Kentucky Supreme Court
Cases of Note
May-June, 2012

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TORTS

Tanya A. Childers; Jeffrey J. Childers v. Sandra F. Geile, M.D.; Marshall Emergency Services Associates, P.S.C.
2009-SC-000790-DG June 21, 2012
Opinion of the Court by Justice Noble. All sitting. Tanya and Jeffrey Childers filed suit claiming intentional infliction of severe emotional distress from a physician's alleged mishandling of a pregnancy. Specifically, the physician was alleged to have told the woman she had miscarried when she had not yet done so and to have prescribed drugs that could have a negative effect on the fetus. The woman miscarried a few days later. The trial court granted summary judgment for the physician. The Supreme Court held that the facts establish that summary judgment is proper because the doctor's conduct was properly the subject of a traditional tort claim, namely, medical malpractice. Because the tort of outrage, also known as intentional infliction of emotional distress, was meant only to be a gap-filler, it cannot be maintained when such a traditional claim is available for the same set of facts.

Brandon Benningfield v. Helen Zinsmeister, Deceased; And Wade Zinsmeister
2009-SC-000660-DG June 21, 2012
Opinion of the Court by Justice Noble. All sitting. Laurie Benningfield filed suit on behalf of her son, Brandon Benningfield, for injuries sustained by a dog attack against the landlords of the dog's owners. The suit alleged that the landlords were statutory owners under KRS 258.095(5) and thus were strictly liable for the attack under KRS 258.234(4). The trial court granted summary judgment for the landlords. The Supreme Court held that a landlord can be the statutory owner of a tenant's dog for the purposes of liability under certain circumstances, but that any such liability extends only to injuries caused on or immediately adjacent to the premises. For that reason, the landlord in this case was liable under the statutes because the attack occurred off the premises. Justice Schroder issued a dissenting opinion but concurred in the result, in which Justice Scott joined, stating that Kentucky's dog bite statutes have never considered the landlord an "owner" of a tenant's dog. Justice Minton issued an opinion that concurs in part but dissents as to the result, in which Justice Venters joined, stating that a landlord whose tenant's dog injures a third party can be held liable under general negligence principles even when the injury occurs off the leased property. Justice Venters issued an opinion concurring in part but dissenting as to the result, in which Justice Minton joined, stating that he disagrees with the conclusion to confine the area "about" the property to the land "so close [to the subject property] as to be within [a person's] immediate physical reach" of the property.

Garry Hall, et al. v. Mortgage Electronic Registration Systems, Inc., et al.
2010-SC-000559-DG June 21, 2012
Opinion of the Court by Justice Scott, in which Minton, C.J.; Abramson, and Cunningham, JJ., concur. Schroder, J., dissents by separate opinion in which Noble and Venters, JJ., join. Appellant owned a tract of property on which he executed a mortgage with Appellee. After Appellant satisfied the mortgage in full, Appellee attempted to release the mortgage in the county clerk's office, but failed to do so effectively due to a simple scrivener's error, of which Appellant was aware. Appellant subsequently secured another mortgage on the property with a different financial institution which

notified Appellee that the original mortgage had not been released. Five months later, Appellant filed a civil action to obtain a release of the original mortgage, also claiming statutory damages pursuant to KRS 382.365. The trial court found that Appellant's notice to Appellee was misleading, that Appellee therefore had "good cause" under the statute not to file a new release, and concluded that Appellant was therefore not entitled to statutory damages. The Court of Appeals affirmed. The Supreme Court likewise affirmed, holding that, in certain circumstances, human error can form the basis upon which "good cause" exists for failure to timely release a lien under KRS 382.365, and under the totality of the circumstances, Appellee had established this "good cause" requirement.

Rodger W. Lofton v. Fairmont Specialty Insurance Managers, Inc., D/B/A Fairmont Specialty Group and D/B/A Fairmont Specialty P&C; Denise Maxey and Delbert K. Pruitt
2010-SC-000749-DG June 21, 2012
Opinion of the Court by Justice Cunningham. All sitting; all concur. Appellant was an attorney who represented a plaintiff in a personal injury action under a contingency fee agreement. Appellant withdrew from representation after the plaintiff client refused to accept a pre-trial settlement offer. Appellant cited the extreme differences of opinion regarding the value of the case as the reason for his withdrawal. The plaintiff then obtained new counsel and accepted a settlement offer for the same amount as the previous offer she had rejected. Appellant filed an attorney's lien for the hours he had worked on the case and a complaint in McCracken Circuit Court seeking recovery of his attorney fees under *quantum meruit*. The trial court declined to award attorney fees, finding that Appellant had breached his contract with the client, but awarded him funds to cover his expenses from the representation. The Court of Appeals affirmed the trial court.

The Supreme Court held that in cases where an attorney has withdrawn from representing a client under a contingency fee contract, recovery under *quantum meruit* may be permitted only where there is "good cause." The Court further held that "good cause" to recover a *quantum meruit* fee is a high standard and requires a showing greater than the "good cause" necessary to withdraw from representation of a client. Whether there is "good cause" to justify the award of a *quantum meruit* recovery is to be determined on a case-by-case basis. The Supreme Court affirmed the Court of Appeals decision, holding that a disagreement with a client over whether to accept a settlement offer was not sufficient "good cause."

Kenton Smith, et al. v. Richard Williams, et al.
2010-SC-000332-DG June 21, 2012
Opinion of the Court by Justice Schroder, reversing and remanding. All sitting; all concur. Partition action for sale of jointly held real estate. Parties opposing sale raised as defense existence of an oral buy/sell agreement between the co-tenants. Held: Statute of frauds, KRS 371.010(6), prevented enforcement of alleged oral buy/sell agreement in the absence of fraud or an equitable claim, neither of which existed in this case.

Hon. Annette Karem, Judge v. Justin Bryant
2010-SC-000375-DG June 21, 2012
Opinion of the Court, reversing and remanding. All sitting; all concur. Held: District court acted within its jurisdiction, pursuant to KRS 387.520 and KRS 24A.120, when it issued an order requiring a guardian to provide all financial records related to a court-ordered accounting and to make restitution to a guardianship account.

Danielle N. Bidwell v. Shelter Mutual Insurance Company
2010-SC-000560-DG June 21, 2012
Opinion of the Court by Justice Scott. All sitting. All concur. Appellant was seriously injured when the automobile in which she was riding as a passenger was in an accident. The car's driver was not its owner, but a permissive user. Appellant submitted her claim to Appellee, the car owner's insurance company, for $250,000—the amount listed on the policy's Declarations page as the limit for bodily injury liability. Appellee claimed that the permissive user step-down provision located

within the policy, but not on the Declarations page, limited her claim to $25,000. Appellant filed for a declaratory judgment, asking the circuit court to declare the step-down provision unenforceable. The circuit court entered summary judgment for Appellee, and the Court of Appeals affirmed. The Supreme Court reversed and remanded, holding that the specific provision at issue violated the doctrine of reasonable expectations.

WORKERS COMPENSATION

Gaines Gentry Thoroughbreds/Fayette Farms v. Adan Mandujano; Honorable Edward Hays, Administrative Law Judge; and Workers' Compensation Board
2011-SC-000298-WC May 24, 2012
Opinion of the Court. All sitting; all concur. Mandujano worked as a groom at the Gaines Gentry horse farm near Lexington, Kentucky. He also showed horses for Eaton Sales, a business that sold horses for Gaines Gentry and others on consignment. Mandujano requested and received permission from Gaines Gentry's farm manager to take time off to work at horse sales to be held at Saratoga Springs, New York because doing so paid considerably more per day than work as a groom. Gaines Gentry paid him to tend to farm's sales yearlings while traveling in a horse van to Saratoga. He worked a few days for Eaton Sales and then worked a few days for another consignor during the subsequent sale of lesser quality horses. He was injured in an accident while traveling back to Kentucky. Gaines Gentry argued that the accident was non-work-related because Mandujano's work for the farm ended when he reached Saratoga or when Eaton sold its yearlings. The ALJ found, however, that Gaines Gentry "instructed" him to travel to Saratoga in the van to attend to its valuable horses and paid him for doing so; that it would have sent another employee had he not made the trip; that both parties contemplated his work for others while at Saratoga; that they also contemplated his return to his duties at the farm at an unspecified date; that he was on his own to find return transportation; and that his choice was not unreasonable. Viewing the return trip as being "necessary and inevitable" to the journey that Gaines Gentry initiated, the ALJ found the accident to be work-related. The Workers' Compensation Board and the Court of Appeals affirmed under the dual purpose, positional risk, and traveling employee doctrines. The Supreme Court also affirmed, rejecting arguments that the purpose of Mandujano's travel had become entirely personal before the accident occurred.

UPS Airlines v. Edwin Corey West; Honorable James L. Kerr, Administrative Law Judge; and Workers' Compensation Board
2011-SC-000295-WC May 24, 2012
Opinion of the Court. All sitting. Minton, C. J. , and Abramson, Cunningham, Schroder, and Venters, JJ., concurred. Scott, J., dissented by separate opinion in which Noble, J., joined. West, a UPS pilot and union member, sustained a work-related back injury for which UPS paid TTD benefits voluntarily. Union pilots were entitled to Loss of License benefits equal to 66 2/3 of the member's "pay period guarantee" for up to 20 pay periods if the member was unable to exercise the privileges of an FAA medical certificate due to medical problems and remained out of work for more than six months. UPS argued that it overpaid TTD benefits and that KRS 342.730(6) entitled it to credit Loss of License benefits against its liability for all income benefits awarded, including TTD as well as past-due and future permanent income benefits. The ALJ agreed and awarded UPS a dollar-for-dollar credit for all Loss of License benefits. The Workers' Compensation Board relied on GAF v. Barnes, 906 S.W.2d 353 (Ky. 1995), to reverse, convinced that KRS 342.730(6) was inapplicable because Loss of License benefits were bargained collectively and, thus, were not exclusively employer funded. The Court of Appeals affirmed. The Supreme Court affirmed in part and reversed in part. Noting that GAF v. Barnes was decided before KRS 342.730(6) was enacted and that the statute made no reference to collectively-bargained benefits, the court held that the statute entitled UPS to credit its liability only to the extent that Loss of License benefits overlapped awarded income benefits and entitled West to the contractual excess. The court explained that contractual benefits overlap statutory benefits for the purposes of KRS 342.730(6) only to the extent that they are less

than or equal to the workers' compensation benefit; cover the same period of time; and are not themselves offset by the receipt of benefits under KRS 342.730(1).

Audi of Lexington v. Colin Elam; Honorable Marc Christopher Davis, Administrative Law Judge; and Workers' Compensation Board
2011-SC-000449-WC June 21, 2012
Opinion of the Court. All sitting. All concur. Elam worked as a car salesman. He sustained a work-related back injury in 2005 when the vehicle in which he accompanied a customer on a test drive was rear-ended while traveling at approximately 50 miles per hour on an interstate highway. His prior medical history included longstanding treatment for a herniated disc and degenerative disc disease. Drs. Kriss and Lockstadt agreed that he had a 5% permanent impairment rating immediately before the injury. In 2007 Dr. Kriss apportioned "63% of the total lumbar causation" to pre-existing degenerative disc disease and the remaining 37% to the accident. He assigned an 8% impairment rating in 2008, attributing a 3% impairment rating to the effects of the accident. Dr. Lockstadt performed lumbar fusion surgery for the injury's effects in 2009 and assigned a 21% impairment rating when Elam reached maximum medical improvement. The ALJ found the surgery to be work-related; relied on Dr. Lockstadt with respect to Elam's present impairment rating; and relied on Dr. Kriss to apportion 37% of the 21% impairment rating, *i.e.*, 7.77%, to the injury. The Workers' Compensation Board reversed, convinced that the ALJ erred by basing Elam's income benefits on a permanent impairment rating that no medical expert assigned using the AMA *Guides*. The Court of Appeals and Supreme Court affirmed, rejecting the employer's argument that the ALJ exercised a fact-finder's discretion to infer reasonably that a progression of the pre-existing degenerative condition contributed in the same proportion to causing Elam's present impairment rating as it did to causing the impairment rating that Dr. Kriss assigned in 2008. The Supreme Court noted the absence of any medical testimony to support such an inference after the fusion surgery and the absence of any medical testimony that the *Guides* authorize the apportionment of an impairment rating in the manner employed by Dr. Kriss.