Kentucky Legal Cases of Note
March 16, 2007

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KY COURT OF APPEALS:

Statute of Limitations: (Accrual)

Case NO. 2005-CA-002448-MR
Bulk Terminals, Inc. v. ALCOA, et al
Rendered 3/9/07
Between 1970 and 1980, Bulk Terminals leased a parcel of land to Liquid Waste Disposal, which was in the business of receiving waste or byproduct chemicals which were then either redistilled or incinerated. Soil contamination was later found and remediated by the federal EPA.
In 1995, a contractor who was installing a water line notified Bulk Terminals' owner of a suspicious odor on a portion of the property previously occupied by Liquid Waste. Investigation showed groundwater contamination.
In February 2003, Bulk Terminals filed an action alleging, under theories of negligence and nuisance, that the appellees were responsible for the groundwater contamination at the site. After conducting discovery related to the statute of limitations issue, the appellees filed a motion for summary judgment. The Jefferson Circuit Court granted the motion, and Bulk Terminals appealed.
Bulk Terminals argued that under the discovery rule, its cause of action did not accrue until July 1998 when it first knew or should have known that damage had occurred. It asserts that only at this point did the Cabinet and its environmental consultants complete their testing and inform Bulk Terminals that the property was damaged and that remediation would be required.
The COA ruled that under the discovery rule, the statute of limitations begins to run once a party knows or, in the exercise of due diligence, should know of his injury and its cause. In this case, the injury involved the contamination of groundwater which stemmed from soil contamination which occurred more than twenty years preceding the filing of the complaint. The Jefferson Circuit Court correctly held that approximately six years prior to the filing of the complaint, appellant Bulk Terminals, Inc. took actions which indicated sufficient knowledge of both of the injury and its cause to trigger the running of the applicable five-year statute of limitations. The COA therefore affirmed the court's summary judgment dismissing the complaint as untimely.

Insurance: UIM coverage and replacement vehicle

Case No. 2005-CA-002580 -MR
Estate of Tony Turner v. Globe Indemnity Co.
Rendered March 2, 2007
Normally, Turner (a local newscaster) would use a company car on assignments, but on this day he chose not to for his own convenience. While in his own car, he was killed in a car accident. He recovered all the liability insurance plus all of his own underinsured motorist benefits (UIM). However, he tried to implicate the coverage on the company's policy claiming he was using a replacement vehicle. The policy provisions were examined closely for coverage. In order for the UIM on the company care o be implicated, the COA held the party must be operating a covered vehicle or a temporary substitute for covered vehicle. The substitute must be out of service

because of its breakdown, repair, servicing, loss or destruction. Evidence showed that there were serviceable fleet vehicles available to Turner, but that he chose to drive his own vehicle for his own convenience.

Insurance: UIM; Insurance carrier identification at trial

Case No. 2006-CA-000337-MR
Stinson v. Mattingly
Rendered March 2, 2007
The COA reversed and remanded this auto case for new trial, holding that the UIM carrier should have been identified to the jury as a party.
Plaintiff-appellee sued defendant-appellant in auto wreck; appellant-defendant counterclaimed and brought third-party complaints against plaintiff-appellee's employer, in tort, and against his own insurer, KFB, for UIM coverage. Prior to trial, plaintiff-appellee successfully moved to exclude any reference to insurance. Defendant-appellant contends this violates Earle v. Cobb. The question at bar, however, is whether the same rule requiring the identification of the defendant UIM carrier applies when, as in this case, there has been no settlement with the alleged tortfeasor, who thus remains a principal party to the plaintiff's suit. If the UIM carrier participates at trial, Kentucky law is clear that the carrier must be identified. However, KFB did not participate here.
The COA held that, although there was no Coots settlement here, the lack of settlement meant only that the tortfeasor remained potentially liable to Stinson along with KFB. KFB was no less a party than the UIM carrier in Earle. KFB was a bona fide real party in interest and under Earle the TC erred by failing to allow the jury to hear that the UIM carrier was a party. Reversal is required to ensure that our court system is not tainted by "deception" or "subterfuge."

Torts: Dram Shop; Apportionment of fault; punitive damages

Case No. 2005-CA-001006-MR
Jackson v. Tullar
Rendered March 2, 2007
The COA reversed and remanded judgment due to error in the apportionment of fault and the award of punitive damages.
Jackson was an injured passenger in an alcohol-related single vehicle MVA where Duncan was the driver. The parties went to several bars that night; their last party stop was the Ginger & Pickles nightclub where they were served a "pickle bowl," a concoction of pure grain alcohol and Kool-Aid. Jackson ultimately sued bar owners, shareholders, and her carrier. The case went to trial against the driver, the last bar to serve him, and the bar's owner. The jury was instructed on a 4-way apportionment of fault among the plaintiff, the driver, the second-to-the-last bar to serve them and the last bar to serve them. The jury assessed fault as follows: 10% to plaintiff; 20 % to driver; and 35% to bar. The jury awarded compensatory damages of $1,600,000. The jury then found the driver, the last bar and the last bar's owner to be grossly negligent, but only assessed punitives against the last bar ($350,000) and its owner ($150,000). On appeal, all parties challenge the apportionment of fault.
In DeStock #14, Inc. v. Logsdon, 993 S.W.2d 952 (Ky. 1999), the Kentucky Supreme Court examined the language of KRS 413.241, commonly referred to as the Dram Shop Act, and concluded that liability may be imposed upon a dram shop despite the statute's express declaration that a dram shop's actions cannot, as a matter of law, be considered the proximate cause of any injury inflicted by an intoxicated person. This means the tortfeasor remains primarily liable while the dram shop is secondarily liable. Also, the dram shop and the tortfeasor are not concurrently negligent, but instead have committed two separate and independently

tortuous acts. Because of these distinctions, the apportionment is improper. The instruction should have required the jury to apportion fault between just the driver and the passenger. Then, only after the jury found the driver to have some percentage of fault, should the jury have determined whether the elements of the Dram Shop Act were satisfied such that either or both dram shops could be held secondarily liable. Because it is now impossible to know how the jury might have apportioned under this instruction, the case must be reversed and remanded for a new trial.
Both parties also appeal the award of punitive damages. The COA concludef that punitives cannot be recovered in a dram shop action.

Damages: Zero pain and suffering verdict

Case No. 2005-CA-002606-MR
Rippetoe v. Feese
Rendered March 2, 2007
This was a rear end car accident in which fault but not damages were stipulated. The jury awarded nothing for pain and suffering, and the COA affirmed the trial court's denial of a new trial as there was evidence of pre-existing conditions etc.
COA held no error to award zero damages when evidence exists that injuries result from cause other than motor vehicle accident. Also, no error in allowing expert testimony when expert was listed by Plaintiff as possible expert, Plaintiff never objected to deposition notice, and deadlines were moved due to continuances.
The COA did note in a footnote the issue on whether or not treating physicians were expert witnesses for CR 26.02 disclosures had not been addressed in Kentucky.

Inuurance: PIP No-fault estoppel

Case No. 2005-CA-001199-MR
Stephenson v. American Family Mutual Ins. Co.
Rendered March 2, 2007
Stephenson was an IN resident involved in an auto accident in KY in November 1998. Stephenson was insured by American Family, a Wisconsin company licensed to do business in IN but not KY. Stephenson retained KY counsel who contacted American Family to inquire whether it would provide no-fault benefits to her, which was affirmed in February 1999. From that time to March 2003, American Family paid $1,255 of Stephenson's medical expenses pursuant to this agreement before it suddenly refused to pay another $130 medical bill and advised her attorney that since it was not licensed to do business in KY, it did not owe Stephenson any no-fault benefits under KY law. Stephenson then filed this lawsuit claiming that American Family was estopped from denying payment for the additional no-fault benefits, and also made a claim against the KY Assigned Claims Bureau that went to State Farm. The TC granted Summary Judgment to both Defendants, and Stephenson appealed.
The COA started by noting the well-established rule that out-of-state insurance companies that are not licensed to do business in KY are not required to comply with KY no-fault insurance requirements for insureds who are not KY residents. See State Farm Ins. Co. v. Tennessee Farmers Mut. Ins. Co., 785 S.W.2d 520 (Ky. App. 1990). American Family argued that this case alone dictates judgment being entered in its favor. The COA, however, felt that Stephenson could rightfully invoke promissory estoppel in this case since she reasonably relied on American Family's initial statement that it would pay no-fault benefits and materially changed her position in reliance on that statement (that being her forgoing making a claim through the Unassigned Claims Plan). The COA thereby concluded American Family was estopped from denying no-fault benefits to Stephenson, and vacated the TC's entry of Summary Judgment in its favor while affirming same in favor of State Farm.

KY SUPREME COURT:

Products Liability (Privity)

Case No. 2005-SC-0228-DG
Compex International Co., Ltd. v. Taylor
Rendered 1/25/07
This appeal involves a products liability claim for the alleged breach of an implied warranty of merchantability.
The circuit court granted a motion to dismiss the implied warranty claim against Appellant, Compex International Company, Ltd., after concluding that the parties lacked privity of contract. That portion of the circuit court's judgment was reversed by the Court of Appeals, which held that the implied warranty claim was permissible under KRS 355.2-318, a statute in Kentucky's version of the Uniform Commercial Code (UCC) which extends liability under an implied warranty to the family members and household guests of a product's buyers.
The appellees contended that the Court of Appeals was correct to remand the case and argue that their implied warranty claim against Compex is viable, despite a lack of contractual privity.
SCOKY disagreed and reversed the decision of the Court of Appeals.

Exculpatory clauses in contract

Case No.'s 2000-SC-000951-DG and 2004-SC-001121-DG
Cumberland Valley Contractors, Inc. v. Del Rio
Rendered 1/25/07
As a general rule, a party cannot contract away liability for damages caused by that party's failure to comply with a duty imposed by a safety statute.
This case presents the question of whether this general rule applies to void a liability-shifting clause in a contract between parties to a coal mining agreement where one side claims economic damages resulting from the other's failure to comply with statutory mine-mapping duties presumably imposed to further mine safety.
SCOKY found that the clause was clearly written as part of an arm's-length transaction between two sophisticated parties who actually shared the statutory mapping duties . Since there was no apparent gross imbalance of bargaining power, SCOKY saw no reason to invalidate the exculpatory clause, which clearly bars the claims of Cumberland Valley Contractors, Inc ., and its assignee, Del Rio, Inc. and reversed the Court of Appeals.

Workers Compensation

Case No. 2006-SC-0261-WC
FEI Installation, Inc. v. Williams
Rendered 2/22/07
In a case where the Administrative Law Judge determined that there was no permanent disability under the A.M.A. Guides, the Supreme Court held that nevertheless the Defendant/Employer is required to cover future medical treatment for that injury indefinitely, subject to the employer's right to re-open to contest medical expenses. Further, the Supreme Court held that the claimant

was entitled to TTD for a period of time prior to surgery, where he was not able to perform his usual work.

Case No. 2006-SC-0186-WC
Bullock v. Goodwill Coal Co.
Rendered 2/22/07
The Supreme Court reversed the Court of Appeals holding that an appeal from the ALJ's decision was precluded by a failure to file a Petition for Reconsideration. The ALJ overlooked a University Evaluation which carries a rebuttable presumption that it is correct. While he failed to follow that evidence and failed to discuss it at all, no one pointed out the mistake to the ALJ. While the Court of Appeals held that this was fatal to the appeal, the Supreme Court held that it was not necessary because it would require a reconsideration of the merits, and the failure to file it was not fatal. It is probably always wise to file a Petition for Reconsideration. However, whether it is necessary or not is often unclear.

INSURANCE: (PIP)

Case No. NO. 2005-SC-000555-DG
Schmidt v. Leppert and Nationwide Mutual Ins. Co.
Rendered 2/22/07
The Supreme Court of Kentucky affirms the Jefferson Circuit Court decision that the negligent driver is personally liable for basic reparation benefits (BRB) as he is not a "secured person" under Kentucky's Motor Vehicle Reparations Act (MVRA). The tortfeasor's out-of-state auto liability policy, sold by American Family Insurance Company, did not provide coverage for BRB.
Kentucky's MVRA provides that a carrier providing BRB is subrogated against anyone but a "secured person." A "secured person" is the owner, operator or occupant of a "secured motor vehicle," legally responsible for the tort. Although "secured motor vehicle" is not defined, "security" is defined to include BRB. Thus, in order to have "security" on a motor vehicle, an insured's policy must include BRB. In fact, the S.Ct. recently held that BRB reimbursement is only available from the secured person's reparation obligor, not directly from the secured person. City of Louisville v. State Farm, 194 S.W.3d 304 (Ky. 2006).
In its opinion, the SC notes that it may come as a surprise to out-of-state "insured" tortfeasors that they are not covered for this loss, but it is likely not a surprise to their insurance companies.