

Kentucky Court of Appeals
Cases of Note
July-August, 2011

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1. Hold down the control (“Ctrl”) key and click on the link.
2. Right-click on the link and select “Open Hyperlink”.

INSURANCE

Yates v. Shelter Mutual Insurance Company

2010-CA-000022 8/19/11 2011 WL 3628866

Opinion by Senior Judge Shake; Judge Stumbo concurred; Chief Judge Taylor dissented by separate opinion. The Court reversed and remanded a summary judgment of the circuit court in favor of the appellee insurance company finding that a permissive driver step-down provision was valid and effectively limited appellee’s liability to \$25,000 for bodily injuries sustained by appellant. The Court held that the trial court erred in granting summary judgment to appellee. Appellee’s failure to provide adequate notification of its reduction in coverage to appellant promoted a reasonable expectation that appellant’s coverage continued to encompass higher bodily liability limits.

TORTS

Buckler v. Mathis

2010-CA-000828 7/22/11 2011 WL 2937251

Opinion by Judge Lambert; Judge Keller and Senior Judge Shake concurred. The Court affirmed a judgment dismissing appellant’s claim against appellee after a jury found that appellant had not met the \$1,000 statutory medical expense threshold required by KRS 304.39-060(2) on his claim for injuries he sustained in a motor vehicle accident. The Court first held that the trial court did not commit error in including in the jury instructions the threshold question of whether appellant’s medical expenses were reasonably needed as a result of the motor vehicle accident. The Court also held that the instructions provided by the trial court were in line with binding precedent as set forth in *Bolin v. Grider*, 580 S.W.2d 490 (Ky. 1979). The Court next held that the trial court did not err by attempting to educate the jury as to what it should do in relation to completing the instructions and verdict forms depending on what findings it made. The Court next held that the trial court correctly determined that appellee’s objections to a doctor’s deposition testimony were timely filed by operation of CR 6.01. The Court then held that trial court did not abuse its discretion in striking portions of the doctor’s testimony, after which the court excluded appellant’s claim for future medical expenses from the trial. The doctor qualified his opinion on the permanency of appellant’s claimed injuries to the performance of a current physical examination, which never occurred, even after the trial court permitted appellant to take additional testimony from the doctor regarding permanency.

Faller v. Endicott-Mayflower, LLC

2008-CA-001506 7/1/11 2011 WL 2582339 DR Filed

Opinion by Judge Nickell; Chief Judge Taylor and Judge Combs concurred. On remand from the Kentucky Supreme Court to consider the matter under *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), the Court again affirmed a summary judgment in favor of appellees on appellant’s claims related to injuries she sustained when she fell while leaving a restaurant. The Court distinguished the facts in *McIntosh* and held that appellant was not foreseeably distracted nor did a third party push her into danger. Therefore, the trial court’s award of summary judgment was

proper. Unlike *McIntosh*, appellant tripped over the threshold marked with yellow- and black-striped caution tape while leaving a restaurant following a leisurely holiday meal. She admitted being familiar with the threshold, having traversed it on prior occasions, and admitted she would not have fallen had she been looking in the direction she was walking.

Jerauld ex rel. Robinson v. Kroger

[2010-CA-001429](#) 8/5/11 2011 WL 3363074

Opinion by Judge Clayton; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a summary judgment in favor of the appellees on a guardian's claims of negligence and intentional infliction of emotional distress after an inmate at the county detention center attempted to commit suicide, resulting in permanent brain injury. The Court first held that the trial court properly granted summary judgment to the appellees. The acts taken by the appellees, as employees of the detention center, were discretionary and therefore, entitled to qualified official immunity. The Court also held that the appellee psychologist was entitled to qualified official immunity and that official immunity related to the functions performed rather than the title or credentials of the one performing the functions.

Jones v. Overstreet

[2010-CA-000920](#) 8/12/11 2011 WL 3516837

Opinion by Judge Moore; Judges Acree and Nickell concurred. The Court affirmed a jury verdict in favor of a physician in appellants' medical negligence action. The Court held that the trial court did not abuse its discretion in admitting into evidence a wire used in an esophageal dilation procedure on the basis that the wire qualified as a true replica of the instrument that allegedly caused the injuries at issue. The wire was properly identified and authenticated as evidence of the wire it represented and the wire used was relevant. The differences between the condition of the sample guide wire and what the appellants speculated was the condition of the actual guide wire were a matter of weight, not admissibility, and appellants could not demonstrate that the sample wire posed a substantial danger of misleading the jury. Appellants' argument that the trial court failed to admonish the jury per the requirements of KRE 105(a) was meritless. Finally, admitting the sample wire into evidence posed little danger of prejudicing appellants' case and even if it was needlessly cumulative, any error that resulted from admitting it was harmless.

WORKERS COMPENSATION

Audi of Lexington v. Elam

[2010-CA-002038](#) 7/8/11 2011 WL 2693503

Opinion by Judge Combs; Judges Thompson and VanMeter concurred. The Court affirmed an opinion of the Workers' Compensation Board directing an ALJ to enter an order awarding benefits consistent with a permanent, partial disability rating substantially higher than the rating originally assigned by the ALJ. The Court held that the Board did not overlook or misconstrue controlling statutes or precedent in concluding that the ALJ's calculation was erroneous. The Board properly determined that the worker should have been awarded permanent, partial disability benefits based on the higher impairment rating after subtracting the worker's pre-existing, active impairment rating from his overall impairment rating. The ALJ was not at liberty to assume a doctor's analysis that the portion of the worker's permanent impairment rating attributable to his pre-existing impairment progressed at a rate commensurate with that portion of his impairment attributable to the work-related injury when there was no medical testimony to support the assumption.