

Kentucky Court Of Appeals
Cases of Note
[September-October, 2023](#)

Note: To open hyperlink, take one of the following steps:

1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

Note: No cases of interest in September.

INSURANCE LAW

CITY OF NEWPORT, KENTUCKY, ET AL. v. WESTPORT INSURANCE COMPANY, AS SUCCESSOR TO COREGIS INSURANCE COMPANY and JEREL COLEMON AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM VIRGIL v. WESTPORT INSURANCE COMPANY, AS SUCCESSOR TO COREGIS INSURANCE COMPANY

[2022-CA-0384-MR](#) 10/06/2023 2023 WL 6522204

[2022-CA-0415-MR](#)

Opinion by EASTON, KELLY MARK; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS) The City of Newport and the Newport Police Department (collectively the Newport Insureds) were subject to a federal civil rights suit under 42 United States Code § 1983 relating to a wrongful arrest in 1987, which led to the conviction of an individual who served 28 years in prison. The Newport Insureds tendered a request to Westport Insurance Company (Westport), with whom they enjoyed a policy from July 1, 1997 to July 1, 2000, for defense and indemnification. Westport maintained the policy coverage was not triggered because a personal injury arising from a wrongful prosecution takes place at the time charges were filed, and the policy was not in place at that time. Westport filed a declaratory judgment action in Campbell Circuit Court, and the circuit court entered summary judgment in Westport’s favor. On appeal, the Newport Insureds argued Westport’s policy was an injury-based occurrence policy, triggered if any injury occurs during the policy period, and because an individual was wrongfully incarcerated during the coverage period, there existed a continuous and ongoing personal injury. At a minimum, the Newport Insureds contended Westport had a duty to defend them in litigation. The Court of Appeals affirmed on the reasoning that, in accordance with the language of Westport’s policy, it could only be triggered by the occurrence of an injury while the policy was in effect. In this instance, the injury at issue was the wrongful arrest and charge which occurred in 1987 before the policy was in effect. The Court determined that a “civil rights violation for a wrongful prosecution is complete when the charges are brought, even though damages continue to be sustained. . . . Kentucky has long recognized a separation of the injury itself and the damages later sustained.” Thus, the Court concluded Westport’s policy was “not continuously triggered by damages accumulating over the years” from an event that occurred prior to the implementation of the policy.

WORKER’S COMPENSATION

JOSEPH LEE v. W.G. YATES & SONS CONSTRUCTION CO., ET AL.

[2023-CA-0695-MR](#) 10/27/2023 2023 WL 7095038

Opinion by KAREM, ANNETTE; CETRULO, J. (DISSENTS AND FILES SEPARATE OPINION) AND MCNEILL, J. (CONCURS) Appellee employer, Yates & Sons, is a

construction company based in Mississippi, which performs jobs all over the country and hires workers on a per-job basis. Appellant Joseph Lee is a permanent legal resident of Louisiana. In accordance with company practice, Lee was contacted via telephone by a representative of Yates about working as a foreman on a project in Maysville, Kentucky. Accordingly, Lee travelled to Kentucky in his pickup truck, towing his travel trailer and motorcycle, and was formally hired at the job site. He lived in the trailer at a nearby campsite in Ohio for the entirety of his employment on the job. Yates provided him with a \$100 daily per diem in addition to his pay.

Lee's family remained at his residence in Louisiana, and he maintained his Louisiana driver's license. Lee was seriously injured while driving his motorcycle to a restaurant for dinner, about two hours before the beginning of his evening shift. The administrative law judge (ALJ) found that Lee had relocated to Ohio and consequently his injury was not compensable under the "going and coming rule." The Workers' Compensation Board affirmed.

Relying on *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456 (Ky. 2012), and *Standard Oil Co. (Ky.) v. Witt*, 283 Ky. 327, 141 S.W.2d 271 (1940), the Court of Appeals reversed and remanded for further proceedings. The Court applied the "traveling employee" exception, which allows recovery of workers' compensation benefits if the employee is injured while traveling as required by his employment unless the travel is a significant departure from the purpose of the trip. The Court's majority found no legal basis that would allow Lee to be recruited as out-of-state talent; to work at a job hundreds of miles from his home that made commuting impossible and be paid a per diem for food and lodging; and then be denied workers' compensation benefits because he lodged in one location for eight months of work. The majority further held that Lee's injury was work-related under the "service to the employer" exception because he was acting in service to his employer throughout the time he was in Kentucky and Ohio, and eating dinner in a restaurant was a necessity of his employment because he was away from home.

The Court's dissent stated that the Board did not overlook or misconstrue controlling precedent. The dissent agreed with the ALJ and the Board that Lee was not required to travel in order to do the job he was hired to perform, and he was not coming or going to work when the accident occurred. The dissent also held that Lee was not providing a service to his employer and at the time of the injury was engaged in an activity that was a distinct departure from work-related travel.