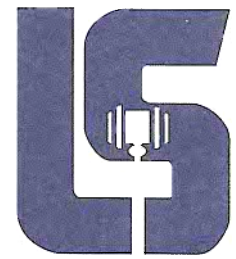


THE LANDRUM & SHOUSE REPORT



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.

Summer 2010

Recent Coverage Case

CGL Policy Does Not Cover Claim of Defective Construction

Jeff Taylor

In Cincinnati Ins. Co. v. Motorists Mutual Insurance Co., 306 S.W.3d 69 (Ky. 2010), the Kentucky Supreme Court held, that as a matter of first impression, that complaints in construction defect cases that only allege poor workmanship do not allege an occurrence that trigger a duty to defend and indemnify in a CGL policy.

Procedurally, in this construction defect action Motorists insured the contractor under a CGL policy during the time the home was under construction. The home was ultimately razed. Motorists defended the contractor and settled the homeowner's claims. The homeowner and contractor assigned to Motorists all rights and claims they may have had against Cincinnati Insurance, the successor to Motorists, as the contractor's CGL insurer.

The sole issue for review was whether the Court of Appeals erred in determining that claims of defective workmanship, standing alone, constitute an "occurrence" under Cincinnati's CGL policy.

The policy issued by Cincinnati Insurance defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" was not defined in the policy. As such, the Court applied the ordinary definition of "accident" to determine if the underlying complaints alleged an occurrence.

The Court looked to outside jurisdictions and determined that a majority of jurisdictions hold that claims of poor workmanship, standing alone, are not occurrences

that trigger coverage under CGL policies similar to Cincinnati's policy at issue here. The Court was persuaded by the majority rule and relied on the element of "fortuity" inherent in the ordinary meaning of the term "accident". The "fortuity" implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship. Simply put, faulty workmanship claims do not present the degree of "fortuity" contemplated by the ordinary definition of "accident" or its common judicial construction.

The Court reasoned that poor workmanship is not a "fortuitous event." The Court correctly reasoned that poor workmanship is a business risk to be borne by the policyholder and CGL policies are "not intended to be the equivalent of performance bonds." Otherwise, the insurer would be "a guarantor of the insured's performance of the contract."

In short, the Kentucky Supreme Court followed the large number of jurisdictions and ruled that claims of poor workmanship, standing alone, are not occurrences that trigger coverage under CGL policies similar to Cincinnati's policy.

Stepping into Shoes that Straddle Two States: Recovering Kentucky No-Fault (PIP) Benefits Arising from Accidents that Occur in Indiana.

Michael K. Nisbet

Two of Kentucky's largest cities, Louisville and Owensboro, border the State of Indiana. Residents of these cities frequently drive their automobiles into Indiana. When a vehicle insured in Kentucky is involved in an accident in Indiana, the drivers and occupants of the vehicle are entitled to PIP benefits. KRS 304.39-030(2). Once PIP benefits have been paid, what is the appropriate avenue for recovery from the insurance carrier for the at fault driver?

Although it is frequently referred to as PIP subrogation, recovery of no fault benefits in Kentucky is not a true subrogation. Instead, it is a direct action against the carrier of the no-fault driver. This is because tort liability for "no-fault" benefits has been abolished. Kentucky's No-Fault statute requires the carrier pursuing "pip subrogation" to pursue that action directly against the carrier covering the alleged at-fault driver. KRS 304.39-070. This is done through arbitration or through intervening in an action filed by the insured. The effect is to create a direct action in the name of the carrier that paid benefits against the carrier of the alleged at fault driver.

Unfortunately, this simple procedure does not exist in Indiana. Tort liability in Indiana has not been abolished and Indiana does not recognize a direct action against an insurance carrier. *Snow v. Bayne* 449 N.E.2d 296 (In.App. 1983). Moreover, Indiana courts have long prohibited splitting causes of action based in tort. *Erie v. George* 681 N.E.2d 183 (In. 1997). Therefore, the recovery of PIP benefits arising out of an accident that occurred in Indiana is a true subrogation action that must be pursued against the alleged tortfeasor. The cause of action belongs to the insured and the insurer merely "steps into the shoes of the insured." The Court in *Erie* explains this procedure at length and concludes:

That an insurer as subrogee of some but not all of its insured's personal injury claims may not sue independently to enforce the subrogated claim prior to resolution of its insured's remaining claims. Unless the parties agree otherwise, the insured is entitled to control adjudication of its rights and the insurer, although entitled as a matter of equity to reimbursement, is a secondary player whose rights derive from its insured. *Id. at 193.*

From an insurance carrier's perspective, the difference between the "no fault" approach in Kentucky and the pure subrogation approach in Indiana is the payment of attorneys' fees and court costs. Indiana's subrogation statute requires an insurer asserting subrogation rights to share in the cost of asserting an action by paying a pro rata share of costs and attorney's fees. IC 34-53-1-2. The statute sets the attorneys fees at one third the amounts recovered. This is even the case where the insured's claim against the tortfeasor settles without the need for filing suit. In cases where the \$10,000 pip benefits have been exhausted, the recovery is reduced by \$3,333. This is substantially more than the \$1,000 inter-company deductible in the arbitration procedure utilized in Kentucky.

Indiana Law has not addressed the issue of whether an insurer attempting to recovery PIP payments made under a Kentucky Policy can avoid reducing its PIP recovery by one third? The Court in *Erie* does suggest that there may be procedure to avoid the one-third set off. This requires the execution of a "medical trust" agreement subrogating to the insurer a right of reimbursement. If the claim is presented to the tortfeasor's carrier and the tortfeasor's carrier makes payment, then the insured is not entitled to a one-third reimbursement from the insurer. *Id. at 19.* The Court in *Erie* is quick to point out that if no agreement can be reached with the tortfeasor's carrier, the subrogee could not sue before the resolution of the insured's claim.

The first step in protecting the PIP subrogation claim in Indiana is to put the insured's attorney and the tortfeasor's carrier on notice of the subrogation claim. The next step is to advise the insured that you are pursuing the subrogation claim independently from the insured's claim. Ideally, obtain payment directly from the tortfeasor's carrier. If you are unable to obtain a payment, obtain an agreement from the tortfeasor's carrier that payment will be made after the conclusion of the insured's claim. This will provide you the best chance of avoiding the one-third payment to the insured for attorney's fees. Undoubtedly, the insured's attorney will expect attorney fees. Accordingly, be prepared to litigate this issue with the insured's attorney.

Finally, unlike Kentucky, the statute of limitations period in Indiana is two years after the motor vehicle accident instead of two years after the last PIP payment. If the insured does not file suit within the two year period, then the carrier will need to file suit if it wishes to preserve its subrogation rights.

Potential Defenses to Outdoor Premises Liability Claims

By Hilary M. Worne

Generally, the property owners or occupants have a duty to use ordinary care to have their property in a reasonably safe condition for the use of those who are invited onto the premises. In Kentucky, however, there are several defenses to premises liability accidents occurring outdoors.

One common outdoor premises liability issue involves the general upkeep of a sidewalk. Many cities have ordinances that instruct property owners to maintain and repair sidewalks abutting the property. In Vissman v. Koby, 309 S.W.2d 345 (Ky. 1958), the Court found that such ordinances merely impose the cost of maintenance and repair of sidewalks on the abutting landowners, but it “does not relieve the municipality of liability nor does it impose liability upon such owners for injuries caused by the dangerous condition of the sidewalk.” 309 S.W.2d at 347, *see also* City of Ashland v. Vansant Kitchen Lumber Co., 281 S.W. 503 (Ky. 1926).

The common misconception is that the violation of such an ordinance is negligence *per se*. In fact, the Court in Vissman specifically found that negligence *per se* does not apply to ordinances in which duties and responsibilities of the municipality are shifted to abutting property owners. 309 S.W.2d at 348. Therefore, absent compelling circumstances, there is ordinarily no cause of action against a property owner for an injury occurring on the sidewalk abutting the property.

Where the outdoor hazard is naturally occurring, such as ice, rain, or even fallen leaves, Kentucky courts have firmly held that there is no duty to protect a person from such conditions. In Standard Oil Co. v. Manis, 433 S.W.2d 856, 857 (Ky. 1968), the Court held that “natural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against.” 433 S.W.2d at 858, *see also*, Corbin Motor Lodge v. Combs, 740 S.W.2d 944 (Ky. 1987). The Court reasoned that the landowner has no control over the

weather and is not in a better position than the individual to identify the hazard. “There was no duty on [the landowner] to stay the elements or make this walkway absolutely safe.” 433 S.W.2d at 859. Since there is no duty owed by the landowner, there can be no negligence. 740 S.W.2d at 946.

Often, there is a concern that a property owner may create a duty by taking measures to remedy the naturally occurring hazard. In PNC Bank v. Green, 30 S.W.3d 185 (Ky. 2000), the Court found that the bank’s numerous attempts at clearing ice and snow from its premises did not create a duty. 30 S.W.3d at 188. The Court found that it would violate public policy and common sense to impose a duty on a property owner who attempts to protect its customers while finding no duty as to a property owner who does not. 30 S.W.3d at 189.

It should be noted, however, that an exception to the rule in Standard Oil has developed in cases where the property owner has, in some way, enhanced or concealed the hazard. *See* PNC Bank, 30 S.W.3d at 188. In Estep v. B.F. Saul Real Estate Inv. Trust, 843 S.W.2d 911 (Ky. App. 2001), the Court indicated that if there is any evidence to create a genuine issue of fact as to whether the business owner did anything to increase or conceal the risk, the business owner could be held to the general duty to keep the customer reasonably safe. *See also* Stapleton v. Citizens Nat’l Corp., 2010 WL 323284 (Ky. App. 2010)(a recent unpublished case following the holding in Estep).

Notwithstanding, ordinarily a landowner may avoid liability for hazards that are known or open and obvious. There is no duty to protect or warn a person from a hazard that is known or obvious to the person. *See* Restatement (Second) of Torts § 343A, Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526 (Ky. 1969), and Johnson v. Lone Star Steakhouse, 997 S.W.2d 490 (Ky. App. 1999). If a Plaintiff admits to being aware of the hazard, or if the hazard is so obvious that the Plaintiff should have been aware, the property owner may avoid liability for injuries caused by the hazard.

SUPREME COURT EXPANDS CLAIM FOR LOSS OF SPOUSAL CONSORTIUM

by Douglas L. Hoots

The Kentucky Supreme Court recently expanded a spouse's claim for loss of spousal consortium in *Martin v. Ohio County Hospital Corporation*, 295 S.W.2d 104 (Ky. 2009). Previously, spousal consortium claims were limited to the time frame between the injury and death. The *Martin* Court felt that imposing such a limit on claims for spousal consortium places "... an arbitrary limit on the duration of what can be a profound loss." *Id.* at 113. The Court reasoned that it defies "common sense" to allow recovery for the pain and deprivation that can be associated with a serious injury to one's spouse while the spouse is incapacitated and deny recovery for spousal consortium after the death of one's spouse." *Id.* at 111. Justice Noble, writing for a unanimous Supreme Court in *Martin*, recognized the pain and deprivation of losing a spouse does not magically disappear when a spouse dies. *Id.*

Previously, our Supreme Court established a cause of action for a minor child for the loss of parent, at least during the child's minority. *Guiliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997). And, KRS 411.135 authorizes recovery for a parent's loss of love and affection of a child for the time frame it would have taken the child to reach majority. In Kentucky, all of the immediate family relationships now need to be analyzed for potential loss of consortium claims, in cases involving wrongful death.

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