

Kentucky Court of Appeals
Cases of Note
March-April, 2012

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1. Hold down the control (“Ctrl”) key and click on the link.
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TORTS

Energy & Environment Cabinet v. Robinson

2011-CA-000139 03/16/2012 2012 WL 876776

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court reversed and remanded a circuit court opinion and judgment remanding to the Board of Claims appellees’ petition for review before the Board seeking compensation from the Division of Forestry for property lost after the Division set “line fires” to create a buffer to control a fire. The Court held that, while the Division had the ministerial duty to fight the fire, the methods used to fight that fire, including the determination that the fire had been contained and that it was appropriate to leave the area, were discretionary. Therefore, the circuit court’s finding that the Division may be subject to liability for negligence was in error.

Oghia v. Hollan

2011-CA-000779 03/16/2012 2012 WL 876792

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court affirmed a jury verdict and judgment in favor of appellee on his medical malpractice suit against the appellant doctor wherein appellee claimed the doctor did not adequately inform appellee of alternative treatment modalities for a kidney stone and that the doctor should have removed the kidney stone using a less invasive and less risky procedure. The Court first held that the trial court did not err in issuing a separate jury instruction regarding the doctor’s duty to inform appellee of the risks of the procedure performed. Because the evidence indicated that the doctor had two duties of care - to treat appellee with the care and skill of a reasonably competent surgeon and to disclose to appellee the risks associated with surgery as a reasonably competent surgeon would - the evidence supported the issuance of two separate duty-of-care instructions. The separate jury instructions did not result in inconsistent verdicts. The Court next held that the trial court did not err in failing to issue a comparative negligence instruction. While a comparative negligence instruction may be appropriate in a medical malpractice case based on lack of informed consent, the case must be extraordinary, which this case was not. The Court next held that because appellant did not offer any narrative statement regarding appellant’s claim that the trial judge’s conduct during the first day of trial resulted in undue prejudice to him, the Court presumed the record supported the judge’s actions. The Court finally held that the trial court did not abuse its discretion in failing to declare a mistrial when counsel for appellee quoted a passage from a treatise during closing arguments, nor did the trial court err by not reprimanding counsel and admonishing the jury. The statements by counsel did not rise to the level of egregiousness in *Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991). Further, a number of passages from the treatise had been read or cited to the jury, the concepts put forth in the disputed passage had been discussed by witnesses and appellant did not ask the court to reprimand opposing counsel or to admonish the jury.

C. R.O. v. A.C.

2010-CA-001677 03/23/2012 2012 WL 967579

Opinion by Judge Acree; Judges Combs and Keller concurred. The Court affirmed a judgment of the circuit court awarding \$6 million in punitive damages against appellant on appellee’s claim for

compensatory and punitive damages for physical and emotional injuries she sustained as a result of appellant's sexual abuse of her multiple times per week for a substantial span of time when she was 11 years old. The Court held that the punitive damage award was not constitutionally excessive. The degree of reprehensibility of appellant's actions was significant; the award bore a reasonable relationship to the compensatory damages of over \$2 million; and given the severe penalty the circuit court could have imposed on both the original charges of first-degree sodomy and the amended charges of four counts of sexual misconduct, there was no reason to modify the punitive damages award.

Gill v. Burress

[2011-CA-000332](#) 04/13/2012 2012 WL 1231967

Opinion by Judge Moore; Judges Acree and VanMeter concurred. The Court affirmed in part, reversed in part and remanded a summary judgment in favor of the appellee physician on appellant's claim that the physician negligently failed to detect a mass in appellant's breast for a period of approximately 18 months. The Court first held that the trial court erred in granting summary judgment on appellant's claim for mental anguish, emotional distress, and a loss of ability to enjoy life due to an increased fear of cancer recurrence or death. While it might be difficult for appellant to attribute any specific part of her existing mental anguish that was specifically related to her five to twenty-five percent increased likelihood of having cancer again, as opposed to what her mental anguish would have been if she had been timely diagnosed, this difficulty did not preclude her from presenting her case to the finder of fact. The Court next held that the trial court erred in granting summary judgment on appellant's claim for compensatory damages arising as a result of chemotherapy treatment and the surgical removal of her ovaries. Testimony was capable of supporting a finding that it was more probable than not that a mammogram would have detected appellant's tumor a year and a half prior to her actual diagnosis, that appellant would have received less treatment and chemotherapy would have been unnecessary if the tumor had been discovered earlier. The Court then held that the trial court did not err in determining that any future medical treatment related to a potential recurrence of cancer was non-compensable when appellant was cancer-free and it was at least seventy percent likely that she would suffer no recurrence and therefore, would not require future medical treatment. The Court finally held that the trial court did not err in finding that appellant's five to twenty-five percent decreased chance of remaining cancer free was non-compensable. Kentucky was among the minority of jurisdictions that did not consider a decreased chance for long-term survival or lost chance for recovery or a better medical result as a compensable injury.

Golden v. Paintsville City Utilities

[2011-CA-000929](#) 04/06/2012 2012 WL 1139318

Opinion by Judge Lambert; Judges Thompson and VanMeter concurred. The Court affirmed a summary judgment in favor of appellee on appellant's claim for injuries he received after his vehicle was struck by a vehicle owned by appellee. The Court held that the circuit court did not err in granting summary judgment when the record clearly established that appellee's employee did not breach his duty to exercise ordinary care under the circumstances. The employee was operating the vehicle within his lane of travel and was otherwise proceeding with all due care until the time another vehicle suddenly turned from its lane into the employee's lane and directly into his path and that the force of the impact on the employee's vehicle was what caused the subsequent collision with appellant's vehicle.

Gossett v. Crockett

[2010-CA-002079](#) 04/20/2012 2012 WL 1365958

Opinion by Judge Combs; Chief Judge Taylor concurred; Judge Nickell dissented by separate opinion. The Court affirmed an order of the circuit court denying appellants' motion for a new trial. The Court held that the improper statement by appellee's counsel in closing argument regarding the prospect of financial ruin for appellee was cured by the strong admonition to each jury member that

consideration of either party's financial condition was not permitted. The Court further held that the trial court did not err in refusing to allow the jury to be informed of appellee's insurance policy when appellants could not show that any prejudice resulted from the decision.

Williams v. Cline

[2011-CA-000444](#) 04/20/2012 2012 WL 1365964

Opinion by Senior Judge Lambert; Judges Caperton and Thompson concurred. The Court affirmed in part, reversed and part and remanded an order of the circuit court dismissing appellant's claims against a police detective and a county attorney for malicious prosecution, abuse of process and negligence. Appellant claimed that appellees coerced her into signing a stipulation of probable cause to get her case dismissed without prejudice and then later used that stipulation to avoid liability. The Court first held that the trial court did not err in dismissing the claim for abuse of process. While there was a genuine issue of material fact as to whether the county attorney requested a probable cause stipulation for improper reasons, because the county attorney had already commenced prosecution at the time he requested the stipulation, he was not acting outside of his authority as a prosecutor and therefore, he was immune from suit on the claim. The Court next held that because the dismissal required a stipulation of probable cause, the trial court erred when it failed to make specific findings of fact that the agreement was voluntary, that there was no evidence of prosecutorial misconduct and that public policy interests would not be affected, before allowing the agreement to preclude suit for malicious prosecution. While appellees' actions taken subsequent to formal prosecution were cloaked with absolute immunity, their actions while investigating only entitled them to qualified immunity. The Court finally held that the trial court erred in granting summary judgment on appellant's negligence claim when there was a genuine issue of material fact as to whether appellees acted in good faith in misidentifying appellant as the offender during the investigation and prior to prosecution but nevertheless initiated the prosecution.

WORKERS COMPENSATION

Kentucky Employers' Mutual Insurance v. Novation Capital, LLC

[2008-CA-000449](#) 02/25/2011 2011 WL 832316 Released for publication

Opinion by Judge Thompson; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court requiring appellant to transfer workers' compensation benefits payable to a worker to appellee under a structured settlement agreement. The Court first held that the circuit court had subject matter jurisdiction to approve the petition for approval of transfer of the structured settlement rights. The petition was unrelated to the worker's compensation and the Structured Settlement Act established jurisdiction in the circuit court. The Court then held that the transfer of the structured settlement payment did not violate the anti-assignment provision of KRS 342.180. The agreement was not an assignment of a claim but was a transfer of the compensation received under the compensation agreement. Further, pursuant to the terms of the Act, the transfer of the structured settlement agreement was subject to judicial approval and a finding that it was in the worker's best interest to satisfy his delinquent housing and automobile debts.

Dallas National Insurance Company v. Board

[2011-CA-001645](#) 04/13/2012 2012 WL 1253277

Opinion by Judge Thompson; Judges Moore and Nickell concurred. The Court affirmed an opinion and order of the Workers' Compensation Board affirming a decision of an Administrative Law Judge awarding permanent total disability benefits to a worker and assessing sanctions pursuant to KRS 342.310. The Court first held that the ALJ correctly determined that at the time of the work-related injury, the trucking company employer was a subcontractor and obtained workers' compensation insurance for the worker with the appellant insurer through its contract with the trucking company for which the driver was hauling tobacco to North Carolina. The contract and related evidence presented demonstrated an agreement to provide workers' compensation for the employer's drivers and the premiums were deducted from payments due to the employer. The Court also held that Kentucky had

jurisdiction over the claim. While the contract between the trucking companies contained a choice of law provision, the provision did not relate to a workers' compensation injury. While North Carolina may have been an appropriate forum because the accident occurred there, North Carolina did not have exclusive jurisdiction. The Court next held that the finding that the worker was permanently and totally disabled was supported by substantial evidence. The Court finally held that the ALJ did not err in assessing sanctions, pursuant to KRS 342.310(1), against the insurer for not paying temporary total disability benefits when it did not pay income benefits and did not appear in the action to assert any defense to payment until after the opinion and award.