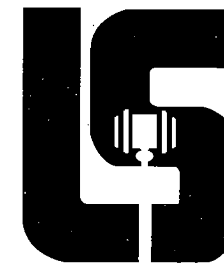
The Landrum & Shouse Report



Fall 2006

Welcome to the Landrum & Shouse Report, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

Cincinnati Insurance Company v. Samples

By Douglas L. Hoots

In Cincinnati Insurance Company v. Samples, 192 S.W.3d 311 (Ky. 2006) our Supreme Court addressed the issue of whether a claimant who is injured in a work related motor vehicle accident can obtain a "double recovery" of damages previously paid by the employer's workers' compensation carrier in a subsequent action against the employer's automobile underinsured motorist carrier. Landrum & Shouse, LLP briefed and argued this case in front of the Kentucky Supreme Court.

In Philadelphia Indemnity Insurance Co. v. Morris, 990 S.W.2d 621 (Ky. 1999), the Court held that the exclusive remedy provision of the Kentucky Workers' Compensation Act did not preclude an employee from recovering from both the workers' compensation insurance and the underinsured motorist coverage provided by the employer. But, the Philadelphia Indemnity case involved a fact situation where the employee only sought to recover actual damages to the extent those damages exceeded both the workers' compensation benefits and the tortfeasor's liability limits. Id. at 624.

The claimant, Raymond Samples, was injured in a two-vehicle accident. At the time, he was operating his employer's vehicle, which was insured by Cincinnati Insurance Company ("Cincinnati"). Samples filed suit against Cincinnati seeking recovery of all damages in excess of the amount paid under the automobile no-fault coverage and the tortfeasor's liability limits. Unfortunately, the total damages awarded at trial were $300,330.55. The net judgment was for $84,147.68, after deductions for paid no-fault benefits, paid liability coverage and paid workers compensation benefits. Samples appealed, and the Kentucky Court of Appeals reversed the trial Court judgment and allowed "double recovery" for damages that were duplicative of workers' compensation benefits.

The Supreme Court took the case on discretionary review. In writing for the majority of the Supreme Court, Justice Cooper noted that the Court recently held that a civil Plaintiff could not recover from a tortfeasor the same elements of damage that had been compensated through workers' compensation benefits. See, Krahwinkel v. Commonwealth Aluminum Corp., 183 S.W.3d 154 (Ky. 2005). The claimant's right to damages against Cincinnati should be no greater than his rights against the tortfeasor. The purpose of underinsured coverage is to put the insured in the same position he would have been in if the tortfeasor had been fully insured. Therefore, the decision of the Kentucky Court of Appeals was reversed. Thus, Samples could not recover damages which duplicated workers' compensation benefits against the underinsured policy issued by Cincinnati. Samples at 316.

Over the years, attorneys at Landrum and Shouse have presented seminars on topics such as Corporate/Business Law, Employment Law, Insurance Litigation, Municipal Law, Transportation, Products Liability and Workers Compensation. Attorneys are available to present seminars on a number of topics to current or prospective clients. Please contact Cheryl Tingle at Landrum and Shouse for additional details.

Please check out our new website for updated biographies, pictures, firm services and links to other websites.
www.landrumshouse.com

The Landrum & Shouse Report

The Landrum & Shouse Report is a quarterly publication and contains news and general information about the firm. It is not meant to nor should it be viewed as a legal research tool or legal advise.

Landrum & Shouse, LLP, is dedicated to serving the needs of its clients. Our professional and support staff has extensive litigation experience and is able to prepare and execute top quality trial presentations in any forum in the Commonwealth of Kentucky. Our computerized systems support productivity in research and include sophisticated communication networks, while the firm's extensive use of modern accounting methods and budgetary controls maintain the most effective approach for our clients. We are well prepared to meet your legal needs. Give one of our legal professionals a call for an introduction to the tradition of Landrum & Shouse.

You can also visit us on the web at www.landrumshouse.com for additional information about our attorneys and the firm.

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U.S. Supreme Court Clarifies Scope of Employer Retaliation Under Title VII

By: Dinah Bevington

Title VII of the Civil Rights Act of 1964 protects an individual from employment-related discrimination based on "race, color, religion, sex or national origin." To prevent an employer from interfering with an employee's efforts to enforce these basic guarantees, the Act provides an anti-retaliation provision. The anti-retaliation provision forbids an employer from "discriminating against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.

Different circuits have reached various conclusions about whether 1) the challenged action must be employment or workplace related and 2) how harmful that action must be to constitute retaliation.

The United States Supreme Court clarified the above issues in June, 2006. In Burlington Northern & Santa Fe Railway Co. v. White, 128 S.Ct. 2405 (2006), the Supreme Court ruled: 1) the anti-retaliation provision is not confined to actions and harms related to employment or which occur in the workplace and 2) the retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or job applicant.

The Supreme Court reasoned that prohibiting retaliatory conduct by an employer only within the employment context would basically leave open the opportunity to retaliate against an employee in other contexts. An employer could still effectively retaliate against an employee by causing harm outside of the workplace. Title VII is enforced by the cooperation of employees who are willing to file complaints and act as witnesses. Therefore, broad protection is extended and retaliatory conduct even outside of the workplace is prohibited.

According to the Court, Title VII only provides protection for retaliation which produces injury or harm. This begs the question: how serious must the injury or harm be before it is actionable?

The Court ruled that the conduct is actionable if it would have been materially adverse to a reasonable employee or job applicant in the Plaintiff's position. In an effort to separate significant from trivial harms, the Court focused on the materiality of the challenged action based on an objective standard. Each act of retaliation will largely depend upon the particular circumstances of each case.

One example of classic retaliatory conduct is reassignment of job duties, such as in the Burlington case. Clearly, not every reassignment is actionable and it will depend on the circumstances of each individual case. Some examples of actionable reassignments include change in levels of prestige, requiring an employee to do dirty or unpleasant work, or even a change in work schedule. Kentucky courts have also recognized that continued sexual harassment after a complaint of sexual harassment has been filed that is "sufficiently severe or pervasive" to alter the conditions of employment and create an abusive working environment.

Many believe that Burlington will propel more litigation by Plaintiffs. Before Burlington, a claim for retaliation perhaps only existed when an employee could establish that an employer's conduct resulted in a "significant change in employment status". As the protection from retaliatory action now extends beyond actions taken within the employment arena and the standard of harm has changed, Plaintiffs now have the opportunity to argue retaliation on a broader scale.

Landrum & Shouse Listed Among Kentucky Law Firms Having Tried the Most Cases

The litigation process is designed to facilitate settlement. Ultimately, the goal is to resolve cases without having a judge or jury decide. While parties should always keep an eye towards settlement, on occasion, the circumstances are such that cases have to be tried.

Between the years 1998 and 2005, attorneys at Landrum and Shouse tried 78 cases. Landrum & Shouse, LLP tied for fourth in 2005 for firms having tried the most cases in the Commonwealth of Kentucky as reported in The Kentucky Trial Reporter, "Year in Review 2005," Eighth Edition.

Tyler Griffin Smith

Knotts v. Zurich Insurance Company

By Douglas L. Hoots

The Kentucky Supreme Court recently addressed application of Kentucky's Unfair Claims Settlement Practices Act (UCSPA) to post litigation conduct in Knotts v. Zurich Insurance Company, 2006 WL 1358718 (Ky.). Douglas L. Hoots and Tyler Griffin Smith filed an *amicus curiae* brief on behalf of the Insurance Institute of Kentucky, State Auto Insurance Companies, and State Farm Insurance Companies in this precedent setting case.

The appellant, Lloyd Knotts, had been injured in an construction accident. Interestingly, the first contact plaintiff's counsel made with Zurich was by letter dated November 30, 1992. Zurich acknowledged receipt of the letter and claim on December 10, 1992. In this letter, Zurich advised plaintiff's counsel that a company representative would contact him after the company had a chance to complete its initial investigation. Apparently, this response did not satisfy plaintiff's counsel. He wrote his clients on December 18, 1992, and told them they should file suit immediately because it appeared the insurer was "stalling". Suit was filed on January 14, 1993. At trial, the jury awarded damages in the amount of $1,202,104.29, reduced by twenty percent (20%) after apportionment for Knotts' own negligence. Id., at *2.

Subsequently, the Knottses pursued a bad faith claim against Zurich. The trial court granted summary judgment in favor of Zurich and held that the UCSPA only applies to claims activities that occur before the commencement of litigation. The Court of Appeals affirmed and the Kentucky Supreme Court granted discretionary review. Id.

Essentially, the argument on behalf of Zurich was that the UCSPA, by definition, only applies to litigation of claims. The legislature would have worded the statute differently if it had intended the UCSPA to apply to post-litigation conduct. Additionally, after litigation commences, the handling and decision process is largely turned over to independent defense counsel. It would be an unconstitutional infringement on the Kentucky Supreme Court's rights to regulate attorneys if the legislature attempted to enact such regulations through the UCSPA. After litigation commences, the defense attorneys' actions cannot be clearly separated from the actions of the insurer. Therefore, it would damage the attorney-client privilege and the obligation of an attorney to zealously represent his client if all actions and statements of defense counsel were "fair game" in a subsequent bad faith action.

On the other hand, the Knottses argued that a carrier should not get a free pass at the commencement of litigation. According to the Knottses, if the UCSPA were not applicable after commencement of litigation, "insurance companies would have the perverse incentive to spur injured parties toward litigation, whereupon the insurance company would be shielded from any claim of bad faith." Id., at *4. Of course, this statement arguably overlooks the true facts of this particular case, which indicated that Zurich had little or no opportunity to investigate the claim before a lawsuit was filed.

In any event, the Court ultimately ruled that any insurer's duty of good faith continues after commencement of litigation. Id., at *5. This does not, however, mean that it will be open season on defense attorneys and insurers for Monday morning quarterbacking of every event, activity, perceived delay, or strategic decision made after litigation commences. The Court apparently recognized the potential dangers of allowing broad evidence of post-litigation conduct in an UCSPA case. The Court appeared to limit evidence of post-filing conduct largely to the timing and amounts of settlement offers made after litigation commences. Id., at *9. Finally, the Court indicated that trial courts should be reluctant to admit evidence of post filing conduct in most situations because such evidence rarely has probative value and carries a high risk of prejudice. Id., at *10.

Obviously, it remains to be seen exactly how trial courts will react to discovery disputes in post-litigation "bad faith" claims. But, a positive note is that the Kentucky Supreme Court took great care when writing the opinion to establish fairly strict boundaries that heretofore may not have existed in Kentucky.