Kentucky Court Of Appeals
Cases of Note
November-December, 2022

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CIVIL PROCEDURE – SUBSTITUTION OF PARTIES

BARBARA ANN DITTO, ET AL. v. JERRY T. MUCKER
2021-CA-1488-MR 11/18/2022 2022 WL 17072191
Opinion by CETRULO; SUSANNE M., ACREE, J. (CONCURS) AND GOODWINE, J. (CONCURS)
The Court of Appeals reviewed a Breckinridge Circuit Court Order dismissing Appellants' lawsuit for failure to revive their personal injury action within one year of the death of the Appellee.

Appellants Robert E. Murray, Jr. and Barbara Ann Ditto were involved in a two-vehicle accident with Appellee Jerry Mucker. The Appellants filed a complaint in circuit court claiming Mucker acted negligently while driving his vehicle. First Chicago Insurance Company, Mucker's vehicle insurer, represented him in the action. After an unsuccessful mediation, Appellants' counsel informed First Chicago that Mucker had recently died of COVID-19. First Chicago filed a Notice of Death of Defendant with service to the Appellants. No personal representative was appointed for the deceased Mucker, and no estate was opened for Mucker.

More than one year after Mucker's death, First Chicago filed a motion for summary judgment, which the Breckinridge Circuit Court granted. The trial court found that, despite having received proper notice of Mucker's death, the Appellants failed to revive their action — by substituting a personal representative for Mucker — within the one-year statute of limitations. Additionally, the trial court determined that any agency relationship that may have existed between First Chicago and Mucker terminated upon Mucker's death. Finally, the trial court found no conflict of interest or ethical violations "for a plaintiff to take action to revive claims against a deceased defendant."

The Court affirmed, and in its opinion, noted that under Harris v. Jackson, 192 S.W.3d 297, 307 (Ky. 2006), the attorney for the deceased has a duty to disclose his or her client's death to the opposing party if a defendant dies between the filing of a complaint and legal resolution. However, the Court stated that the deceased's attorney is not required to file the motion for substitution. CR 25.01(1). The Court further stated that if the representative or other party decides to revive the action, they must file a motion for substitution within one year after the defendant's death. KRS 395.278. In this matter, the Court held that the duty to disclose Mucker's death was not at issue, and all parties were aware of his death approximately one week after it occurred. Instead, the Court determined that the Appellants attempted to expand the duty beyond disclosure as required under Harris.

The Court was unpersuaded by the Appellants' position that First Chicago had a duty to file the revivor because of the ongoing agency relationship between Mucker and his insurer. It was reasoned there was no need to discuss if an agency relationship existed because even if an

agency relationship existed, the agency ended at Mucker's death. Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 591 (Ky. 2012) (citing Phelps v. Louisville Water Co., 103 S.W.3d 46, 50 (Ky. 2003)). See also Restatement 2d of Agency, § 120.

Lastly, the Appellants argued that if they had filed a petition on Mucker's behalf, that would be — in a limited capacity — the same as representing both sides of the litigation, thereby violating SCR 3.130 (1.7). However, the Court disagreed and concluded that not petitioning for the appointment is contrary to the Appellants' own interest because without the appointment, the litigation could be properly dismissed under CR 25.01 and KRS 395.278. Additionally, the Court indicated that the appointment, under these circumstances, is more akin to joining an essential party than it is representing an opposing party. Moreover, it was noted that the Kentucky Supreme Court addressed the issue of revivor without imposing a duty to file the petition for substitution on a particular party. See Harris, 192 S.W.3d at 307; see also Jackson v. Est. of Day, 595 S.W.3d 117, 123 (Ky. 2020)

TORTS

SYLVIA RIEFF v. JESSE JAMES RIDING STABLES, INC.
2022-CA-0161-MR 12/02/2022 2022 WL 17365814
Opinion by CETRULO, SUSANNE M.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)
Appellant Sylvia Rieff challenged the Barren Circuit Court's summary judgment precluding her recovery on negligence claims for injuries suffered in a horseback riding accident after she signed a waiver of liability, which included her minor children, with Appellee Jesse James Rising Stables, Inc. On appeal, she argued that summary judgment was erroneous because the waiver did not meet the test articulated in Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005). More specifically, a clause in the waiver which disclaimed liability except in cases of "gross negligence" was argued to not meet the Hargis standard of "utmost clarity." She further maintained it was ambiguous if the waiver intended to cover her individually rather than just her children.

The Court of Appeals affirmed and ruled that the waiver's language was sufficient to communicate to ordinary persons that it covered all conduct short of gross negligence. Citing CLK Multifamily Mgmt., LLC v. Greenscapes Lawn & Landscaping, Inc., 563 S.W.3d 706 (Ky. App. 2018) for analogous support, the Court determined that the waiver satisfied three out of four factors under Hargis: (1) an express exoneration of Appellee from liability; (2) a virtual impossibility to construe the clause as intending to do anything other than provide protection against suits for bodily injuries and damages; and (3) the nature of the hazard at issue in the underlying case was specifically mentioned under the waiver's coverage. The Court noted that only one of the Hargis factors need be satisfied. The Court concluded the waiver was specifically enforceable against Appellant because her argument was based on a select portion of the agreement which, when read as a whole, contained indemnifying language that specifically identified her within its coverage. The Court reasoned, this coupled with a lack of or contradictory evidence in the record, such as assertions by Appellant during her deposition she only intended to sign on behalf of her children, did not support her position.

KATE CARUCCI v. NORTHERN KENTUCKY WATER DISTRICT
2021-CA-0524-MR 12/16/2022 2022 WL 17724565
Opinion by CALDWELL, JACQUELINE M.; CLAYTON, C.J. (CONCURS) AND K. THOMPSON, J. (CONCURS)

Appellant Kate Carucci sought to reverse the Campbell Circuit Court's summary judgment in favor of Appellee Northern Kentucky Water District on her negligence claim related to injuries sustained from a fall after stepping on an unsecured water meter cover on a public sidewalk. The case was remanded back to the circuit court after the decision rendered in Northern Kentucky Water District v. Carucci, 600 S.W.3d 240 (Ky. 2019) reversed an original summary judgment precluding suit based on governmental immunity. The new summary judgment was rendered based on the reasoning that there was no affirmative evidence Appellee had actual or constructive notice of the unsecured water meter cover. -10-

On appeal, Appellant argued that Appellee had knowledge of a report of unauthorized water use, and weeks before her accident, dispatched an employee in response who failed to assert during a deposition if he secured the meter cover before completing the assignment. The Court of Appeals affirmed the summary judgment and agreed there was a lack of evidence of actual or constructive notice of Appellee regarding the unsecured water meter cover. It was reasoned Appellant could cite no evidence of actual notice, and the evidence in the record did not establish the water meter was uncovered for a period long enough to give Appellee constructive notice before the accident. The Court stated that the report of unauthorized water use alone did not represent a dangerous condition to a passer-by, and there was a lack of affirmative evidence to suggest the meter cover was not secured after the inspection was completed. Furthermore, the Court's opinion held that an inference that Appellee's employee failed to secure the meter cover was impermissibly speculative particularly since it was in an area where others could have tampered with it between the service call and the accident. Thus, summary judgment was proper since Appellant only offered speculation and argument in the place of affirmative evidence to support her claims that the employee who inspected the meter failed to secure the cover.

HEATHER JONES, AS SISTER OF NICOLE WAGNER AND AS ADMINISTRATRIX AND ON BEHALF OF THE ESTATE OF NICOLE WAGNER, ET AL. v. ACUITY, A MUTUAL INSURANCE COMPANY
2021-CA-0834-MR 12/22/2022 2022 WL 17838393
Opinion by CETRULO, SUSANNE M.; COMBS, J. (CONCURS) AND GOODWINE, J. (CONCURS)
This is an appeal from a summary judgment in favor of an insurer by the Harrison Circuit Court. The trial court found that no coverage existed under the commercial general liability policy issued to a plumbing business whose employee, Donald Bottoms, had pled guilty to the fatal shooting of Nicole Wagner. Mr. Bottoms and Ms. Wagner spent time together on the night of April 18, 2020, at Bottoms' apartment located within his plumbing company's place of business. When he drove her home in the early morning hours, a struggle ensued in his vehicle, and she was shot and killed. Her estate filed a claim for wrongful death, and Acuity, the insurer of the business moved for summary judgment, asserting that the policy only covered the business and Mr. Bottoms for events that fell within the conduct of the business. The trial court's summary judgment was affirmed by the Court on the basis that coverage was intended to cover business purposes and not personal and recreational activities. The Court further found that the criminal plea could be used for purposes of collateral estoppel in this civil action.

WORKERS' COMPENSATION

DREISBACH WHOLESALE FLORISTS, INC. v. DONALD LEITNER, ET AL.
2021-CA-1495-WC 11/10/2022 2022 WL 16842447
Opinion by ACREE, GLENN E.; CLAYTON, C.J. (CONCURS) AND TAYLOR, J. (CONCURS)

After an automobile collision at work, Appellee Donald Leitner obtained compensation for injuries to his left knee and right shoulder, but not for his claimed injuries to his neck. After the award, Leitner underwent neck decompression surgery which relieved pain, and a subsequent expert opinion stated that previous expert opinions, relied upon by the ALJ in making the award, were incorrect in concluding Leitner had no impairment in his neck. Leitner moved to reopen his award, alleging mistake, and an ALJ denied the motion. The Worker's Compensation Board reversed the denial.

The Court of Appeals again reversed, holding the subsequent expert opinion did not demonstrate a mistake and therefore did not exempt Leitner's award from res judicata. The ALJ weighed evidence regarding Leitner's asserted neck impairment when making the award, and thus the subsequent medical opinion was not sufficient to establish a mistake sufficient to reopen the award. Because an ALJ is the finder of fact in workers' compensation actions, the Board, by reversing the denial of Leitner's motion to reopen, improperly substituted its own judgment as to the weight of evidence for the judgment of the ALJ.