Kentucky Court Of Appeals
Cases of Note
January-February, 2023

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INSURANCE LAW

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY v. BRITTANY BROWN
2021-CA-1213-MR 2/03/2023 2023 WL 1485416
Opinion by CALDWELL, JACQUELINE M.; CETRULO, J. (DISSENTS AND FILES SEPARATE OPINION) AND COMBS, J. (CONCURS) Allstate Property and Casualty Insurance Company appealed the Jefferson Circuit Court's ruling Allstate had no reasonable foundation to delay personal injury protection ("PIP") payments and consequently owed interest and attorney fees to Brittany Brown. Brown was involved in a motor vehicle accident and directed her PIP benefits be used to pay for certain medically related costs. Allstate requested and Brown agreed to submit to an examination under oath ("EUO"). Her attorney informed immediate payments for medical bills were expected to be made directly to Brown, and twelve percent (12%) interest would accrue on overdue payments and would increase to eighteen percent (18%) after the EUO. After the EUO took place, payments including the twelve percent (12%) rate were instead made, without Brown or her attorney's knowledge, directly to medical providers for amounts less than that billed. When E-Mails seeking inquiries about the payments' status received no response, Brown filed suit prompting an adjustor to respond with a log of PIP payments indicating reductions and denials were implemented. Summary judgment was granted in Brown's favor awarding twelve percent (12%) interest per annum, and from the date of the EUO forward, eighteen percent (18%) interest per annum along with attorney fees.

The Kentucky Court of Appeals reviewed the appeal for manifest injustice due to Allstate's failure to contain a preservation statement before the argument in its brief and affirmed. It was reasoned the amount of interest awarded was "relatively small" and when weighed with the Kentucky Motor Vehicle Reparations Act's ("MVRA") goal of encouraging prompt payments of medical bills, the circuit court's order was not a manifest injustice. Additionally, it was determined Allstate delayed payment of bills without a reasonable foundation, and per the holding in State Farm Mutual Automobile Insurance Company v. Adams, 526 S.W.3d 63 (Ky. 2017), used the EUO to conduct a "fishing expedition" for the impermissible purpose of seeking medical information as opposed to properly obtaining it through shared documentation or court petitioned discover required by the MVRA. The Court noted that receipt of medical bills is legally presumed to be a reasonable, and prompt payment is "not excused simply because the insurer claims to be investigating or seeks an EUO for unspecified reasons." The Court additionally noted Allstate's payments factored in the twelve percent (12%) interest rate, "thus admitting the payments were overdue." Attorney fees were concluded to be permissible on the basis such could be awarded under KRS 304.39-220(1) if "overdue benefits are paid after receiving notice of counsel's representation [and] denial or delay is without reasonable foundation." Furthermore, the Court stated, nothing in record "indisputably show[ed] that Brown had no need for legal assistance or that counsel's involvement was of no consequence in obtaining payment of benefits." Judge Cetrulo dissented in a separate opinion stating that the

record was easily reviewable to permit a standard de novo review, and per KRS 304.39-28(3) and the holding in Adams, 526 S.W.3d 63, the use of the EUO was proper in this instance due to Brown's consent to submit.

PROGRESSIVE DIRECT INSURANCE COMPANY v. COURTNEY HARTSON
2021-CA-0197-MR 2/10/2023 2023 WL 1871477 2021-CA-0256-MR
Opinion by EASTON, KELLY MARK; DIXON, J. (CONCURS) AND JONES, J. (CONCURS)
Progressive Direct Insurance Company ("PDIC") appealed the Jefferson Circuit Court's summary judgment ordering it to pay basic reparation benefits ("BRB") denied to Courtney Hartson. Hartson cross-appealed seeking to overturn the circuit court's denial of attorney fees and judgment fixing the award of interest at twelve percent (12%) instead of eighteen percent (18%). Hartson was involved in a motor vehicle accident while driving her visiting out-of-state grandparent's vehicle and was denied BRB from Southern-Owners Insurance Company, a subsidiary of Auto-Owners Insurance Company, on account of her not being named on her grandparent's insurance policy. Hartson initially sued to collect BRB from Auto-Owners as obligor. Hartson also filed a claim under the Kentucky Assigned Claims Plan ("KACP"), and her claim was assigned to Progressive Adjusting Company, Inc. ("PAC"). The circuit court absolved Auto-Owners of liability for BRB. Hartson subsequently filed an amended complaint naming PDIC as defendant, and summary judgment was granted ordering payment of twelve percent (12%) interest from the date it was first notified of her claim. On appeal, PDIC argued that PAC was the proper party against which to file suit, and Hartson was not entitled to BRB due to, inter alia, her having settled a bodily injury claim with the at-fault driver's insurance, State Farm.

The Court of Appeals affirmed the award of BRB payment from PDIC. The Court held that PDIC failed to sufficiently preserve its argument it was the improper party before the circuit court. Citing Smith v. Commonwealth, 410 S.W.3d 160, 167 (Ky. 2013), the Court concluded that PDIC's only mention of this defense was in a brief footnote in its response to Hartson's motion for summary judgment. Therefore, the Court deemed this was inadequate to raise the significance of this issue to the circuit court's attention. Even if the issue was preserved, the Court stated PDIC would be estopped from asserting it due to "its actions in this case." The Court reasoned, "[a] litigant should not be able to just mention an issue, take no affirmative action to correct it, litigate the issues in the case for years, and then insist on starting over with a newly named entity." It was also held Southern-Owners was not liable for BRB because Hartson's grandparent's policy did not "contractually add BRB for Harston" and Southern-Owners was not licensed in Kentucky.

The Court was unpersuaded by PDIC's argument's that unpaid medical bills were the result of Hartson's failure to pay them. The Court stated the record contained Hartson's application for no-fault benefits and noted she was not provided an "opportunity to designate whether she wanted the medical providers to be paid directly." Additionally, Hartson provided medical bills which were presumed to be a reasonable cost under KRS 304.39-020(5)(a), and the fact Hartson had not paid those bills out of pocket could not be argued to relieve PDIC of BRB payments directly to the medical providers. The Court proclaimed, "the purpose of BRB is to get bills paid without arguments over fault, and this purpose is further served by making sure medical providers are paid for their services, whether directly or by the injury victim." The Court rejected arguments that Hartson would be receiving "double compensation" for her medical bills due to her settlement with State Farm. Quoting Holzhauser v. West American Ins. Co., 772 S.W.2d 650 (Ky. App. 1989), the Court proclaimed that tort recovery and contractual BRB are "distinct methods of recovery" which "do no overlap" or "provide duplicate benefits for the same

elements of loss." It was noted, Hartson's general release with State Farm did not contain anything releasing the BRB carrier or indemnifying BRB benefits.

The Court affirmed the award of interest at the twelve percent (12%) rate on the premise there was "reasonable foundation" for delay in payments under KRS 304.39-210(2). There was an initial mutual belief that Auto-Owners was responsible for BRB payments, and it was reasonable for PDIC to investigate Medicaid benefits paid toward Hartson's medical bills. The Court reversed with respect to the date from which the interest would begin on the grounds that interest should accrue from the date PDIC received the medical bills rather than the date the claim was first assigned during ongoing litigation between Hartson and Auto-Owners. In conclusion, the circuit court's denial of attorney fees was held to be a reasonable use of discretion citing the delay in providing medical bills to PDIC.

TORTS

MICHAEL GONTERMAN, ET AL. v. WOOSTER MOTOR WAYS, INC., ET AL.
2021-CA-1304-MR 1/06/2023 2023 WL 125065
Opinion by THOMPSON, LARRY E.; DIXON, J. (CONCURS) AND LAMBERT, J. (CONCURS) The Court of Appeals reversed and remanded a grant of summary judgment in favor of Appellees. The trial court held that the Firefighter's Rule, which prohibits emergency personnel from recovering for injuries sustained while performing their duties under certain circumstances, prohibited Appellant Michael Gonterman, a police officer, from recovering from Appellees. The Court of Appeals held that the Firefighter's Rule did not apply because Appellees who allegedly caused his injuries were not the kind of people the rule was created to protect, namely landowners and occupiers who call first responders to respond to emergency situations. Here, Gonterman was hit by a truck on a public roadway while he was trying to remove loose dogs from the side of the road. The Court also held that the rule did not apply because Gonterman was not injured by the risk he was called to remedy. Gonterman was called to the scene of his injury to remove dogs from the road but was injured by the alleged negligent acts of two truck drivers who caused the accident which injured him.

COMMONWEALTH OF KENTUCKY TRANSPORTATION CABINET v. ESTATE OF ZAVIER FROEBER, ET AL.
2021-CA-1137-MR 1/27/2023 2023 WL 447887
Opinion by CALDWELL, JACQUELINE M.; ACREE, J. (CONCURS) AND LAMBERT, J. (CONCURS) A motorist perished after his vehicle was hit by a train at a railroad crossing. His estate filed a claim with the Kentucky Board of Claims asserting that the Kentucky Transportation Cabinet was negligent in setting up a work zone which obstructed the view, created distractions and confusion increasing the likelihood a driver would miss alerts, and failed to warn of oncoming trains. The Cabinet argued that the accident occurred adjacent to the work zone, and as a result, it did not owe a duty of care to drivers outside the work zone. Following an evidentiary hearing, the Board adopted the findings of the hearing officer which found the Cabinet twenty percent (20%) culpable for the accident and attributed the remaining eighty percent (80%) to the motorist. The Cabinet appealed the ruling to the Jefferson Circuit Court which affirmed.

The Court of Appeals also affirmed on the basis that the Cabinet had a duty to warn motorists traversing through the work zone of oncoming trains. The Court held, "In short, the Board found that it matters not if the injury or accident occurs within the work zone, so long as the failure to warn occurred within the worksite and is a direct cause of the injury. The circuit court affirmed

this finding. We cannot say this finding was clearly erroneous." It further stated, "The proximity of the train to the worksite, coupled with the view of the tracks being obstructed by the dump truck and backhoe for northbound drivers, plus the inherent distraction of a worksite, all formed to require those employees working and supervising that day to recognize the foreseeable eventuality of a train arriving adjacent to the worksite." The Court placed particular emphasis on the relatively close proximity of the train tracks to the work zone and noted that, "If the tracks had been further away . . . we may well have agreed with the Transportation Cabinet's position."

JAMES MICHAEL EVERETT v. GREGORY PAUL EDELEN, ET AL.
2022-CA-0109-MR 2/17/2023 2023 WL 2052293
Opinion by EASTON, KELLY MARK; COMBS, J. (CONCURS) AND MCNEILL, J. (CONCURS) Appellant challenged the Marion Circuit Court's summary judgment finding he enjoyed independent contractor status while building a barn on Appellees' cattle farm. Appellant was injured after falling twelve (12) feet off the top of the barn's structure while performing construction. all of the Restatement (Second) of Agency § 220(2) Appeals affirmed 's listed factors with the facts in the record, t After weighing he Court of the summary judgment. While observing that Appellees and materials and both parties agreed on an hourly basis supplied most of the tools payment arrangement circumstances supported the finding Appellant was an independent contractor. Properties, LLC v. Nalley , 558 S.W.3 d 457 (Ky. 2018) , and Dexter v. Hanks t , the Court held Citing the Auslander , 577 S.W.3d 789 (Ky. App. 2019) Appellant. , the Court determined Appellees "left the details of the job of building the barn--" to Appellant.

ARBITRATION LAW

MASONIC HOMES OF KENTUCKY, INC. D/B/A MASONIC HOME OF LOUISVILLE v. ANNETTE WILEY, INDIVIDUALLY AND AS ADMINISTRATRIX AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE BLAIR, ET AL.
2021-CA-0544-MR 02/24/2023 2023 WL 2193398
Opinion by McNEILL, J. CHRISTOPHER; CALDWELL, J. (CONCURS) AND TAYLOR, J. (DISSENTS AND FILES SEPARATE OPINION) Appellant Masonic Homes of Kentucky, Inc. d/b/a Masonic Homes of Louisville appealed from the Jefferson Circuit Court's order denying its motion to compel arbitration. Appellee Annette Wiley was the daughter of and power of attorney ("POA") for Charlotte Blair as well as the administratrix of her estate. Wiley filed suit against Masonic Homes alleging various tort, contract, and statutory claims in connection with Blair's long-term care at an elder care facility owned by Masonic Homes. Masonic Homes moved to stay the civil proceedings and compel arbitration pursuant to the alternative dispute resolution ("ADR") agreement signed by Wiley as Blair's POA. The circuit court denied the motion finding that the POA was invalid due to it missing two witness signatures as required by KRS 457.050. The Court of Appeals reversed on the reasoning that KRS 457.050 was amended in 2020 to dispense with the two-witness signature requirement, and the amendment applied retroactively to the period when Blair and Wiley's POA was created. The Court was unpersuaded by Wiley's argument that the POA terminated upon Blair's death before the statute's amendment, and thus, made the POA no longer governed by the statute. The Court stated the law "concerns an agent's authority to act pursuant to a POA as clearly indicated by the context of KRS 457.100. The relevant issue in this case is whether the POA was valid at the time Wiley signed the ADR agreement. According to KRS 457.060(1), it was." The Court further rejected an argument on appeal that the POA did not grant authority to bind Blair to an arbitration agreement. Citing Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306 (Ky. 2015), the Court held the POA's "broad, universal delegation of authority" allowed for entry into ADR agreements. Additionally, Wiley argued the POA was unconscionable due to a provision in the

elder care home's admission agreement absolving liability for mere negligence. The Court disagreed stating that the terms of the admission agreement were separate and independent from the POA and thus had no bearing. Wiley also argued that the ADR agreement lacked sufficient consideration, but the Court held that the ADR agreement required both parties to submit equally to arbitration thus satisfying the consideration requirement. Lastly, for purposes of whether a wrongful death claim should be stayed, the Court remanded with instructions to the circuit court to consider whether the claim's outcome would be dependent upon the arbitrator's decision. Judge Taylor authored a dissent on the basis KRS 457.060(1) did not cure the two-witness signature requirement during the period the POA was executed.