PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

JULY 1, 2014 to JULY 31, 2014

I. ARBITRATION

A. *HQM of Pikeville, LLC v. Collins*

2012-CA-000149 07/18/2014 2014 WL 3537039 Rehearing Denied

Opinion by Judge Taylor; Judges Caperton and Dixon concurred. Appellee, acting as administratrix of her grandmother's estate and on behalf of grandmother's wrongful death beneficiaries, asserted various claims related to appellants' actions towards grandmother during her residency at a nursing home. The circuit court denied appellants' motion to compel arbitration and the Court of Appeals affirmed. The Court first held that the purported arbitration agreement executed between the nursing home and granddaughter, acting on behalf of grandmother, did not encompass the wrongful death claim brought following grandmother's death. The wrongful death claim was not derivative and independently accrued to grandmother's heirs or beneficiaries; therefore, it could be asserted by the estate's personal representative. The Court further held that granddaughter's appointment as emergency fiduciary, which was in effect when grandmother was admitted to the facility, did not authorize granddaughter to enter into any contractual relationships on behalf of grandmother - including the subject arbitration agreement. Instead, the emergency order specifically limited granddaughter's powers and duties to determining living arrangements, consenting to medical procedures and handling financial arrangements, while unchecked boxes in the form order excluded any authority to enter into a contractual relationship on behalf of grandmother, to dispose of her property, or to execute any instruments on her behalf. Finally, the Court held that the estate's claims for negligence, medical negligence, corporate negligence, and violations of grandmother's rights under the statutes governing long-term care facilities arose during grandmother's lifetime. Thus, they constituted personal injury claims that survived grandmother's death and could be asserted or revived by granddaughter on behalf of the estate.

II. BUSINESS ORGANIZATIONS

A. ***Tayloe v. Sellco Two Corp.***

2012-CA-001445 07/25/2014 2014 WL 3674252 Rehearing Denied

Opinion by Judge Lambert; Judge Combs concurred; Judge Thompson concurred in result only. A judgment creditor (Sellco) brought an action seeking to hold a judgment debtor LLC's managing member (Tayloe) personally liable for a $745,733.47 agreed judgment. The circuit court granted Sellco's motion for summary judgment against Tayloe, pierced the corporate veil, and held Tayloe personally liable. On appeal, the Court of Appeals affirmed and agreed with the circuit court that piercing the corporate veil was appropriate because Tayloe had utilized LLC money for personal use and for other business debts. The Court further held that piercing the veil of an LLC was similar to piercing the veil of a corporation and was proper under Kentucky law. Kentucky law does not distinguish between corporations and LLCs when discussing liability or piercing the corporate veil.

III. COUNTIES

A. ***City of Lancaster v. Garrard County***

2013-CA-000716 07/03/2014 2014 WL 2978474 Rehearing Pending

Opinion by Judge Taylor; Judge Jones concurred; Judge Moore concurred in part, dissented in part, and filed a separate opinion. The Court of Appeals reversed and remanded a summary judgment upholding the validity of a county ordinance that imposed a 25-cent "user fee" upon every water meter located within the county to finance the county's 911 emergency communications system. The Court held that the charge was not a valid "user fee" under KRS 91A.510 since no direct relationship existed between the charge paid (25 cents upon each water meter) and the benefit received (911 telephone service). The Court declined to address the questions of whether the fee constituted a license or a tax and, if so, whether either was valid. Instead, those questions were to be considered by the circuit court upon remand. The Court further noted, however, that if the circuit court determined that the ordinance imposed a tax, the parties had conceded that it would be an unconstitutional tax and the subject ordinance would be invalid under KRS 65.760.

IV. CRIMINAL LAW

A. *Burke v. Commonwealth*

2011-CA-000972 07/18/2014 2014 WL 3537037 DR Pending

Opinion by Judge Nickell; Judges Clayton and Combs concurred. This appeal presented a challenge to the constitutionality of Kentucky's "hate crime" statute - KRS 532.031. Following appellant's conviction for fourth-degree assault (for kicking a woman in the back) and second-degree assault (for knifing three men who tried to rescue her) and shortly before the sentencing hearing, the Commonwealth asked the court to find that appellant's actions had been hate crimes because, before and during the attack, appellant and four friends had hurled anti-gay slurs against women they suspected were lesbians. Following argument, the trial court found that appellant believed the victim of the fourth-degree assault was a lesbian and that he lashed out against her because of her sexual orientation. The trial court further found that the three men who tried to assist the victim would not have been assaulted but for the hate-motivated attack on the woman; therefore, all four assaults were hate crimes. On appeal, appellant contended that he should have received pretrial notice of the Commonwealth's intention to pursue the finding of a hate crime; jurors should have been told how a hate crime impacts parole eligibility; and, rather than a judge finding appellant's actions to be a hate crime by a preponderance of the evidence, jurors should have been required to make that finding beyond a reasonable doubt.

In upholding the statute and affirming appellant's conviction and sentence, the Court held that a jury plays no role in determining whether a crime is a hate crime. Instead, that decision is to be made by the sentencing judge alone following conviction, based upon a review of the evidence developed at trial. If the sentencing judge is convinced, by a preponderance of the evidence, that a particular set of facts demonstrates that an offense was intentionally perpetrated upon an individual or group due to "race, color, religion, sexual orientation or national origin," that crime may be declared a hate crime. Such a finding is merited if the judge is convinced hate was the primary motivation for the crime; moreover, there is no requirement that the actor's motivation be accurate, only that it prompted him to act. The Court further held that the Commonwealth is not required to reveal its intention to seek a hate crime finding in the indictment because a hate crime is not a separate offense, does not enhance the penalty, and is not determined until after a defendant has been convicted of a specified offense. The sole impact of a hate crime finding is the creation of another factor the sentencing judge may use to deny "probation, shock probation, conditional discharge, or other form of nonimposition of a sentence of incarceration" or the parole board may use to defer or deny parole. The Court also rejected appellant's arguments that the trial court had erroneously admitted

prejudicial and irrelevant evidence, inaccurately instructed the jury, and wrongly restricted his right to present a defense. Appellant specifically complained about the introduction of a photo (introduced for identification purposes) showing him to have certain inflammatory tattoos - in particular, a faint swastika on his left shoulder. However, because none of appellant's individual tattoos was mentioned and no meaning was attributed to any of them, the Court held that the trial court had appropriately balanced the Commonwealth's need to identify appellant as the perpetrator against appellant's right to a fair trial.

B. ***Smith v. Commonwealth***

2012-CA-001742 07/18/2014 438 S.W.3d 392

Opinion by Judge Lambert; Judges Jones and Stumbo concurred. In an appeal from the denial of an RCr 11.42 motion alleging ineffective assistance of counsel and appellate counsel, the Court of Appeals vacated and remanded the matter to the circuit court for a ruling on appellant's ineffective assistance of appellate counsel (IAAC) claim. Appellant raised the IAAC claim in both his motion and in his appellate brief, but the circuit court failed to rule on that issue in its order. Therefore, the Court could not review that issue. The Court further noted that RCr 11.42(6), which requires a party to invoke CR 52.02 when a lower court fails to make a finding of fact on an issue essential to the order, is inapplicable in cases where an evidentiary hearing was not held, as in this case.

V. CUSTODY

A. ***Oster v. Oster***

2013-CA-001028 07/18/2014 2014 WL 3537057

Opinion by Judge Nickell; Judge Clayton concurred; Judge Combs concurred in result only. In an appeal from an order reinitiating contact between the parties' two sons and their mother, the Court of Appeals reversed and remanded. Mother suffered a head injury while in college and, at some point, was diagnosed with borderline personality disorder, anxiety disorder, NOS, and obsessive/compulsive disorder. Mother had not seen her sons since December 2008 and, due to entry of a domestic violence order, she was forbidden to have any contact with her former husband and children. In 2011, the family court entered an order stating that it believed it was in the children's best interests to have a relationship with mother, but before the court would consider resuming supervised visitation, she had to comply with "all recommendations" made by the court-appointed evaluator. The evaluator testified that he had "reluctantly recommended" resuming visitation at one point, but he withdrew that recommendation because mother had not progressed in treatment and had concealed the true extent of her mental health issues from her psychologist. Despite mother's failure to follow any of the evaluator's recommendations, the family court entered an order allowing those involved to work toward reinitiating visitation. In reversing, the Court noted that the 2011 order requiring full compliance with "all recommendations" had not been rescinded or amended; all witnesses and the trial court agreed there had been no compliance; and the trial court wrongly presumed visitation was in the boys' best interests under KRS 403.320. Since mother had been denied visitation previously, the presumption was unavailable to her. *Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky. App. 1982); *McNeeley v. McNeeley*, 45 S.W.3d 876, 878 (Ky. App. 2001). The proper standard for resuming supervised visitation in this scenario was "best interests" of the children, but no one had established that resuming visitation was in the best interests of the boys even though they had expressed a strong desire to see their mother. Therefore, reversal was merited.

VI. EVIDENCE

A. ***Chaney v. Justice***

2013-CA-000230 07/18/2014 2014 WL 3537055 Rehearing Denied

Opinion by Judge Clayton; Judges Combs and Stumbo concurred. The Court of Appeals affirmed a judgment that resolved the question of the proper boundary line between the parties' two tracts of land. However, in affirming the decision, the Court concluded that certain testimony by the deceased property owner of one of the tracts should not have been admitted. The trial court had permitted the admission of the testimonial evidence under KRE 803(20), which is an exception to the hearsay rule. The Court discussed the implications of KRE 803(20), which allows for the admission of reputation evidence in a community about boundaries or customs affecting the land and also allows reputation evidence about events of general history important to the community or state. Noting that Kentucky has a lack of authority addressing the rule, the Court looked to a treatise on evidence and rulings from other jurisdictions. The Court ultimately held that KRE 803(20) applies only to reputation or general consensus evidence and does not permit the admission of specific statements or assertions made by a predecessor in interest regarding a boundary line. However, even though the testimony at issue was improperly admitted by the trial court, the Court held that such admission was harmless error.

B. ***Werner Enterprises, Inc. v. Northland Ins. Co.***

2012-CA-001906 07/11/2014 437 S.W.3d 730

Opinion by Judge VanMeter; Chief Judge Acree and Judge Jones concurred. In an automobile negligence action, the Court of Appeals held that the trial court did not abuse its discretion by allowing the trooper who investigated a three-vehicle collision to testify about his identification of "human factors" involved in the collision, specifically the defendant driver's "following too close and inattention." The trooper was qualified as an accident reconstruction expert and identified the human factors based on the conditions he observed upon arriving at the scene and the lineup of the vehicles. Moreover, the trooper did not opine about the "ultimate issue" of the case, *i.e.*, fault; rather, his opinion concerned a subject specifically within the knowledge of a trained accident reconstruction expert and was likely to assist the jury in understanding the circumstances of the collision. Accordingly, since the trooper's testimony did not go to the ultimate issue of liability, his opinion did not invade the province of the jury and was admissible. The Court further held that the defendant was not entitled to a directed verdict on grounds that the presence of a "sudden emergency" eliminated the defendant's duty of care. The jury instructions set forth the defendant's specific duties with respect to operating the motor vehicle and the "sudden emergency" instruction properly qualified those specific duties. The determination of whether a party breaches a duty of care, with or without the presence of a "sudden emergency," is a question of fact for the jury. In this case, the jury was properly instructed on the "sudden emergency" and was charged with deciding whether it believed the defendant's conduct was a reasonable response to the circumstances. The mere presence of a "sudden emergency" did not necessitate a directed verdict and the trial court did not err by declining to enter one.

VII. INSURANCE

A. ***Boarman v. Grange Indemnity Ins. Co.***

2012-CA-002199 07/18/2014 437 S.W.3d 748

Opinion by Judge VanMeter; Chief Judge Acree and Judge Jones concurred. On review from a judgment holding that appellant waived his statutory right to uninsured motorist ("UM") coverage when his wife signed a waiver rejecting coverage, the Court of Appeals reversed and remanded, holding that each insured on a motor vehicle insurance policy must individually reject UM coverage on his or her own behalf if he or she does not wish to have such coverage included. In reaching this decision, the Court cited to the plain language of KRS 304.20-020, which requires motor vehicle insurance policies to include UM coverage but provides that "the named insured shall have the right to reject in writing such coverage." The Court concluded that this language requires a written rejection from each insured covered by the policy, not just the insured that purchases the policy. The Court further held that appellant's wife did not act as his agent in waiving his right to UM coverage, finding that he did not give her permission or instructions to do so, nor did he subsequently ratify her actions.

VIII. LABOR AND EMPLOYMENT

A. ***Bowlin Group, LLC v. Secretary of Labor, Commonwealth of Kentucky***

2013-CA-000432 07/11/2014 437 S.W.3d 738

Opinion by Chief Judge Acree; Judges Taylor and VanMeter concurred. Appellant, an installer of electrical power lines, sought reversal of the circuit court's judgment affirming the decision of the Kentucky Occupational Health and Safety Review Commission that appellant engaged in a safety violation related to electrical burns suffered by an employee. The Court of Appeals first held that 29 C.F.R. § 1926.955(c)(3) expresses no preference for grounding, instead of insulation or isolation, as a means of protecting employees from electrical shock. In this case, because isolation was impossible and because appellant consciously elected not to ground the electrical hazard, insulating employees became the only way to protect those employees. On conflicting evidence, the Commission concluded that appellant had no policy for insulating employees working on the ground and that this failure violated Occupational Safety and Health Administration regulations. Because Appellant had constructive knowledge of this violation, the Commission cited appellant, the circuit court affirmed the Commission's decision, and the Court affirmed the circuit court. The Court also affirmed the Commission's rejection of appellant's defense of employee misconduct.

IX. NEGLIGENCE

A. ***Dishman v. C & R Asphalt, LLC***

2012-CA-001139 07/18/2014 2014 WL 3537051 DR Pending

Opinion by Judge Lambert; Judges Combs and Thompson concurred. In a premises liability case, the Court of Appeals affirmed a summary judgment entered in favor of appellees - a retail store and paving contractor. The action was brought as a result of injuries sustained by appellant when she tripped and fell over uneven ground in a construction area in the store's parking lot on her way to the store's entrance. The Court held that the paving contractor did not breach its duty to appellant and had met the standard of care by warning invitees of the risk brought on by the repaving work. The Court further held that the paving contractor was acting as an independent contractor and had sole possession of the section of the parking lot where appellant fell. Therefore, the store could not be held liable for appellant's injuries and the contractor's alleged negligence under the doctrine of respondeat superior. In reaching its decision, the Court discussed and applied the Supreme Court's recent opinions in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013).

X. ZONING

A. ***Hampson v. Boone Co. Planning Com'n***

2011-CA-001559 07/25/2014 2014 WL 3734106 DR Pending

Opinion by Judge Maze; Judge VanMeter concurred; Judge Caperton dissented and filed a separate opinion. Neighboring property owners sought judicial review of the decision of the county planning commission to grant an application for the construction of a 305-foot cellular antenna tower with proposed height, structure, and landscape waivers. In affirming, the Court of Appeals held that the commission's approval of an alternative location for the tower did not violate appellants' due process rights. Appellants were given the opportunity at a meeting to be heard on the matter of the location and re-location of the tower in question, and the possibility of moving the tower was raised at several points during the meeting, including during the public comment period and prior to appellants' attorney's opportunity to speak. The Court further held that the applicant was not required to provide notice to landowners whose land rested miles from the proposed cell tower and that the evidence was sufficient to support granting the application.