

Kentucky Court of Appeals
Cases of Note
July-August, 2010

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INSURANCE

Gibson v. Kentucky Farm Bureau Mutual Insurance Company

2009-CA-000048 07/09/2010 2010 WL 2696282

Opinion by Judge Acree; Judges Combs and Wine concurred. The Court affirmed in part, and reserved in part and remanded, a judgment of the circuit court entered upon a jury’s verdict finding appellants liable for fraud and ordering them to pay damages. The appellee insurer filed a complaint seeking a declaration of rights to a truck appellants reported stolen and asserting a fraud claim against appellants. The Court first held that the circuit court’s refusal to strike for cause prospective jurors who were policyholders of the insurer was not erroneous absent a showing of any individual juror’s actual bias. The Court next held that the admission of out-of-court statements made to the insurer’s investigator was error. The statements were not admissible under KRE 801A(b)(1), as admissions of a party, or under KRE 804(b), as statements against the declarant’s interest. However, the Court held that any error was harmless in light of the other evidence of fraud, including the signed, notarized title. The Court next held that it was improper for the trial court to instruct the jury on the issue of attorney fees or to enter judgment for such an award based on a jury’s verdict. The award was a determination for the trial court to make in light of statutory, contractual or equitable considerations. The Court next held that there was competent evidence to support the award of investigation expenses and that the insurer was not required to provide exact calculations of the damages. The Court finally held that the evidence did not support the conclusion that appellants defrauded the individual appellee who acquired the truck as collateral for a loan to another individual. The individual could not prove all the elements of common-law fraud because he did not act in reliance upon any representation made by appellants.

Holzkecht v. Kentucky Farm Bureau Mutual Insurance Co.

2009-CA-001022 8/13/2010 2010 WL 3187645

Opinion by Judge Combs; Chief Judge Taylor and Judge Nickell concurred. The Court affirmed a summary judgment in favor of the appellee insurance company on its petition for declaration of rights pursuant to KRS 418.040, alleging that it was under no obligation to defend or to indemnify homeowners on appellant’s claims for injuries sustained by her daughter at a home-based child care business. The Court held that the trial court properly concluded that the homeowner’s policy specifically and unambiguously excluded coverage for personal liability arising from the business. The Court rejected appellant’s argument that the business pursuits exclusion should only apply if the dog was involved in the business and kept on the premises for the purpose of earning a profit for the business. The Court also held that the business pursuits exclusion was not subject to the policy’s severability provision so as to preserve coverage for the spouse of the person running the day care. The spouse plainly fell within the scope of the policy’s business-pursuits exclusion because he was involved in the enterprise. The policy exclusion was unambiguous and broad enough to encompass him. The severability clause did not render the exclusion ambiguous. Therefore, the availability of a business-risk endorsement was the only clear and unambiguous protection to the homeowners.

Little v. Kentucky Farm Bureau Mutual Insurance Co.

2009-CA-001030 8/20/2010 2010 WL 3270110

Opinion by Judge Nickell; Judge Stumbo and Senior Judge White concurred. The court affirmed summary judgments entered in favor of the appellee insurance company, agent and agency on

appellant's claims for negligence and vicarious liability for failing to provide him with the underinsured coverage he requested. The Court held that KRS 304.39-320(2) did not impose a duty upon the insurer to provide a specific amount of requested underinsured coverage. Further, nothing in caselaw interpreted the statute to contain a common law duty to provide the specific amount of insurance requested by an insured.

TORTS

Celina Mutual Insurance Company v. Harbor Insurance Agency, LLC

[2009-CA-000790](#) 07/16/2010 2010 WL 2788164

Opinion by Judge Clayton; Senior Judge Buckingham concurred; Judge Caperton dissented by separate opinion. The Court affirmed two orders of the circuit court granting summary judgment in favor of appellees on the appellant insurance company's negligence and indemnity claims alleging that the appellee insurance agency submitted an application for the appellee insured that failed to reflect a prior fire loss. The insured's home and contents were destroyed in a fire and appellant paid pursuant to the policy. The Court first held that the trial court did not abuse its discretion in granting summary judgment on the negligence claims when appellant failed to identify an expert witness to show that appellees negligently failed to properly disclose information on the insurance application. The Court then held that summary judgment as to the indemnification claim was proper. First, there was no express or implied contract for indemnity. Second, appellant's claim of a common law right of indemnification failed because without negligence, there could be no tortious conduct.

Thomas v. St. Joseph Healthcare, Inc.

[2007-CA-001192](#) 07/16/2010 2010 WL 2812967

Opinion by Judge Wine; Judges Clayton and Dixon concurred. On remand from the Supreme Court, the Court affirmed in part, reversed in part, and remanded a judgment of the circuit court on an estate's claim against a hospital for negligence and under the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. The Supreme Court remanded the action for reconsideration in light of *Martin v. Ohio County Hospital Corp.*, 295 S.W.3d 104 (Ky. 2009). The Court first held that, even in light of the analysis in *Martin*, the Hospital was not entitled to a directed verdict on the EMTALA claim. A jury could find that the Hospital did not meet its stabilization duties under EMTALA, notwithstanding a doctor's determination that the deceased was stable at the time of his discharge. The Court also held that the claims under EMTALA and for medical negligence were not mutually exclusive and therefore, a failure to provide stabilization of an emergency medical condition may amount to a violation of EMTALA and medical negligence and the damages may overlap. While the Hospital may have been entitled to a different instruction on the EMTALA claim based upon the analysis in *Martin*, it had not requested a new trial, only a finding that it was entitled to a directed verdict. The Court then adopted the portions of the prior opinion relating to trial issues, the award of unliquidated damages and the award of punitive damages and remanded for a new trial on punitive damages. cause of action was not so unlike Kentucky's so that they were not "like causes of action." Finally, no matter which limitations statute was applicable, appellants' claims were barred under either limitations period, rendering an incorrect choice-of-law decision as harmless error. The Court next held that the trial court had sufficient information to conclude that appellants' claims were time-barred as a matter of law and there were no genuine issues of material fact to submit to a jury. The Court then held that the trial court correctly interpreted appellants' misrepresentation claim based on the rendering of professional services, which was subject to KRS 413.245 and not the five-year statute of limitations set forth in KRS 413.120(12).

Bennett v. Malcomb

[2009-CA-000871](#) 8/20/2010 2010 WL 3270103

Opinion by Judge Acree; Chief Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed an order granting summary judgment to appellee on appellant's complaint for the tort of outrage related to his allegation that appellee harmed him by pinning him against a post with a

tractor. The Court held that the trial court properly concluded that the claim was barred by the one-year statute of limitation in KRS 413.140. Because recovery could appropriately be sought under the traditional common law torts and the evidence showed that the actions were not intended to only cause emotional distress, the cause of action for outrage was not appropriate. The tort of outrage was not intended to provide a cause of action for plaintiffs who simply failed to bring a traditional tort claim within the statute of limitations.

Cornett v. Bright

[2009-CA-001186](#) 8/27/2010 2010 WL 3360875

Opinion by Judge Nickell; Judge Stumbo and Senior Judge White concurred. The Court affirmed a jury verdict entered in an automobile negligence case and an order denying a motion for a new trial. The Court held that the trial court did not err in denying appellant's motion for a new trial. The fact that the jury awarded damages for medical expenses and lost wages was legally insufficient to require an award of damages for pain and suffering. The Court then held that the trial court did not err in offsetting the jury's award for medical expenses and lost wages by the basic reparation benefits payable by statute. The actual payment of the expenses by the basic reparation benefits carrier was not required for the offset provisions of the Motor Vehicle Reparations Act (MVRA) to apply. The Court then held that the trial court correctly considered a motion for costs filed within a reasonable time following the judgment. CR 54.04, which controls bills of costs, contains no limitation on when such motions must be filed and a plain reading of the rule indicates that the supplemental judgment has nothing to do with the lost jurisdiction to alter, amend or vacate the final judgment. The Court finally held that the trial court did not err in denying appellant's motion for costs. The trial court dismissed appellant's complaint with prejudice on the ground that the amount of the jury's verdict was less than the MVRA tort liability threshold. Thus, appellant could not be the prevailing party for any purpose, especially for the purpose of the application of CR 54.04.

May v. Holzkecht

[2009-CA-001905](#) 8/13/2010 2010 WL 3191766

Opinion by Judge Combs; Chief Judge Taylor and Judge Nickell concurred. The Court affirmed a partial summary judgment and subsequent trial order and judgment of the circuit court in favor of the mother and next friend of a minor child injured when a dog mauled her in a home-based childcare center. The Court first held that the trial court did not err by concluding that the provisions of KRS 258.235(4), the dog-bite statute, created strict liability for appellants under the circumstances when neither the child victim, nor any intervening third party, was at fault to exculpate appellants. Appellants harbored the dog, they knew or reasonably expected that the dog would have direct access to the children in their home, and they told the child's mother that the dog would be kept outside, contrary to actual practice. Evidence of the dog's temperament was irrelevant. The child was legally incapable of negligence and no third party or fortuitous circumstance existed to implicate any aspect of comparative negligence. The Court next held that the trial court did not err in denying a motion for directed verdict to the spouse of the person caring for the children. He was liable by virtue of his status as a keeper of the dog who violated his statutory duty to prevent the child from being mauled by the dog. The Court finally held that the trial court did not err by permitting the jury to make an award for the child's future pain and suffering even when no future medical expenses were indicated. Under the circumstances, pain and suffering were likely to continue to occur.

Thornton v. Carmeuse Lime Sales Corp.

[2009-CA-000090](#) 8/20/2010 2010 WL 3270055

Opinion by Judge Acree; Chief Judge Taylor and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee on appellant's negligence claim. The Court held that the circuit court properly granted summary judgment. Because appellee fell within the statutory definition of a contractor under KRS 342.610(2), it was entitled to "exclusive remedy" immunity under KRS 342.690. The delivery of lime to appellee's customers was a regular and recurrent part of its business to mine and deliver lime to its customers. The relationship between appellee and the employer transit company amounted to a contractor-subcontractor

relationship as defined by KRS 342.610(2). Because appellee was a contractor under the statute, the Court declined to engage in an examination of the motor-carrier agreement.