

Kentucky Court of Appeals
Cases of Note
May-June, 2011

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INSURANCE

Certain Underwriters at Lloyds's, London v. Abundance Coal, Inc.

2009-CA-001283 6/24/11 2011 WL 2496203

Opinion by Judge Acree; Judges Dixon and Keller concurred. The Court reversed in part, vacated in part and remanded an order of the circuit court granting the appellee coal company’s motion to dismiss the appellant insurer’s declaratory judgment action seeking a declaration that an insurance contract did not provide coverage on a claim that the coal company’s operations had tortiously caused coal dust to enter real property. The Court first held that the circuit court erred in dismissing the action to the extent it rendered the insurer liable for punitive damages when the insurance contract specifically excluded such coverage. The Court then held that the trial court erred in dismissing the action after concluding that the tort claims should necessarily be covered by the policy. Applying the holding in *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679 (Ky. App. 1996), the Court held that the circuit court properly determined that the “Absolute Pollution” exclusion in the contract was ambiguous. However, the circuit court was not correct in concluding that the tort claims were covered. The Court remanded for additional proceedings to determine whether the alleged injuries suffered by the property owners were a result of pollution caused by the coal company and for which the exclusions would apply, or whether the dust and debris which allegedly entered the property did not constitute pollution as defined in the policy and for which the insurer would be liable.

The Medical Protective Company v. Wiles

2010-CA-000262 6/17/11 2011 WL 2420011

Opinion by Judge Lambert; Judge Stumbo and Senior Judge Shake concurred. The Court affirmed in part, reversed in part and remanded a multi-million dollar judgment of the circuit court in a third-party insurance bad faith claim brought pursuant to Kentucky’s Unfair Claims Settlement Practices Act (UCSPA). The claim arose from appellant’s handling of appellees’ medical malpractice claim. The Court first held that the jury instructions on punitive damages were proper in that they required the jury to find that there was no reasonable basis for the insurer’s action or inaction or that the insurer acted with reckless disregard for whether there was a basis for delaying payment of the claim. The Court then held that there was sufficient evidence to warrant the award of punitive damages. The twenty-seven-month delay between the injury and the initial settlement offer, where fault was clear, could not be considered mere delay and the insurer’s focus on the financial appearance of the company established a questionable motive for the method of investigation and timing of the settlement. This was sufficient evidence to submit the issue of bad faith to the jury. The Court next held that appellant’s failure to present the issue of an excessive punitive damage award to the trial court precluded review on appeal. The Court also held that the trial court did not abuse its discretion in permitting witnesses to characterize the settlement offer as low ball; the trial court did not abuse its discretion in excluding the testimony of the insurer’s expert witnesses, none of whom had no claims handling or adjusting experience; the trial court did not abuse its discretion in permitting evidence of the insurer’s national reserves to be introduced because the evidence was relevant to show a motivation for late reserving practices; and the trial court

did not err in allowing the introduction of a surveillance tape of the injured appellee in order to question why the insurer failed to review the surveillance after learning it was not helpful to the defense, while at the same time contending that appellee was exaggerating her symptoms. The Court then held that the trial court erred as a matter of law when it determined that appellees were entitled to an award of attorney fees and statutory interest pursuant to KRS 304.12-235. The plain and unambiguous language of the statute limited its application to named insureds and healthcare providers, not third-party claimants. The Court finally held that the trial court did not abuse its discretion in denying the insurer's motion to lower the interest rate on the post-judgment interest or in ordering the interest to run from the entry an earlier judgment and order when a second order merely reconsidered and corrected the earlier order.

TORTS

Bailey v. GRW Engineers, Inc.

[2009-CA-002140](#) 6/24/11 2011 WL 2496216

Opinion by Judge Dixon; Judges Acree and Keller concurred. The Court reversed and remanded an order dismissing appellant's claims for defamation, libel and tortious interference with business relations. The Court held that the trial court erred in dismissing the action after finding that appellee was entitled to absolute immunity for statements it made in a letter to a city mayor related to appellant's qualifications and references as low bidder on a city project. The Court held that the legislative immunity afforded by caselaw and statute was not only limited to actual members of a legislative body but also only to statements made while acting within the scope of the duties imposed upon them by statute. Appellee was not a member of the city council and had no duties imposed upon it by statute, therefore it was not entitled to legislative immunity. The Court also rejected appellee's argument that the statements were comparable to statements made by witnesses in judicial proceedings entitling it to judicial immunity.

Dennis v. Fulkerson

[2009-CA-001367](#) 6/24/11 2011 WL 2496204

Opinion by Judge Wine; Judge VanMeter concurred; Judge Thompson concurred in part and dissented in part. On direct appeal, the Court affirmed an order of the circuit court denying appellant's motion for a new trial in his medical negligence case and on cross-appeal, reversed and remanded the circuit court's denial of the cross-appellant's CR 59.05 motion to alter, amend or vacate the judgment. The Court first held that the jury award, which awarded past medical expenses but nothing for pain and suffering and lost wages after an emergency room doctor misdiagnosed appellant's appendicitis, was adequate. While the jury could have reached a different conclusion, its conclusion with respect to pain and suffering and lost wages was nonetheless supported by evidence that appellant's appendix may have perforated 12 to 24 hours before he ever presented to the emergency room and that even if he had not been misdiagnosed, the more invasive surgery may have been necessary. Further, the jury was free to return a \$0 award for lost wages when appellant was unemployed at the time of the medical negligence. On the doctor's cross-appeal, the Court held that the trial court erred when it failed to reduce the amount of judgment to the extent that the bill was written off by the hospital.

LaMarre v. Fort Mitchell Country Club

[2010-CA-000813](#) 6/24/11 2011 WL 2496242

Opinion by Senior Judge Shake; Judges Lambert and Stumbo concurred. The Court reversed an order of the circuit court granting summary judgment to the appellee country club on appellants' claims that the club had acted negligently by illegally serving alcohol to the driver of a golf cart, resulting in permanent injury to a passenger. The Court held that the circuit court erred in granting summary judgment to the club based on KRS 413.241, the Dram Shop Act. The club's distribution of package alcohol in direct violation of its special private club license under KRS 243.270, which only

permitted the distribution of retail alcoholic drinks, excepted the club from the protections of the Dram Shop Act. The Court also held that even if the Club had not acted in direct contravention of its license, summary judgment was still inappropriate because there were genuine issues of material fact as to whether the club employees knew or should have known that the driver was intoxicated when they continued to serve him alcohol.

Lucas v. Gateway Community Services Organization, Inc.

[2010-CA-001033](#) 6/24/11 2011 WL 2508193

Opinion by Judge Lambert; Judges Nickell and Wine concurred. The Court affirmed a summary judgment entered in favor of appellees on appellant's claim for damages for negligent maintenance and construction of a parking lot and failure to maintain premises in a safe and hazard-free condition after she was injured in a fall. The Court held that, based on appellant's own testimony, summary judgment was proper and the circuit court properly found that there were no disputed issues of material fact concerning the open and obvious condition of the parking lot. The Court then held that *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not apply to alter the result because appellant's own testimony showed that she was not distracted so as to make her injury foreseeable.

Shelton v. Kentucky Easter Seals Society, Inc.

[2009-CA-000945](#) 6/24/11 WL Citation Not Yet Available

Opinion by Judge Wine; Judges Acree and VanMeter concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellee on appellant's claims for injuries she received when her foot became entangled in wires at her husband's hospital bedside. The Court held that the recent opinion of *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), did not abrogate the open and obvious doctrine in Kentucky and that the activities and circumstances surrounding *McIntosh* were distinguishable because there was no evidence that appellant was distracted, or made to forget the hazard, as she approached her husband's bed to kiss him goodbye. Further, the evidence did not show that appellant was forced to encounter the hazard merely because she was unable to approach the bed on the other side because of the bed's proximity to the wall.

The Estate of Judith Burton v. The Trover Clinic Foundation, Inc.

[2009-CA-001595](#) 6/10/11 2011 WL 6816338

Opinion by Judge Caperton; Judge Clayton concurred; Judge Acree concurred by separate opinion. The Court affirmed in part and reversed and remanded in part a judgment entered pursuant to a jury verdict finding in favor of a medical clinic and doctor on the appellant estate's claims that the doctor misread CT scans and as a result the deceased's lung cancer went undiagnosed. The Court first recognized the tort of negligent credentialing and set out the elements of the tort. On the direct appeal, the Court then held that, pursuant to CR 42.02, the trial court did not abuse its discretion in bifurcating the proceedings for medical negligence from those for negligent credentialing. The procedure did not violate KRS 411.186. The estate was free to pursue punitive damages and introduce evidence to support said damages in the first and second phase of the trial. Further, while the estate should have been permitted to conduct a full and complete voir dire concerning both phases of the trial, any error was harmless because the jury did not find appellees to be negligent during the first phase of the trial and the second phase had not yet been conducted. The Court next held that the trial court did not abuse its discretion in excluding peer review reports and minutes seeking to establish the doctor's habit of reading radiological films at a dangerously fast pace when the reports and minutes were not verbatim, the meetings were not recorded and the statements contained in the minutes could not be attributed to any particular person. The Court next held that the trial court did not abuse its discretion in determining that members of the peer review committee were not qualified to express expert opinions because their opinions would be based on radiological practices and standards, the very expertise of which they had no independent knowledge. The Court next held that because the estate failed to revive a fraud claim against the doctor, the argument presented related to the fraud claim was not preserved for the Court's review. The Court next held

that the trial court committed prejudicial error by depriving the estate of the right to cross-examine the doctor regarding the suspension of his medical license. Although post-treatment of the deceased, the suspension was not a collateral matter when it was close in time to the deceased's misread CT scans and relevant to the doctor's qualifications as an expert witness. The Court finally held that the trial court did not improperly prohibit the estate from cross-examining a witness who made a statement to the peer review committee when a hearing revealed that the peer review secretary could not attribute the statement directly to the witness. On the cross-appeal the Court first held that the trial court did not err in admitting habit evidence in the form of testimony regarding the doctor's workload and speed of film interpretation. The testimony of two physicians and four employees, along with the doctor's own testimony, was sufficient to establish a habit of the doctor and any question as to the timeliness of the evidence bore on the weight, not to its admissibility. Further, the witnesses had sufficient personal knowledge. The Court then held that the trial court did not abuse its discretion in denying a motion for a change of venue, given the information presented to the trial court concerning pretrial publicity.

WORKERS COMPENSATION

Schmidt v. South Central Bell

[2010-CA-000986](#) 5/13/2011 2011 WL 1843056

Opinion by Judge Lambert; Judges Moore and Nickell concurred. The Court reversed and remanded a decision of the Workers' Compensation Board affirming a decision of the ALJ finding that an employer was no longer responsible for the payment of future medical payments. The finding was based upon the \$3,500.00 cap on the amount of medical expenses found in the version of KRS 342.020 in effect at the time of the worker's injury. The Court held that the amendments in 1964 and 1972 to KRS 342.020, removing the cap on future medical expenses, represented a remedial, procedural change as described in *Kentucky Insurance Guaranty Association v. Conco, Inc.*, 882 S.W.2d 129 (Ky. App. 1994). Therefore, the amendments applied to the worker and the Board misconstrued the controlling statutes and law in upholding the decision that the employer was no longer responsible for payment of the future medical expenses.