PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 1, 2023 to APRIL 30, 2023

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. APPELLATE PROCEDURE

A. ***KKR & CO., INC., ET. AL. v. JEFFREY C. MAYBERRY, ET. AL.; THE BLACKSTONE GROUP INC., ET. AL. v. JEFFREY C. MAYBERRY, ET. AL.; and R.V. KUHNS & ASSOCIATES, INC., ET. AL. v. JEFFREY C. MAYBERRY, ET. AL.***

2021-CA-1307-MR 4/14/2023 2023 WL 2939473
2021-CA-1312-MR
2021-CA-1313-MR
Opinion by DIXON, DONNA L.; CETRULO, J. (CONCURS) AND TAYLOR, J. (CONCURS)

KKR & Co., Inc., and others cross-appeal from orders of the Franklin Circuit Court, including one allowing the Office of the Attorney General (OAG) to intervene after a remand ordering dismissal. The Court of Appeals affirmed dismissal of an amended complaint and vacated other orders.

Members of Kentucky Public Pension Authority's (KPPA) defined-benefit retirement plan brought claims for funding losses sustained by the plan against former KPPA trustees and officers, private investment advisors, and hedge funds and their principals. Defendants moved to dismiss on immunity and jurisdictional grounds, but their motions were denied. Interlocutory appeals were taken, and the Supreme Court of Kentucky found members lacked standing and remanded with instructions to dismiss the complaint. On remand, the trial court entertained various motions, including OAG's intervention, prior to dismissing the amended complaint.

The Court held that the trial court erred by impermissibly entertaining and ruling on motions after the matter was remanded with instructions to dismiss the complaint. The trial court did not have power after an interlocutory decree made or directed by a higher court's mandate to admit new parties to make the same defense, or to allow the same parties to introduce another defense existing before the decree. The trial court only had authority to dismiss the amended complaint on remand; thus, additional orders were vacated.

II. CRIMINAL LAW

A. ***JEREMY KENDRICK v. COMMONWEALTH OF KENTUCKY***

2022-CA-0117-MR 04/07/2023 2023 WL 2817480
Opinion by LAMBERT, JAMES H.; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

The Court of Appeals affirmed the revocation of probation, rejecting an argument that the revocation order had to contain detailed explanations for its findings. The Court explained that *Helms v. Commonwealth*, 475 S.W.3d 637 (Ky. App. 2015), did not require trial courts to provide detailed explanations for statutorily mandated findings. The Court also rejected the argument that revocation was improper because the probationer's drug addiction could have been better addressed with treatment. The issue in revocation proceedings is whether the probationer engaged in behavior sufficient to satisfy the statutory requirements for revocation, not whether some lesser sanction would provide better treatment options.

III. INSURANCE LAW

A. ***FIRST SPECIALTY INSURANCE CORP. v. ALLTRADE PROPERTY MANAGEMENT, ET AL.***

2022-CA-0385-MR 4/28/2023 2023 WL 3133176
Opinion by KAREM, ANNETTE; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 09/20/2023

First Specialty Insurance Corporation ("First Specialty") appealed from the Jefferson Circuit Court's grant of summary judgment in favor of Motorists Mutual Insurance Company ("Motorists") and Alltrade Service Solutions and Alltrade Property Management ALC (collectively "Alltrade"). The judgment resolved a dispute over the insurance companies' obligation to cover damages in a wrongful death suit brought against Alltrade and two of its employees, Jeremy Tanzilla and Bruce Key. Alltrade was contracted with Whispering Brook Acquisitions, LLC ("Whispering Brook"), the owner of an apartment complex, "to act as exclusive agent to lease, operate, manage and service" the property. While driving to respond to a maintenance request at an apartment unit, Tanzilla fatally struck a young child with his personal vehicle which resulted in the parents filing suit for wrongful death. Tanzilla was supervised by Key.

Whispering Brook was insured under a commercial general liability policy with First Specialty. Alltrade was insured with Motorists who intervened in the circuit court action to determine the rights and duties and priority of coverage between Motorists and First Specialty for the damages alleged against Alltrade. The First Speciality policy contained two portions which raised interpretative disputes regarding coverage. One was an "auto exclusion" provision which excluded coverage of any bodily injury related damages caused by an automobile of the insured, and the other was a "non-owned auto endorsement" which covered automobiles not owned or borrowed by the insured used with permission in connection with the business of the insured. The circuit court's summary judgment ruled that Alltrade and its employees were entitled to coverage under the First Specialty policy. Additionally, Motorists and First Specialty shared primary liability for the loss and were required to contribute equal shares to defend and indemnify Alltrade and its employees.

The Court of Appeals held that the circuit court did not err when it determined Alltrade and its employees were covered under the First Speciality policy. Tanzilla's personal vehicle was determined to fall within the "covered auto" provision of First Speciality's "non-owned auto endorsement" because the property management agreement gave Alltrade "sole authority to control its employees and contracted labor in the management of the apartment complex." As a result,

Whispering Brooks provided Alltrade with an implied delegation of authority allowing Alltrade to give permission to one its employees to use his own vehicle in the maintenance call. Citing *American Mut. Fire Ins. Co. v. Reliance Ins. Co.*, 233 S.E.2d 114 (S.C. 1977), Whispering Brook's actual knowledge of the vehicle's use was not a perquisite for permission because it could "be inferred 'from the broad scope of the initial permission or from the attending circumstances and the conduct of the parties[.]'" (Brackets in original.) Additionally, the use of the vehicle in response to a maintenance call was in furtherance of Whispering Brook's business. Alltrade, as the apartment's property manager, met the definition of an "insured" under the First Speciality policy, and Alltrade and Key together were covered under the "non-owned auto endorsement" provision as they could be held vicariously liable for the negligence of Tanzilla. The fact Tanzilla was towing a trailer owned by the apartment complex did not implicate the "auto exclusion" provision because there was no allegation or evidence the trailer itself "played any part in causing the collision with the victim."

However, the Court reversed the circuit court's ruling that both the Motorists and First Speciality policies contained "mutually repugnant excess clauses" requiring a *pro rata* division between the insurers of the costs incurred. The Court agreed with First Speciality's position that the clause at issue in its policy was a nonstandard escape clause, which as a matter of law, takes precedence over an excess clause contained within Motorists' policy. It was stated that the First Speciality clause was "virtually identical" to the provision at issue in *Empire Fire and Marine Ins. Co. v. Haddix*, 927 S.W.2d 843 (Ky. App. 1996). The case was remanded for entry of an order reflecting that the First Speciality policy contained a nonstandard escape clause and its coverage was the excess over the coverage of the Motorists policy's.

IV. PROPERTY TAX VALUATION

A. ***BILL DUNN, MCCRACKEN COUNTY PROPERTY VALUATION ADMINISTRATOR v. SOLOMON FOUNDATION, ET AL. and DEPARTMENT OF REVENUE, ET AL. v. SOLOMON FOUNDATION, INC.***

2022-CA-0399-MR 4/28/2023 2023 WL 3133200
2022-CA-0401-MR

Opinion by EASTON, KELLY MARK; CETRULO, J. (CONCURS) AND DIXON, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 10/18/2023

The Solomon Foundation ("TSF"), a non-profit entity which raised funds to finance churches, owned property at 1200 Jefferson Street in Paducah, Kentucky which was leased to The Crossing Church. The Crossing Church subleased the property to the Restoration Church and the Healing Projects ministry. TSF was defined by the Internal Revenue Service (IRS) as a "public charity." The lease documents required use consistent with the TSF's goals of advancing Restoration Movement Christian Churches. TSF sought an exemption from property taxes under Section 170 of the Kentucky Constitution which was denied by the McCracken County Property Valuation Administrator and the local board of assessment appeals. The Kentucky Board of Tax Appeals ("KBTA") ruled that TSF constituted a religious institution, as opposed to purely a public charity, but was not entitled to an exemption because it did both own and occupy the property at issue. The McCracken Circuit Court upheld the determination that TSF was a religious institution and not a public charity but reversed the conclusion it had to own and occupy the property.

The Court of Appeals affirmed the circuit court's decision. The Court held that the IRS's determination that TSF was a public charity for federal exemption purposes had no bearing on the more restrictive language of Section 170 which limited exemptions to a "purely public charity." The Court reasoned that non-profit religious organizations could not be categorized as purely public charities under Section 170 in the absence of solely providing concrete charity to others. After an extensive examination of the history leading up to the 1990 amendments to Section 170, the Court held that TSF was a religious institution because it existed "to propagate a specific religious doctrine and to financially support this cause." Finally, the Court stated that Section 170 did not require the property to be owned and occupied by a singular religious institution because the plain language only required ownership and occupation by "religious institutions." Ownership and occupation of the property at issue, while split between two separate religious institutions, was thus held to fall within Section 170's requirement.

V. TORTS

A. ***FAITH HORBACH v. BRIANNA M. FORSYTHE (N/K/A BRIANNA MICHELLE LYDANNE), ET AL.***

2022-CA-0216-MR 4/21/2023 2023 WL 3027803
Opinion by JONES, ALLISON; ACREE, J. (CONCURS) AND DIXON, J. (CONCURS)

Faith Horbach suffered injuries to her right hand when she was bitten by the Appellees' dog, which she had been hired to walk. She filed suit against the Appellees, asserting both common negligence claims and strict liability under KRS 258.235. After a period of discovery, the Jefferson Circuit Court granted summary judgment to the Appellees, finding that Horbach was an "owner" as defined in KRS 258.095 when she was hired to walk the dog; therefore, she could not sue the Appellees for damages pursuant to *Jordan v. Lusby*, 81 S.W.3d 523 (Ky. App. 2002).

In a direct appeal from the trial court's denial of the Appellee's motion, the Court of Appeals affirmed in part, agreeing that *Jordan* operated to bar Horbach's strict liability claims. However, the Court held that the trial court improperly applied *Jordan* to Horbach's common law negligence claims. Citing *Dykes v. Alexander*, 411 S.W.2d 47 (Ky. 1967), the Court noted a dog's secondary owner may sue the dog's primary owners if the primary owners had knowledge of the dog's vicious propensities, failed to warn the secondary owner, and the secondary owner is consequently injured. Accordingly, the Court vacated the portion of the judgment in which the trial court applied the reasoning from *Jordan* to the common law negligence claims and remanded for further proceedings.