

Kentucky Court Of Appeals
Cases of Note
July-August, 2014

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INSURANCE

Boarman v. Grange Indemnity Ins. Co.

[2012-CA-002199](#) 07/18/2014 437 S.W.3d 748

Opinion by Judge VanMeter; Chief Judge Acree and Judge Jones concurred. On review from a judgment holding that appellant waived his statutory right to uninsured motorist (“UM”) coverage when his wife signed a waiver rejecting coverage, the Court of Appeals reversed and remanded, holding that each insured on a motor vehicle insurance policy must individually reject UM coverage on his or her own behalf if he or she does not wish to have such coverage included. In reaching this decision, the Court cited to the plain language of KRS 304.20-020, which requires motor vehicle insurance policies to include UM coverage but provides that “the named insured shall have the right to reject in writing such coverage.” The Court concluded that this language requires a written rejection from each insured covered by the policy, not just the insured that purchases the policy. The Court further held that appellant’s wife did not act as his agent in waiving his right to UM coverage, finding that he did not give her permission or instructions to do so, nor did he subsequently ratify her actions.

Hensley v. State Farm Mut. Auto. Ins. Co.

[2013-CA-000006](#) 08/15/2014 2014 WL 3973115 DR Pending

Opinion by Judge Jones; Chief Judge Acree concurred; Judge Moore dissented by separate opinion. This appeal required the Court of Appeals to consider when the statute of limitations begins to accrue on an underinsured motorist (UIM) claim. As a matter of first impression, the Court held that the statute of limitations on a UIM claim begins to run when the insurer denies a claim for UIM coverage and communicates that denial to the insured. The Court also held that while an insurer can shorten the limitations period by contract, KRS 304.14-370 operates to prevent a foreign insurer from relying on policy provisions that bar claims filed less than a year from the accrual of the cause of action. As such, under both the policy terms at issue and the common law of Kentucky, appellant’s UIM claim did not accrue until November 4, 2011 - when appellee denied her claim and less than a year before the subject action was filed.

TORTS

Pearce v. Whitenack

[2013-CA-000669](#) 08/08/2014 440 S.W.3d 392

Opinion by Judge VanMeter; Chief Judge Acree concurred; Judge Taylor dissented by separate opinion. A former city police officer, who had resigned his employment as a police officer after being suspended with pay, brought an action against the police chief and other public officials, alleging violation of his statutory due process rights and various tort claims. The circuit court dismissed the complaint, and the Court of Appeals affirmed. The Court held that all of the

officer's claims, except his claim for invasion of privacy, were precluded by his failure to exhaust his administrative remedies under KRS 15.520. The Court further held that the officer had lost his expectation of privacy regarding information he transmitted from his home computer to his social networking website; therefore, the police chief did not violate the officer's right to privacy when he issued a notice of verbal counseling based on information the officer had posted on the website. As with all internet communications, the officer ran the risk that even a posting or communication he intended to remain private would be further disseminated by an authorized recipient. In dissent, Judge Taylor argued that the Court's conclusion that the officer had failed to exhaust his administrative remedies was contradicted by the record in this case, which reflected that the city terminated the administrative process and left the officer no other option but to file suit. Judge Taylor further contended that the majority impermissibly acted as a fact-finder regarding appellant's constructive discharge claim.

ARBITRATION

HQM of Pikeville, LLC v. Collins

[2012-CA-000149](#) 07/18/2014 2014 WL 3537039 Rehearing Denied

Opinion by Judge Taylor; Judges Caperton and Dixon concurred. Appellee, acting as administratrix of her grandmother's estate and on behalf of grandmother's wrongful death beneficiaries, asserted various claims related to appellants' actions towards grandmother during her residency at a nursing home. The circuit court denied appellants' motion to compel arbitration and the Court of Appeals affirmed. The Court first held that the purported arbitration agreement executed between the nursing home and granddaughter, acting on behalf of grandmother, did not encompass the wrongful death claim brought following grandmother's death. The wrongful death claim was not derivative and independently accrued to grandmother's heirs or beneficiaries; therefore, it could be asserted by the estate's personal representative. The Court further held that granddaughter's appointment as emergency fiduciary, which was in effect when grandmother was admitted to the facility, did not authorize granddaughter to enter into any contractual relationships on behalf of grandmother - including the subject arbitration agreement. Instead, the emergency order specifically limited granddaughter's powers and duties to determining living arrangements, consenting to medical procedures and handling financial arrangements, while unchecked boxes in the form order excluded any authority to enter into a contractual relationship on behalf of grandmother, to dispose of her property, or to execute any instruments on her behalf. Finally, the Court held that the estate's claims for negligence, medical negligence, corporate negligence, and violations of grandmother's rights under the statutes governing long-term care facilities arose during grandmother's lifetime. Thus, they constituted personal injury claims that survived grandmother's death and could be asserted or revived by granddaughter on behalf of the estate.

Stephen D. Prater Builder, Inc. v. Larmar Lodging Corp.

[2013-CA-001242](#) 08/22/2014 441 S.W.3d 133

Opinion and order dismissing by Judge Combs; Judges Stumbo and Thompson concurred. After the parties engaged in arbitration, the circuit court vacated the arbitration award and remanded for a new hearing. An appeal was filed, as well as a motion to dismiss the appeal. The Court of Appeals held that dismissal of the appeal was warranted. While KRS 417.220(1), which sets forth the circumstances under which an arbitration award can be appealed, allows for an appeal of an order vacating an arbitration award without directing a rehearing, the statute implies that an order vacating an award and directing rehearing is non-final and non-appealable. Therefore, dismissal was required.

NEGLIGENCE

Dishman v. C & R Asphalt, LLC

[2012-CA-001139](#) 07/18/2014 2014 WL 3537051 DR Pending

Opinion by Judge Lambert; Judges Combs and Thompson concurred. In a premises liability case, the Court of Appeals affirmed a summary judgment entered in favor of appellees - a retail store and paving contractor. The action was brought as a result of injuries sustained by appellant when she tripped and fell over uneven ground in a construction area in the store's parking lot on her way to the store's entrance. The Court held that the paving contractor did not breach its duty to appellant and had met the standard of care by warning invitees of the risk brought on by the repaving work. The Court further held that the paving contractor was acting as an independent contractor and had sole possession of the section of the parking lot where appellant fell. Therefore, the store could not be held liable for appellant's injuries and the contractor's alleged negligence under the doctrine of respondeat superior. In reaching its decision, the Court discussed and applied the Supreme Court's recent opinions in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013).

STATUTES

United Ins. Co. of America v. Com., Dept. of Ins.

[2013-CA-000612](#) 08/15/2014 2014 WL 3973160 DR Pending

Opinion by Judge Maze; Chief Judge Acree and Judge Thompson concurred. Insurance companies brought an action for declaratory relief against the Department of Insurance. The suit challenged the Department's retroactive application of the Unclaimed Life Insurance Benefits Act to policies that were issued prior to the Act's effective date. In response, the Department sought declaratory relief holding that retroactive application of the Act was constitutional. On cross-motions for summary judgment, the circuit court entered judgment in favor of the Department. The Court of Appeals reversed, holding that the Act's requirements may only be applied to policies executed after the Act's effective date. The Court noted that the Act clearly imposes new and substantive requirements that affect the contractual relationship between insurer and insureds. Most notably, the Act shifts the burden of obtaining evidence of death and locating beneficiaries from the insured's beneficiaries and estate to the insurer. Although this may be a valid exercise of the state's regulatory authority, it is a substantive and not a remedial alteration of the contractual relationship between insurers and insureds. Consequently, the Act falls within the rule prohibiting retroactive application to contracts in effect prior to its effective date.

WORKERS' COMPENSATION

Basin Energy Co. v. Howard

[2013-CA-001725](#) 08/08/2014 447 S.W.3d 179

Opinion by Judge Jones; Judges Maze and Moore concurred. This appeal required the Court of Appeals to consider whether the Workers' Compensation Board erred when it sua sponte dismissed the subject action on the ground that both the Board and the Administrative Law Judge lacked subject-matter jurisdiction over a medical dispute where a prior dismissal order stated that the underlying claim was dismissed as settled "with prejudice." The Court held that the Board erred by raising the jurisdictional issue because the jurisdictional question in this instance involved particular-case jurisdiction, which is waived if not asserted at the trial level, as opposed to general subject-matter jurisdiction, which can never be waived.

Because the Workers' Compensation Act gives an ALJ the authority to rule on motions to reopen filed pursuant to KRS 342.125, the ALJ had general subject-matter jurisdiction over the medical dispute and reopening. The Court also held that the "with prejudice" language in the prior ALJ's order did not deprive the parties of their statutory right to reopen because the Form 110 was clear and unambiguous with respect to the fact that medicals were left open for a portion of the claimant's injuries and because the dismissal order referred to the Form 110. Thus, the "with prejudice" language could not bar a reopening otherwise proper under KRS 342.125.