Kentucky Supreme Court
Cases of Note
September-October, 2012

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INSURANCE

In re: Wehr Constructors Inc. v. Assurance Company of America
2012-SC-000221-CL October 25, 2012
Opinion by Justice Venters. All sitting; all concur, with J. Noble concurring by separate opinion. The United States District Courts for the Western District of Kentucky sought certification to the following question of Kentucky law: Whether an anti-assignment clause in an insurance policy that requires an insured to obtain the insurer's prior written consent before assigning the claim under the policy is enforceable or applicable when the claimed loss occurs before the assignment, or whether such a clause would, under those circumstances, be void as against public policy? Under Kentucky law, an anti-assignment clause in an insurance policy that requires an insured to obtain the insurer's prior written consent before assigning the claim under the policy is not enforceable or applicable when the claimed loss occurs prior to the assignment, and that such a clause would, under those circumstances, be void as against public policy.

TORTS

Raza Hashmi, M.D. v. Linda Kelly, Administratrix of the Estate of Rosalie Stamper
2009-000843-DG September 20, 2012
Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, Cunningham, Schroder, and Venters, JJ. concur. Scott, J., concurs in part and dissents in part by separate opinion. At issue was a discovery violation question about the use of deposition testimony of a treating physician, Dr. Johnstone. At trial, Dr. Johnstone's deposition testimony was being offered by Appellant Hashmi as expert testimony about the standard of care. Appellee asked Dr. Johnstone whether Appellant violated the standard of care and he responded, "I think it was fine," but his deposition indicated that he had never seen Appellant's actual, detailed medical records and did not have them in his possession. Instead, he had only reviewed a summary of Appellant's medical records prepared by his attorney. Appellee asked to review what the treating physician had reviewed, which was refused as work-product, and thus had no basis to cross-examine the doctor.

However, Dr. Johnstone was never specifically identified as an expert witness by Appellant going into trial, but had been identified as a trial witness. Appellee filed a motion to exclude the standard of care testimony portion of Dr. Johnstone's deposition because he had not been identified as an expert witness and the testimony was not admissible because it was not based on decedent's records.

The trial court overruled the motion and allowed Dr. Johnstone's deposition to be played in its entirety. The jury found for the Appellant. The Court of Appeals reversed, simply finding that Appellant had not complied with the language or spirit of CR 26, Kentucky's discovery rules.

This Court reversed. Although the Court found that the trial court erred in allowing that portion of Dr. Johnstone's deposition to be played to the jury without providing Appellee notice, such error was deemed to be harmless because it amounted to five words uttered in an eight day trial. Scott, J., agreed with the Court that the trial court erred in allowing Dr. Johnstone's deposition to be played, but dissented on the ground that the testimony may have swayed the jury's verdict, and was therefore not harmless.

Benjamin Wright, Jr. v. House of Imports, INC. D/B/A In Style
2011-SC-000264-DG September 20, 2012
Opinion of the Court by Justice Scott. All sitting; Minton, C.J.; Cunningham, Noble, Schroder and Venters, JJ., concur. Schroder, J., also concurs by separate opinion. Abramson, J., concurs in result only. A jury awarded Appellant $120,863.75 in his common-law negligence action after he fell down a set of stairs at Appellee's retail business establishment. The Court of Appeals reversed and remanded for a new trial, holding that the trial court committed palpable error in permitting expert testimony of building code violations without instructing the jury as to the applicability of the code. The Supreme Court reversed the Court of Appeals' judgment and reinstated that of the trial court. First, it held that because this was a common-law negligence cause of action, and not a negligence per se claim, testimony concerning the building codes was irrelevant and therefore erroneously admitted. However, the trial court's failure to instruct the jury on the applicability of the building code did not constitute *palpable* error because the allegedly fatal instructions were tendered by the defendant/Appellee. The Court held that "[w]hen a trial court adopts a party's proposed jury instructions, that party cannot be heard to complain that its 'substantial rights' have been affected by said instructions, nor that a 'manifest injustice has resulted from the error.'"

Christopher Tucker, as Administrator of the Estate of Mindi Tucker, Deceased Etc., et al. v. Women's Care Physicians of Louisville, P.S.C.; And Susan Bunch, M.D.
2010-SC-000466-DG October 25, 2012
Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson and Cunningham, JJ., concur. Venters, J., dissents by separate opinion in which Schroder and Scott, JJ., join.

Trial court in medical malpractice case denied Estate's request to introduce expert testimony that a standing order from a doctor to a nurse was ambiguous on the grounds that it was not relevant. Court of Appeals held that trial court did not abuse its discretion, and affirmed.

In affirming the Court of Appeals, the Court held that, based on her trial and deposition testimony, the nurse did not believe that the standing order was ambiguous, and therefore any expert testimony that the order was ambiguous was not relevant.

Venters, J., dissented on the ground that the trial court abused its discretion because the proffered expert testimony was relevant and admissible.

Sophia Savage, et al. v. Three Rivers Medical Center
2010-SC-000478-DG October 25, 2012
And
Three Rivers Medical Center v. Sophia Savage, et al.
2011-SC-000348-DG October 25, 2012
Opinion by Justice Venters. Minton, C.J., Cunningham, Noble and Scott, JJ., concur. Abramson, J., concurs in result only. Schroder, J., not sitting; Civil, Procedure, Evidence; Questions presented 1) Whether, after return of verdict tainted by evidentiary error, trial court had discretion to grant a new trial rather than judgment notwithstanding the verdict; 2) Were duplicate copies of X-rays retained by patient rather than hospital medical record custodian properly admitted into evidence; 3) Was nurse with military training and experience reading x-rays qualified to give expert opinion testimony

regarding what is shown on x-ray film; 4) Whether defendant was entitled to jury instruction apportioning fault to settling non-party; and 5) whether damages awarded totaling over $2.5 million were excessive. Held: 1) While, ordinarily a verdict based upon insufficient evidence justifies the entry of a judgment notwithstanding the verdict, trial judge has broad discretion under CR 50.02 to grant a new trial instead; 2) Duplicate x-ray was properly admitted into evidence pursuant to KRE 1003; Patient who had retained possession of X-ray film was competent to authenticate it under KRE 901(b)(1); 3) Nurse, with wartime experience reading x-rays to locate shrapnel and bullets in wounded soldiers, had the "knowledge, skill, experience, training" to satisfy requirements of KRE 702 to testify as an expert in reading x-ray to locate metal object left in patient during surgical procedure; 4) In a medical negligence case, to have an apportionment instruction that permits allocation of fault to non-party medical provider, the defendant must put forth sufficient testimony to show that the medical provider failed to conform to the appropriate standard of care; 5) despite trial court's conclusory statement that damage award was the result of jury passion and prejudice, the evidence explicitly established that removal of sponge negligently left in patient's body resulted in substantial pain, discomfort, and disability, as well as emotional anguish, distress, and loss of consortium, so that jury award exceeding $2.5 million was not excessive.