PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2016 to SEPTEMBER 30, 2016

I. ARBITRATION

A. *GGNSC Frankfort, LLC v. Richardson*

2013-CA-000245 09/16/2016 2016 WL 4937875

Opinion by Judge Thompson; Judges Acree and Combs concurred.

GGNSC appealed from an order denying its motion to compel arbitration and to dismiss or stay the action pending arbitration. The issue before the Court of Appeals was whether a power-of-attorney document executed by Fannie Lyon authorized her attorney-in-fact to arbitrate any claims arising from GGNSC's negligence while Fannie was a GGNSC resident. The Court held that Fannie, through her attorney-in-fact, had no power to bind the beneficiaries of a wrongful death action. That action belonged only to the beneficiaries. The Court also held that public policy favoring arbitration was not applicable because the issue presented was whether there was a binding arbitration agreement. Citing to *Extendicare Homes Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), the Court noted that there must be express authority granted in the power-of-attorney document to the attorney-in-fact to execute an arbitration agreement. The power to commence or to defend administrative and legal proceedings did not include the power to enter into an arbitration agreement. Arbitration is not a legal suit or an administrative proceeding. The Court further held that powers pertaining to property or rights are limited and do not include the power to enter into an arbitration agreement. Finally, the Court held that document language conveying the broad power to "generally do and perform for me all that I may do if acting in my own person" was not sufficient to waive the constitutional rights to access to the court and to a jury trial.

II. CHILD SUPPORT

A. ***Legg v. Commonwealth***

2015-CA-001502 09/23/2016 2016 WL 5319057

Opinion by Judge D. Lambert; Judges Clayton and Nickell concurred.

This appeal was taken from an order directing appellant to pay child support. Appellant Tiffany M. Legg and appellee Candace L. Back were a same-sex couple who entered into a civil union in 2010. At the time of their union, Back was pregnant, and she gave birth a few days later. Following the child's birth, Legg and Back decided to designate Legg as his father on his birth certificate. The parties eventually filed for divorce, and the family court dissolved the marriage after the U.S. Supreme Court rendered its decision in *Obergefell v. Hodges*, --- U.S. ----, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). The family court also found that Legg was the child's parent as a matter of law and equity despite having no biological ties to him. According to the family court, Legg had acted *in loco parentis* with respect to the child and ordered her to pay child support. On appeal, the Court of Appeals affirmed. The Court noted that although same-sex parents are biologically incapable of producing offspring together, Kentucky's courts must equally apply maternity/paternity-by-estoppel principles when a putative parent married to an individual of the same sex attempts to avoid his or her child support obligation. To hold otherwise would deny same-sex married couples their constitutional right to enjoy the same legal treatment as opposite-sex couples. Here, it was undisputed that Legg and Back married before the child was born. It was also undisputed that Legg knew she was not the child's biological parent when she designated herself as his "father" on his birth certificate and when she agreed that the child would bear her last name. Accordingly, when coupled with the family court's finding that Legg acted as the child's parent for roughly four years, equity would not permit Legg to now claim that she never intended to raise the child alongside Back.

III. CORPORATIONS

A. ***Conlon v. Haise***

2014-CA-001581 09/30/2016 2016 WL 5485531

Opinion by Judge Jones; Judges Maze and Stumbo concurred.

This appeal concerned the ownership and value of shares in a closely-held corporation as well as the duties, if any, majority shareholders owe minority shareholders. The Court of Appeals was asked to determine whether shareholders in a privately-owned corporation owe one another common-law fiduciary duties. After reviewing the nature of fiduciary relationships in conjunction with the applicable business statutes and prior case law, the Court concluded that Kentucky's common law does not support imposing heightened duties on shareholders. The law provides various remedies to a shareholder in a corporation who believes his rights have been violated. Those rights derive out of the Kentucky Business Corporation Act, not out of any common law special relationship of trust and confidence with other shareholders. Therefore, the Court agreed with the circuit court's decision to grant summary judgment in favor of the majority shareholder as related to the minority shareholder's fiduciary duty claim. The Court also held that the majority shareholder was entitled to summary judgment on the minority shareholder's breach of contract claim because the claim was barred by the statute of frauds where the alleged agreement was made in 1998, but the shares were not to be transferred until 2001.

IV. CRIMINAL LAW

A. ***Bowen v. Commonwealth***

2015-CA-000480 09/16/2016 2016 WL 4934609

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

Appellant entered a conditional guilty plea to a number of criminal charges but reserved his right to challenge the trial court's denial of his motion to suppress. During a routine license plate check, appellant was mistakenly identified as having an outstanding arrest warrant. Appellant's vehicle was stopped and the officer, upon running appellant's driver's license, realized his mistake. However, while walking from his cruiser back to appellant's car to send him on his way, the officer noticed a small baggie on the center hump of the rear floorboard in the vehicle. The baggie contained a white substance later revealed as cocaine. Appellant attempted to escape but was ultimately apprehended. The vehicle was impounded and searched, revealing a large quantity of cocaine concealed in the gas cap door. In denying appellant's motion to suppress, the trial court relied primarily on *Herring v. U.S.*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009), for the proposition that negligent mistakes of fact by law enforcement officers do not require suppression of the evidence yielded by a search unless the search rises to the level of a deliberate, reckless, or grossly negligent violation of the Fourth Amendment, or the violation reflects recurring or systemic negligence. The Court of Appeals affirmed but noted that a *Herring* analysis was unnecessary. The stop was supported by a good faith belief that the driver of the vehicle was subject to immediate arrest, and the intrusion was minimal in light of those circumstances. Thus, the trial court would have been entirely justified in ruling the evidence admissible based on the proper *Terry* stop of the vehicle. Even assuming, though, that the initial stop was improper, the Court concluded that the trial court properly applied *Herring* in denying the motion to suppress.

B. ***Edington v. Commonwealth***

2015-CA-001712 09/09/2016 2016 WL 4709120 DR Pending

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

Following denial of his motion to suppress a warrant to search his residence, appellant entered a conditional guilty plea to first-degree trafficking in a controlled substance, more than two grams of heroin, first-degree trafficking under two grams of heroin, and being a felon in possession of a firearm. The Court of Appeals affirmed the denial of the motion to suppress, holding that the challenged search warrant affidavit stated sufficient information for a finding of probable cause to issue a warrant to search the residence. Although the affidavit contained false statements describing a controlled buy that never took place and did not make a connection between appellant's prior residence and the residence to be searched, the affidavit did contain: (1) a description of a controlled buy that had occurred at appellant's previous address; (2) a lengthy description of a traffic stop where appellant consented to a search of his vehicle, which yielded an empty pill bottle and several pills hidden in appellant's underwear; and (3) appellant's statements to police that his source of supply for heroin was at his residence, that the source had heroin inside the residence, and that there were firearms inside the residence. Thus, the affidavit, when viewed as a whole, supported a finding of probable cause to search the premises.

C. ***Foley v. Commonwealth***

2015-CA-000247 09/30/2016 2016 WL 5485409

Opinion by Judge Clayton; Judges Combs and Maze concurred.

A police officer pulled over appellant, who was driving at the speed limit in the left lane on New Circle Road in Lexington on two completely flat tires. She was subsequently charged with driving under the influence. The district court suppressed the evidence, but the circuit court granted the Commonwealth's petition for a writ of prohibition. Appellant argued that the police officer never articulated an adequate reason for pulling her over, and that expert testimony was required to show that driving on two flat tires was dangerous either to appellant or to other motorists. The Court of Appeals affirmed. The Court first noted that the police officer's subjective reason for pulling the car over was not relevant to a Fourth Amendment analysis because courts are required to objectively assess whether the stop is reasonable. The Court then held that the stop was justified because expert testimony was not needed to determine that driving in the left lane at full speed on two completely flat tires is a violation of KRS 189.020, which requires a vehicle to be equipped so as "to protect the rights of other traffic, and to promote the public safety." The Court further held that the stop was justified under the community caretaking function because even though the police officer did not expressly testify that he believed appellant required assistance, her actions suggested that she was not aware her tires were flat and potentially dangerous.

D. ***Haney v. Commonwealth***

2015-CA-001552 09/23/2016 2016 WL 5318836

Opinion by Judge D. Lambert; Judge Maze concurred; Judge Jones concurred and filed a separate opinion.

After entering a conditional guilty plea, appellant challenged the denial of his motion to suppress certain evidence. He presented the following issues: whether the evidence adequately established his constructive possession of evidence seized in a search of the garage he occupied at the time of the search, and whether the arresting officer had a sufficient basis for conducting a pat down of his person. After receiving permission to search a residence, a police officer was allowed access through a locked door to an attached garage, where he noticed a "very pronounced" chemical odor, characteristic of the manufacture of methamphetamines. He also observed a truck, some chairs, a workbench, and appellant. In plain view under the workbench, the officer located two plastic 20-ounce bottles. Testimony offered at the suppression hearing revealed that these bottles were smoking, indicating that they were both active "one-step" meth labs. Also in the garage, in a plastic bin, the officer located various other precursor materials. A subsequent pat-down search of appellant resulted in the discovery of a small plastic bottle containing marijuana seeds, but no evidence relating to the manufacture of methamphetamines. A grand jury indicted appellant for manufacturing methamphetamines, first offense, but he was not charged with any offense pertaining to the marijuana seeds found on his person. On appeal, the Court of Appeals affirmed. The Court held that the evidence presented in the suppression hearing supported a conclusion that appellant was in constructive possession of the evidence seized. Appellant had locked himself in an unventilated room with two meth labs that were actively generating noxious fumes. This fact supported an inference that he knew of the two meth labs. Moreover, the locking of the door to the garage supported an inference that appellant intended to exclude all others - even the owners of the residence - from entry into the garage and, thus, he controlled all personalty found inside. The Court also found no reversible error as it related to the search of appellant's person, as it yielded no evidence giving rise to his indictment.

E. ***McGuffin v. Commonwealth***

2015-CA-000553 09/02/2016 2016 WL 4575639 DR Pending

Opinion by Judge Nickell; Chief Judge Kramer concurred; Judge Thompson dissented without separate opinion.

On appeal from a conviction for trafficking in a controlled substance in the first-degree (two or more grams of methamphetamine) and PFO I, appellant argued entitlement to a directed verdict because the Commonwealth did not conduct an analysis to establish the relative purity of the methamphetamine, thereby making it impossible to know the actual weight of the methamphetamine trafficked. He contended that the weight of any adulterants or fillers mixed into the methamphetamine should be disregarded for purposes of determining whether more than two grams of a controlled substance was trafficked under KRS 218A.1412. By a 2-1 vote, the Court of Appeals disagreed, citing the definition of "methamphetamine" in KRS 218A.010(25) as "any substance that contains any quantity of methamphetamine, or any of its salts, isomers, or salts of isomers." No legislative intent was discerned requiring proof of weight of a pure illegal substance, but clear intent was seen to punish more harshly those who sold larger amounts of illicit drugs, regardless of their relative purity. Because the total weight of the substances trafficked exceeded two grams, the conviction was not disturbed. The majority likewise rejected appellant's unpreserved challenge to the trial court's failure to require the jury to recommend sentence on the underlying crime before determining guilt on the PFO charge. Any slight procedural defect in this regard was insufficient to qualify as palpable error where no possibility existed that the PFO sentence was unlawful. Finally, the majority upheld the denial of appellant's motion to dismiss the entire jury pool where the Commonwealth Attorney had initially been part of the pool. The Commonwealth Attorney had been excused before the pool's first trial, and no record existed of how the jury might have been actually or impliedly impacted, biased, or otherwise tainted by the brief inclusion of the prosecutor in the venire.

V. CUSTODY

A. ***Retherford v. Monday***

2015-CA-001803 09/02/2016 2016 WL 4575605 Released for Publication

Opinion by Judge Combs; Judge J. Lambert concurred; Judge VanMeter concurred and filed a separate opinion.

This was a child custody case in which the parents disputed the designation of the primary residential custodian. The trial judge adopted verbatim the proposed findings of fact and conclusions of law as propounded by one of the parties - complete with typographical grammatical errors as tendered. On appeal, the Court of Appeals vacated and remanded with directions that the trial court make its own independent findings and conclusions. In so doing, the Court noted the importance of adherence to CR 52.01 in general but especially in the particular context of family law cases involving children. In his concurring opinion, Judge VanMeter disagreed with the majority's reasoning, but concluded that vacatur was nonetheless merited because the findings adopted by the trial court were unsupported by substantial evidence.

VI. FAMILY LAW

A. ***Grasch v. Grasch***

2015-CA-000294 09/23/2016 2016 WL 5319744

Opinion by Judge Clayton; Chief Judge Kramer and Judge J. Lambert concurred.

The parties were married for 32 years before Wife filed for dissolution. Husband had a law practice where Wife also worked until the parties separated. The primary issue in dividing the parties' property was whether to have Husband's contingency fee contracts from his law firm declared income or property of the marital estate subject to division. The trial court found the contingency fee contracts constituted income. The Court of Appeals agreed. Contingency fee contracts are not property interests owned by attorneys, but are income-generation devices that permit attorneys to determine their fees based on their clients' recoveries. Furthermore, the nature of a contingency fee case is that an attorney may not receive any money, as the case may result in no award to the client. The contract may also be declared void due to a public policy violation or null by operation of law. The Court was also presented with the following question: When a husband and wife use wife's non-marital property and both parties' martial property to purchase land and construct a residence that ultimately is worth less than the total contributions, should the marital and non-marital shares be proportioned to share in the loss? The Court answered the question affirmatively because the facts demonstrated that the decrease in value of the combined marital and non-marital funds was due to general economic conditions; therefore, both fund sources should shoulder the loss in proportionate shares. The case was remanded for the trial court to first resolve a factual issue regarding how much the parties spent in marital funds on improvements to the residence, and then to divide the remaining marital share in just proportions.

B. ***Moore v. Moore***

2015-CA-001823 09/30/2016 2016 WL 5485214

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

In an appeal from a domestic violence order, the Court of Appeals affirmed, holding that a trial judge has discretion to deny a motion to voluntarily dismiss under CR 41.01(2) based on grounds outside the factors set forth in *Sublett v. Hall*, 589 S.W.2d 888 (Ky. 1979). In so holding, the Court noted that the *Sublett* factors alone could not adequately address a court's unique concerns surrounding domestic violence. The Court also relied on the fact that Kentucky law had previously recognized that voluntary dismissals were treated differently in termination of parental rights cases than in general civil cases in *Van Wey v. Van Wey*, 656 S.W.2d 731 (Ky. 1983). Finally, the Court found sufficient evidence that domestic violence had occurred and may occur again due to appellant's failure to seek substance abuse treatment, the seriousness of the act of domestic violence, and the fact that the parties lived together.

VII. FRAUD

A. ***Grant Thornton, LLP v. Yung***

2014-CA-001957 09/16/2016 2016 WL 4934672

Opinion by Judge Maze; Judge Clayton concurred; Judge Thompson dissented and filed a separate opinion.

Clients of a public accounting firm brought an action against the firm alleging fraud and negligence in the course of providing tax and accounting services. Following a bench trial, the circuit court entered judgment for the clients and awarded compensatory damages totaling nearly $20 million and punitive damages of $80 million. By a 2-1 vote, the Court of Appeals affirmed in part, reversed in part, and remanded. Notably, the Court held that the clients' allegation that the accounting firm had actively marketed its tax avoidance product, knowing that the IRS had rejected a substantially similar tax product, supported their claim for fraud by misrepresentation, notwithstanding the firm's argument that such statements were unactionable statements of opinion or prediction regarding whether the IRS would allow the tax shelter. The Court further held that the clients' reliance on the firm's misrepresentations was justifiable. Although the clients could have obtained an independent review of the transactions at issue, there was no evidence that they knew the transactions at issue were fraudulent. Moreover, the clients did not participate in the development or implementation of the strategy, the accounting firm held itself out as having an honest and professional opinion concerning the legality of the tax shelter, and the firm consistently misled the clients about the risks through an ongoing pattern of misrepresentations and omissions. The Court also held that: (1) the accounting firm was not prejudiced by the trial court's failure to find that the clients had waived their attorney-client privilege; (2) the firm owed a fiduciary duty to disclose material facts relating to the legality of its tax avoidance advice; and (3) the clients could properly recover taxes and interest incurred as damages. However, the Court reversed the trial court's award of punitive damages after concluding that the award was excessive as a matter of due process. Citing to Sixth Circuit precedent, the Court held that where the harm caused was entirely economic, the plaintiffs were sophisticated business entities who were not financially vulnerable, and the underlying award of compensatory damages was substantial, the ratio of punitive to compensatory damages may not exceed 1:1. In dissent, Judge Thompson disagreed with the majority's decision to reduce the punitive damage award.

VIII. HEALTH

A. ***Commonwealth of Kentucky, Cabinet for Health and Family Services v. Sexton***

2015-CA-000246 09/02/2016 2016 WL 4575650 DR Pending

Opinion and Order by Judge Clayton; Judges Combs and Stumbo concurred.

The Cabinet for Health and Family Services appealed an interlocutory order denying its motion to dismiss the petition for review of a decision by the Cabinet Secretary. The Secretary concluded in her administrative decision that appellee Lettie Sexton did not have standing to appeal the decision by Coventry Healthcare and Life Insurance denying medical reimbursement for medical services. In addition, Sexton filed a motion to dismiss the appeal because it was interlocutory. The Court of Appeals held that because the issue of sovereign immunity was implicated, the interlocutory appeal was proper. Next, the Court determined that Sexton's failure to strictly comply with KRS 13B.140 did not abrogate the waiver of sovereign immunity. The Court further held that when the Cabinet has entered into a Medicaid Service Provider Agreement with a managed care organization, the legislature has waived sovereign immunity by operation of KRS 45A.245 of the Kentucky Model Procurement Code. Under KRS 45A.245, any entity entering into a lawfully written contract with the Commonwealth may bring an action for breach or enforcement of a contract. Therefore, under KRS 45A.245, sovereign immunity has been waived in appeals of disputes involving Medicaid reimbursements between MCOs and enrollees, who may be represented by an authorized agent of the provider. Nonetheless, the Court ultimately vacated and remanded the decision because the proper venue for these cases was Franklin Circuit Court.

IX. IMMUNITY

A. ***Commonwealth of Kentucky, Transportation Cabinet v. Watson***

2015-CA-001610 09/02/2016 2016 WL 4575615 Rehearing Pending

Opinion by Judge Clayton; Judge Nickell concurred; Judge Jones concurred in result only.

Two vehicles collided in an intersection. Appellee Robert Watson subsequently filed a complaint against the other motorist and the Transportation Cabinet, alleging that the collision partially occurred because the Cabinet failed to maintain the traffic light at the intersection. The Cabinet moved to dismiss the complaint against it on the ground that it was entitled to sovereign immunity. The circuit court denied the motion and the Cabinet filed an interlocutory appeal. On appeal, the Court of Appeals reversed and remanded, holding that the Transportation Cabinet was entitled to immunity from suit because the Cabinet is a creation of the Commonwealth and performs an integral state government function. The Court further noted that the Cabinet may only be sued through the Board of Claims for any negligence in performing ministerial acts. An alternative issue regarded whether an apportionment instruction against the Cabinet was permissible at trial. The Court rejected the alternative claim, holding that once a third-party complaint has been dismissed due to sovereign immunity, apportionment is not permitted. If an immune party were to remain in the case for apportionment, then it would incur the cost, inconvenience, distractions, and burdens of trial in cases where it is not even financially liable.

B. ***Louisville/Jefferson County Metro Government v. Cowan***

2015-CA-000600 09/23/2016 2016 WL 5319295

Opinion by Judge VanMeter; Judges Combs and Thompson concurred.

On review from an order denying the Louisville/Jefferson County Metro Government's motion for summary judgment on grounds of sovereign immunity, the Court of Appeals reversed, holding that as a consolidated metro government, Louisville Metro was entitled to sovereign immunity and, therefore, the claims against it for its allegedly negligent operation of a pool should have been dismissed. *See Lexington-Fayette Urban Cnty. Gov't v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004) ("[U]rban county governments constitute a new classification of county government … entitled to sovereign immunity."); *see also* KRS 67C.101(2)(e) ("A consolidated local government shall be accorded the same sovereign immunity granted counties, their agencies, officers, and employees."). The Court clarified the distinction between sovereign immunity and governmental immunity, holding that the second part of the two-part test set forth in *Comair v. Lexington-Fayette Urban Cnty. Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), which assesses whether a government entity's function is integral to government, only applies when an entity alleges governmental immunity. Sovereign entities are entitled to absolute immunity, regardless of whether their functions are integral to government.

X. INSURANCE

A. ***Houchens v. Government Employees Insurance Company***

2014-CA-002017 09/09/2016 2016 WL 4709168 DR Pending

Opinion by Judge Dixon; Judges Combs and Stumbo concurred.

The Court of Appeals reversed an order granting summary judgment in favor of GEICO and finding that nothing in Kentucky's Motor Vehicle Reparations Act, KRS 304.39-010 *et seq.*, prohibits a reparations obligor from denying or terminating basic reparations benefits based solely upon a third-party paper review of an insured's medical records. The trial court agreed with GEICO's argument that the phrase "may petition the court" contained in KRS 304.39-270(1) means that a reparations obligor may, but is not required, to seek a court order for an independent medical exam (IME) prior to terminating or denying benefits. Disagreeing, the Court of Appeals noted that whether KRS 304.39-270(1) provides the sole statutory mechanism for a reparations obligor to challenge an insured's medical bills has yet to be addressed by a Kentucky court. However, in examining the decisions in *Grant v. State Farm Mutual Automobile Insurance Co.*, 896 S.W.2d 24 (Ky. App. 1995), *Miller v. United States Fidelity & Guaranty Co.*, 909 S.W.2d 339 (Ky. App. 1995), and *White v. Allstate Insurance Company*, 265 S.W.3d 254 (Ky. App. 2007), the Court observed that there is a distinct difference between the use of a paper medical records review by a reparations obligor for the purpose of establishing good cause for a court-ordered IME and the use of a medical records review by that obligor for the purpose of unilaterally denying or terminating an insured's benefits. As is evidenced by the case law, the legislature enacted KRS 304.29-270(1) as a safeguard against the misuse of IMEs. Not only must the obligor demonstrate good cause for the IME, but the court is then required to set the time, place, manner, conditions, scope of the examination, and the physician by whom it is to be made. The Court of Appeals opined that it would violate the intent and purpose of Kentucky's MVRA to hold that the legislature would require court oversight of an IME of an insured yet would condone that insured's benefits being terminated or denied solely based upon a unilateral paper review of his or her medical records. Thus, the Court concluded that under KRS 304.39-270(1), a reparations obligor who questions the veracity of an insured's medical bills may petition the court for an IME. The obligor also has the prior option of requesting that the insured voluntarily undergo an IME, which the insured may or may not agree to. However, if the obligor chooses to do neither, it must pay the claim, as medical bills are statutorily presumed to be reasonable and the burden is on the obligor to prove otherwise.

XI. JUDGMENT

A. ***Hoffman v. Hoffman***

2015-CA-001436 09/02/2016 2016 WL 4575617 Released for Publication

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

Appellant challenged an order denying her motion to alter, amend, or vacate an order reducing maintenance filed pursuant to CR 59.05 or, alternatively, CR 60.01 or CR 60.02. The family court ruled that although neither party received the order until two days after the expiration of the ten-day period provided for in CR 59.05, it had lost jurisdiction to consider the motion. The Court of Appeals reversed and remanded. First, the Court noted that the failure to receive notice of the order was not the fault of either attorney; instead, the only plausible conclusion was that the circuit court clerk had failed to timely mail the order to the attorneys. The Court held that under these circumstances the family court retained jurisdiction to consider whether equitable tolling should be applied to the late filing of the CR 59.05 motion, but the Court recognized that the denial of a CR 59.05 motion is not a final and appealable order. However, the Court then held that the denial of a CR 60.02 motion is final and appealable, that the family court retained the equitable power under CR 60.02 to correct the clerk's error by considering appellant's motion, and that appellant was entitled to relief under CR 60.02 based on the failure of the clerk to promptly mail the order reducing maintenance.

XII. NEGLIGENCE

A. ***Memorial Sports Complex, LLC v. McCormick***

2013-CA-001788 09/02/2016 2016 WL 4575676 Released for Publication

Opinion by Judge Thompson; Judge D. Lambert concurred; Judge Maze concurred and filed a separate opinion.

A baseball player brought a personal injury action against a sports complex for an injury he received after his arm slid under a fence while diving for a foul ball. The sports complex subsequently filed third-party complaints against the player's coach, the player's father, and the fencing company, seeking indemnity, contribution, or apportionment. The circuit court dismissed the third-party defendants and the Court of Appeals affirmed. The Court held that the sports complex was the primary cause of the injury sustained by the player and, thus, was not entitled to indemnification from the coach, father, or fencing company. In reaching this decision, the Court noted that the complex made the decision not to install a warning track, colored piping at the top of the fence, or additional reinforcement at the bottom of the fence. The Court further noted that it was the configuration of the field and fence that allowed the injury to take place, that any failure to supervise on the part of the coach or father was a lack of action in the face of an ongoing adverse condition caused by the complex, and the subcontractor built the fence to specifications supplied by the complex. The Court additionally held that contribution was not available against the coach, father, or fencing company because an apportionment instruction was available and required under KRS 411.182. In his concurring opinion, Judge Maze expressed the view that the Supreme Court of Kentucky should take the opportunity to sort out the continued viability of contribution and indemnity and their proper relationship to the statutory apportionment of fault.

XIII. TAXATION

A. ***Wilgreens, LLC v. O'Neill***

2015-CA-000407 09/23/2016 2016 WL 5319593

Opinion by Judge Jones; Chief Judge Kramer and Judge Taylor concurred.

This appeal concerned a property tax assessment on commercial real property located in Fayette County, Kentucky. Appellants argued that the Fayette County PVA exceeded its statutory authority when assessing the subject property. According to appellants, the PVA overvalued the property because it took into consideration the income generated under appellants' triple net lease, which appellants asserted was above-the-market. The Kentucky Board of Tax Appeals determined that the PVA's method of assessment resulted in a reasonable estimation of the fair cash value of the property, a decision the Fayette Circuit Court affirmed. The Court of Appeals also affirmed, holding that while appellants demonstrated an alternative method for assessing the property, they failed to present convincing evidence that the PVA's assessment overvalued the subject property. The PVA's inclusion of the income generated under appellants' lease was consistent with KRS 132.191(2)(b), which provides that the PVA may value property using the income generation approach by estimating the present value of "future benefits" arising from ownership of the property.

XIV. TORTS

A. ***Maupin v. Tankersley***

2015-CA-001259 09/16/2016 2016 WL 4934283

Opinion by Judge Maze; Judge Nickell concurred; Judge Jones dissented and filed a separate opinion.

Appellant brought an action alleging that appellee was strictly liable for injuries appellant sustained when she was attacked by appellee's dogs while walking on a dirt path on appellee's property. The circuit court entered judgment in favor of appellee and denied appellant's motions for judgment notwithstanding the verdict and for a new trial on damages. By a 2-1 vote, the Court of Appeals affirmed, holding that the general negligence standard - not strict liability - applied to the determination of appellee's statutory liability for appellant's injuries. In dissent, Judge Jones argued that the plain language of KRS 258.235 and the decision of the Supreme Court of Kentucky in *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012), compelled the application of strict liability.

B. ***Pursifull v. Abner***

2015-CA-000879 09/23/2016 2016 WL 5335515

Opinion by Judge Clayton; Judges Combs and Stumbo concurred.

Two Kentucky State Police troopers were sued in their individual capacities for negligence that allegedly occurred during a high-speed automobile chase that ended with the death of a sheriff's deputy. The high-speed chase exceeded speeds of 100 miles per hour and occurred over almost 15 miles of highway roads. At the chase's conclusion, the deputy was stationed in his vehicle off the road at a T-juncture waiting for the troopers and the suspect. When the suspect approached the juncture, he veered his car off the road while traveling approximately 70 miles per hour and slammed head-on into the deputy's vehicle's side. The deputy and his canine unit were instantly killed. The suspect survived and later pled guilty to murder and first-degree fleeing and evading. The Court of Appeals concluded that entry of summary judgment in favor of the troopers was appropriate because the causation element of a negligence tort could not be proven. The case of *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) held in a nearly-identical situation that the suspect's criminal act was an intervening cause that made the officer's actions in pursuing the suspect neither the legal nor the proximate cause of the resulting damages. Here, there was no evidence that the officers' conduct in any way caused the suspect to intentionally, or wantonly with extreme indifference to human life, veer his car off the road and into the deputy's cruiser. A dash-cam video of the incident revealed that the suspect did not lose control of his vehicle, nor did his break lights engage indicating that he was attempting to stop or slow down. The officers were not acting negligently when the suspect veered off the road and rammed the deputy's cruiser. Under these facts, appellants could not prove the causation element of their claim. Thus, summary judgment was appropriate.

XV. WORKERS' COMPENSATION

A. ***Commonwealth of Kentucky, Uninsured Employers' Fund v. Crayne***

2016-CA-000284 09/30/2016 2016 WL 5485212

Opinion by Judge Clayton; Judges Combs and Stumbo concurred.

The Uninsured Employers' Fund petitioned for review of a Workers' Compensation Board opinion that affirmed an Administrative Law Judge's order awarding appellee benefits and ordering the UEF to pay the benefits. The UEF disputed whether appellee proved that his injury was work-related and gave adequate notice. Further, the UEF maintained that the ALJ improperly determined appellee's average weekly wage. In affirming, the Court of Appeals noted that the ALJ has the sole authority to determine the weight and credibility of, and the inferences to be drawn from, the evidence. Given the ALJ's role, the Court concurred with the Board that substantial evidence supported the ALJ's decisions regarding the work-related nature of the injury, adequacy of notice, and average weekly wage. The Court also noted that the purpose of the UEF is to provide compensation to workers when their employers fail to provide such compensation.