

Kentucky Legal Cases of Note

June 19, 2007

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KY COURT OF APPEALS:

Vicarious liability (respondeat superior and scope of employment)

[Case No. 2005-CA-000114](#)

Easterling v. Man-O-War Automotive, Inc.

Rendered 4/20/07

This case arose from a one-car accident. The passenger Easterling sued Tudor and his employer Man-O-War successfully obtained a dismissal at summary judgment who defended on the grounds that since Tudor was not acting within the scope of his employment at the time of the accident, the theory of respondeat superior liability was inapplicable. Tudor was a sales manager at Man-O-War who was given concert tickets by the owner and was driver a "demonstrator vehicle" when he was traveling from the concert with Easterling and another person as a passenger when the accident occurred.

To hold an employer vicariously liable for the actions of an employee, the doctrine of respondeat superior requires a showing that the employee's actions were in the course and scope of his employment and in furtherance of the employer's business. As was noted in *Sharp v. Faulkner*, 166 S.W.2d 62, 63 (Ky. 1942), the respondeat superior doctrine has no application when an employee engages on a "personal and private trip" which has "no connection with his masters' business."

The COA could not perceive how giving someone concert tickets meets the necessary "foreseeability test" required in Kentucky to create causation for a subsequent automobile accident. See *Lewis v. B&R Corp.*, 56 S.W.3d 432 (Ky. App. 2001) and held that at the time of the collision, Tudor was engaged in a purely personal activity, and was not in any manner acting within the scope and course of his employment. (From KY Cases)

Statute of Limitations – Medical Negligence

[Case No. 2005-CA-002355-MR and No. 2005-CA-002517-MR](#)

GMRIK, Inc. F/K/A General Mills Restaurants, Inc. v. Emberton

Rendered 4/20/07

GMRI appeals judgment entered by Warren Circuit Court following a jury trial awarding Appellee \$233,666.05 for him having contracted hepatitis A from dining at Appellant's Red Lobster restaurant. Appellant argued that the 1-year statute of limitations had expired prior to Appellee filing suit while Appellee countered that suit was timely filed pursuant to the discovery rule.

The relevant timeline was that Appellee had eaten at the restaurant on 7/28/01 and was hospitalized on 8/30/01. Prior to his release on 9/05/01, Appellee was given the diagnosis following which the health department investigated the matter to determine the source. Appellee never followed up with the department to see if the source had been identified and admittedly never attempted to conduct his own independent investigation. The record reflects that Appellee did not suspect Red Lobster as the source until his attorney visited him in May 2004 about the

condition (the attorney was representing other people who had also contracted the condition at Red Lobster).

The COA began by noting the legal history of the discovery rule, and that it applied to tort actions for injury from latent disease caused by exposure to a harmful substance. However, the COA agreed with GMRI that hepatitis A cannot be considered a latent disease since Appellee knew of his disease only a month after eating at the restaurant. The COA also notes Appellee's duty to reasonably investigate the source once he was given the diagnosis, and found a complete failure to do so even when the health department was offering him aid in this regard. At worst, the COA held that suit should have been filed within 1 year of the date of diagnosis since the time begins to run once the occurrence of an injury is known even if the source is not yet known. (From KY Cases)

Workers Comp 3X Multiplier

[Case No. 2006-CA-001417](#)

Square D Company v. Miller

Rendered 5/4/07

The claimant underwent a back surgery as a result of an injury at work, and returned to his job with some modifications of his work. He also did not perform the same amount of overtime as previously, resulting in lower average pay than before his injury. He argued that he was entitled to the triple multiplier because he was unable to return to the type of work he was performing at the time of his injury. The ALJ had decided that he could return to the same job, and was not entitled to the triple multiplier. However, on appeal to the Workers' Compensation Board, the ALJ's decision was reversed in order to determine if the claimant was able to return to the same tasks post-injury as he performed at the time of the injury. The Court of Appeals reversed relying on *Lowes #0507 v. Greathouse*, 182 SW3d 524 where the triple multiplier was denied because the claimant could return to a primary job, but not a secondary job, because of an injury. The Court here considered the overtime a secondary job, and holding that being unable to return to the overtime did not entitle him to the triple multiplier regarding the regular forty hour week. What is unclear in this decision is whether the claimant had any physical restrictions from a doctor which limited his ability to perform the work. Probably, that is what the Board had remanded in order to clarify. (From KY Cases)

Premises Liability and the "Implied Invitee"

[Case No. 2006-CA-001100](#)

Hack v. Baker

Rendered 5/18/07

CA reverses and remands TC entry of SJ for defendants in this trip-and-fall case. Appellees Baker moved into a new home in June across the street from Appellant Hack. Appellees Insight and G&C installed video cable at the Baker's home, failing to bury the coaxial cable and leaving it laying on the ground at the Baker residence. The Bakers placed three separate calls to Insight to remedy the hazard, but Insight failed to do so.

The neighbors were cordial and the Hacks visited with the Bakers in their home several times by invitation. Appellant Hack also testified that the custom in the neighborhood was for families to frequently traversed other families' yards while playing and socializing. (The parties live on a cul-de-sac with no sidewalks). Appellant Hack tripped on the cable, shattering his right arm, while playing in a yard adjacent to the Bakers and running through the Bakers' nearby yard; the Bakers were not present.

Hack sued the Bakers and Insight; the Bakers and Insight claimed he was a trespasser to whom they owed no duty; Hack argued he was an "implied invitee" (licensee), and Appellees owed him

a duty to exercise reasonable care under the circumstances, which they failed to do. The TC agreed that Hack was a trespasser and granted SJ to the Bakers, also holding that Insight stood in the shoes of the Bakers on liability.

CA holds that the facts as Hack has alleged them create a genuine issue of material fact as to whether Hack was a trespasser or licensee. "The custom of the neighborhood of brief entry onto each other's yards coupled with the Bakers' failure to voice objection creates a genuine issue of their acquiescence to such conduct. This Court cannot say that Hack was a trespasser as a matter of law." The CA also holds that a genuine issue of material fact exists as to whether the cable's location constituted an unsafe condition on the premises which created an unreasonable risk of danger to those living in the neighborhood. (From KY Cases)

Premises Liability - Business invitee - landlord liability

[Case No. 2006-CA-000429](#)

Bugg v. American Legion, Anderson Post No. 34

Rendered 5/25/07

CA affirms grant of directed verdict for appellee in this unusual premise liability case. Appellant was injured when a fellow patron of a horse show - under the influence of marijuana, cocaine and alcohol - was arrested and his concealed weapon accidentally discharged, hitting appellant. CA holds that appellant failed to show that appellee or its agents failed to act or provide sufficient security, once it became aware of the other patron's inebriated and belligerent state. (From KY Cases)

Dram Shop Apportionment and Punitives

[Case No. 2005-CA-001006](#)

Jackson v. Tullar

Rendered 6/1/07

The CA affirms as to the amount of compensatory damages and reverses as to the punitive damage award. The case is remanded for a new trial on the issue of apportionment of liability between the parties.

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 between 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 tortious 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. CA concludes that punitives cannot be recovered in a dram shop action. (From KY Cases)

Qualified Privilege in Defamation

[Case No. 2006-CA-000395](#)

Ashland Hospital Corp. v. Slusher

Rendered 6/1/07

The dispositive issues in this appeal are whether appellants, King's Daughters Medical Center and its chief financial officer, Paul McDowell, were entitled to judgment as a matter of law on Dr. Mary Beth Calor's claims of defamation and tortious interference with contractual relations which she based upon communications appellants made to Staff Care, Inc. concerning her billing practices. A jury trial resulted in an award to Dr. Calor in the amount of \$175,000.00 for emotional and mental distress, \$59,050.00 in lost wages, and \$300,000.00 in punitive damages.

Because there is no dispute as to the nature of the appellants' statements or the context in which they were communicated to Staff Care, appellants were entitled to application of a qualified privilege as a matter of law on the defamation claim and a verdict in their favor on the tortious interference claim. The judgment must therefore be reversed.

In December 2001, the quality assurance department at Staff Care became concerned about the number of hours Dr. Calor was claiming. Michelle VonLuckner, who was Staff Care's scheduling consultant for Dr. Calor, initially contacted Dr. Calor's husband, who was also her business manager, concerning the accuracy of the hours claimed. He assured Ms. VonLuckner that the hours claimed were accurate.

Nevertheless, Staff Care's concerns over the number of hours Dr. Calor was claiming continued, based primarily on the fact that they were paying "outrageous malpractice premiums" due to the extraordinary amount of actual patient contact she was claiming on the form with Staff Care "red-flagging" many of her bills as involving a questionable number of hours.

Dr. Calor was terminated by the hospital after she refused to meet with their CFO without her business manager-husband being present. The Hospital CFO (McDowell) then contacted notified Staff Care Dr. Calor had been based upon suspicion that she had been over-billing and that the hospital was investigating her billing records.

As to the defamation claim, the COA was convinced that upon the undisputed facts of this case appellants were protected by a qualified privilege in reporting the results of their investigation into Dr. Calor's billable hours to Staff Care. Under the "common interest" theory, as explained by the Supreme Court of Kentucky in *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 796 (Ky. 2004), appellants clearly had the right, if not the duty, to investigate and convey their concerns about Dr. Calor's billing to Staff Care which had a corresponding interest in the accuracy of her hours. The Court in *Stringer* also provides guidance as to the conditional nature of qualified privileges and the circumstances under which the right to claim the privilege may be lost. The condition attached to all such qualified privileges is that they must be exercised in a reasonable manner and for a proper purpose. The immunity is forfeited if the defendant steps outside the scope of the privilege, or abuses the occasion. The qualified privilege does not extend

to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection.

COA found there is no question that King's Daughters' communications to Staff Care concerning its investigation into Dr. Calor's hours fall squarely within the Stringer rationale.

Based upon these factors, appellants were entitled to judgment on Dr. Calor's defamation claims as a matter of law. We are thus convinced that the trial court erred in allowing either the defamation claim or the tortious interference claim to be resolved by a jury. Accordingly, the judgment in her favor is reversed and the case remanded for entry of an order dismissing those claims. (From KY Cases)

KY SUPREME COURT:

None