Kentucky Court of Appeals
Cases of Note
March-April, 2011

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INSURANCE

Hodgkiss-Warrick v. State Farm Mutual Automobile Insurance Company
2010-CA-000603 4/8/2011 2011 WL 1327644
Opinion by Judge Caperton; Judges Thompson and Senior Judge Lambert concurred. The Court reversed and remanded a summary judgment in favor of the appellee automobile insurance company on appellant's claim seeking underinsured motorist coverage under both her policy and her husband's policy. The Court held that in light of the Kentucky Supreme Court's holdings in Williams v. State Farm Mut. Auto. Ins. Co., 255 S.W.3d 913 (Ky. 2008), and State Farm Mut. Auto. Ins. Co. v. Marley, 151 S.W.3d 33 (Ky. 2004), public policy in Kentucky disfavored the application of the regular-use exclusion when the policy holder had no real control or ability to obtain greater liability coverage on the vehicle involved in the accident. As such, appellant was entitled to UIM coverage under her policy and the trial court erred in granting summary judgment to the insurer.

TORTS

Leighton v. CSX Transportation, Inc.
2009-CA-001158 3/11/11 2011 WL 831433
Opinion by Judge Acree; Judges Combs and Wine concurred. The Court affirmed an order of the trial court denying appellant's motion for a new trial of his tort claim against his employer on the ground that the jury was allowed to speculate about collateral source payments for medical expenses. In a case of first impression, the Court held that a jury instruction including a limitation on the award of damages, allowing appellant to recover no more than the amount of medical expenses not paid by the employer under The Railroad Employees National Health and Welfare Plan, was not improper. The Plan was not a collateral source of payment for the medical expenses.

Aesthetics in Jewelry, Inc. v. Estate of Robinson S. Brown, Jr.
2009-CA-002056 4/8/2011 2011 WL 1327411
Opinion by Judge Caperton; Judges Combs and Keller concurred. The Court affirmed an order of the circuit court denying a motion for directed verdict in favor of an estate arising out of the sale of jewelry by appellants to the deceased. The Court also affirmed an order of the circuit court denying appellants' motion for attorney fees under the Kentucky Consumer Protection Act, KRS 367.220. The Court first held that the trial court did not err in denying the estate's motion for a directed verdict. There was no evidence that prior to the purchase of the jewelry, appellant intentionally or negligently made material representations to the deceased as to the value of the property. While there was evidence that appellant believed he could sell the jewelry to someone else for the amount paid and that he believed the MSRP to be $1 million, and that he advised the deceased of these opinions, ultimately the figures were opinions that did not amount to material

misrepresentations, which the estate was required to prove in bringing its claims. The Court then held that the trial court did not abuse its discretion in denying the motion for attorney fees. While the attorney fee-shifting provisions in KRS 367.220 gave the court the authority to award attorney fees to a prevailing defendant, the trial court considered the facts and evidence and made a conclusion, well within its discretion, that the claim brought by the estate was not frivolous and was advanced in good faith and therefore, attorney fees were not warranted.

Goodin v. White
2009-CA-002261 4/15/2011 2011 WL 1434670
Opinion by Senior Judge Shake; Judges Lambert and Stumbo concurred. The Court affirmed a judgment of the circuit court entered upon a jury verdict in favor of a patient on her claims that her doctor was negligent and deviated from the standard of care in his treatment of her condition. The Court first held that the trial court did not err in denying the motion to admit a settlement agreement between the patient and the doctor's insurer as an unfair Mary Carter agreement that created bias. The insurer's continued presence at trial was not only because of the settlement agreement but also because the doctor never moved to dismiss his third-party action against the insurer. The record did not indicate that the patient or any of her witnesses changed their testimonies or made inconsistent statements after the settlement agreement was executed. Because the jury had been informed that the patient and insurer had settled, the jury was well aware of the position of the adversarial, as well as the non-adversarial parties. The Court next held that the patient and insurer did not receive additional preemptory strikes beyond those allowed by CR 47.03(1). The record indicated that although the patient and the insurer had discussed possible settlement, the settlement was not reduced to writing until jury selection was complete. Moreover, the parties' interests were not aligned, nor were they co-parties, and the doctor's indemnity claim proceeded against the insurer.

O'Bannon v. Allen
2010-CA-000695 4/1/2011 2011 WL 1196852
Opinion by Judge Keller; Judges Clayton and Senior Judge Isaac concurred. The Court affirmed a trial court order dismissing appellants' wrongful death action against a doctor. The Court held that the trial court correctly determined that the county in which a patient died after overdosing on medication was not the proper venue for the claim but rather, the proper venue was the county where the patient sought treatment. The patient's death was not the injury referred to in KRS 452.160(1). The statute describes venue as being where the injury was done, not where the damage was suffered. Further, pursuant to KRS 411.130, the entitlement to bring an action for wrongful death arises from the negligence or wrongful act of another inflicted on the decedent, not on the negligence or wrongful act inflicted on the estate or survivors of the decedent. The doctor's duty arose when the patient sought treatment and any breach of that duty occurred in the county where the patient sought treatment. Therefore, the injury was "done" in that county.

Wilkerson v. Williams
2010-CA-000088 2/18/2011 2011 WL 559218 Ord. Pub. by S.Ct.
Opinion by Senior Judge Isaac; Chief Judge Taylor and Judge Dixon concurred. The Court affirmed an order of the circuit court denying appellants' motion for a new trial on their claims that appellee had committed assault and negligent assault against appellant at a party hosted by appellee's father. The Court first held that appellants' designation of the order for a new trial as that from which the appeal was taken, as opposed to the final judgment dismissing the appeal, was harmless error. The Court then held that the trial court's exclusion of testimony that appellee was drinking moonshine at the party, finding that the testimony was more prejudicial than probative, was fully in accord with KRE 403. The Court next held that the trial court did not err in denying the motion for a new trial on the basis that the jury failed to follow the instructions.

There was no indication that the jury agreed to be bound by a quotient verdict and appellants' speculation of what occurred in jury deliberations did not establish that the jury did not follow the instructions. The Court finally held that the trial court did not err in dismissing the father as a defendant. The Court declined to adopt social host liability to impose a duty on the father.

WORKERS COMPENSATION

Forbes v. Dixon Electric, Inc.
2009-CA-000834 4/30/10 2010 WL 1729101 Ordered Published by S.Ct.
Opinion by Senior Judge Knopf; Judges Clayton and Nickell concurred. The Court affirmed a summary judgment of the circuit court in favor of appellee after finding that the company was entitled to up-the-ladder immunity afforded by KRS 342.610 of Kentucky's Workers' Compensation Act for injuries a police officer sustained while directing traffic at an intersection where appellee was replacing wood poles with steel poles. The Court held that the Kentucky Supreme Court did not create a new test for up-the-ladder immunity when it rendered General Electric Co. v. Cain, 236 S.W.3d 579 (Ky. 2007), and the facts of this case fell squarely within the application of Cain and KRS 342.610. By virtue of its contract with the Lexington-Fayette Urban County Government to install and repair traffic signals throughout the city, appellee had to provide for traffic control, which was done either by its employees or city police officers. Traffic control was unquestionably a regular and recurrent part of appellee's business. Appellee took on the role of a contractor while the police took on the role of sub-contractor at the time and place of the accident and therefore, appellee was entitled to up-the-ladder immunity.

Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano
2010-CA-000663 4/29/2011 2011 WL 1648262
Opinion by Senior Judge Lambert; Judges Clayton and Combs concurred. The Court affirmed a decision of the Workers' Compensation Board affirming an ALJ's determination that a worker sustained compensable work-related injuries in an automobile accident during the course of his employment with a horse farm. The Court first held that the ALJ and Board correctly relied on the "dual purpose" doctrine in support of their conclusion that the worker's injuries were compensable. The trip in question clearly qualified as a business trip because the employer acknowledged that if this worker had not traveled to New York, the employer would have sent another employee in a horse van to watch the horses during the trip. Even if the worker had already made arrangements to go to New York well before requesting or being offered the ride by appellant, the employer asked the worker to travel in the horse van with the farm's horses to care for them on their way to New York and paid him for his efforts. Further, the worker showed the farm's horses at the sale in New York, thereby conveying an obvious economic benefit to the employer. The Court also held that the ALJ and the Board correctly relied on the "positional risk" rule and the "traveling employee" exception to the "going and coming" rule to determine that the workers' injuries arose out of were in the course of employment. Even though the worker stayed in New York and worked for the sales, he was injured while traveling back to resume his work at the horse farm in Kentucky. Therefore, even if the work for the sales could be considered a personal errand and a deviation for personal purposes, the deviation would not embody an intent to abandon the work-connected travel home. When the deviation was terminated and travel home was resumed, the coverage resumed.

UPS Airlines v. West
2010-CA-001433 4/22/2011 2011 WL 1549289
Opinion by Judge Wine; Judge VanMeter and Senior Judge Shake concurred. The Court affirmed an order of the Workers' Compensation Board reversing an opinion and award of the

ALJ granting the employer a credit, representing an offset against the amount of temporary total disability (TTD) benefits, after finding that a "Loss of License" benefit plan was exclusively employer-funded. The Court held that the Board correctly found that the benefit, which under its terms entitled a pilot, who had been off work and unable to use his FAA certificate to fly for a period of six months, a percentage of pay for up to twenty-four months, was employer funded. In a case of first impression, the Court held that benefits received pursuant to a collective bargaining agreement were not exclusively employer-funded under the terms of KRS 342.730(6). Therefore, the employer was not entitled to an offset against the TTD benefits.