Kentucky Supreme Court
Cases of Note
May-June, 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".

INSURANCE

James Malone v. Kentucky Farm Bureau Mutual Insurance Company
2007-SC-000468-DG June 25, 2009
Opinion by Justice Abramson; all sitting. After sustaining injuries in a car accident, Malone sued the other driver and Malone's underinsured motorist carrier (KFB). The tortfeasor's insurer offered to settle for the policy limits and Malone's counsel sent a certified letter to KFB indicating Malone was "considering whether to accept" the offer and demanding that, consistent with KRS 304.39-320 and Coots, that KFB either consent to the settlement or preserve its subrogation rights by advancing a check for the amount equivalent to the tortfeasor's policy limits. KFB responded to the letter, advising Malone's counsel to notify KFB when his client had made a final decision on the settlement offer from the tortfeasor's insurer. Malone subsequently accepted the settlement offer and executed a release. KFB then filed a motion for summary judgment which the trial court granted on the grounds that Malone's UIM claim was extinguished for lack of proper notice to KFB of the settlement. The Court of Appeals affirmed.

The Supreme Court affirmed, holding that KRS 304.39-320 requires notice to the UIM carrier when the injured party "agrees to settle." Since Malone's letter merely stated the offer was being considered, there was no agreement in place and notice to KFB was insufficient. The Court rejected Malone's argument that he had substantially complied with the intent of the statute, noting that the central underpinning of the statute was the existence of a binding agreement to settle between the injured party, the under-insured motorist and the under-insured motorist's liability carrier. Justice Cunningham (joined by Justice Schroder and Justice Scott) dissented, asserting that the letter satisfied the notice requirements and that the majority was, in effect, adopting a "magic phrase" component. The dissent contended that the majority was focusing solely on the "considering whether to accept" phrase while ignoring the plain meaning of the overall letter. The minority discounted KFB's response to Malone's letter saying objective analysis trumped KFB's subjective interpretation.

TORTS

Timothy Morgan v. Candria Scott and James E. Scott, Jr.
2006-SC-000693-DG May 21, 2009
2006-SC-000701-DG May 21, 2009
2007-SC-000282-DG May 21, 2009
Opinion of the Court; all sitting. Morgan went to an automobile dealership where, contrary to its policy, he test drove a truck without being accompanied by a salesperson. Morgan lost control of the truck and struck the vehicle driven by Scott. Scott and her husband sued Morgan and the dealership, claiming Morgan had driven negligently and that the dealership had breached its duty to ensure Morgan's safe operation of the vehicle. The jury returned a verdict in Scott's favor,

awarding approximately $4,000,000 and apportioning fault equally between Morgan and the dealership. The Court of Appeals affirmed the verdict against Morgan, but reversed as to the dealership. Further, the Court of Appeals held that Morgan was liable for 100% of the damages awarded by the jury.

The Supreme Court affirmed the Court of Appeals, holding that the dealership satisfied its duty of care when it confirmed Morgan was duly licensed to drive and not otherwise obviously impaired. The Court further held that the dealership did not assume a duty towards the public by establishing its policy that test drivers must be accompanied by a salesperson since a) Scott could not have relied upon the policy since the evidence showed she was unaware of its existence; and b) the dealership's failure to observe its policy did not increase the risk of harm to Scott. The Court also rejected Morgan's argument that he should bear only 50% of the liability for the damages verdict, holding that KRS 411.182(1) requires apportionment only when "more than one party" is at fault. Wrote the court: "We can find nothing fundamentally unfair about assigning one hundred percent of the fault for an injury to the only party that breached a duty and caused the injury."

Justice Abramson (joined by Justice Cunningham) concurred in part, but dissented from the portion of the opinion holding Morgan 100% liable for the damages—asserting the case should be remanded for a new trial solely on the issue of damages caused by Morgan. Justice Noble also dissented in part, contending that whether or not the dealership assumed a duty and if failure to follow its policy increased the risk of harm to Scott were questions for the jury. The Chief Justice concurred in result only.

Ten Broeck Dupont, Inc. (d/b/a Ten Broeck Hospital) v.
Artemecia Brooks
2006-SC-000484-DG May 21, 2009
Opinion by Justice Scott. Justice Abramson not sitting. Patient sued a psychiatric hospital claiming she was raped by an orderly during her in-patient stay. The jury returned a judgment in the patient's favor for $2,091,000. The Supreme Court affirmed in part, reversed in part and remanded for a new trial. The Court held that the trial court erred when it excluded the patient's medical records as well as her relevant sexual history under KRE 412 (Kentucky's Rape Shield Law). The Court ruled that the excluded evidence should have been allowed since it was highly probative of the issues of consent and patient's injuries. The Court determined that the danger of harm to the patient from admitting the evidence did not outweigh the hospital's need for the probative value of the evidence.

The Court also held that the trial court committed reversible error by failing to include a definition of "rape" in its jury instructions. In so doing, the Court reasoned, the trial court did not require the jury to determine whether the sexual conduct was non-consensual—effectively denying the hospital a defense to the patient's claims. Justice Schroder (joined by the Chief Justice) concurred in result only, contending that the patient's sexual history was not relevant to the issue of her damages.

Myanh Coleman v. Bee Line Courier Service, Inc.
2007-SC-000628-DG May 21, 2009
Opinion of the Court. Justice Abramson not sitting. Coleman suffered injuries in an accident involving a vehicle owned by Bee Line. She received $5,737 in basic reparation benefits (BRB) from her insurer, Nationwide, before settling with Bee Line for $6,500. As part of the settlement with Bee Line, Coleman signed a release in which he agreed to indemnify Bee Line for all claims "against the proceeds of the settlement." Nationwide then sought reimbursement of its BRB payment from Bee Line in arbitration proceedings. After agreeing to pay Nationwide $4,737,

Bee Line demanded indemnity from Coleman. When she refused, Bee Line filed suit. The trial court awarded summary judgment to Bee Line, holding she was contractually obligated to reimburse Bee Line for the payment. The Court of Appeals affirmed.

The Supreme Court reversed, holding that the language of the agreement limited indemnity to "claims against the proceeds of the settlement" of personal injury tort claims and did not include BRB benefits. The Court declined to address the issue of whether a sufficiently specific agreement to indemnify the tortfeasor for BRB recoupment claims would contravene the purposes of Kentucky's Motor Vehicle Reparations Act. Justice Noble (joined by Justice Venters) concurred in result only, contending that the Court should have addressed the "next question" regarding the propriety of tortfeasors extracting BRB recoupment agreements when settling claims. The minority asserted that the legislative intent and public policy behind the MVRA prohibit such agreements.

Labor Ready, Inc. and Sylvann C. Hudson III v. Wanda Sue Johnston
2007-SC-000419-DG June 25, 2009
Opinion of the Court; Justice Abramson not sitting. Mid-America Auto Auction routinely supplemented its permanent workforce during auctions by ordering temporary employees from Labor Ready, a temporary labor service. During one such auction, Johnston, a permanent employee of Mid-America, was struck by a vehicle operated by Hudson, a temporary employee. Johnston settled her claim for workers' compensation benefits with Mid-America and then filed suit in tort against Labor Ready and Hudson.

The defendants moved for summary judgment arguing that Hudson was Johnston's coworker at the time of the accident—thus her sole remedy was workers' compensation. The trial court granted summary judgment, reasoning that allowing a permanent employee to receive workers' compensation benefits and to sue a subcontractor in tort would unconstitutionally grant the permanent employee greater rights than a similarly situated temporary employee even though they would both be performing the exact same work. The Court of Appeals reversed.

The Supreme Court affirmed the Court of Appeals and remanded the case back to the trial court, holding that a contractor's permanent employee may maintain a tort action against a temporary labor service and its employee for an injury that occurred while working for the contractor. The Court concluded that the exclusive remedy provision of KRS 342.690(1) did not legislatively overrule the holding in Dillman that a subcontractor's employee was not immune from a tort claim by the principal contractor's employee. The Court also rejected Labor Ready's argument that Hudson was a loaned employee, since KRS 342.615(4) states that temporary help service workers are deemed to be employees of the temporary agency. Therefore, Johnston and Hudson were not coworkers.

WORKERS' COMPENSATION

Crawford & Company v. Joseph Wright, et al.
2008-SC-000646-WC May 21, 2009
2008-SC-000746-WC May 21, 2009
Opinion of the Court. All sitting; all concur. Crawford—the employer's third party insurance adjuster—filed a motion to reopen a 1987 award, seeking a determination that it had no responsibility for future medical treatment for claimant's knee. ALJ Davis entered an order stating Crawford would be relieved of responsibility if no response was filed within 20 days. No response was filed and the matter subsequently came before the Chief ALJ who reopened the

award and assigned the case to ALJ Smith to take additional proof in anticipation of ruling on the merits. ALJ Smith granted Crawford's motion to reconsider reopening the award, vacated the Chief ALJ's order, and reinstated ALJ Davis' order-- noting that no response had been filed. The Supreme Court held that a response to the motion to reopen is not required by the controlling regulation. Further, the Court held that to require a response to avoid the award being revised amounted to an impermissible shifting of the burden of proof. Lastly, the Court held that just because ALJ Davis presided over the Chief ALJ's motion docket did not mean that ALJ Davis retained jurisdiction over the underlying medical dispute and reinstated the CALJ's order reopening the award.

Kentucky Employers Safety Association v. Lexington Diagnostic Center, et al.
2008-SC-000671-WC May 21, 2009
Opinion of the Court. All sitting; all concur. Worker was splattered in the face with blood when flushing out a patient's IV line. Consistent with the employer's post-exposure protocol, the worker went to a required series of five doctor visits. The employer's workers' compensation insurance carrier refused to pay beyond the second visit, deciding that until such time as an objective medical finding showed the exposure had resulted in a harmful change to the worker, no injury had occurred. The Workers Compensation Board determined the insurer was liable for the payments and the ALJ and Court of Appeals affirmed. The Supreme Court also affirmed, holding that for the purposes of KRS 342.0011(1), being splattered with foreign blood or other potentially infectious material constitutes a "traumatic event."

Vacuum Depositing, Inc. v. Tamatha Dever; ALJ; and Workers' Compensation Board
2008-SC-000853-WC June 25, 2009
Opinion of the Court. All sitting; all concur. ALJ dismissed claimant's application for benefits concluding that the claimant's workplace fall was idiopathic and thus non-compensable because the evidence showed claimant was wearing high heel and admitted she was "clumsy." The Board reversed on the grounds that the ALJ misapplied the law and the Court of Appeal affirmed. The Supreme Court affirmed the Court of Appeals, noting that under Workman, unexplained falls were presumed to be work-related. Further, the Court held that the record contained (a) no evidence that the claimant suffered from any preexisting condition that caused the fall and (b) no evidence that claimant was engaged in conduct that would take her injury out of the workers' compensation scheme or (c) no evidence that claimant's footwear was inherently dangerous or inappropriate for her workplace. Since the evidence did not overcome the presumption that the fall was unexplained, it was work-related.

Speedway / Super America v. Mazen Elias; ALJ; and Workers'Compensation Board
2008-SC-000873-WC June 25, 2009
Opinion of the Court. All sitting; all concur. ALJ awarded claimant workers' compensation benefits for home healthcare services provided by claimant's spouse. The employer appealed, arguing the ALJ should have dismissed the claim since claimant had not submitted a "fully completed" Form 114 as required by 803 KAR 25:09 § 11(1). Further, the employer argued that the claim for the period before August 2003 should have been dismissed since it was not filed timely under 803 KAR 25:09 § 11(3). The Court affirmed the decisions of the Board and Court of Appeals, holding that while failure to include detailed information or failing to respond to requests for additional information may justify an employer's refusal to pay a claim, it did not preclude an ALJ from deciding the extent to which the services covered by a disputed form are compensable. The Court noted the permissive nature of the timeliness component of § 11(3), and held that there was no authority requiring dismissal of claim because of an untimely form. The Court further held that sufficient compliance with § 11(1) depends on the facts and circumstances and that the ALJ's decision was reasonable under the circumstances at hand.