Kentucky Court of Appeals
Cases of Note
November-December, 2010

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INSURANCE

Burton v. Kentucky Farm Bureau Mutual Insurance Company
2009-CA-001056 11/05/2010 2010 WL 4366178
Opinion by Judge Thompson; Chief Judge Taylor and Judge Moore concurred. The Court affirmed a summary judgment of the circuit court declaring that appellant was not entitled to underinsured motorists benefits under a policy of insurance issued by appellee. The Court held that the clause excluding UIM coverage of a vehicle owned by the insured or a family member was enforceable.

TORTS

Peyton v. Neonatal Intensive Care Experts, II, PLLC
2009-CA-001411 11/19/2010 2010 WL 4669093
Opinion by Judge Lambert; Judge Combs concurred; Judge Keller concurred by separate opinion. The Court reversed and remanded a summary judgment in favor of appellees on appellant's claim alleging gross negligence and malpractice in the generation and reading of a toxicology report rendered in conjunction with the labor and delivery of appellant's son. The Court held that the trial court prematurely determined that appellees were immune from civil liability pursuant to KRS 620.030 and KRS 620.050 when they reported incorrect toxicology results to Child Protective Services, who in turn removed the child from appellant's care. There was conflicting evidence in the record as to whether CPS requested the screening performed on appellant or whether her admissions to prior drug use triggered the screening. The record seemed to indicate the CPS requested the screening but the order granting summary judgment presumptively stated that the admissions triggered the screening. Because the outcome of the case, in particular the applicability of the immunity conferred by KRS 620.050(1) and the exception to immunity in KRS 620.050(14), depended upon who initiated the report of abuse, the issue of fact had to be resolved by the trial court.

Gaines v. Diamond Pond Products, Inc.
2009-CA-000848 12/29/10 2010 WL 5343290
Opinion by Chief Judge Taylor; Judges Acree and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court granting a directed verdict in favor of appellee and dismissing appellants' negligence claim for injuries the minor appellant received while employed by appellee for an annual charitable activity. The Court held that the trial court properly granted the directed verdict. In reaching that conclusion, the Court first held that the trial court correctly concluded that appellee breached no duty of care owed to appellant as an employee. The uncontroverted facts demonstrated that appellee provided appellant with a reasonably safe place to work and any injury he suffered was caused by his violation of appellee's rules and occurred while he was engaged in activities outside the proper scope of his employment. The Court next

held that even if appellant was an invitee, appellee did not breach its duty of care by failing to warn of a dangerous condition on its premises. While *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), modified the open and obvious doctrine, it did not abolish it. Appellant's injury was not a foreseeable harm that appellee could anticipate nor was it caused by a known or obvious condition and appellee had no duty to protect appellant from himself.

Johnson v. United Parcel Service, Inc.
2009-CA-000404 2/19/10 2010 WL 567375 Released for publication
Opinion by Judge Wine; Judges Moore and Nickell concurred. The Court affirmed an order of the circuit court finding that the appellee ex-employer had no duty to warn a future employer of an ex-employee's violent work history and dismissing an estate's claim pursuant to CR 12.02 for failure to state a claim for which relief could be granted. The Court held that no Kentucky law imposed a duty to warn the future employer. Kentucky does not recognize a universal duty of care; Kentucky does not recognize a duty to warn others that a crime may be committed by another; there was not a special relationship between the employer and ex-employee or future employers which would create a duty to warn, as contemplated by the Restatement (Second) of Torts §315; appellee did not undertake a duty to render services by providing a reference check; and there was no support in existing Kentucky law for a cause of action for negligent misrepresentation in the employee reference context.

Phillips v. Lexington-Fayette Urban County Government
2009-CA-001613 12/29/10 2010 WL 5481365
Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed orders of the circuit court granting summary judgment in favor of the Lexington-Fayette Urban County Government on appellant's claim for injuries she allegedly received during an encounter with Emergency Medical Services and dismissing an amended complaint against the individual medical technicians. The Court first held that even if LFUCG had purchased liability insurance, such a policy would not constitute a waiver of its sovereign immunity. The Court next held that LFUCG could not be held vicariously liable because vicarious liability was precluded by sovereign immunity. The Court next held that the doctrine of *respondeat superior* did not and could not work to waive sovereign immunity. The Court next held that the Good Samaritan Statute, KRS 411.148, had no application to emergency care or treatment given by a certified EMT or paramedic while on duty in the course and scope of employment and therefore, the statute was not a waiver of sovereign immunity. The Court finally held that the trial court did not err in dismissing the claims against the technicians as time-barred. The technicians did not receive actual notice within the statutory period and therefore, the amended complaint could not relate back under CR 15.03.

Rossi v. CSX Transportation, Inc.
2009-CA-001234 12/17/10 2010 WL 5128637
Opinion by Judge Nickell; Judges Moore and Lambert concurred. The Court affirmed an entry of judgment in appellee's favor following a jury trial on appellant's claims under the Federal Employer's Liability Act (FELA) for work-related cumulative trauma resulting in bilateral carpal tunnel syndrome and trigger finger in two fingers. The Court first held that the trial court did not err in precluding appellant's expert biomedical engineer from testifying regarding the cause of appellant's injuries. Although the expert was clearly qualified to testify as to the risk factors, he was not a medical doctor and did not physically examine or test appellant. Further, there was no discernible harm as appellant's treating physician testified to the cause of appellant's injuries. The Court next held that the trial court did not abuse its discretion in prohibiting appellant from cross-examining appellee's former senior safety officer using a document with which the witness

was unfamiliar. The proffered letter was unsigned, undated and wholly unauthenticated; appellant did not produce testimony or evidence of authentication as required under KRE 901, nor did he show the letter was self-authenticating; the relevance of the letter was suspect; the letter was not produced in discovery; the letter constituted inadmissible hearsay; and the public records exception set forth in KRE 803(8) did not apply because no indication of the trustworthiness of the document was produced. Further, even if the letter could have been used for impeachment purposes, appellant could not thwart the purposes of the evidentiary rules by simply labeling an otherwise inadmissible piece of evidence as impeachment evidence. The Court next held that the trial court correctly refused to give a proffered instruction that the Federal Railroad Administration requires reporting of all musculoskeletal injures under certain circumstances when there was no evidence or testimony adduced regarding the existence or substance of the regulation referred to in the instruction. The Court finally held that the trial court did not abuse its discretion in precluding appellant from offering rebuttal testimony of a witness who was not identified on appellant's witness list and whose testimony was not responsive to any surprise evidence presented by appellee when the issue of whether appellee discouraged employee injury reporting was injected into the case by appellant.

WORKERS COMPENSATION

Peabody Painting Waterproofing, Inc. v. Kentucky Employers' Mutual Insurance Company
2008-CA-001914 12/29/10 2010 WL 5343284
Opinion by Judge Thompson; Chief Judge Taylor and Judge Clayton concurred. The Court affirmed an order of the circuit court granting an insurer's motion for summary judgment on an employer's claims that the insurer wrongfully denied coverage for a worker injured in Louisiana, for bad faith, for violation of the Kentucky Consumer Protection Act and the Unfair Claims Settlement Practices Act and for violation of KRS 304.12-235. The Court also affirmed an order of the circuit court denying the insurance agent's cross-claim for indemnification. The Court held that the trial court correctly granted the motions for summary judgment in favor of the insurer. The terms of the policy unambiguously covered only workplaces in Kentucky. Further, the extraterritorial coverage provisions as set forth in KRS 342.670 did not provide coverage because the worker's employment was not principally localized in Kentucky nor was he working under a contract of hire made in Kentucky. The worker received his work orders from Florida, had no interaction with the Kentucky office, was a Florida resident, and the majority of his work assignments were in Florida. Therefore, his employment was not principally located in Kentucky. Other than a routine check of his driver's license by the Kentucky office, no one from the Kentucky office participated in the worker's hiring, the worker completed the application in Florida and the offer and acceptance of employment occurred in Florida. The Court also held that the insurer was not estopped from denying coverage. The insurance agent was informed that the policy did not offer out-of-state coverage, the policy unambiguously stated the same limitation, and the employer knew it lacked coverage when the Florida Division of Workers' Claims issued a stop work order for the company upon finding that the policy did not cover Florida employees. The Court finally held that because the insurer could not be liable to the employer under any theory alleged in the complaint, the cross-claim for indemnification must fail.

Steinrock v. Cook
2010-CA-001136 12/10/10 2010 WL 5113217
Opinion by Judge Lambert; Judges Moore and Nickell concurred. The Court affirmed an order of the Workers' Compensation Board reversing an opinion of an Administrative Law Judge holding that a worker was an independent contractor and not an employee of the appellant roofing

company. The Court held that the Board did not overlook or misconstrue controlling law or so flagrantly err in evaluating the evidence so as to cause gross injustice, nor did the Board substitute its judgment for that of the ALJ. Instead, the Board reviewed the ALJ's application of the controlling law to the facts and determined that the ALJ's ruling was in error, concluding that the ALJ failed to recognize the phrase "distinct occupation" as a legal term of art and in doing so, erred in applying the factors set forth in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), and refined in *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969).