

Kentucky Court of Appeals
Cases of Note
July-August, 2009

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TORTS

D'Angelo v. Mussler

[2008-CA-001003](#) 05/29/2009 2009 WL 1491390

Opinion by Judge Moore; Judge Dixon and Senior Judge Knopf concurred. The Court affirmed a summary judgment of the circuit court in favor of the appellee attorney on appellant’s claim alleging wrongful use of civil proceedings. The Court held that the trial court properly found that appellee did not lack probable cause for the basis of a medical malpractice claim against appellant, although it was later voluntarily dismissed with prejudice.

Industrial Risk Insurers v. Giddings & Lewis, Inc.

[2007-CA-002163](#) 07/02/2009 2009 WL 1884386 DR Pending

Opinion by Judge Keller; Judges Clayton and Lambert concurred. The Court affirmed in part, reversed in part, and remanded a circuit court order granting summary judgment to appellees on appellants’ tort claims related to damage to a lathe, material handling system and vertical machining centers manufactured by appellees. The Court held that the circuit court correctly determined that the Economic Loss Rule applies in Kentucky and that the destructive or calamitous exception to the Economic Loss Rule does not apply in Kentucky. The claims arising out of negligence and breach of warranty were contractual in nature and thus, were barred by the Economic Loss Rule. However, the claims arising out of negligent misrepresentation and fraud arose out of common law tort theories and did not fall within the rule. The Court then held that the trial court erred in concluding, as a matter of law, that the lathe, vertical machining centers and material handling system were one product and that, considering the evidence, this was a question of fact for a jury. The Court next held that, to the extent any service contract existed, any claims by appellants related to misrepresentation or fraud could be addressed in conformity with the holdings regarding the Economic Loss Rule. The Court finally held that appellants might be able to recover damages related to any other equipment or to its facility to the extent it could prove such damages.

Peters v. Wooten

[2007-CA-001955](#) 07/17/2009 2009 WL 2059085

Opinion by Judge Moore; Judge Acree and Senior Judge Knopf concurred. The Court affirmed a verdict and judgment for the defense after a jury trial in a personal injury case arising from an automobile accident. The Court first held that the trial court erred in ordering discovery of appellants’ Social Security disability application. The Court then held that, although the error occurred, the trial court did not abuse its discretion in overruling appellant’s objection to the evidence at trial when the records were used only to point out inconsistencies in appellant’s prior testimony regarding his work history and did not reference appellant’s attempt to collect benefits or disclose the name of the agency. The Court next adopted the “financial hardship” exception to the collateral source rule and held that the trial court did not abuse its discretion in allowing appellee’s attorney to question appellant regarding collateral source benefits when appellant’s wife opened the door by testifying that appellant did not seek medical treatment due to financial hardship. The Court also held that the probative value of not leaving the impression with the jury that appellant lacked monetary means to seek medical treatment outweighed any prejudice produced by the evidence. The Court next held that the trial court did not err in refusing to give a jury instruction allowing an award

of damages resulting from the aggravation of a pre-existing injury when the court provided a broad instruction consistent with case law. The Court finally held that the trial court did not err in denying appellant's motion for a judgment notwithstanding the verdict as appellant's testimony was subject to a credibility determination by the jury and there was nothing to suggest the verdict was palpably or flagrantly against the evidence such that it indicated the jury reached the verdict as a result of passion or prejudice.

Hamilton v. Trans Union Settlement Solutions, Inc.

[2008-CA-001475](#) 8/14/09 2009 WL 2475430

Opinion by Senior Judge Lambert; Judges Clayton and Thompson concurred. The Court reversed and remanded for further proceedings a judgment of the circuit court granting appellants recovery on their claims against appellee related to a title examination in which it failed to discover a land use restriction in a deed. The Court first held that the trial court's determination that appellee breached its duty to exercise ordinary care in its examination of the title to the real property was not erroneous. The Court next held that the trial court did not err in calculating the damages that arose from the defective title abstract prepared in connection with a loan. The Court then held that the trial court lacked discretion to punish appellants by deducting their negotiated recovery of interest and attorneys' fees from the compensatory award to which they were entitled for what the trial court believed to have been improperly collected interest and attorneys' fees through negotiations with other parties. If the court believed that appellants, their attorneys or other parties behaved contemptuously or unethically, other remedies were available.

Price v. Garcia

[2007-CA-001344](#) 8/7/09 2009 WL 2408156

Opinion by Judge Nickell; Judge VanMeter and Senior Judge Graves concurred. The Court affirmed a judgment of the circuit court dismissing appellants' personal injury claims with prejudice following a jury verdict finding that appellants had not incurred \$1,000.00 in reasonably necessary medical expenses required for recovery under KRS 349.39-060(2)(b). The Court held that the trial court properly admitted three items of testimony from the investigating officer who was neither listed nor qualified as an expert witness and even so, any error was harmless as the challenged testimony bore on fault, an issue not reached by the jury. In doing so the Court held that the issues were preserved for appeal because the circuit court ruled during trial on the issues advanced on appeal. The Court then held that 1) the trial court did not abuse its discretion in permitting the officer to testify about the weather conditions the night of the accident as the facts were well within her perception at the scene; 2) the trial court did not abuse its discretion in allowing the officer's testimony in allowing cumulative testimony which was nothing more than an oral description of the damage depicted in photos of the accident scene and not accident reconstruction testimony; and 3) that the officer's testimony about carrying a child from the car involved in the accident was harmless, as it related to the issue of fault, which was not reached by the jury.

Trent v. Teco Coal Corporation

[2008-CA-000486](#) 5/22/2009 2009 WL 1424031 Ordered Pub 8/21/09

Opinion by Judge Clayton; Judges Moore and Stumbo concurred. The Court affirmed a judgment of the circuit court entered subsequent to a jury verdict apportioning fault between the parties on appellant's claim related to an automobile accident. The jury apportioned 50 percent liability to appellant, 50 percent to the driver of the bus that rear ended appellant after she stopped at a yellow traffic light and zero percent liability to the appellee coal company that appellant claimed left dust and debris to accumulate on the stretch of road where the accident happened. The jury awarded no damages to appellant. The Court first held that appellant properly preserved her objections to the jury instructions by submitting jury instructions and by participating in extensive discussion regarding the jury instructions. The Court then held that the jury instructions were not confusing and did not erroneously refer to a non-party to the action. The use of the phrase "the substantial factor" rather than "a substantial factor" was not so substantial as to cause prejudice and appellant failed to provide any evidence that the jury was prejudiced or would have decided the case differently. Further, the

instructions were not erroneous and correctly stated the law as to the duty of care of the individuals. The Court then held that appellant was not entitled to an instruction on negligence per se as to the coal company's negligence when she failed to prove that the coal company violated any regulation. The Court next held that the trial court did not abuse its discretion in denying appellant's motion for a new trial with respect to the issue of damages. Although conflicting, the evidence was sufficient for the jury to conclude that appellant did not sustain a compensable injury.

WORKERS COMPENSATION

Max & Erma's v. Lane

[2009-CA-000528](#) 07/24/2009 2009 WL 2217530

Opinion by Judge Moore; Judge Nickell and Senior Judge Harris concurred. The Court affirmed an opinion of the Workers' Compensation Board reversing and remanding a decision of an ALJ denying an award of future medical treatment. The Court held that the Board did not err in reversing the ALJ's ruling that the worker was not eligible for an award of future medical benefits and correctly determined that KRS 342.020(1) obligated the employer to pay for any reasonable and necessary medical treatment for her permanent disability.

Baptist Hospital East v. Possanza

[2009-CA-000082](#) 8/7/09 2009 WL 2424212

Opinion by Judge Lambert; Judges Caperton and Keller concurred. The Court affirmed a decision of the Workers' Compensation Board reinstating a worker's claims for benefits. The Court held that the Board did not err in its interpretation and application of KRS 342.165(2) that all three factors must be present before compensation could be denied. Because the employer failed to show a causal connection between the workers' claim for a neck injury and the misrepresentation related to a low back condition, the worker was improperly denied compensation. The Court rejected the employer's claim that the connection arose out of the fact that the worker would not have sustained the injury had he been honest about his physical condition at the time he took the job.

Ranger Contracting v. Morley

[2008-CA-001037](#) 8/28/09 2009 WL 2707394

Opinion by Judge Nickell; Judges Caperton and Keller concurred. The Court affirmed an order of the Workers' Compensation Board affirming an ALJ's award of medical benefits to a worker and his treating physician following the reopening of a claim resulting from a disputed medical fee. The Court held that the ALJ did not err in allowing the reopening of the claim outside the two-year statutory window provided by KRS 342.185(1). The doctor's medical opinion alone, that the worker's recurring back pain was a consequence of the injuries he sustained in the work-related fall and claimed prior to the original award, was substantial evidence upon which the ALJ could reasonably find a causal connection between the back pain and the originally claimed work-related injuries. Therefore, the medical treatment for back pain was compensable under KRS 342.020. The Court further held that the ALJ properly determined that the motion to reopen for medical benefits associated with his ongoing back pain was not barred by the two-year statute of limitations. KRS 342.185 does not require workers to timely provide notice and file claims for all known symptoms but only for all known conditions.

Williams v. Farmers Stockyard, Inc.

[2008-CA-000785](#) 8/7/09 2009 WL 2408399

Opinion by Judge Caperton; Senior Judge Buckingham concurred; Judge Stumbo dissented by separate opinion. On discretionary review, the Court affirmed a judgment of the circuit court reversing a district court order regarding creditors' claims to workers' compensation benefits paid to the estate of a deceased worker. The Court held that the creditor exemption in KRS 342.180 did not apply to money received by an estate when a worker died without dependents.