

Kentucky Court of Appeals
Cases of Note
January-February, 2009

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

INSURANCE

Auto-Owners Insurance Company v. Veterans of Foreign Wars Post 5906

2008-CA-000141 01/16/2009 2009 WL 103197

Opinion by Judge Lambert; Judges Clayton and Wine concurred. The Court affirmed a summary declaratory judgment in favor of a VFW post finding that it was entitled to liability coverage and indemnity under a liability policy entered into with the appellant insurer. The Court held the commercial general liability insurance policy provided coverage for a wrongful death claim arising from an automobile accident involving a driver who had visited the VFW prior to the accident. The exclusion contained in the policy pertaining to incidents involving bodily injury or property damage in causing or contributing to the intoxication of a person was not applicable because the VFW was not in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages but rather, was primarily concerned with the operation of its bingo hall and various charitable activities and simply a storage facility for its members’ alcohol.

Auto-Owners Insurance Company v. Goode

2008-CA-000350 02/13/2009 2009 WL 367216

Opinion by Judge Keller; Chief Judge Combs and Senior Judge Henry concurred. The Court affirmed a jury verdict in favor of appellee on her claim for coverage under her mother’s underinsured motorist coverage, which exempted from coverage a relative who owned an automobile. The Court first held that the definition of “automobile” in the policy was ambiguous. The Court then held that the holding in *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977) was applicable and therefore, the trial court did not err in defining “automobile” as one that had not been retired from service for an indefinite time into the future. The Court next held that the jury instruction regarding the operability of appellee’s car was not erroneous, as counsel had ample opportunity to flesh out the legal nuances regarding the extent of damage to appellee’s car, the cost to repair it and whether appellee intended to repair it. The Court finally held that the trial court did not err in denying the insurer’s motion for a directed verdict. Appellee’s evidence that the automobile did not have a steering column, needed brake repairs, had bald tires and had not been driven for several months was sufficient for a jury to reasonably conclude that the repairs necessary to make the car roadworthy and/or operable were not minor in nature.

State Farm Mutual Automobile Insurance Company v. Slusher

2008-CA-000169 02/27/2009 2009 WL 485027

Opinion by Judge Wine; Judge Caperton concurred; Judge Taylor dissented by separate opinion. The Court affirmed a judgment of the circuit court finding that the estate of an employee was entitled to receive uninsured motorist benefits under a policy issued to the deceased on his personal automobile. In a case of first impression, the Court held that the co-employee’s immunity from liability under the Workers’ Compensation Act, KRS 342.690(1), did not preclude the estate from recovering uninsured motorist’s benefits from the policy. Because the policy language “legally entitled to recover” was ambiguous, the Court applied the “essential

facts” approach. Because the parties stipulated that the co-employee’s negligence caused the accident and that the damages exceeded the workers’ compensation benefits and were at least the policy limits for UM or UIM benefits, recovery was appropriate. Further, because the clear intent of the UIM statute was to allow an insured to purchase additional coverage so as to be fully compensated, it was of no consequence that the tortfeasor was unable to respond in damages.

TORTS

Combs v. Stortz

[2007-CA-001232](#) 01/09/2009 2009 WL 50174

Opinion by Judge Caperton; Judge Keller and Wine concurred. The Court reversed and remanded a judgment of the circuit court entered pursuant to a jury verdict finding liability but awarding no damages on appellant’s claims for negligence arising from an automobile accident. The Court held that 1) the damage instructions impermissibly linked the two threshold questions of monetary damages for reasonably necessary medical expenses exceeding \$1,000 and the specifically enumerated physical or permanent injuries, loss, or death, as allowed by KRS 304.39-060(2)(b); 2) appellant was not entitled to a directed verdict on the liability of a settling party; 3) the apportionment instruction as to the liability of the settling party was not improper and even so, any error was harmless; 4) the trial court did not commit reversible error by excluding reference to the insurer as the provider of UIM coverage; 4) the trial court did not err in admitting expert opinion testimony that took into account the mechanism of injury, appellant’s medical history and available medical records, in addition to the information derived from a physical examination; 5) the trial court did not err by allowing testimony regarding prior workers’ compensation claims and insurance payments for impeachment purposes; 6) the trial court did not err in excluding expert medical testimony regarding appellant’s condition that was couched in terms of possibility, rather than probability or certainty, and that was not timely produced; 7) appellant placed her medical condition at issue and therefore, defense counsel did not improperly cross-examine her regarding past workers’ compensation claims, past treatment and injury claims with past employers; 8) while cross-examination about appellant’s nephew’s employment by appellant’s counsel was admitted in error, the error was harmless; and 9) expert testimony by an auto mechanic regarding alleged brake failure was properly admitted.

Davis v. Johnson

[2007-CA-002394](#) 02/20/2009 2009 WL 414008

Opinion by Senior Judge Buckingham; Judges Dixon and Nickell concurred. The Court reversed a judgment of the circuit court that reversed a judgment of the district court finding that appellee could not recover a share of damages under Kentucky’s wrongful death statute. The Court held that a decedent’s stepchild who was not legally adopted could not recover a share of the damages under KRS 441.130.

Davis v. Scott

[2007-CA-002279](#) 02/13/2009 2009 WL 367219

Opinion by Judge Dixon; Judges Caperton and VanMeter concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellees and dismissing appellants’ claim for legal malpractice. The Court held that the trial court did not err in dismissing the claim. Appellants’ assignment of the proceeds from the legal malpractice action as settlement in federal litigation, conditioned upon appellant pursuing a legal malpractice claim against his attorney, constituted an impermissible assignment of a legal malpractice claim, which was void as against public policy. The Court further held that the cause of action could not be maintained apart from the assignment as, under the express terms of the settlement agreement in the federal litigation, appellant could not be the real party in interest.

WORKERS' COMPENSATION

Ridener v. South KY Rural Electric Cooperative, Corp.

[2008-CA-001520](#) 01/23/2009 2009 WL 172897

Opinion by Judge Keller; Chief Judge Combs and Senior Judge Henry concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion of the ALJ finding appellant only partially disabled. The Court held that the employer's proof of appellant's entitlement to long-term disability benefits had little or no bearing on his entitlement to permanent total disability benefits, as the definition of disability under the long-term disability policy was significantly different from and far less restrictive than the definition of permanent total disability under KRS 342.0011. The Court also held that the evidence did not compel a finding that appellant was totally disabled.

Morrison v. The Home Depot

[2007-CA-002457](#) 02/13/2009 2009 WL 367212

Opinion by Judge Nickell; Judges Clayton and Taylor concurred. The Court affirmed an opinion of the Workers' Compensation Board affirming an opinion of the ALJ, after remand from the Kentucky Supreme Court, finding that a university evaluator was affiliated with the University of Louisville School of Medicine. The Court held that the ALJ's finding was supported by substantial evidence that the doctor met the requirements of KRS 342.315 to serve as a university evaluator. The evidence showed that the doctor was a non-tenured professor of orthopedic surgery and had performed the university evaluation at the request of the medical school and that his status as an independent contractor with a medical assessment clinic did not negate those facts.