Kentucky Court Of Appeals
Cases of Note
May-June, 2022

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TORTS

TRACY WINDUS V. BUFFALO CONSTRUCTION, INC.
2020-CA-1035-MR 05/20/2022 2022 WL 1592870
Opinion by McNEILL, J. CHRISTOPHER; LAMBERT, J. (CONCURS) AND TAYLOR, J. (CONCURS IN RESULT ONLY)
Appellant Tracy Windus appealed from the Jefferson Circuit Court's summary judgment in favor of Appellee Buffalo Construction, Inc. While working a waitressing shift at Buffalo Wild Wings, Windus tripped on a raised drain and pipe located on the floor in front of a counter. She sustained serious injuries and was unable to work for six months. She asserted a negligence claim against Buffalo Construction, which was responsible for the drain's installation and maintenance. The circuit court granted summary judgment in favor of Appellee on the ground that Appellee was not in possession or control of the premises at the time of Windus' injuries. The Court of Appeals reversed the circuit court and remanded the case for trial. In doing so, the Court held that a building contractor, or similarly situated person or entity performing such work, may be held liable for negligence resulting from work performed whether the underlying work/condition was "accepted" or not.

JAMIE E. THOMAS V. BRIAN ALLEN
2021-CA-0529-MR 05/13/2022 2022 WL 1509718
Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)
Appellant Jamie E. Thomas filed an appeal requesting the Court to reverse the Jefferson Circuit Court's grant of summary judgment in favor of Appellees Brian Allen and The Thirsty Pedaler, LLC (TTP) on Thomas's negligence claims arising from his fall from one of TTP's quadricycles. The Court of Appeals affirmed, holding that the pre-injury waiver Thomas signed was valid under Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005). The Court also held that the waiver did not violate public policy by attempting to contract away liability for damages caused by TTP's alleged failure to comply with safety statutes or local ordinances and that Thomas failed to present sufficient evidence that TTP had violated any safety statute or ordinance. The Court also determined TTP was not a common carrier because its primary purpose was to provide entertainment and not transportation.

BOBBY G. FISH, JR. V. STATE FARM AUTOMOBILE INSURANCE COMPANY
2021-CA-0573-MR 05/13/2022 2022 WL 1510372
Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)
Appellant Bobby G. Fish, Jr. filed an appeal requesting the Court of Appeals to reverse the Boone Circuit Court's grant of summary judgment in favor of Appellee State Farm Automobile Insurance Company on Fish's claims brought under the Kentucky Unfair Claims Settlement Practices Act. On appeal, Fish argued there were genuine issues of material fact as to whether State Farm handled his claim in bad faith. The Court affirmed the circuit court's order in part and reversed and remanded it in part. The Court determined that under Hollaway v. Direct General Insurance Company of Mississippi, Inc., 497 S.W.3d 733, 737-38 (Ky. 2016), the circuit court

erred in granting summary judgment because Fish offered sufficient proof of each of the required elements of bad faith discussed in Hollaway to create genuine issues of material fact. However, the Court found that the circuit court properly denied Fish's request to amend his complaint to assert a fraud claim because Fish filed the motion almost ten years after filing his original complaint and because he provided no concrete reasons as to why the circuit court's denial was an abuse of discretion.

MARY LAWSON V. DAVID SMITH
2021-CA-0816-MR 05/27/2022 2022 WL 1697254
Opinion by CETRULO, SUSANNE M.; DIXON, J. (CONCURS) AND LAMBERT, J. (CONCURS)
Appellant Mary Lawson appealed from the Carroll Circuit Court's summary judgment in favor of Appellee David Smith. Lawson was Smith's girlfriend's mother, and she was staying at Smith's house. On the night in question, Lawson woke up to use the bathroom, mistakenly opened a door leading to the basement, and fell down the stairs, causing injuries. She was aware of the stairs and of the basement door's proximity to the bathroom door. It was undisputed that Lawson was a licensee. Further, as the Supreme Court has adopted the Restatement Second of Torts Section 342, the only duty owed by the homeowner was to not let a licensee come upon a hidden peril or willfully or wantonly cause her harm. Thus, the Court of Appeals held that the circuit court did not err in granting summary judgment because Lawson failed to submit any proof that Smith breached a duty that caused her to fall down steps she knew were there.

DANIEL MEKURIA V. JAMES MARTIN
2020-CA-0926-MR 05/27/2022 2022 WL 1695873
Opinion by CLAYTON, DENISE G.; COMBS, J. (CONCURS) AND JONES, J. (CONCURS)
Appellant Daniel Mekuria appealed from the Jefferson Circuit Court's dismissal of civil claims he asserted against various governmental entities and law enforcement officials arising from what he deemed was his wrongful arrest and prosecution for drug-related offenses. The Court of Appeals affirmed. In doing so, the Court first addressed two jurisdictional issues. First, the Court concluded Mekuria's notice of appeal was timely because the circuit court clerk incorrectly added the notice of appeal to the official court record, endorsed it, and electronically noted it as "filed" within the deadline even though Mekuria's counsel failed to pay the filing fee as required by CR 73.02(1), which is a prerequisite to a notice of appeal being filed. Second, Mekuria failed to name the Louisville/Jefferson County Metropolitan Government (Metro) in his notice of appeal. The Court concluded Metro was not an indispensable party because Mekuria had also named Greg Fisher, who had been named in his official capacity as the Mayor of the Louisville Metro Government, and thus as an agent of Metro. As long as the government entity receives notice and an opportunity to respond, official capacity suits are to be treated as a suit against the entity. As to the merits of the appeal, the Court held that the circuit court properly dismissed Mekuria's malicious prosecution claims because he, through his attorney, had stipulated to probable cause, and the Court rejected Mekuria's argument that the stipulation to probable cause should be set aside.

ARBITRATION

NEW ALBANY MAIN STREET PROPERTIES, LLC D/B/A PORT OF LOUISVILLE ET. AL. V. R. WAYNE STRATTON, CPA
2021-CA-0562-MR 05/27/2022 2022 WL 1695881
Opinion by JONES, ALLISON E.; CLAYTON, C.J. (CONCURS) AND COMBS, J. (CONCURS AND FILES SEPARATE OPINION)

Appellants appealed the Jefferson Circuit Court's opinion and order dismissing Appellants' claims for failure to state a claim. The Court of Appeals affirmed. On appeal, Appellants contended: (1) the circuit court prematurely granted Appellees' motion to dismiss prior to discovery; (2) Appellees' defamatory statements in arbitration were not made in a "judicial proceeding" and were, therefore, not privileged; (3) paid expert witnesses were not entitled to absolute immunity under the judicial statements privilege; and (4) Appellants asserted a valid cause of action for professional malfeasance. In affirming the circuit court's dismissal, the Court of Appeals held: (1) the circuit court properly assessed Appellants' complaint based on its allegations, and it was not required to allow discovery for the purpose of ascertaining whether Appellants could allege other claims; (2) the judicial statements privilege applies in arbitration, as arbitration is a "quasi-judicial proceeding;" (3) the judicial statements privilege applies to paid expert witnesses; and (4) an expert witness owes no duty of care to an adverse party, and so the circuit court did not err in dismissing Appellants' professional malfeasance claim against Appellee's expert as a matter of law. The concurrence agreed with the majority's reasoning but expressed concern that malicious statements, or those made in bad faith, currently face no legal repercussions due to the judicial statements privilege. By way of remedy, the concurrence suggested that the Supreme Court could fashion a rule through which a lack of candor to the tribunal would be punishable in contempt proceedings.

CIVIL PROCEDURE

DONNA POWERS V. KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY

2020-CA-1011-MR 06/24/2022 2022 WL 2279868

Opinion by CALDWELL, JACQUELINE M.; GOODWINE, J. (CONCURS) AND LAMBERT, J. (CONCURS)

The Court of Appeals affirmed an order of the McCracken Circuit Court dismissing Appellant's claims against Fendol Carruthers, Jr. as nullities and denying Appellant's motion to revive said claims against Carruthers's estate. Appellant and Carruthers were involved in a two-vehicle accident. Because Appellant's claimed damages exceeded Carruthers's policy limit, Appellant sought underinsured coverage from her policy in August 2016. Unbeknownst to Appellant, Carruthers passed away in March 2016. Appellant filed a complaint in April 2018, within the limitations period contained in the Motor Vehicle Reparations Act. However, Appellant did not seek to revive the action as to Carruthers's estate until September 2019. The circuit court ultimately dismissed the complaint and granted Appellee's request for summary judgement, this appeal followed. The Court of Appeals determined that Appellant's efforts to revive the claims as to the estate was outside the Motor Vehicle Reparations Act's two-year statute of limitations and the virtual representation doctrine was incapable of saving Appellant's claims because the doctrine was not intended to protect a party from its own failure to act with due diligence, as had occurred here. Further, the Court held that the underinsured motorist claim must also fail because the underlying claims were null considering Carruthers's death and Appellant's failure to properly revive the action.