Kentucky Legal Cases of Note
August 21, 2007

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KY COURT OF APPEALS:

Premises Liability to Contractor
Case No. 2006-CA-000916
Pennington v. MeadWestvaco Corp.
Rendered 6/15/07
This is a premises liability tort case which attempts to use the Kentucky Occupational Health and Safety guidelines to hold a premises owner liable to third party invitees, in this case Pennington, who was an employee of a contractor performing repairs at MeadWestvaco. The Court held that MeadWestvaco was not Pennington's employer, and therefore OSHA standards did not apply to its duties to Pennington. The Court upheld the trial Court's dismissal on summary judgment because Pennington was warned of the danger on MeadWestvaco's premises. (From KY Cases)

FELA Foreseeability, Experts, Damages, Tax Consequences
Case No. 2005-CA-001494
CSX Transportation, Inc. v. Moody
Rendered 7/13/07
CA affirms in part and vacates in part the $2.74 million jury verdict in favor of plaintiff-appellee in this Federal Employer's Liability Act (FELA) toxic exposure case. The CA vacates only $200,000 speculatively awarded for future medicals in this thorough and succinctly-written opinion.

Plaintiff-appellee was exposed to solvents between 1978 and 1982 and suffered a permanent psychiatric neurological injury. A jury awarded him future medicals of $200,000; impairment of earning capacity $540,000; past pain & suffering $1 million and future pain & suffering $1 million. CSX appealed on issues of foreseeability; jury instructions; Daubert; causation; admission of evidence; and damage calculations.

CA held that ample evidence supported foreseeability under FELA and that the general negligence instruction given was not error. CA also found no error in admitting evidence of prior claims of solvent exposure by other employees as they occurred under "substantially similar" conditions. CA held, however, that plaintiff-appellee failed to present evidence upon which future medicals could be accurately calculated and that, therefore, the jury's award was speculative and must be vacated. Future lost wages, however, were awarded within the jury's ability to make its own determination. CA also held that the TC should have instructed the jury that lost wages are not taxable, but that, since the defendant failed to present evidence from which the jury could appropriately reduce the award, the failure was harmless error. Also, no error for failure to instruct jury to reduce the award to present value. (From KY Cases)

Workers Comp Subrogation and UIM Benefits
Case No. 2003-CA-000129
G & J Pepsi-Cola Bottlers v. Fletcher
Rendered 7/13/07

In this case, the COA held that a workers compensation carrier has no subrogation claim against the claimant's underinsured motorist benefits.

The single question in this appeal is whether the Circuit Court erred in summarily dismissing the subrogation claim of appellant, G&J Pepsi-Cola Bottlers, Inc., for workers' compensation benefits paid to appellee, Nicholas Fletcher. This appeal was held in abeyance pending resolution by the Supreme Court of Kentucky of the issues advanced in Cincinnati Insurance Company v. Samples, 192 S.W.3d 311 (Ky. 2006). Having fully considered those supplemental briefs, the original briefs filed in this appeal, and the record, the COA affirmed the circuit court dismissal.

Fletcher was seriously injured in a car accident and received workers compensation benefits. Fletcher sued Urmson, the at fault driver, and Ohio Casualty, his personal automobile insurance carrier, for underinsured motorist's ("UIM") benefits. Fletcher subsequently amended his complaint to add a UIM claim against United States Fire Insurance Company ("US Fire"), the insurer of his employer G&J's fleet of vehicles. Finally, G&J intervened to assert a $370,000.00 subrogation claim for workers' compensation benefits paid to Fletcher as a result of the same automobile accident.

The primary issue became whether G&J could assert a subrogation claim against the benefits Fletcher was seeking from US Fire and Ohio Casualty. COA answered no.

Relying upon the language of KRS 342.700(1) and the rationale set out in State Farm Mutual Insurance Company v. Fireman's Fund American Insurance Company, 550 S.W.2d 554 (Ky. 1977), the circuit court concluded that the employer's statutory subrogation rights extend only to recovery of benefits paid "from the other person in whom legal liability for damages exists" in other words, the tortfeasor.

Applying the holding in State Farm, the trial court noted that the payment of benefits by a UIM carrier is the performance of a contractual obligation, not the payment of damages by the person in whom legal liability rests. Thus, the trial court granted the motion for summary judgment because it found no case or statute which would permit G&J to assert its subrogation claim against the amounts paid under the two separately purchased UIM policies.

The COA first prefaced it discussion of the merits of G&J's appeal with a reiteration of the the analysis set out in State Farm v. Firemen's Fund concerning the nature of UIM benefits and the genesis of an employer's subrogation rights. The following analysis was from that earlier UM decision, and since the appellate courts analyze UIM and UM similarly, the Judge Knopf's analysis is addressed (as it incorporates the analysis from Justice Palmore):
KRS 342.055 [now KRS 342.700(1)], the subrogation statute, provides that "the other person in whom legal liability for damages exists" quite clearly refers to the third-party tortfeasor who is liable at common law. A payment made in performance of a contractual obligation is not a payment of "damages." Hence the liability of an insurance company under its uninsured motorist coverage cannot be the "legal liability for damages" mentioned in KRS 342.055.

Moreover, the satisfaction of an injured party's claim by his own insurance company under its uninsured motorist coverage does not inure to the benefit of the uninsured motorist. His liability is not extinguished, and it may be enforced by both the carrier which has paid workmen's compensation benefits and the carrier which has paid under the uninsured motorist coverage.

To hold that the contractual rights of an insured party under the uninsured motorist clause of an automobile liability insurance policy must inure to the benefit of a workmen's compensation carrier to the extent of compensation paid or payable to him would confer upon the

compensation carrier an additional right which it does not have under the subrogation statute. The injured party, or the person under whose insurance policy he is defined as an "insured," has no obligation to his employer's compensation carrier to carry any automobile liability insurance or underinsured motorist benefits whatever.

In the absence, therefore, of a statute or agreement to the contrary, what can be the source of the compensation carrier's right to have the benefits of such insurance? The answer, we think, is that there is none.
Judge Knopf also emphasized that this result does not deprive the employer of its subrogation rights; it can still look to the tortfeasor as provided for in KRS 342.700(1).

The import of that distinction is that KRS 342.700 operates as "a limitation on the rights of the worker that is attendant to his right to collect workers' compensation benefits" and is not a defense personal to the tortfeasor.

The purpose and intent of the uninsured and underinsured motorist statute is to treat the insured victim as if the tortfeasor is insured. Hence, the UM and UIM carrier stands in the wrongdoer's shoes for purposes of paying damages.
KRS 304.39-320(2) requires "every insurer" to make available upon request UIM coverage to pay "for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident **because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon** . . . ."

In other words, the UIM carrier is liable only for damages for which the insured would have been compensated but for the fact that the tortfeasor was underinsured. It follows that if the underinsured tortfeasor could not be held liable for an item of damages, that item is not "uncompensated damages" payable by the UIM carrier.

The UIM carrier is liable for damages only to the extent to which the underinsured tortfeasor is or could have been held liable.

Thus, it is clear that the holding in Samples is directed to the question of what damages an injured employee may recover from his own or his employer's UIM carrier; it neither addresses nor changes the law regarding an employer's subrogation rights as set out in State Farm v. Fireman's Fund.

The COA noted that while Samples makes clear that the UIM carrier's liability is measured by the liability of the tortfeasor, it does not follow that payments made under a UIM contract are the payment of legal damages in the traditional sense. While the UIM carriers may stand in the shoes of the tortfeasor for the sole purpose of making the injured party whole, the UIM contract does not provide an additional right of subrogation not provided for in KRS 342.700(1).

Because the COA concluded that as a matter of law G&J is not entitled to subrogation against the UIM carriers, there was no error in failing to conduct an evidentiary hearing to resolve a factual question. (From KY Cases)

Workers Comp Causation and Pre-Existing
Case No. 2006-CA-002630
UPS v. Anderson
Rendered 7/20/07
COA affirmed ALJ/WCB who concluded claimant Anderson's bilateral carpal tunnel syndrome and Kienböck's disease were work-related and compensable.

United Parcel Service (UPS) appealed from an opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge awarding Paul Anderson permanent partial disability benefits based on a 17% functional impairment rating related to his carpal tunnel syndrome and Kienböck's disease.

UPS contends that the Board erred when it affirmed the ALJ's award which was based on the opinion of Dr. Joseph Zerga regarding causation but did not follow Dr. Zerga's opinion as to apportionment. Alternatively, UPS argues that the ALJ abused his discretion when he relied on Dr. Zerga as to causation but awarded benefits based on Dr. Michael Moskal's impairment rating. It also contends that the Board substituted its judgment for that of the ALJ when it found that Anderson did not have a pre-existing active condition.

The ALJ is free to "pick and choose among conflicting medical opinions" and has the sole authority to determine whom to believe. Thus, the ALJ was free to rely upon Dr. Zerga's opinion in regard to causation but to rely on that of Dr. Moskal as to the impairment rating.

When a "work related trauma causes a dormant degenerative condition to become disabling and to result in functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury."

The Board correctly recited the law applicable to the compensability of a pre-existing condition when it stated:
It is well established that in permanent partial disability cases, before a condition may be characterized as "active" the underlying pre-existing condition must be symptomatic and must be capable of being rated pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("Guides") immediately prior to the occurrence of the work-related injury. Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003).
The opinion of the Workers' Compensation Board is affirmed. (From KY Cases)

Workers Comp Attorney Fees
Case No. 2006-CA-002184
Rager v. Crawford and Company
Rendered 7/20/07
COA affirmed the Worker's Compensation Board decision awarding Rager an attorney's fee pursuant to KRS 342.320(7), but denying his motion that the Appellee, Crawford and Company (hereinafter "Crawford"), his former employer, be required to pay that attorney's fee.

Rager requested sanctions in the form of attorney fees pursuant to KRS 342.310, based on the alleged unreasonableness of Crawford's reopening of the proceedings.

The ALJ entered an order on October 3, 2005, holding that the proposed medical procedures, including the additional surgery, were reasonable and ordering Crawford & Company to pay the expenses for such procedures as well as all other disputed medical bills. However, the ALJ denied Rager's request for sanctions pursuant to KRS 342.310, finding that Crawford had a reasonable basis for reopening the proceedings and contesting the necessity of the additional expenses. The ALJ's order did, however, invite a standard motion for attorney fees by the claimant.

After a series of motions, appeals, remands, etc., the ultimate order which ended up in this appeal was the ALJ's award of attorney fees to Rager, the claimant, but these were to be borne by him personally.

Rager's only claim on appeals is that he should have been awarded attorney fees against Crawford pursuant to KRS 342.320. While that statute does not expressly prohibit the award of attorney fees against the employer, neither does it make any provision for such an award

COA believed the Board's holding is consistent with a common-sense interpretation of KRS 342.320 and also with the overall statutory scheme, allowing attorney fees only from the employee personally or from his recovery, in the absence of grounds for sanctions.

Although he ALJ has the authority to award attorney fees in a medical-fee dispute under KRS 342.320(7), the COA did not construe this statute as permitting the imposition of fees on the defendant employer in this situation.

Under the statutory scheme, attorney fees can be imposed upon an employer only as a sanction under KRS 342.310, for prosecuting or defending workers' compensation proceedings "without reasonable ground." The ALJ found that Crawford had reasonable grounds for reopening and for their position in this matter. Rager did not appeal from that ruling.

The appellant asserts that his position is consistent with the legislative purpose of KRS 342.320(7), which allows the award of attorney fees on the reopening of a case. But there is nothing in that section which suggests that those fees should come from any other sources than they would come from in the ordinary case, before a reopening; that is, from the employee personally or from his recovery.

The decision of the Worker's Compensation Board is affirmed. (From KY Cases)

KY SUPREME COURT:

Preserving Issues on Appeal and Pre-Impact Fear Damages
Case No. 2005-SC-000551-DG
Steel Technologies, Inc. v. Congleton
Rendered 6/21/07
(Note: Previously reported in an email on 6/28/07.)
In this wrongful death case, the jury awarded the appellees $3,767,267 in damages, which included $1 million in punitives and $100,000 in pre-impact fear damages. Melissa Congleton died at the scene when improperly secured steel coils fell off a truck and struck her car, killing her almost instantly. The trial judge granted a directed verdict for the defendant denying any claims for pain and suffering *after* the impact but instructed the jury on pre-impact fear. On appeal the issues centered on insufficiency of the evidence, pre-impact fear, and punitive damages. In striking down appellant's motion for judgment NOV, the Supreme Court held it was the appellant's duty to preserve a complete record on appeal, and failure to prove that it had made a mid-trial directed verdict motion was fatal to its post-trial claim regarding the insufficiency of the evidence. Even though a portion of the trial was not recorded, the Court concluded appellants were not without other means to preserve the record and vague comments during jury instructions regarding objections did not suffice. The award for "pre-impact" fear damages was reversed based upon Kentucky's adherence to the "impact rule". Emotional distress must be caused by the contact and not just accompanied by the contact. The punitive damages award did not violate due process as some level of reprehensibility was present and when compared to the amount of direct compensatory damages awarded. (From KY Cases)

CGL Policy "Occurrence, Exclusions, Duties
Case No. 2005-SC-000013-DG

Bituminous Casualty Corp. v. Kenway Contracting, Inc.
Rendered 6/21/07

Bituminous appeals COA's opinion affirming Warren Circuit Court's Summary Judgment entry in favor of Kenway Contracting that Bituminous owed a defense and indemnity to its insured Kenway for property damage claims being alleged by Kenway's customers Turner. This coverage action arose from these facts: Kenway contracted with the Turner's to demolish a carport attached to their home. One of Kenway's employees was sent to the Turner's home with a trackhoe to meet Kenway's foreman, and upon arriving began the demo work. To the foreman's dismay, the employee had torn down not only the carport but half of the home as well by the time he arrived. Kenway submitted the claim to Bituminous who first issued a reservation of rights before before denying coverage outright within a month primarily on the basis that the loss did not result from an 'accident,' but instead from faulty workmanship. Kenway filed a declaratory judgment action and ultimately prevailed, the TC reasoning that the damages resulted from a miscommunication between Kenway's employee and foreman (the foreman/VP and president both testified that the employee had specifically been told that only the carport was to be torn down), not shoddy work. On appeal, the COA recognized that while the act causing the damages was intentional, the consequences were unintended unexpected by the insured Kenway.

At the SC level, Bituminous made a 2-part argument: 1) the damages did not constitute an 'occurrence' under Kenway's CGL policy; and 2) notwithstanding, one or more business risk clauses in the policy excluded coverage. The SC began began its opinion (authored by Cunningham) by reiterating the SC's prior holding in James Graham Brown Found. v. St. Paul FIre & Marine Ins. that the primary purpose of a "comprehensive" general liability policy is to provide broad comprehensive coverage, and that an insured is entitled to all coverage he may reasonably expect under the policy. Justice Cunningham wrote that the SC adopted the majority rule when it concluded in that case that if the damages were not actually and subjectively intended or expected by the insured, coverage exists even if the action causing the damages was intentional and the damages ultimately foreseeable.

As to Part I of Bituminous' argument, the SC analyzed whether the resulting damages were an 'accident' as that term is used in the policy definition of 'occurrence.' While the SC agreed with Bituminous that the damage was not unintended or unexpected from the demo employee's viewpoint, it noted that coverage must be determined from the insured Kenway's perspective since claim was made against Kenway alone. The SC noted that the damages did not result from the any plan, design or intent on the part of Kenway's officers, and found a lack of any evidence to show that Kenway's officers otherwise expected them.

As to Part II of the argument, the SC reviewed 2 business risk exclusions cited by Bituminous (the 'Damage to Property' subsections), the first excluding damage to that particular part of real property on which the insured is performing operations, and the second excluding damage to that particular part of any property that must be restored, repaired or replaced because the insured's work was incorrectly performed on it. As to Exclusion 1, the SC noted that neither "that particular part of real property" nor "operations" were defined in the CGL policy, and that Kenway had suggested operations be limited to the carport since that was the original scope of the work while Bituminous argued operations should extend to any part of property that actual work occurred. As the SC found both arguments reasonable under the plain meaning of the policy words, it ruled that this exclusionary clause was ambiguous and strictly construed the clause against the drafter Bituminous. As to Exclusion 2, the SC found this clause also to be ambiguous and subject to 2 opposing interpretations under the particular facts of this case since the exclusion could be read as relating to the manner of the work (Kenway arguing that the demo work itself was not conducted improperly) v. the location of the work (Bituminous countering that the work was performed on the wrong part of the property). This second exclusion was also

construed in favor of the insured Kenway.

The SC having found both parts of Bituminous's argument without merit (as applied to these particular case facts), it affirmed the COA's opinion requiring Bituminous to defend and indemnify Kenway for the damages sought by the Turner's. (From KY Cases)

Pollution and Trespass, Damages
Case No. 2005-SC-000686-CL
Smith v. Carbide and Chemicals Corp.
Rendered 6/21/07
SCOKY certified the law on two questions from the U.S. Sixth Circuit Court of Appeals arising from claims of groundwater contamination by property owners within ten miles of the Paducah Gaseous Diffusion Plant
Question No. 1: Is proof of actual harm required to state a claim for an intentional trespass?
Answer: No.
When the evidence was vague as to the amount of damage, but where a trespass has been committed upon the property of another, he is entitled at least to nominal damages for the violation of his rights.
Question No. 2: If the plaintiffs can prove a diminution in their property values due to an intentional trespass, do they have a right of recovery under Kentucky law? Answer: Cannot be answered simply yes or no as this question confuses the "right to recover" with the "measure of damages" as a substitute "for proof of actual harm". Kentucky law allows the recovery of just compensation (not merely nominal damages) upon proof of actual injury to the real estate . Hughett, 313 Ky. at 90, 230 S.W.2d at 96.

Once the particular injury to real estate is shown, the diminution in fair market value is a recognized measure of damages. Thus, the preliminary question in a contamination case in Kentucky is at what level does the trespass evolve from a mere stigma, or damage to the reputation of the realty, into an actual injury or harm?

To reach the question posed, the Sixth Circuit must determine whether the contaminants in this case create an actual injury - an interference with an owner's use of the land. Mere damage to the reputation of realty does not entitle one to recovery, as that injury is more imaginary than real. Likewise, the mere presence of contaminants may only damage the property's reputation and not its use . The Court of Appeals in Rockwell, 143 S .W.3d at 604, set the bar for a compensable harm in negligent trespass cases to fall at the point where the contaminants cause a health hazard. Relying on the rationale in Wood v. Wveth-Ayerst Laboratories , 82 S.W.3d 849 (Ky. 2002), a products liability case with a question as to "harm to the person," the Rockwell court reasoned that the mere presence of PCB's itself was not an injury, that some physical harm needed to be shown.

SCOKY then noted it was not as forgiving in identifying actual injury to real property, whether by intentional or negligent trespass . When the intrusion is through imperceptible particles not visible to the naked eye, there may still be an actual injury. An intrusion (or encroachment) which is an unreasonable interference with the property owner's possessory use of his/her property is sufficient evidence of an actual injury (or damage to the property) to award actual damages.
When the parcel's groundwater is contaminated, whether by imperceptible particles or visible particles, to the extent that it cannot be used for consumption by humans, animals, or crops, there is an actual injury.

The amount of harm, if any, to the individual parcels, and the corresponding measure of actual or

compensatory damages will depend upon the proof introduced at trial - an issue of fact.

To the extent that the property owners prove actual or compensatory damages for the harm (the cost of restoring the property to the pretrespass condition), "the amount by which the injury to the property diminishes its total value operates as an upper limit on any damage recovery." Thus, the diminution in the property's value due to an intentional trespass is a recognized measure of damages after, or if, an actual injury has been found. (From KY Cases)

SIXTH CIRCUIT COURT OF APPEALS:

Insurance Bad Faith Re: Excess vs. Primary
Case No. 07a0287p.06
National Surety Corp. v. Hartford Casualty Ins. Co.
Rendered 7/30/07
ROGERS, Circuit Judge. When a primary insurer against tort liability refuses to settle and then loses at trial for amounts greater than its coverage limits, what recourse does an excess insurer have against the primary insurer? This case involves the issue of whether, under Kentucky law, an excess insurer can recover against a primary insurer pursuant to the doctrine of equitable subrogation, either for the primary insurer's failure in good faith to settle a claim or for the primary insurer's failure to investigate whether an insured has other insurance.

The excess insurer in this case, National Surety Corporation, argues that the primary insurer, Hartford Casualty Insurance Company, acted in bad faith by failing to settle a tort claim against their mutual insured, Sufix U.S.A., and thereby exposed Sufix to excess liability.1 National Surety seeks to step into Sufix's shoes, pursuant to the doctrine of equitable subrogation, to assert this bad-faith claim. National Surety also seeks to assert a claim against Hartford for Hartford's failure to discover that Sufix was insured by National Surety. The district court held that National Surety did not have a cause of action under Kentucky law, and accordingly granted Hartford's motion to dismiss.

We reverse the district court's order because the Supreme Court of Kentucky would likely recognize a cause of action in this case. Kentucky law already permits an insured to sue a primary insurer for bad faith failure to settle a claim. Kentucky law also recognizes the doctrine of equitable subrogation, which permits an insurance company to "step into the shoes" of the insured and recover what the insured would have been able to recover against a tortfeasor. Combining these two principles to allow an excess insurer to recover from a primary insurer is a logical extension of these principles and furthers Kentucky's policy goals of encouraging fair and reasonable settlements and preventing third parties from profiting from an insured's insurance coverage. However, the district court's order properly dismissed National Surety's failure-to-investigate claim because an insured does not have a cause of action under Kentucky law against its insurer for failing to discover an insured's other sources of insurance. (From KY Cases)