Kentucky Supreme Court
Cases of Note
March-April, 2009

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".

TORTS

Greg Beaver (d/b/a Beaver Construction Co.) v. Kevin Oakley & Crawford Electric, Inc.
2006-SC-000813-DG March 19, 2009
Opinion by Chief Justice Minton; all sitting, all concur. Oakley brought suit in tort against Beaver for injuries suffered at a construction site. The trial court granted summary judgment to Beaver, holding he was entitled to "up-the-ladder" immunity from tort liability as a contractor. The Court of Appeals reversed, holding that since Oakley's employer (Crawford Electric) had not contracted with Beaver's employer (Whitaker Construction Management) there was no contractor/subcontractor relationship though which Beaver could avail himself of up-the-ladder immunity. The Supreme Court reversed the Court of Appeals and reinstated the trial court's award of summary judgment in favor of Beaver, holding that a formal written contract between an injured worker's employer and an alleged tortfeasor is not essential to establish up-the-ladder immunity. While acknowledging that Crawford and Whitaker had contractual relationships with the property owner rather than each other, the Court concluded that the "paperwork obscured the reality of the functional contractor/subcontractor relationship."

Gregory B. Nazar, MD, et al. v. Sheila Branham, Executrix of the Estate of Roe Branham
2004-SC-001015-DG April 23, 2009
2005-SC-000834-DG April 23, 2009
Opinion by Special Justice Mando; Chief Justice Minton and Justice Schroder not sitting. During surgery to remove a brain tumor, a small metal "Durahook" was left in the patient's scalp, necessitating a second surgery months later to remove the item. The patient brought a medical malpractice suit against the surgeon. The jury returned a defense verdict after the trial court refused to instruct the jury on the patient's theory that the surgeon was vicariously liable for the nurses' failure to remove the item. The Court of Appeals reversed, holding that under Laws v. Harter, leaving a foreign object inside a patient is negligence per se, and that the patient should have been awarded summary judgment on the issue of liability.

The Supreme Court reversed the Court of Appeals and overruled Laws, holding that the res ipsa loquitur standard was more appropriate than the stringent negligence per se standard for foreign object cases because it allows juries to determine the individual healthcare professional's level of liability in a situation where any number of people may be responsible for leaving the object inside the patient. Having determined the issue of the surgeon's personal liability was properly sent to the jury, the Court then took up the issue of the surgeon's vicarious liability. The Court held that in order for vicarious liability to exist, it must be established that the nurses were the surgeon's agents. The Court found the patient had presented no evidence of an agency relationship and noted the surgeon's evidence showing that he did not control the nurses' training, terms of employment or details of their work. As such, the Court held that the trial court was correct in its refusal to instruct the jury on vicarious liability. Justice Venters (joined by Justice Cunningham and Justice Noble) concurred but disagreed with the majority's conclusion that the nurses were not agents of the surgeon. The minority wrote that because the surgeon did

not order or instruct nursing staff in how to assist him did not necessarily negate the supervisor/agent relationship but might instead indicate that the surgeon was deficient in his supervision of the nurses.

William Mattingly, et al. v. William E. Stinson, et al. Kentucky Farm Bureau Mutual Insurance Company v. William E. Stinson, et al.
2007-SC-000221-DG April 23, 2009
2007-SC-000222-DG April 23, 2009
Opinion by Justice Cunningham. Justice Abramson not sitting. Stinson sued Mattingly and Stinson's underinsured motorist carrier (KFB) for injuries suffered in a motor vehicle accident. Before trial, Mattingly's motion to prohibit reference to UIM coverage was granted. The jury returned a verdict in Mattingly's favor—finding Stinson 100% at fault. The Court of Appeals reversed and remanded for a new trial, holding that prohibiting reference to UIM coverage violated the rule set forth in Earle v. Cobb. In Earle, the Court held that a UIM carrier must be identified at trial when it had chosen to preserve its subrogation rights by means of the procedure set forth in Coots v. Allstate. The purpose of Earle was to eliminate the "legal fiction" that occurs when the name of the tortfeasor is substituted for the UIM carrier for trial purposes. The Court noted that in this case, KFB did not enter into a Coots settlement and therefore did not substitute its own liability for Mattingly's—thus there was no legal fiction presented to the jury. The Supreme Court reversed the Court of Appeals and reinstated the jury verdict, declining to extend Earle to trials where the UIM carrier has not availed itself of the Coots procedure to subrogate its rights. Justice Scott concurred in result only, disagreeing with the majority's suggestion that both a Coots settlement and participation at trial are needed to trigger identification of the UIM carrier as a party at trial.

George Miller, et al. v. Donna Hutson (d/b/a Scott Partin Builders)
2007-SC-000317-DG April 23, 2009
Opinion by Justice Schroder; all sitting. Miller, buyer of a new residence, brought an action against Hutson, a subdivision developer, and her builder over defects with the house. The trial court granted Hutson's motion for partial summary judgment dismissing the claims against her since she was not the builder of the house. The Court of Appeals affirmed, declining to extend the builder's exception to the rule of caveat emptor found in Crawley to developers of residential subdivisions. The Supreme Court held that summary judgment in Hutson's favor was inappropriate since there were issues of fact as to whether Hutson was the builder as well as the developer. The Court cited a V.A. loan form where Hutson identified herself as the builder of the residence. Furthermore, the Court held that Hutson's possible status as builder was irrelevant since she signed a one-year home warranty in a personal capacity as warrantor. Thus the Court held that the trial court should have entered a partial summary judgment against Hutson on the issue of liability. The Court remanded for further proceedings on the issue of damages. Justice Venters (joined by Justice Scott) concurred by separate opinion, writing that the Court should have expanded Crawley to hold developer-sellers of residential subdivisions to the same implied warranties as the builder—an issue the majority declined to consider.

CIVIL PROCEDURE (TORTS)

Tom Duffy, Sr. et al v. Hon. Karen L. Wilson, et al.
2008-SC-000507-MR March 19, 2009
Opinion by Justice Venters; all sitting. Ryan Owens died following football practice at Henderson County High School. Two weeks later, an adjuster for the school board's insurer conducted interviews with witnesses. Present at the interviews were two attorneys for the school board, one of whom (Wilson) made statements to the effect that he was not hired to sue or

defend anyone. Owens' estate subsequently brought a wrongful death suit against the coaches and school board officials. The estate sought to compel production of the statements. The trial court granted the motion to compel concluding that the statements were not privileged attorney work product under CR 26.02(3) because, based on Wilson's remarks, they were not made in anticipation of litigation. The trial court further held that even if the statements were considered attorney work product, they would still be discoverable since the estate had a substantial need for the statements and would be unable to otherwise obtain them without undue hardship since the witnesses' memories would not be as clear as they were at the time of the interviews. The Court of Appeals affirmed, and the defendants sought a writ of prohibition blocking execution of the trial court's order to compel from the Supreme Court.

The Supreme Court reversed the Court of Appeals and ordered it to enter the writ, concluding that the statements were attorney work product as they were "clearly" taken in anticipation of litigation. The Court stated that Wilson's disclaimer, while truthful, was not a conclusive admission that litigation was not anticipated. The Court further held that the estate had not shown that it was unable to obtain a substantial equivalent of the statements without undue hardship; noting that the estate had presented no compelling argument that the witnesses' memories had substantially deteriorated since the time of the incident. In his dissent, Justice Cunningham wrote that common sense dictates that statements taken from witnesses within two weeks of the incident are not equivalent in quality or veracity to those taken six months later.

WORKERS' COMPENSATION

Kentucky Employers' Mutual Insurance v. J&R Mining, Inc. et al.
2008-SC-000257-WC March 19, 2009
Opinion of the Court; all sitting; Justice Venters concurs in result only. Earl Reed, Jr., president and co-owner of a mining company, was killed in a work-related accident. The ALJ awarded survivor benefits to Reed's widow (also a co-owner). On appeal, the insurer argued that the policy specifically excluded officers of the company from coverage at Reed's request. In affirming, the Supreme Court held that under KRS 342.640, every officer of a corporation is also an employee for workers' compensation purposes. Employees wishing to opt out may only do so by properly executing the proper form and filing it with the Office of Workers' Claims. Since Reed had not rejected coverage in this specific manner, he was covered by the insurer's policy, notwithstanding his endorsement of the exclusion on the contract of insurance.

Larry Cain v. Lodestar Energy, Inc.; Hon. J. Landon Overfield, AJL; Workers' Compensation Board
2008-SC-000178-WC March 19, 2009
Opinion of the Court; all sitting; Justice Scott concurs in result only. Under KRS 342.732(1)(a), workers that are diagnosed with category-1 coal workers' pneumoconiosis, but who do not exhibit significant respiratory impairment are entitled to a retraining incentive benefit (RIB). Cain submitted a chest x-ray determined to show a category-2 disease. The x-ray submitted by the employer was determined to show a category-1 disease. Since the two reports were not in consensus, the x-rays were submitted to a panel of "B" readers as required under KRS 342.316(3)(b)4.e. Despite the fact that the evidence submitted by both parties showed at least a category-1 disease, the panel reached a consensus of a category-0 and the ALJ dismissed the claim. The Supreme Court, consistent with its 2008 decision in Harper, rejected Cain's argument that KRS 342.316 was unconstitutional on its face since it a) imposed a higher clear-and-convincing standard to rebut a panel's finding whereas other claimants need only prove their injuries by a preponderance of the evidence; and b) coal workers are only permitted to prove their disease with x-ray evidence, thus excluding a workers' credible testimony. However,

the Supreme Court held that KRS 342.316 was unconstitutional on equal protection grounds as applied to Cain and similarly situated workers whose employer also submitted evidence of a category-1 disease but whose claim was not subject to panel review. The Court further held that there is no rational basis for a claim to be submitted to review by a consensus panel when the worker's and employer's evidence both support the conclusion that the worker is entitled to a RIB award.

Chrysalis House, Inc. v. Keith Tackett; Hon. Grant Roark, ALJ; & Workers' Compensation Board
2008-SC-000221-WC March 19, 2009
Opinion of the Court; Justice Noble not sitting. Tackett suffered a job-related injury subsequently returned to work after being awarded income benefits of $38.87 per week. Tackett later sought to reopen the case in order to receive double benefits pursuant to KRS 342.730(1)(c)2, asserting that his employment with Chrysalis House had ceased and he now earned five dollars per hour less than he did at the time of his injury. The employer argued that Tackett was not entitled to an increased benefit because he was discharged for cause, namely theft. The ALJ awarded the increased benefit on the ground that the statute states the benefit is to be doubled in the event of cessation of employment "for any reason, with or without cause." The Supreme Court reversed, noting that while at first blush the statute requires an increase regardless of the reason for cessation of employment, when 342.730 is read as a whole, it provides that the cessation of employment must relate to the disabling injury. The Court remanded back to the ALJ for a determination whether employment ceased for reasons related to Tackett's injury.

Tokico (USA), Inc. v. Krystal Kelly; Hon. Chris Davis, ALJ; and Workers' Compensation Board
2008-SC-000480-WC April 23, 2009
Opinion of the Court. All sitting; all concur. Employer argued on appeal that doctor's diagnosis of complex regional pain syndrome (CRPS) did not conform to standards of the AMA's Guides to the Evaluation of Permanent Impairment (the Guides). The Supreme Court held that while diagnostic criteria stated in the Guides have relevance in judging the credibility of a diagnosis, there was no statutory requirement that a diagnosis must conform to the criteria listed in the Guides. The doctor in this case made a diagnosis of CRPS even though the claimant met only 7 of 11 diagnostic criteria —while the Guides require 8 for a diagnosis of CRPS. The Court also rejected the employer's argument that the ALJ erred by relying on the doctor's impairment rating for a psychological condition even though the doctor stated the claimant still needed treatment. The Court held that the need for additional treatment does not preclude a finding that the claimant has reached maximum medical improvement.