Kentucky Supreme Court
Cases of Note
January-February, 2009

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INSURANCE

Debra Gilbert v. Nationwide Mutual Insurance Co.
2007-SC-000078-DG 1/22/2009
Opinion by Justice Abramson. All sitting; all concur.
In 2000, a tractor trailer tipped over and fell on the automobile driven by Gilbert's daughter. Gilbert, the Appellant, gave prompt notice to her insurance carrier, Nationwide-- the Appellee. Although the tortfeasor's insurer, Prime, initially accepted liability for Gilbert's property claim and her daughter's bodily injury claim, the daughter eventually had to sue Prime. Gilbert did not join her property claim to the suit, but assumed her loss would be paid when her daughter's claim was resolved. The suit settled in late 2003 and Gilbert demanded reimbursement for the loss of her automobile. After Prime asserted a statute of limitations and denied payment, Gilbert was permitted to intervene in her daughter's lawsuit. She also filed a claim with Nationwide, who too refused payment. Gilbert then added Nationwide as a defendant to the suit. The circuit court granted summary judgment in favor of Nationwide on the grounds that Gilbert had violated the provision of her policy requiring that she "do nothing to prejudice" Nationwide's subrogation rights by allowing the statute of limitations to lapse on her property damage claim. On appeal, the Court of Appeal affirmed summary judgment. The Supreme Court reversed and remanded, holding that provision of the policy did not require Gilbert to initiate a lawsuit on Nationwide's behalf. Further the Court held that Appellant's timely notice to Nationwide of her loss and potential claim satisfied her duty. Once Nationwide had notice, the Court held, it was afforded adequate opportunity to take steps to preserve its subrogation rights.

TORTS

Charles E. Brewster v. Colgate-Palmolive Co. & Jewish Hospital Healthcare Services
2006-SC-00584-DG 1/22/2009
Jewish Hospital Healthcare Services v. Charles Brewster
2007-SC-000366-DG 1/22/2009
Opinion by Chief Justice Minton; Justice Abramson not sitting.
Brewster worked as an independent contractor during the 1970's doing construction work at Jewish Hospital in Louisville and the Colgate-Palmolive plant in Jeffersonville, Indiana. In 2001, Brewster was diagnosed with asbestosis and filed suit against Jewish Hospital and Colgate-Palmolive claiming they had breached their duty to warn independent contractors of the presence and dangers of asbestos. The trial court granted summary judgment in favor of the defendants, which was upheld by the Court of Appeals. The Supreme Court affirmed, holding that because Brewster failed to offer affirmative evidence establishing a genuine issue of material fact concerning the premises owners' actual knowledge of the presence and dangers of asbestos, summary judgment was appropriate. The Court reaffirmed Owens v. Clary, stating that a duty to warn exists only where the premises owner has actual knowledge of the danger and the independent contractor has neither actual or constructive knowledge of the danger. The Court

declined to adopt either the "superior knowledge" approach (where duty to warn is imposed only where premises owner had superior knowledge of the danger at time of exposure) or a business invitee burden-shifting approach (as used in slip-and-fall cases). In Justice Venters' dissent (joined by Justice Scott) he agrees with the rule reaffirmed by the majority, but felt that the premise owners were not entitled to summary judgment because they did not "negate the realistic possibility that [Brewster] could produce at trial, evidence sufficient to meet his burden of proof."

Lois DeVasier (Administratrix of the estate of Kenneitha Crady) v. William James, M.D.
2007-SC-000130-DG 2/19/2009
2007-SC-000365-DG 2/19/2009
Opinion by Justice Venters; all sitting.
Kenneitha Crady was murdered by her boyfriend, Rene Crissell, shortly after he had been seen by Dr. James. Crady's estate brought suit against Dr. James alleging he breached the duty to warn Crady imposed by KRS 202A.400. The jury returned a verdict in favor of Dr. James. The Court of Appeals affirmed, interpreting the statute to require that the threat triggering the duty to report be made directly to the mental health professional, not through an intervening agent, such as a nurse. Since there was no evidence that Cissell had directly expressed a threat to Dr. James, the Court of Appeals held that Dr. James was entitled a directed verdict. The Supreme Court, affirmed but on different grounds. The Supreme Court held that the Court of Appeals construed the word "communicated" as used in the statute too narrowly and ruled that the statute includes threats communicated by a patient to the mental health professional indirectly through agents who have a duty to relay the patient's information. The Court concluded that even though Dr. James knew of previous acts of violence by Cissell towards Crady, there was no evidence that Cissell communicated an actual threat to inflict harm upon Crady by physical violence. The Court rejected the estate's argument that the information communicated to Dr. James demonstrated that Cissell himself constituted a "threat" to Crady that would trigger the statutory duty to warn. The Court noted that the legislature, by the language of the statute, showed they intended that the patient communicate a threat towards an identifiable person, not that they simply are a threat.

Flegles, Inc. v. Truserv Corporation
2006-SC-000471-DG 2/19/2009
2007-SC-000155-DG 2/19/2009
Opinion by Justice Abramson; all sitting.
Flegles Inc., which operated a family-owned True Value hardware store, sued its wholesale cooperative, Truserv claiming that Truserv made fraudulent misrepresentations which induced Flegles to build a new expanded store—which did not perform up to expectations. The jury found for Flegles and awarded $1.3 million in damages. The Court of Appeals reversed and ordered dismissal of Flegles' complaint. The Supreme Court affirmed the Court of Appeals, holding that Truserv's predictions of future performance did not support a claim of fraud. Generally, misrepresentation must relate to past or present material fact. Opinion or prediction may not be the basis for a misrepresentation action, unless the opinion either incorporates falsified past or present facts or the declarant falsely represents his true opinion of a future happening. In his dissent, Justice Scott (joined by Justice Schroder and Justice Venters) wrote that Truserv's concealment of business projections that were less optimistic than the one actually presented to Flegles amounted to a false representation of a future happening, sufficient to take the issue to the jury

WORKERS' COMPENSATION

Alcan Aluminum Corp. v. Jackie Stone; Hon. Lawrence F. Smith, ALJ; and Workers' Compensation Board
2008-SC-000179-WC 1/22/2009
Memorandum opinion of the court. All sitting; all concur.
KRS 342.730(6) permits certain employer-funded disability benefits to offset workers' compensation income benefits. Injured employee chose to retire under employer's disability retirement plan because the benefits were 15% greater than the employer's early retirement benefits. During his workers' compensation proceedings, the employer asserted that its payment of disability retirement benefits should offset its liability for workers' compensation income benefits. The Supreme Court affirmed the Court of Appeals, holding that "income benefits" under KRS 342.730(6) does not include retirement benefits. Therefore, the employers could only offset the amount representing the difference between the disability retirement benefit and the early retirement benefit.

Susan Mitchell v. The TFE Group; Hon. Sheila C. Lowther, ALJ; and Workers' Compensation Board
2008-SC-00148-WC 1/22/2009
Memorandum opinion of the court; all sitting; all concur.
Mitchell appealed the ALJ's ruling that she was not entitled to an award of attorney's fees for the employer's violation for the workers' compensation unfair claim settlement practices act, arguing that no statute prohibited attorney fees and that public policy demanded such an award. The Supreme Court affirmed, holding there was no statutory authority for an award of attorney's fees in a proceeding under KRS 342.267. The Supreme Court noted that KRS 342.267 does not create a private cause of action or additional means of recovery for an employee.

Clark County Board of Education v. Audeen Jacobs; Hon. Sheila C.Lowther, CALJ; Workers' Compensation Board
2008-SC-000222-WC 2/19/2008
All sitting; all concur.
Claimant was employed as a high school teacher and served as sponsor of the school's chapter of the Beta Club—a national honor student organization. While accompanying the club to a convention in Louisville, claimant fell and fractured her shoulder in four places. The school board asserted the injury was not work-related and denied the claim. The ALJ determined the injury was work-related, noting claimant attended the convention with her principal's approval and that she was not required to take sick or vacation time to do so. Further, the ALJ found that the club provided a service to claimant's employer by advancing the school's responsibility to educate students and prepare them for adult life. In affirming, the Supreme Court restated the test from Spurgeon for determining if an activity arises in the course of employment: 1) that an employer must exercise a sufficient degree of compulsion to permit a reasonable finding that it brought the disputed activity within the scope of the employment; and 2) that evidence of a specific employer benefit may bolster evidence of compulsion.