Kentucky Court Of Appeals
Cases of Note
November-December, 2012

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INSURANCE

Martindate v. First National Ins. Co. Of America
2011-CA-001747 12/21/12
Opinion by Judge Nickell; Judge VanMeter concurred; Judge Taylor concurred in result only.
Court of Appeals affirmed dismissal of appellants from bad faith claim they filed after a jury verdict in an automobile accident case. Citing the doctrine of judicial estoppel, the trial court based their dismissal from the bad faith claim upon their concealment in a subsequent bankruptcy proceeding of the personal injury lawsuit and resulting jury award. Furthermore, even if the bad faith claim had been allowed to proceed, the Court of Appeals concluded that the appellants could not have prevailed at trial where, at most, appellants demonstrated only a disparity between the jury's award and the insurance company's offers. That factor alone is insufficient to establish a bad faith claim.

Edwards v. State Farm Mutual Automobile Insurance Company
2012-CA-000033 12/21/12
Opinion by Judge Lambert; Judges Combs and Nickell concurred.
Trial court did not err in refusing to admit release into evidence where appellant failed to plead release as an affirmative defense; failed to comply with mandatory disclosure order; and offered no explanation whatsoever why she did not come forth with release prior to the day of trial. Court of Appeals also upheld award of damages against contention that it was not based upon fair market value of vehicle. Appellant offered no evidence at trial of her opinion as to fair market value through the testimony of an expert or documentary evidence and did not object to the testimony presented by the insurer. Because NADA information was not available due to newness of the car, insurer's testimony as to how the valued the car and the amount of damages it paid its insured was adequate to determine fair market value.

Sparks v. Trustguard Insurance Company
2011-CA-001119 12/14/12
Opinion by Judge Moore; Chief Judge Acree and Judge Thompson concurred.
Long-time companion of named insured who did not meet the definition of "family member" under automobile insurance policy sought UIM benefits under policy on basis that she, not named insured, had always been owner of the car insured. Court of Appeals held that trial court did not err in declining to impute her into coverage under the policy on basis of her claim of that she was a "de facto insured." Neither did her arguments of estoppel, reasonable expectations, illusory coverage, and public policy provide a basis for reserving entry of summary judgment for insurance company.

TORTS

Gibson v. Raycom TV Broadcasting, Inc.
2011-CA-001347 11/02/12
Opinion by Judge Clayton; Judges Combs and Thompson concurred.
Summary judgment was properly granted on contractor's defamation claim against television station where statements made during broadcast were substantially accurate; no malice on the part of station

or homeowner who contacted station was proven; information regarding unsatisfactory workmanship was legitimate; and because station is a media defendant, constitutional free speech issue was implicated. Whether statements were defamatory per se is immaterial to analysis where statements were true or substantially true.

Ries v. Oliphant
2011-CA-000100 12/21/12
Opinion by Judge Taylor; Judge Stumbo concurred; Judge Clayton concurred in result only.
In medical malpractice action, Court of Appeals held that trial court erred in permitting expert testimony in form of mathematical formula that essentially timed fetal blood loss. Expert admitted to having done no independent research in the area or having knowledge of any scientific study or other objective source directly setting forth his "mathematical model and equilibration theory" concerning a fetus in utero. Without an underlying objective basis of record to support expert's assumption that the equilibration rate of a human fetus in utero is identical to that of a human adult or child, it is virtually impossible to assess the reliability of that assumption or the reliability of his mathematical formula. Because the timing of fetus's blood loss was a critical factual issue for the jury to resolve, the persuasive effect of the expert's testimony in stating that he could accurately time the blood loss within a fifteen minute window required reversal for new trial.

Jackson v. Ghayoumi
2011-CA-002017 12/14/12
Opinion by Judge Lambert; Chief Judge Acree and Judge Thompson concurred.
Trial court did not err in excluding expert testimony to support claim in malpractice action that chiropractor's us of an electrical stimulation treatment modality caused plaintiff to spontaneously miscarry her pregnancy. Excluded expert testified in his deposition that he had no knowledge whatsoever regarding the delivery of electrical stimulation to the human body and disclaimed any knowledge of how electrical stimulation delivered to plaintiff's neck caused her alleged injurires. Court of Appeals found no error in trial court's conclusion, after conducting a Daubert hearing, that expert's testimony was speculative and unreliable.

Rice v. Vanderespt
2011-CA-002152 12/21/12
Opinion by Judge Combs; Judges Lambert and Nickell concurred.
Patrol office shot while responding to a dispatcher's call concerning a report of domestic violence sued landlords of her assailant based upon their decision to rent their property to "violent and/or disruptive tenants." Court of Appeals affirmed summary judgment for landowners on basis that that they were protected from liability by the public policy considerations of the Firefighter's Rule. Court of Appeals rejected officer's argument that landowners' failure to evict menacing tenant created an undue risk of injury beyond what is inevitably involved in response to a call for help in a domestic violence situation.

Miller v. Fraser
2011-CA-000884 12/07/12
Opinion by Judge Caperton; Judges Lambert and Nickell concurred.
Court of Appeals reversed jury verdict for physician in medical malpractice action on the basis that trial court erred in ruling plaintiff could not present his claim for failure to obtain informed consent prior to administration of therapeutic medication. Court of Appeals concluded that informed consent statute is not limited to surgical procedures and thus plaintiff should have been permitted to present his claim of negligence for lack of informed consent.

Potter v. Boland
2011-CA-001336 12/07/12
Opinion by Judge Thompson; Judge Clayton concurred; Judge Combs dissented.
Majority of Court of Appeals affirmed dismissal of loss of consortium claims as having been filed outside applicable statute of limitations. Because it is an independent action and not specifically a part of a wrongful death claim, a parent's claim for loss of consortium under KRS 411.135 remains regardless of whether the child's personal representative asserts a wrongful death claim or whether a personal representative is appointed.
Thus, as previously settled by the Supreme Court, KRS 411.140 is the only limitation period set forth by the General Assembly for loss of consortium and trial court properly applied it in this case. Because it was painfully obvious that parents knew they had been harmed when child died, they had a duty to exercise reasonable diligence to discover whether they had been injured by physician's malpractice. In order to defeat application of one-year statute of limitations, parents were thus required to submit affirmative evidence that they could not discover with reasonable diligence that they had been injured by the physician.

Collins v. Appalachian Research and Defense Fund of Kentucky, Inc.
2011-CA-001680 12/07/12
Opinion by Judge Dixon; Judges Maze and Nickell concurred.
In negligence action stemming from automobile accident, Court of Appeals affirmed trial court's determination that Appalred was entitled to summary judgment on plaintiffs' claim that it was vicariously liable for their injuries under doctrine of respondeat superior. Where plaintiff offered no proof other than their own beliefs as to whether defendant driver was acting within scope of her employment at time of accident, no genuine issue of material fact is created to rebut defendant's proof to the contrary. Further, a defendant's general schedule is not determinative of what she was doing on the morning of the accident so as to bring her activities within the scope of her employment.

WORKERS COMP

Decker v. Control Systems, Inc.
2012-CA-000468 11/02/12
Opinion by Judge VanMeter; Judges Keller and Taylor concurred.
Court of Appeals affirmed dismissal of workers' compensation claim on basis that claimant failed to file claim within two years after receipt of the last voluntary payment of benefits. Despite claimant's contention that he did not receive last TTD check until June 6, 2008, and that he did not remember receiving notice from Department of Workers Claims, substantial evidence supported ALJ's findings that claimant received check on June 2, 2008; that employer complied with its duty to notify Department of the termination of TTD; and the Department mailed claimant a letter informing him of the limitations date for filing a claim for benefits expired on May 25, 2010, which was two years from the date TTD benefits ceased. Court of Appeals found no basis for applying doctrine of equitable estoppel where there was no evidence claimant was lulled into filing outside limitations period.

Meuth Concrete v. Kindle
2012-CA-001059 12/21/12
Opinion by Judge Combs; Judges Keller and Lambert concurred.
Court of Appeals affirmed an opinion of the Board which vacated and remanded the decision of the ALJ on the basis that the ALJ filed to make sufficient findings of fact and failed to properly account for rejecting the opinion of a university evaluator with respect to causation. The Court of Appeals agreed with the Board's conclusion that the ALJ's summary of the evidence was partially inaccurate and that the ALJ's finding as to causation did not provide an evidentiary basis sufficient to enable a

reviewing body to determine whether the finding was supported by substantial evidence and whether it was reasonable.

Jones v. Dougherty
2010-CA-001985 12/14/12
Opinion by Judge Keller; Judges Clayton and Maze concurred.
Absent evidence of aggression or hostility in assistant principal's act of taking a snake to a teacher's office to show it to her, assistant principal's actions act occurred within the scope of employment where there was no evidence she knew that teacher had a fear of snakes or that she pushed or thrust the snake toward the teacher. Thus, Court of Appeals affirmed entry of summary judgment on teacher's claim that assistant principal's "willful and unprovoked aggression" overcame the exclusive remedy provisions of the Workers' Compensation Act. Trial court correctly determined that appellants failed to provide evidence that the assistant principal's action in showing snake to teacher constituted will and unprovoked aggression.