

Kentucky Court of Appeals
Cases of Note
July-August, 2008

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Items captioned in red were previously reported in prior “Kentucky Legal Cases of Note.”

INSURANCE

Ann Taylor, Inc. v. Heritage Insurance Services, Inc.

2007-CA-000317 07/11/2008 259 S.W.3d 494

Opinion by Judge Moore; Judges Keller and Thompson concurred. The Court affirmed a summary judgment in favor of appellees on appellant’s claim for negligent misrepresentation. Appellant was the certificate holder of an insurance policy covering a carrier contracted to transport cargo between warehouses. The cargo was stolen from an unattended tractor trailer and the insurer declined coverage because the policy excluded theft of cargo from an unattended vehicle. The Court held that the certificate of insurance was only evidence of insurance coverage and could not be relied upon by a claimant for the full terms of the policy. Therefore, the trial court properly granted summary judgment to appellees.

Auto Owners Insurance Company v. Omni Indemnity Company

2007-CA-001165 08/01/2008 2008 WL 2940809 DR filed 08/25/2008

Opinion by Senior Judge Henry; Chief Judge Combs and Judge Keller concurred. The Court affirmed an order of the circuit court finding that the appellant insurer of an automobile accident victim was not entitled to restitution from the appellee tortfeasor’s insurer for advance money it paid to its insured in accordance with *Coots v. Allstate Insurance Company*, 853 S.W.2d 895 (Ky. 1993). The Court held that appellant, as the Underinsured Motorist carrier, bore the risk when it substituted payment of the settlement amount. When the tortfeasor filed for bankruptcy and appellant failed to protect its subrogation rights against him in the proceedings, it resulted in the tortfeasor’s dismissal from the action without an adjudication of his liability, terminating in the functional equivalent of a zero verdict, resulting in an overpayment, for which appellant bore the risk.

TORTS

Commonwealth, University of Kentucky Hospital v. Douglas

2007-CA-000647 07/18/2008 2008 WL 2779448 DR filed 08/18/2008

Opinion by Judge Acree; Judge Nickell and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court, which affirmed a decision of the Board of Claims on the claim of an estate for civil negligence against appellant, Commonwealth of Kentucky University of Kentucky Hospital, Albert B. Chandler Medical Center of the University of Kentucky. Appellant first filed a civil negligence claim in circuit court alleging medical malpractice. The claim was dismissed as being barred by sovereign immunity and a claim was then filed with the Board of Claims. The Board overruled appellant’s motion to dismiss the claim as untimely. The Court held that the tolling language in KRS 413.270 was intended to apply to suits against the Commonwealth and that the dismissal of the claim by the circuit court for lack of jurisdiction properly triggered the tolling provisions of the statute. The Court also held that, given the

difficulty in defining the extent of sovereign immunity at the time the claim was filed in circuit court, the claim could have been filed in the circuit court in good faith so that estate could avail itself of the tolling provision.

Brooks v. Grams, Inc.

[2007-CA-001087](#) 08/08/2008 2008 WL 3165583 DR filed 09/08/2008

Opinion by Judge Wine; Judge Caperton concurred; Judge Keller concurred by separate opinion. The Court affirmed an order of the circuit court dismissing appellants' negligence claims against appellees for damages arising from an automobile accident. Appellants were injured in a collision with a vehicle driven by the husband of store employee after the employee asked him to run an errand for the store to purchase sausage. The Court held that, although the task performed was of a type which would have been performed by the store owner or someone working under his direct employ, an independent contractor would not have been hired to run the errand, the employee gave her husband money from the store to purchase the sausage, and purchasing sausage was part of the regular business of the store, these facts were not sufficient to impose liability under the doctrine of respondeat superior in the absence of any showing that the store exercised control over the husband or the instrumentality that cause appellants' injuries. The Court also noted that social and economic considerations to imposing vicarious liability upon a principal for the negligence of a volunteer were relevant, given the lack of evidence supporting a finding that appellees exercised any control over the husband.

Cook v. Taylor

[2007-CA-000122](#) 08/22/2008 2008 WL 3896694 DR filed 09/19/2008

Opinion by Judge Lambert; Judge Caperton and Judge Thompson concurred. The Court reversed and remanded an order of the circuit court dismissing appellants' claims against a paramedic and EMT who were dispatched by County Emergency Medical Services to treat a person who later suffered cardiac arrest and died. The Court held that the trial court erred in finding that the paramedic and the EMT were subject to the protection of KRS 411.148, the Good Samaritan Statute. Because appellees provided care to the deceased in the normal course of their work and were called to the scene of the emergency while on duty, they had a duty to assist the deceased and therefore, were specifically exempted from the immunity granted by the statute. The Court also held that, because there were factual disputes that brought into question the validity of a release signed by the deceased's wife, the trial court properly refused to dismiss on the grounds of waiver.

Maysville Obstetric and Gynecological Associates, P.S.C. v. Lee

[2007-CA-001616](#) 08/29/2008 2008 WL 4140664

Opinion by Judge Lambert; Chief Judge Combs and Judge Dixon concurred. The Court affirmed in part and reversed and remanded in part a jury verdict rendered against an obstetric practice for negligence in the death of a newborn child related to an injury that occurred during the birth. The Court first held that despite conflicting evidence, the jury's verdict finding that the care by the obstetric practice was negligent was supported by substantial evidence. The Court then held that it was error for the jury to award no damages for the child's loss of earning capacity when there was no dispute that other than the blood loss leading to her death, the child was an otherwise normal and healthy child.

WORKERS' COMPENSATION

AK Steel Corp. v. Pollitt

[2007-CA-001698](#) 07/18/2008 259 S.W.3d 505

Opinion by Judge Thompson; Judges Nickell concurred; Judge VanMeter dissented by separate opinion. The Court affirmed an opinion and order of the Workers' Compensation Board

affirming an opinion and order of the ALJ on a worker's claim for income and medical benefits related to lung problems associated with exposure to asbestos. The ALJ dismissed the worker's claim for income benefits but determined that he was entitled to receive medical benefits to monitor a calcified pleural plaque condition. The Court held that the ALJ properly awarded medical benefits for the medical monitoring of the worker's condition as part of the treatment of an occupational disease, as the condition was a precursor to a well-known occupational disease, asbestosis. Further, the fact that the ALJ dismissed the claim for income benefits as a result of an occupational disease, did not preclude an award of medical benefits to monitor the condition.

White v. Great Clips

2007-CA-001855 07/18/2008 2008259 S.W.3d 501

Opinion by Judge Thompson; Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed in part and vacated and remanded in part an order of the Workers' Compensation Board that reversed a decision of the ALJ awarding appellant future medical benefits. The Court held that the Board's reversal of an award of future medical benefits for appellant's neck and shoulder injuries was proper in that the claim for the neck and shoulder injuries was dismissed prior to the ALJ's opinion and order. However, because the ALJ failed to make essential findings of fact regarding why the back injury warranted an award of future medical benefits, in light of a finding that the injury was not compensable, it was necessary to vacate and remand to the ALJ for additional findings of fact.

Commonwealth, Uninsured Employers' Fund v. Gussler

2008-CA-000482 08/08/2008 2008 WL 3247264 Motion to file petition

Opinion by Judge Caperton; Judge VanMeter and Senior Judge Guidugli concurred. The Court affirmed an opinion of the Workers' Compensation Board reversing and remanding an opinion and order of the ALJ ruling that an injured worker was exempt from contractor status under KRS 342.610(2) and that his injury was excluded from coverage as an agricultural exemption under KRS 342.0011(18), KRS 342.630(1), and KRS 342.650(5). The Court first held that that the legislature deliberately omitted logging from the definition of agriculture in KRS 342.0011(18). The Court then held that the Board's decision was supported by substantial evidence in the record that the work performed was logging. The logging was not connected to the day-to-day operations of the farm itself but was entirely distinct and separate from any farming activity, the timber was removed to be sold for profit, the checks made payable to the worker noted that they were for logging, and the employer had a federal tax ID number solely in conjunction with the logging permits.

Kentucky Employers Safety Assoc. v. Lexington Diagnostic Center

2007-CA-002360 08/29/2008 2008 WL 4133945 NOA to S.Ct.- Unpub

Opinion by Judge Thompson; Chief Judge Combs and Judge Acree concurred. The Court affirmed an opinion and order of the Workers' Compensation Board affirming an opinion and order of the ALJ holding appellant responsible for a worker's reasonable and necessary medical treatment, including blood-borne pathogen protocol for ongoing assessment. The Court held that a worker's contact with blood and other body fluids alone was sufficient to constitute a physical injury for the purpose of the Workers' Compensation Act and consequently, the employer was liable for medical expenses incurred as a result of medical testing and laboratory work performed. Merely because the worker could not offer proof of a permanent impairment as a result of his contact with a patient's blood, did not preclude an award of medical benefits.

Pike County Board. of Education v. Mills

2008-CA-000149 08/01/2008 260 S.W.3d 366

Opinion by Judge Thompson; Judge Keller and Senior Judge Graves concurred. The Court affirmed a decision of the Workers' Compensation Board affirming an award of permanent

partial disability and medical benefits by the ALJ. The Court held that the Board and the ALJ correctly found that a high school color guard instructor was an employee of the Board of Education on the date of his injury, even though the notification from the superintendent that he had been hired was not received until later. KRS 342.640, which specifically deals with the definition of an employee within the context of the Workers' Compensation Act preempted the more general language of KRS 160.380, which vests exclusive authority in the superintendent to appoint or promote individuals. The Court also held that, because the Board of Education did not file a petition for reconsideration requesting further findings, review was limited to whether the ALJ's conclusion that the instructor was a seasonal employee was unreasonable. Based on the instructor's testimony that he was hired to work only from the summer to fall season, the finding was not unreasonable.