

Kentucky Legal Cases of Note

December 12, 2007

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KY COURT OF APPEALS:

Workers Compensation: Evidence

[Case No. 2007-CA-000578](#)

Simpson v. Franklin Ins. Agency, Inc.

Rendered 9/21/07

Evidence: The ALJ may not disregard uncontradicted medical evidence. He may reject uncontradicted medical evidence, but only if he states a sufficient basis for doing so. The COA remanded for further findings as to why the ALJ rejected certain uncontradicted evidence, and affirmed where there was some evidence to support the ALJ’s findings. (From KY Cases)

Workers Compensation: Future Medical Treatment

[Case No. 2006-CA-002182](#)

Mullins v. Mike Catron Construction Co.

Rendered 9/28/07

The Court of Appeals held that an ALJ may refuse to grant future medical treatment in a case where he finds that no medical treatment is needed in the future. The COA distinguished recent Supreme Court case law in FEI Installation v. Williams which held that an ALJ may not refuse to grant future medical benefits even if there is no permanent impairment, where a work related injury has been proven. The COA also held that the claimant failed to object to the appointment of Dr. Goldman as a University Evaluator under KRS 342.315. The Supreme Court in Morrison v. Home Depot had held that Dr. Goldman was not qualified as a university evaluator because he was merely a contracted evaluator and not an actual employee of a University. (From KY Cases)

Workers Compensation: Black Lung

[Case No. 2006-CA-002628](#)

Lutz v. Energy Conversion Corp.

Rendered 9/28/07

The claimant, a life long coal miner, challenged the clear and convincing burden of proof to overcome the consensus of a panel of experts, who found that he did not suffer from pneumoconiosis. The Court of Appeals rejected the argument, holding that the statute reasonably classifies pneumoconiosis claims differently from traditional injury claims. Stumbo dissents, as she would hold that the statute denies equal protection to miners with this type of disease. (From KY Cases)

Workers Compensation: Black Lung and Equal Protection

[Case No. 2007-CA-000072](#)

Jameison v. Eagle Rod & Gun Club, Inc.

Rendered 11/9/07

Glenn Lutz petitions for the review of an opinion of the Workers’ Compensation Board (Board), entered affirming the decision of an administrative law judge (ALJ) dismissing Lutz’s workers’ compensation claim. His sole argument is that Kentucky Revised Statute (KRS) 342.316, which deals with pneumoconiosis disease, is unconstitutional because it violates his right to equal protection under the law. COA disagreed and thus affirmed. (From KY Cases)

Workers Compensation: Safety Violation

[Case No. 2007-CA-000789](#)

Wehr Constructors, Inc. v. Gibson

Rendered 10/12/07

The Court of Appeals reversed the Board holding that, where the claimant is alleging an intentional violation of the general 'safe workplace' requirement of OSHA, an egregious violation must be proven. Here, the claimant did not prove that a specific regulation was intentionally violated when a ladder leaned up against a building, without a tie-off, fell, but alleged that the employer failed to supply a safe workplace. The Court reversed the ALJ and the Workers' Compensation Board, holding that the violation of the general regulation must be 'egregious' before being found to be intentional. Finding an intentional safety violation on the part of the employer results in a 30% increase in income benefits for the claimant. (From KY Cases)

Workers Compensation: ALJ Review of Settlement Agreement, Subrogation and Tort Recovery Proceeds

[Case No. 2006-CA-001974](#)

Greene v. Paschall Truck Lines

Rendered 10/26/07

The ALJ's opinion dismissed claimant Greene's claim for permanent disability income benefits and granted partial future medical benefits for injuries arising from a work-related collision. The ALJ also declined to review, citing a lack of jurisdiction, an agreement reached between Greene and his former employer, Paschall Truck Lines pertaining to payment of a subrogation lien. A petition for reconsideration filed by Greene was summarily dismissed by the ALJ, and the WCB then affirmed the ALJ's decision in all respects and this appeal ensued. (From KY Cases)

Workers Compensation: Substantial Evidence

[Case No. 2006-CA-002045](#)

Mizaree v. United Parcel Service

Rendered 10/26/07

COA affirmed ALJ's dismissal of worker's claim for disability and medical benefits against his employer. A party challenging the ALJ's factual findings must do more than simply present evidence supporting a contrary conclusion to justify reversal. COA held the the evidence relied upon by the ALJ is evidence of substance that supports his opinion, and the Board was without the authority to conclude otherwise. (From KY Cases)

Torts: Expert Witnesses, Disclosures, Voir Dire, Loss of Chance

[Case No. 2006-CA-001241](#)

Dawson v. Jewish Hospital

Rendered 9/28/07

This medical negligence claim arose from alleged negligent post-surgery care by the hospital's nursing staff. A jury returned a verdict in favor of Jewish Hospital and this appeal followed in which the appellant alleges the trial court: (1) erroneously excluded relevant and competent evidence concerning Mr. Dawson's bedsores; (2) denied the Dawsons' counsel an adequate opportunity to voir dire the jury; and (3) failed to tender a loss-of-chance instruction to the jury. The Dawsons also appeal from a post-verdict order requiring them to pay Jewish Hospital's expert witness fees. The appeals were consolidated. Finding no reversible error, the COA affirmed. (From KY Cases)

Torts: Medical Negligence

[Case No. 2006-CA-001277](#)

Jenkins v. Best, M.D.

Rendered 9/28/07

CA affirms in part and reverses and remands in part these related appeals from the TC summary judgments for Best and University Obstetrical and Gynecological Associates ("University Associates") in this medical malpractice case. (Jefferson Cir. Ct., Hon. Judith E. McDonald-Burkman, judge, presiding).

CA holds that Dr. Farmer and Baptist Hospital have no standing to challenge the summary judgments in favor of their former co-defendants. Also, as to Jenkins' appeal, CA affirms summary judgment for Dr. Best and reverses and remands summary judgment for University Associates. (From KY Cases)

Torts: Medical Negligence and Expert Witnesses

[Case No. 2005-CA-001334](#)

Nalley v. Banis, M.D.

Rendered 11/9/07

COA affirmed summary judgment dismissing medical negligence claims filed against physician.

Dr. Banis performed elective chin implant and brow lift procedures on Mrs. Nalley at Norton Hospital. Several days later, she developed a staphylococcus infection near her chin implant, requiring Dr. Banis to remove the implant. Thereafter, Mrs. Nalley and her husband filed their complaint in the circuit court.

Despite the general rule that expert testimony is necessary in most medical malpractice cases, the Nalleys premised their entire case on the exceptions to this general rule and maintain that expert testimony is not needed to meet their burden. (From KY Cases)

Torts: Medical Negligence, Experts, and Summary Judgment

[Case No. 2006-CA-001612](#)

Collier v. Caritas Health Services, Inc.

Rendered 11/9/07

In a medical negligence case, the trial court must first determine if experts are required to prove negligence, and then the plaintiff must be given a reasonable time to disclose those experts. In this case, the trial court properly concluded experts were needed but failed to give the plaintiffs sufficient time to produce the experts and thus vacated the summary judgment dismissing the claim since it was used a discovery sanction.

COA vacated summary judgment dismissing Horace Collier's medical negligence claim and remanded for further proceedings. (From KY Cases)

Torts: Punitive Damages

[Case No. 2006-CA-001566](#)

Gersh v. Bowman

Rendered 10/5/07

CA affirms judgment against driver in this single vehicle MVA case. CA holds that defendant's conduct rose to the level of gross negligence warranting a punitive damage instruction and that appellant failed to preserve an objection to the pain and suffering instruction. (From KY Cases)

Torts: Sudden Emergency

[Case No. 2006-CA-001692](#)

Henson v. Klein

Rendered 10/5/07

Henson appeals judgment entered in Klein's favor following a jury trial on her personal injury claim stemming from a jet ski accident, arguing that the TC erred by permitting a sudden emergency instruction and for failing to instruct the jury that she had the right-of-way at the time of her watercraft's impact with another one being driven by her then boyfriend while at Lake Cumberland. Not surprisingly, the parties' testimony on the events leading up to the collision were at odds, with Klein testifying that while trailing behind and to the left of Henson's jet ski, she suddenly looked over her shoulder and him and yelled his name and veered 90 degrees to the left directly into his path. In response, Klein attempted to veer left but could not avoid hitting Henson. The testimony of an eyewitness substantially supported Klein's testimony, and importantly confirmed that Klein leaned his body and turn his jet ski promptly to the left in an attempt to avoid the collision. Following the defense verdict, Henson moved for a new trial on the argument that there was no sudden emergency since Klein had failed to exercise ordinary care by following her too closely, which was denied and led to this appeal. (From KY Cases)

Torts: Instructions, Duty of Minor, Spoliation of Evidence

Case No. 2006-CA-001871

Hays v. Alia

Rendered 10/19/07

Seven-year-old Katie visited her grandparents in Louisville. She left their home to walk down the street to meet a neighbor. En route and unsupervised by anyone, Katie met an unknown neighbor girl and began jumping with her on her family's trampoline. Katie suffered a significant leg break requiring surgeries and resulting in differing leg lengths.

CA upholds denial of directed verdict for plaintiff on liability because there was sufficient evidence on the issue, including Katie's grandparents' supervision, to present a question for the jury. Denial of directed verdict for plaintiff on her contributory fault is moot because the jury found in her favor on this question. Finally, the denial of a jury instruction on spoliation of evidence (destruction of the trampoline) was not improper as the destruction was considered a subsequent remedial measure. (From KY Cases)

Torts: Duty and Foreseeability

Case No. 2006-CA-001641

Lee v. Farmers Rural Elective Cooperative Corp.

Rendered 10/19/07

Lee appeals TC's entry of summary judgment for Farmers RECC in her wrongful death action stemming from an accident in which her husband's low flying plane struck an unmarked power line 1/4-inch in diameter and stretching 870 feet across the channel of Nolin Lake at a height of 85 feet. FRECC argued that it was under no statutory or common duty to mark this particular power line, and the TC agreed.

On appeal, Lee continued to argue that, at a minimum, FRECC had a common law duty to mark the power line considering that the supporting structures on either side of the lake were concealed by trees and vegetation, that FRECC knew that aircraft frequently flew at a low height over the lake, and the fact that there had been a prior accident involving another unmarked line over Nolin Lake. Thus, Lee maintained that her husband's accident was foreseeable to FRECC. In response, FRECC maintained its position on a lack of duty and contended that the decedent's violation of FAA regulations was the proximate cause of his death.

On review, the COA began by noting that in Kentucky a person only owes a duty to exercise ordinary care in those situations where an injury is foreseeable, and that foreseeability is to be determined by reviewing the facts as they reasonably appeared to the party being charged with negligence, not as they appear in hindsight. To demonstrate foreseeability, the claiming party

need not demonstrate that the defendant should have been able to anticipate the precise injury sustained or the manner in which it was sustained. Rather, the party only needs to show that an injury of some kind to some person could have been foreseen under the circumstances. (From KY Cases)

KY SUPREME COURT:

Torts: Medial Negligence

[Case No. 2005-SC-000414-DG](#)

Witten, M.D. v. Bonnie Pack, Administratrix

Rendered 11/1/07

The Court of Appeals held that Dr. Witten, an orthopedic surgeon, was negligent as a matter of law for slipping in the operating room while holding a patient's leg. On appeal Appellants argued that setting aside the verdict was improper because Dr. Witten was not negligent as a matter of law. The SC disagreed with the COA that Dr. Witten's testimony constituted a judicial admission of negligence, and ruled that it was for the jury to decide whether Dr. Witten was negligent. Therefore, they concluded that the COA erred in holding that Dr. Witten was negligent as a matter of law, and that the TC correctly denied Appellee's directed verdict motion. (From KY Cases)

Workers Compensation: Reopening

[Case No. 2006-SC-000885-WC](#)

Russelville Warehousing v. Basham

Rendered 11/1/07

Reopening was denied on the grounds of mistake or newly discovered evidence where autopsy showed a non-work related cause of the claimant's condition, but the ALJ's original decision in the claimant's favor, while he was alive was not appealed. (From KY Cases)

Workers Compensation: Statute of Limitations and Cumulative Trauma

[Case No. 2007-SC-000051-WC](#)

University of Kentucky Family Practice v. Leach

Rendered 11/1/07

The Supreme Court affirmed an award of medical benefits based on cumulative trauma, which occurred over a several year period, finding that the last two years of cumulative trauma was sufficient to exacerbate the time-barred cumulative trauma. (From KY Cases)

Workers Compensation: Tolling of Statute of Limitations and Preservation of Issues

[Case No. 2006-SC-000884-WC](#)

Shelby Motor Co., Inc. v. Quire

Rendered 11/1/07

The Supreme Court held that the claimant's counsel failed to argue in his brief that the statute of limitations on a previous injury was tolled by payment of TTD on a subsequent injury to the same body part, thus abandoning that argument. (From KY Cases)