Kentucky Court Of Appeals
Cases of Note
May-June, 2014

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INSURANCE

Tryon v. Encompass Indem. Co.
2013-CA-001275 06/06/2014 2014 WL 2536984 DR Pending
Opinion by Judge Stumbo; Judges Jones and Lambert concurred. The Court of Appeals reversed an order granting summary judgment in favor of Encompass Indemnity Company and Philadelphia Indemnity Insurance Company. The trial court found that these two insurance companies did not owe appellant underinsured motorist benefits. Appellant was involved in a motor vehicle accident while riding his motorcycle. The motorcycle was not insured by the appellees, but appellant had other vehicles insured by these companies. These other policies included provisions for underinsured motorist benefits. The appellees denied benefits because of a policy exclusion stating that underinsured motorist coverage is excluded in instances "[w]hile that covered person is operating or occupying a motor vehicle owned by, leased by, furnished to, or available for the regular use of a covered person if the motor vehicle is not specifically identified in this policy under which a claim is made." The Court reversed the order granting summary judgment and remanded for further proceedings in light of *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky. 1990), and *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993). These two cases hold that the policy exclusion at issue is against public policy and unenforceable.

PIP – PEER REVIEW

Commonwealth of Kentucky, Board of Chiropractic Examiners v. Barlow
2013-CA-000552 06/27/2014 2014 WL 2916902
Opinion by Judge Moore; Judges Taylor and VanMeter concurred. Two medical doctors rendered opinions to an insurance carrier for the purpose of assisting the carrier in determining whether to pay or deny personal injury protection (PIP) benefits to individuals involved in motor vehicle accidents who later sought chiropractic treatment. The Kentucky Board of Chiropractic Examiners sought an injunction in Franklin Circuit Court against both doctors, contending that they had violated KRS 312.200(3) because: (1) it had not licensed and trained either doctor pursuant to KRS 312.200(3); and (2) both doctors had rendered opinions regarding the reasonableness and necessity of chiropractic treatment and, in its view, had therefore conducted unauthorized "peer reviews" within the meaning of KRS 312.015(4). The circuit court dismissed the Board's suit, and the Board subsequently appealed. In affirming, the Court of Appeals interpreted these statutory provisions to mean that if an individual evaluates the appropriateness, quality, utilization, and cost of health care and health service provided to a patient by a Kentucky chiropractor, but has done so without the license and training described in KRS 312.200(3) and without purporting to do so under the purview of KRS 312.200, that individual has not

conducted a "peer review" within the meaning of these statutory provisions and is not, therefore, subject to any kind of action or censure from the Board.

TORTS

McKinley v. Circle K
2013-CA-000289 06/20/2014 2014 WL 2784418
Opinion by Judge VanMeter; Judges Combs and Dixon concurred. In this premises liability action, the Court of Appeals held that the trial court erred in granting summary judgment based on a finding that appellee did not have a duty to protect appellant from "open and obvious" snow and ice conditions on its premises, where appellant had slipped and fallen. The Court noted that the Supreme Court of Kentucky had revised the analysis to be conducted in "open and obvious" cases such as this one in *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901 (Ky. 2013). Because appellant was an invitee, appellee owed him not only a general duty of reasonable care, but also the more specific duty associated with the land possessor-invitee relationship to protect invitees from unreasonable risks posed on the property. The question then becomes whether appellee fulfilled the relevant standard of care owed to appellant, which is a question of breach, not duty. Based on the evidence in this case and the requirements of *Shelton*, the Court concluded that a genuine issue of material fact existed as to whether appellee could have foreseen the harm to appellant and whether it acted reasonably in fulfilling its duty to invitees to protect against the risk of physical injury from the ice and snow. As a result, reversal was merited.

ARBITRATION

Diversicare Healthcare Services, Inc. v. Estate of Hopkins ex rel. Prince
2013-CA-001258 05/09/2014 2014 WL 1876136 Released for Publication
Opinion by Judge Caperton; Judges Combs and Dixon concurred. In dismissing the appeal as untimely, the Court of Appeals held that an order denying a motion to compel arbitration was appealable to the same extent as orders or judgments in a civil action, despite its lack of "final and appealable" language, in light of the statute creating an interlocutory right of appeal of "[a]n order denying an application to compel arbitration." KRS 417.220(1)(a) and (2).

Kindred Healthcare, Inc. v. Henson
2013-CA-000895 05/16/2014 2014 WL 1998728 Rehearing Denied
Opinion by Judge Nickell; Judges Dixon and Taylor concurred. During the process of admission to a nursing home owned and operated by appellants, the patient was unable to execute the admission documents and designated her son (appellee) to do so for her, stating "I'm too nervous and shaky. Rick, take care of it for me." Appellee executed all documents presented to him, including an optional arbitration agreement, and his mother was admitted to the home. Following the mother's release, appellee, acting as next friend, brought a negligence action against appellants. Appellants moved to compel arbitration pursuant to the agreement executed at admission. However, the trial court, relying on *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), found that appellee was without authority to bind his mother to the arbitration agreement. The Court of Appeals affirmed upon holding that *Ping* was properly applied. The Court held that the grant of authority to appellee was akin to creating a health-care agency with no specific authority granted to settle or resolve disputes. Thus, like the general power of attorney at issue in *Ping*, the general verbal directive here was insufficient to grant actual, apparent, or implied authority to appellee that would bind his mother to any form of alternative,

non-judicial dispute resolution. The Court also rejected appellants' argument that appellee acted solely as his mother's scrivener and not as her agent as both unpersuasive and unpreserved. The Court also rejected appellants' invitation to apply federal preemption principles.

CONTRACTS

Enerfab, Inc. v. Kentucky Power Co.
2013-CA-000753 05/30/2014 2014 WL 2795148
Opinion by Judge Dixon; Judges Caperton and Combs concurred. The injured employee of a maintenance contractor brought a negligence action against an electrical utility company, seeking to recover for injuries sustained in a fall that occurred while the employee was performing maintenance work at a power plant. The utility filed a third-party complaint against the contractor, seeking indemnification for any and all sums recovered by employee. The circuit court entered summary judgment in favor of the utility on its indemnity complaint. The Court of Appeals affirmed. The trial court determined, and the Court agreed, that the contractor was obligated to indemnify the utility for attorneys' fees and all costs of litigation associated with enforcement of the parties' indemnity agreement. The Court held that the "sole negligence" exception contained in the indemnity agreement did not apply because under the undisputed facts, there could be no finding that liability arose from the utility's sole negligence because the injured employee was not wearing the KOSHA-required safety belt at the time of his accident and thus was negligent *per se*. The Court concluded that it was irrelevant under the plain language of the indemnity agreement which parties were negligent so long as the utility was not solely negligent.

DAMAGES

Jones v. Marquis Terminal, Inc.
2013-CA-000702 05/23/2014 2014 WL 2155255 Rehearing Pending
Opinion by Judge Combs; Judges Clayton and Stumbo concurred. An equipment owner brought an action against a company that rented equipment for unpaid rent, conversion, and for an injunction for immediate return of the equipment. Following a bench trial, the circuit court entered judgment in favor of the owner but limited the owner's recovery based on his failure to mitigate damages and recover the equipment. The Court of Appeals reversed the circuit court's conclusion that the owner had failed to mitigate damages. The Court held that while a plaintiff must minimize or avoid losses, his efforts need not be unduly risky, expensive, or burdensome. A defendant also bears the burden of proving that the plaintiff failed to mitigate damages. Observing no failure by the owner as to mitigation of damages, the Court reversed on this issue. The Court also held that an award of pre-judgment interest was due to the equipment owner as a matter of course since there was no dispute regarding either the number of days the company retained possession of the equipment or the rental rate. Finally, the Court held that the owner's claim for conversion was not sustainable under these facts since he did not show that he had sustained tort damages or a loss independent of his contract damages.

WORKERS' COMPENSATION

Kentucky Employers' Mut. Ins. v. Burnett
2013-CA-001834 05/16/2014 2014 WL 2022236 Released for Publication
Opinion by Judge Thompson; Judge Stumbo concurred; Judge Lambert concurred in result only. In affirming the Workers' Compensation Board, the Court of Appeals held that substantial evidence supported the ALJ's finding that claimant's contract of hire was entered into in Kentucky, not Indiana, for purposes of extraterritorial jurisdiction as provided by the Workers' Compensation Act. Although employer made the initial telephone call to claimant while at his Indiana residence, employer at that time asked only for claimant's temporary help and the parties did not enter into a contract of hire until they discussed claimant's full-time permanent employment during dinner at a restaurant in Kentucky. The Court also held that substantial evidence supported the ALJ's finding that claimant's employment was not principally localized in any state for purposes of extraterritorial jurisdiction. Employer testified that he did not have a place of business in Kentucky or Indiana and that he conducted his business in his truck or restaurants using a cell phone. Claimant also testified that 90% of his work was performed in Kentucky. The Court further held that claimant preserved the issue of permanent total disability benefits at the benefit review conference when he requested benefits pursuant to KRS 342.730.