**PUBLISHED OPINIONS**

**KENTUCKY COURT OF APPEALS**
**AUGUST 1, 2016 to AUGUST 31, 2016**

## I. CIVIL RIGHTS

### A. ***Cowing v. Commare***

2015-CA-000769 08/26/2016 2016 WL 4490582

Opinion by Judge Combs; Judges Acree and Jones concurred.

In a case of first impression, the Court of Appeals addressed whether the intracorporate conspiracy doctrine could be invoked in a case involving an allegation of violations of the Kentucky Civil Rights Act - specifically KRS 344.280. An employee was injured on the job, and the company claimed that it could not accommodate his restrictions and limitations upon his return to work. He sued the company's manager, who had discharged him, as well as the corporation, contending that the manager "aided and abetted" the corporation in its allegedly illegal discrimination against him. The Court of Appeals held that the intracorporate conspiracy doctrine did not apply to serve as an avenue for relief due to the identity of the corporate manager with the corporation. The intracorporate conspiracy doctrine requires at least two actors/wrongdoers. A corporation and its agents cannot be deemed to be separate entities and, thus, cannot act in concert in order to meet the elements of the intracorporate conspiracy doctrine in the context of KRS 344.280.

## II. CONSUMER PROTECTION

**A.** ***Thomerson v. Commonwealth ex rel. Conway***

2014-CA-001208 08/12/2016 2016 WL 4256913

Opinion by Judge Nickell; Judges Jones and Maze concurred.

ABC, Inc. a/k/a National College of Kentucky, Inc. ("College") and James L. Thomerson, Albert F. Grasch, Jr. and Grasch Law, PSC brought separate appeals from orders imposing sanctions on the college pursuant to KRS 367.290 and on the attorneys pursuant to CR 37.02. The Court of Appeals affirmed as to both appeals. Litigation between the parties began in 2010 when the Office of the Attorney General (OAG) issued College a civil investigative demand (CID) containing fifty requests for information and records. College is a for-profit entity providing post-secondary education at campuses in Kentucky and Indiana. Not until 2014 did College send the OAG responses that OAG deemed to be complete. The OAG was investigating College for alleged "unfair, false, misleading, or deceptive acts or practices." Thomerson and Grasch are attorneys who were representing College. College consistently maintained that the CID's scope was overly broad and unreasonable, but offered no material support for its contention. In a 2012 Opinion, the Court of Appeals held that the OAG was authorized to issue the CID, but it remanded the case to the trial court with directions that College be allowed to contest the CID's scope. After various hearings, deficiency notices by the OAG, and entry of orders specifying a timetable for the filing of complete responses, the trial court entered an order finding all fifty CID requests to be within the scope of the OAG's inquiry. The order further characterized College's responses as unreasonable and obstructionist because it refused to answer any interrogatory not precisely targeting information directly and specifically listed in the 2012 Court of Appeals opinion or the trial court's order of July 3, 2013. On appeal, both College and its attorneys faulted the trial court for imposing sanctions. College claimed that it answered all fifty requests and that the trial court abdicated its role by allowing the OAG to determine whether it had fully responded to the requests; the attorneys claimed that they had to make novel arguments because so little law exists about CID. The Court of Appeals held that the trial court did not abuse its discretion in imposing sanctions and did not abdicate its role. Although the trial court took notice of an update filed by the OAG in reaching its decision, the Court concluded that the trial court had also independently reviewed the record in reaching its decision as evidenced by detailed findings and a timeline of events. The Court also noted that as a practical matter, due to the sheer volume of material, the trial court did not abuse its discretion in relying on the OAG to determine whether the CID responses were adequate. Moreover, had College fully responded in a reasonable period of time - as did other similar entities under investigation for

the same activities - it could have avoided sanctions entirely.

## III. CONTEMPT

### A. ***Morris v. Morris***

2014-CA-000857 08/19/2016 2016 WL 4410708

Opinion by Judge Jones; Judges Acree and Clayton concurred.

In consolidated appeals, appellant challenged the trial court's April 24, 2014 order extending a prior Domestic Violence Order (DVO) through April 23, 2017, on the basis that appellant's continued behavior constituted contempt. Appellant also challenged the trial court's attempt to vacate the April 2014 order on the contempt issue and to simply extend the DVO through November of 2016. The trial court's second order vacating the April 2014 order was issued after appellant filed his notice of appeal. In affirming in part and reversing in part, the Court of Appeals held: (1) that the trial court did not abuse its discretion when it extended the DVO as a sentence for contempt, and (2) that the trial court's attempt to vacate its order was null because the court no longer had jurisdiction over it once the notice of appeal was filed. The Court explained that given the wide discretion trial courts enjoy over contempt proceedings, the extension of the DVO as a sanction for contempt was appropriate. The Court further determined that the trial court had authority to extend the DVO based on the evidence presented since appellant's irrational and clearly menacing conduct required appellee to have continuing protection. The Court next held that while there is authority to vacate an order that has been appealed in certain extraordinary circumstances, the agreement of one of the parties is not one of those circumstances. As such, the Court reversed the trial court's attempt to vacate its prior contempt order.

## IV. CONVERSION

**A.** ***Baciomiculo, LLC v. Nick Bohanon, LLC***

2015-CA-001654 08/26/2016 2016 WL 4487696

Opinion by Chief Judge Kramer; Judges Acree and D. Lambert concurred.

Baciomiculo, LLC, owned certain tower crane and construction equipment. Ardis E. Greenamyer II permitted Baciomiculo to store the equipment at his unimproved commercial property in Louisville, Kentucky. Subsequently, PBI Bank filed a foreclosure action against Greenamyer with respect to the commercial property. PBI Bank assigned its mortgage on the commercial property to Lakeland Capital, and Lakeland was substituted as the foreclosing party in the PBI Bank foreclosure action. Thereafter, Lakeland allegedly obtained ownership of the commercial property following a judicial sale. Lakeland was aware of the presence of the equipment on the commercial property; did not ascertain the identity of the owner of the equipment; and contracted with the Bohanon Defendants to undertake the removal of the equipment. Their contract stipulated that the Bohanon Defendants would remove all of the equipment, pay Lakeland $10,000, and keep any proceeds from the sale of the equipment. The Bohanon Defendants entered the commercial property, removed the equipment, and sold it to another entity. Baciomiculo then filed suit against Lakeland and the Bohanon Defendants for conversion. The Bohanon Defendants moved for summary judgment, contending they purchased the equipment for value and in good faith, had thereby acquired good title to the equipment, and therefore could not be sued for conversion. The circuit court agreed and granted their motion. In doing so, the circuit court reasoned that even if Lakeview had no title in the equipment, no evidence reflected that Lakeview did not present itself to Baciomiculo as being the owner of the equipment, and no evidence reflected that the Bohanon Defendants had any knowledge that Lakeview did not have good title in the equipment. Reversing and remanding, the Court of Appeals explained that the concept of purchasing in "good faith" was not a basis for summary judgment because it was irrelevant under the circumstances presented. In the context of sales transactions regarding personal property (such as the equipment at issue), "good faith" is relevant when a purchase is made from a seller with "voidable title," or from a seller entrusted with property as provided in KRS 355.2-403. Additionally, it is relevant where: (1) a voluntary transaction regarding the personal property had taken place between the owner and the individual who wrongfully sold it; and (2) it was a relatively close call whether the transaction qualified as a sale as opposed to a lease. Here, the record did not support that any of these circumstances had occurred. Absent the above, where a seller has no title in personal property, no measure of protection is afforded to a "good faith" purchaser.

## V. COURTS

### A. ***Cadle Company v. Gasbusters Production I Limited Partnership***

2015-CA-000323 08/12/2016 2016 WL 4256904

Opinion by Judge VanMeter; Judges Dixon and Nickell concurred.

On review from an order granting summary judgment, the Court of Appeals held that *res judicata*, specifically claim preclusion, barred re-litigation of a case involving debts owed by a bankruptcy debtor already litigated in bankruptcy court. The Court held that because two creditors participating in the same debtor's bankruptcy proceeding both stand in privity to the debtor and the bankruptcy trustee, for purposes of *res judicata* claim preclusion, identity of the parties is satisfied when either creditor is party to a state court case concerning monetary disputes between the debtor and a third party, even when the other creditor was the only party to argue that those monies constituted offsets in the bankruptcy proceedings. Further, cause of action identity is satisfied when debts and offsets were already litigated in the bankruptcy court. Thus, the creditors involved were barred by *res judicata* from re-litigating the dispute in state court, even when different claims of relief were sought. Additionally, the Court held that the bankruptcy court did have the authority to resolve the state law offset claims, despite the holding in *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), because the matter was a core proceeding under the Bankruptcy Code.

## VI. HEALTH

### A. ***Commonwealth of Kentucky, Cabinet for Health and Family Services v. Owensboro Medical Health System,***

2015-CA-000229 08/12/2016 2016 WL 4256905

Opinion by Judge VanMeter; Judges Nickell and Stumbo concurred.

On review from the Franklin Circuit Court's order reversing a final order of the Cabinet for Health and Family Services, the Court of Appeals held that Kentucky's Medicaid plan does not prohibit provider reimbursement for outpatient level of care services when services were inappropriately provided at an inpatient level of care. The Court held that Section 4.19(a) of Title XIX of the Social Security Act Medical Assistance Program, as adopted by the Cabinet for the Commonwealth, which provides that "inappropriate level of care days are not covered," only applied to a hospital's provision of medically necessary services at an inpatient level of care when care at a post-hospital extended care facility, like a skilled nursing facility, was appropriate. Conversely, the cost of medically necessary outpatient services were to be reimbursed when inpatient services were provided and the Cabinet later determined that only outpatient services were necessary.

### B. ***The Harrison Memorial Hospital, Inc. v. Wellcare Health Insurance Company of Kentucky, Inc.***

2015-CA-000024 08/05/2016 2016 WL 4151860 DR Pending

Opinion by Judge J. Lambert; Judge Combs concurred; Judge Thompson concurred in result only.

Harrison Memorial appealed from a summary judgment dismissing its petition for declaratory judgment. The petition concerned the interpretation of KRS 205.6310 as related to the denial of payment of emergency room claims by WellCare, a Medicaid managed care organization. The Court of Appeals affirmed the circuit court's dismissal, holding that Harrison Memorial did not have a right to sue under KRS 205.6310 nor did it have a right to sue under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (EMTALA), the federal statute addressing the management of Medicaid claims. The Court concluded that it is up to the General Assembly (through statutes) and the executive branch (through the Cabinet promulgating regulations) to determine the parameters of Kentucky's Medicaid reimbursement policy for emergency room visits.

## VII. MORTGAGES

### A. ***KeyBank National Association v. Allen***

2014-CA-001320 08/26/2016 2016 WL 4490588

Opinion by Judge Thompson; Judges Dixon and D. Lambert concurred.

The Court of Appeals reversed a judgment dismissing a junior mortgagee's action for judgment on a promissory note on the basis of *res judicata*. The action was dismissed because the junior mortgagee failed to participate in a foreclosure action resulting in the sale of the property in which the junior mortgagee and the mortgagor were co-defendants. The Court held that claim preclusion did not bar the junior mortgagee's separate action on the promissory note because it did not assert an adverse claim against the mortgagor in the foreclosure action. While the junior mortgagee could have asserted a permissive cross-claim against the mortgagor in the first action, which would have made them adverse parties, it did not do so nor was it required to do so.

## VIII. TORTS

### A. ***Adkins v. Wrightway Readymix, LLC***

2014-CA-001644 08/26/2016 2016 WL 4488161

Opinion by Judge D. Lambert; Judges Combs and VanMeter concurred.

In a case that originally began as a debt collection action in district court, the Court of Appeals affirmed a circuit court order dismissing appellant's counterclaim for wrongful use of civil proceedings. Appellee moved to dismiss its complaint on the basis that it was already receiving relief - via bankruptcy proceedings filed by appellant - that it would have received if it had continued this litigation. By failing to dispute appellee's claim and presenting it as part of the plan approved by the bankruptcy court, appellant conceded the legitimacy of the debt in the bankruptcy action. Therefore, the termination of the debt collection action was not in appellant's favor and, as a matter of law, he could not prevail on his counterclaim. The Court of Appeals further held that the circuit court did not err in denying appellant's motion to recuse.

## IX. WORKERS' COMPENSATION

### A. ***Flat Rock Furniture v. Neeley***

2015-CA-001255 08/26/2016 2016 WL 4488152

Opinion by Judge J. Lambert; Judges Acree and Maze concurred.

The Workers' Compensation Board affirmed an ALJ's award of permanent total disability benefits to a worker who injured his eye in a work-related incident. The Court of Appeals affirmed, holding that the record attached to the worker's Form 101 substantially met the requirements of the applicable administrative regulations even though it was not submitted on a Form 107-I. The Court further held that the ALJ sufficiently clarified a misstatement regarding a physician's opinion, and that the ALJ's finding of permanent total disability was supported by substantial evidence of record.

**B.** ***Fresenius Medical Care Holdings, Inc. v. Mitchell***

2015-CA-000598 08/26/2016 2016 WL 4488155

Opinion by Judge D. Lambert; Judges Jones and Thompson concurred.

In an appeal and cross-appeal taken from a workers' compensation decision, the Court of Appeals affirmed in part and reversed in part. The facts giving rise to the appeals originated in November 2009, when Tamorah Mitchell was in her personal vehicle returning home to Paducah from a work-related meeting in Louisville. Mitchell's husband at the time, Todd Mitchell, drove while Mitchell rode in the front passenger seat. Traveling at an estimated 80-85 miles per hour, Todd swerved to avoid a deer in the road, overcorrected, and lost control. A wreck resulted in which Mitchell suffered several significant injuries, including an orbital "blowout" fracture. There was some question regarding whether Mitchell was wearing a seatbelt at the time. Mitchell later settled a civil action filed against Todd (now her ex-husband) for the vehicle's liability policy limits and subsequently sought workers' compensation benefits. On appeal, Mitchell's employer argued: (1) that the Workers' Compensation Board erred in reversing and remanding the Administrative Law Judge's finding that the determined impairment rating, as it related to Mitchell's eye injury, was insufficiently supported; and (2) that the Board erred in affirming the ALJ's finding that Mitchell's alleged failure to wear a seatbelt did not merit a reduction in benefits under KRS 342.165(1). As to the first argument, the Court of Appeals agreed with the employer that the Board inappropriately substituted its judgment for that of the ALJ when remanding the issue for further proceedings. While the record established an eye injury and permanent symptoms resulting therefrom, including loss of ocular motility and visual acuity, the ALJ justified his ruling on the basis that even Mitchell's medical expert was unsure whether the impairment assessment had been consistent with established AMA guidelines. Thus, while the ALJ's ruling did reject the uncontested medical proof, it did so with sufficient justification. As to the second argument, the employer contended that Mitchell violated KRS 342.165(1) by an alleged violation of KRS 189.125(6). However, the Court agreed with the ALJ and the Board that any alleged negligence on the part of Mitchell in failing to wear a seatbelt did not give rise to the application of the penalty provisions of KRS 342.165(1). The ALJ cited *Tetrick v. Frashure*, 119 S.W.3d 89 (Ky. App. 2003), in which the Court held that KRS 189.125(6) did not impose a duty on passengers to wear seatbelts; it merely imposes a duty upon drivers to do so. Absent a duty, there can be no negligence. On cross-appeal, the Court agreed with Mitchell that the employer was not entitled to a subrogation credit against Mitchell's tort recovery. The Court noted that Mitchell and Todd were married at the time of the accident and that Mitchell

paid the majority of the premiums securing the vehicle liability policy through their joint account. Because of this, for the purpose of the tort action, Todd was a first-party insured rather than a third-party tortfeasor within the meaning of KRS 342.700. Therefore, the employer was not entitled to a subrogation credit.