Kentucky Court Of Appeals
Cases of Note
January-February, 2014

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1. Hold down the control ("Ctrl") key and click on the link.
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INSURANCE

Countryway Ins. Co. v. United Financial Casualty Co.
2012-CA-002051 01/24/2014 2014 WL 265508 Rehearing Pending
Opinion by Judge Jones; Chief Judge Acree and Judge VanMeter concurred. In an appeal concerning the priority of coverage between two uninsured motorist (UM) policies, the Court of Appeals reversed and remanded. The trial court had determined that the policies contained mutually repugnant excess coverage provisions and ordered damages to be pro-rated between the two policies. In reversing, the Court held that under Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co., 326 S.W.3d 803 (Ky. 2010), where two excess/other insurance UM provisions clashed, the repugnancy rule and apportionment were no longer applicable. Instead, pursuant to Shelter, the UM policy covering the injured person will be deemed primary to the policy covering the vehicle, as a matter of public policy and judicial economy.

Deans & Homer, Inc. v. Com., Public Protection Cabinet, Kentucky Dept. of Ins.
2012-CA-000012 01/31/2014 2014 WL 341887
Opinion by Chief Judge Acree; Judges Lambert and Maze concurred. The Court of Appeals reversed the opinion and order of the Franklin Circuit Court adopting the Kentucky Department of Insurance's order determining that appellant was promoting an unauthorized insurance policy. The Court held that appellant's practice of amending individual storage unit rental contracts to include the partial waiver of an exculpatory clause in the event of property damage in exchange for an additional monthly rental payment did not constitute the formation of an insurance contract, but instead was merely an adoption of a different risk of loss provision between the parties. The court remanded the case to the Franklin Circuit Court with instructions to vacate the previous order of the Kentucky Department of Insurance.

CIVIL PROCEDURE

Edwards v. Headcount Management
2012-CA-000535 01/31/2014 2014 WL 346070
Opinion by Chief Judge Acree; Judges Dixon and Lambert concurred. The Court of Appeals affirmed an order denying appellant's motion to set aside summary judgment pursuant to CR 60.02. Appellant alleged that CR 60.02 relief was warranted because appellee allegedly committed fraud upon the court when it filed suit under its d/b/a or trade name. The Court first determined that the essence of appellant's defense was one of capacity. The Court then held that appellant waived the defense of capacity when she failed to assert it in a timely manner by motion or responsive pleading. The Court also held that appellant did not properly invoke CR 60.02 because appellant's capacity defense could and should have been raised in a direct appeal. Finally, the Court concluded that the alleged deceit identified by appellant did not rise to the level of extrinsic fraud contemplated by CR 60.02.

CONTRACTS

Ohio Casualty Ins. Co. v. City of Providence
2012-CA-002204 01/10/2014 2014 WL 92268 Rehearing Pending
Opinion by Judge Nickell; Judges Clayton and Maze concurred. A former city clerk alleged various tort claims against the City of Providence following allegations that the clerk embezzled city funds. Appellant, who had written, as surety, an "aggregate and non-cumulative" performance bond in the penal sum of $300,000 on the clerk for an "indefinite" period of time when she was appointed, moved to intervene and sought a declaratory judgment regarding its rights and obligations under the bond. The city had filed a claim with the surety arguing that it had purchased $300,000 in coverage for each year the clerk was in office. The city based its claim not on a reading of the bond, but on "renewal notices" it had received from its insurance agent alerting the city it was time to pay its annual premium of about $1,000. After the clerk's claims were dismissed, the circuit court entered judgment on a jury verdict in favor of the city finding that the bond created $300,000 in liability for each of the seven years the bond was in force. The circuit court specifically found that the words "aggregate" and "non-cumulative" were ambiguous and open to multiple interpretations. Due to the perceived ambiguity, the circuit court relied on extrinsic evidence to determine the intentions of the parties when the bond was originally executed in 1997. On appeal, the Court of Appeals reversed and remanded, holding that based on the unambiguous terms of the bond, the surety was only liable for $300,000 for the life of the bond. The Court relied on the fact that the clerk was appointed rather than elected and that her bond was written for an "indefinite" open-ended period rather than for a specific term. The Court further held that the fact that the city had been paying a yearly "premium" did not merit a different result. There was no need in this case to resort to extrinsic evidence because of the intention of the parties as stated in the bond, the subject matter of the bond, the situation of the parties and the conditions under which the bond was written. Moreover, because the bond was for an indefinite term, the fact that the premiums were paid annually did not create a series of separate yearly contracts.

APPEALS

Bituminous Cas. Corp. v. Estate of Bramble
2011CA000542 02/21/2014 2014 WL 685453 DR Pending
Opinion by Chief Judge Acree; Judge Moore concurred; Judge Thompson dissented and wrote a separate opinion. Appellants sought review of the trial court's partial summary judgment, which found that appellees/plaintiffs had established the first prong of the three-prong test for liability for an insurer's bad faith under Wittmer v. Jones, 864 S.W.2d 885 (Ky. 1993). The Court of Appeals dismissed the appeal as interlocutory. The Court first held that a merits panel of the Court is not bound by the interlocutory orders previously entered by a motion panel of the Court. The Court next held that it may proceed to the merits of an appeal only after it has determined, sua sponte if need be, that it has jurisdiction to do so. In this case, the order from which the appeal was taken was interlocutory because it was not a final judgment, was not an interlocutory judgment capable of being made final by CR 54.02(1), and was not any type of order identified by our Supreme Court as being appealable notwithstanding its immutable interlocutory nature. Therefore, the case was dismissed for want of jurisdiction.

McGuire v. Lorillard Tobacco Co.
2012CA000845 02/14/2014 2014 WL 585626 Rehearing Denied
Opinion by Judge Moore; Judges Lambert and VanMeter concurred in part as to all issues but one. As to this issue, Judge VanMeter wrote the majority opinion, joined by Judge Lambert. Judge Moore dissented. In an appeal from a defense verdict on claims of negligence and product liability asserted by the estate of a decedent allegedly exposed to asbestos as a result of smoking asbestos-filtered cigarettes and working in a plant that manufactured the cigarettes, the Court of Appeals affirmed. The Court held that the Workers' Compensation Act provided the exclusive remedy for appellant's claim against Lorillard for workplace exposure to asbestos. KRS 342.690(1). Appellant's tort action stemming from decedent's smoking of asbestos-filtered cigarettes, on the other hand, was not barred by the exclusive remedy provision of the Act. Although Lorillard provided decedent with free cigarettes, smoking the cigarettes was not a required part of his employment. Judges VanMeter and Lambert held, however, that the trial court's ruling that the exclusive remedy provision of the Act applied to this claim merely qualified as harmless error and did not warrant reversing and remanding for a new trial. The Court also held that the trial court did not abuse its discretion by excluding evidence that other individuals who had worked at Lorillard's plant had contracted mesothelioma. Appellant failed to provide a foundation for this evidence by demonstrating a causal link between each individual's work at Lorillard and each individual's mesothelioma. The Court also noted that establishing such a causal link in each instance would lead to numerous collateral inquiries and result in jury confusion; moreover, any prejudice that may have resulted in excluding this evidence was mitigated by an admonition from the trial court that, in addition to the decedent, other individuals had worked at Lorillard's plant and had later contracted mesothelioma. The Court also held that the trial court did not abuse its discretion by allowing Lorillard and H & V to introduce deposition testimony of three deceased witnesses who had been called upon by Lorillard and H & V in prior litigation involving the filter at issue. Because the parties against whom the depositions were offered in the prior litigation had a motive similar to appellant's motive in confronting the deponents' testimony, and because those other parties had developed the deponents' testimony through appropriate objections and searching cross-examination, appellant qualified as a "predecessor in interest" of those other cross-examining parties within the meaning of KRE 804(b)(1).