Appeals for review of the Workers' Compensation Board's opinion affirming the Administrative Law Judge's application of the amended version of KRS 342.730(4) to Roberts' award of benefits. The Court of Appeals affirmed based upon the holdings in two recent Supreme Court of Kentucky cases, Cates v. Kroger, 627 S.W.3d 864 (Ky. 2021), and Dowell v. Matthews Contracting, 627 S.W.3d 890 (Ky. 2021). In Cates, the Supreme Court examined the history of KRS 342.730(4) and held that the current version did not violate the Equal Protection Clause under the federal or state constitutions, as it was only based upon age. It also held that the General Assembly's decision to make its application retroactive was not an arbitrary exercise of legislative authority. In Dowell, the Supreme Court held that the Contracts Clause was not applicable in workers' compensation actions, as the system was controlled by legislative enactments rather than by a contract between an employer and an employee. In addition, the Supreme Court in Dowell held that a claimant's right to benefits becomes fixed and vests on the date of injury, but the right to a certain duration or amount of benefits does not vest until a final decision on a claim is entered. In this case, Roberts' injury occurred after 1996, and his award of benefits was still being litigated. Consequently, the 2018 amendments to KRS 342.730(4) applied.