PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2014 to FEBRUARY 28, 2014

I. APPEALS

A. ***Bituminous Cas. Corp. v. Estate of Bramble***

2011CA000542 02/21/2014 2014 WL 685453 DR Pending

Opinion by Chief Judge Acree; Judge Moore concurred; Judge Thompson dissented and wrote a separate opinion. Appellants sought review of the trial court's partial summary judgment, which found that appellees/plaintiffs had established the first prong of the three-prong test for liability for an insurer's bad faith under *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). The Court of Appeals dismissed the appeal as interlocutory. The Court first held that a merits panel of the Court is not bound by the interlocutory orders previously entered by a motion panel of the Court. The Court next held that it may proceed to the merits of an appeal only after it has determined, *sua sponte* if need be, that it has jurisdiction to do so. In this case, the order from which the appeal was taken was interlocutory because it was not a final judgment, was not an interlocutory judgment capable of being made final by CR 54.02(1), and was not any type of order identified by our Supreme Court as being appealable notwithstanding its immutable interlocutory nature. Therefore, the case was dismissed for want of jurisdiction.

II. ATTORNEY AND CLIENT

A. ***Persels & Associates, LLC v. Capital One Bank, (USA), N.A.***

2012CA001447 02/14/2014 2014 WL 585629 DR Pending

Opinion by Judge Clayton; Judges Maze and Nickell concurred. The Court of Appeals affirmed the circuit court's imposition of CR 11 sanctions against appellants. Appellant Persels & Associates, LLC (Persels) is a national law firm that was retained separately by two Kentucky individuals to represent them in debt collection cases. Under the terms of local counsel's agreement with Persels, counsel was not required to sign pleadings, enter an appearance, or attend a court proceeding. The Court held that the terms of this agreement did not abrogate CR 11's requirement that the attorneys who drafted the pleadings in those cases sign the pleadings or face sanctions. The Court also held that the imposition of a $1.00 fine against each attorney who had failed to sign pleadings in the subject actions was neither onerous nor an abuse of discretion. The Court further held that the trial court's adverse rulings on appellants' motions were insufficient to warrant recusal under KRS 26A.015.

III. CONSTITUTIONAL LAW

A. ***Jamgotchian v. Kentucky Horse Racing Com'n***

2012CA002154 02/07/2014 2014 WL 495575 DR Pending

Opinion by Judge Lambert; Judges Combs and Thompson concurred. The Court of Appeals affirmed an order finding that 810 KAR 1:015, Section One, Article 6(a)-(b) - which prohibits a racehorse purchased at a Kentucky claiming race from racing anywhere else but Kentucky until the meet at which it was claimed is closed - does not violate the Commerce Clause. The Court held that while appellant had standing to challenge the regulation, he had not demonstrated that the regulation violated the "dormant" Commerce Clause or otherwise unduly burdened interstate commerce. The Court noted that the regulation of horse racing is a traditional governmental function in Kentucky and that the regulation benefited the Kentucky economy and did not discriminate between out-of-state and in-state actors who had bought a horse at a claiming race in Kentucky.

IV. CONTRACTS

A. ***Ford Contracting, Inc. v. Kentucky Transp. Cabinet***

2012CA000554 02/07/2014 2014 WL 495579 Rehearing Denied

Opinion by Chief Judge Acree; Judges Lambert and Stumbo concurred. The Court of Appeals affirmed in part and reversed in part the opinion and order of the Franklin Circuit Court upholding the Kentucky Transportation Cabinet's $52,001.26 damages award to appellant for breach of contract. In holding that this conclusion was partly erroneous, the Court found that the trial court mistakenly affirmed the Cabinet's denial of appellant's idle-equipment damages claim and direct/indirect/labor costs claim. In an issue of first impression, the Court first concluded that, under the facts of this case, use of the federal cost principles identified in 48 C.F.R. Part 31 to calculate damages was not mandatory under KRS 45A.215. In another issue of first impression, the Court recognized idle-equipment damages as a compensable category of damages. The Court further concluded that the Cabinet's finding as to appellant's damages for direct/indirect/labor costs was not supported by substantial evidence. Finally, the Court held that appellant's remaining damages claims were supported by substantial evidence and that the trial court did not erroneously deny appellant's request for prejudgment interest.

V. CRIMINAL LAW

A. ***Brown v. Commonwealth***

2012CA001944 02/14/2014 423 S.W.3d 765

Opinion by Judge Maze; Chief Judge Acree and Judge Stumbo concurred. The Court of Appeals reversed and remanded as to an order denying appellant's motion to suppress evidence obtained during a warrantless protective sweep of appellant's residence. The Court held that because police lacked the requisite suspicion of danger to justify the protective sweep, the trial court erred in denying the motion to suppress. The officers who conducted the sweep had no articulable information that could have led them to reasonably believe that someone remained inside the home, and they saw no sight and heard no sound which spurred them to enter the home.

B. ***Wilson v. Commonwealth***

2012CA000920 02/07/2014 2014 WL 495566 DR Pending

Opinion by Judge Clayton; Judges Dixon and Maze concurred. In an appeal from an order denying a motion to suppress evidence obtained following a warrantless search of appellant's patio, the Court of Appeals affirmed but for reasons different from those relied upon by the trial court. The Court first held that appellant's patio, which was adjacent to his first-floor apartment and enclosed on two sides, was part of the apartment's curtilage, such that investigating police officers were required to obtain a warrant prior to entering the patio. Although the patio had no front enclosure, it was used as an extension of the home's living space, and patio users entered onto the patio from inside the apartment. Consequently, while officers had the authority to be on the public area next to the patio, they did not have the authority to reach onto the patio and retrieve bullets from a chair. The Court also held that the retrieval of a stolen GPS from a trash can on the patio was the product of an illegal search because the patio was an extension of the home. However, the Court also held that statements made by appellant to police did not need to be suppressed due to a lack of a *Miranda* warning because he had not been subjected to an interrogation. The Court also held that the search warrant subsequently obtained by police was still valid because the illegally-seized evidence was not directly relied upon in the search warrant affidavit and other sufficient evidence supported the finding of probable cause for the warrant. The Court further cited to the doctrine of inevitable discovery and held that the illegally-seized items would have been found during the execution of the search warrant; thus, they did not require suppression.

VI. HEALTH

A. ***Commonwealth, Cabinet for Health and Family Services, Dept. of Medicaid Services v. Bratcher***

2012CA002219 01/10/2014 2014 WL 97474 Released for Publication

Opinion by Judge Combs; Judges Lambert and Thompson concurred. The recipient of assistance through the Supports for Community Living Services ("SCL") program appealed from an order of the Cabinet for Health and Family Services, Medicaid Services ("the Cabinet"), which denied recipient re-certification in the program. The Court of Appeals held that the final order of the Cabinet denying re-certification exceeded the Cabinet's statutory powers by requiring the recipient to have, as a prerequisite to showing a developmental disability, an IQ of 70 or below. No regulation required an individual who qualified for the SCL waiver on the basis of developmental disability pursuant to 907 KAR 1:145 to show that he also met the regulation's definition of mental retardation.

VII. IMMUNITY

A. ***Commonwealth v. Samaritan Alliance, LLC***

2012CA000745 02/21/2014 2014 WL 685479 Released for Publication

Opinion by Judge Maze; Judges Clayton and Dixon concurred. The Cabinet for Health and Family Services and the Cabinet's Secretary (collectively, "the Cabinet") brought an interlocutory appeal from an order denying its motion to dismiss appellee's breach of contract and fraud claims. The Cabinet argued that appellee's claims were barred by the doctrine of sovereign or governmental immunity. The Court of Appeals held that the legislature had waived the Cabinet's immunity from appellee's breach of contract claim by operation of KRS 45A.245 and that KRS 13B.150 allowed appellee to present evidence of extrinsic fraud as part of its statutory appeal from the Cabinet's final order. The Court further held, however, that appellee could not assert an independent claim for damages arising out of that alleged fraud. The Court also concluded that the substantive matters raised regarding the validity of appellee's statutory appeal were not properly raised in an interlocutory appeal.

B. ***Prater v. Catt***

2013CA000324 02/28/2014 2014 WL 794809 DR Pending

Opinion by Judge Combs; Judges Caperton and Thompson concurred. Appellant was injured by a horse utilized by a Lexington mounted police officer to monitor crowd control at a University of Kentucky football game. The Court of Appeals affirmed the trial court's entry of summary judgment, holding that the officer and her supervisor were shielded by qualified official immunity. The control of a horse under these circumstances involved discretionary action by the police officer, and she exercised that discretion in good faith.

VIII. MINES AND MINERALS

A. ***Department of Revenue, Finance & Admin. Cabinet v. Roanoke Cement Co., LLC***

2013CA000471 02/21/2014 2014 WL 685502 DR Pending

Opinion by Judge Combs; Judges Caperton and Thompson concurred. The Department of Revenue sought review of a determination of the Kentucky Board of Tax Appeals that appellee, which operated a limestone quarry, was entitled to a tax credit against the mineral severance tax imposed on the gross value of limestone aggregate severed from its quarry. The Court of Appeals agreed with the circuit court that appellee was eligible for a tax credit pursuant to KRS 143A.035. The Court also held that the amount of tax credit to which appellee was entitled included the value of sales of severed limestone aggregate to out-of-state customers in which the out-of-state customers took possession of the limestone aggregate within the state, at the quarry. Appellee's entitlement to claim the tax credit did not depend on the method by which the limestone aggregate reached the out-of-state purchasers.

IX. MORTGAGES

A. ***Mortgage Electronic Registration Systems, Inc. v. MainSource Bank***

2012CA001168 02/21/2014 2014 WL 685488 Released for Publication

Opinion by Judge VanMeter; Judges Lambert and Moore concurred. On review from a judgment denying appellants' motion to vacate an order confirming a Master Commissioner's report, the Court of Appeals held that the circuit court improperly confirmed the Master Commissioner's report of sale before the CR 53.05 10-day period for objections had expired. The Court further held that the circuit court improperly confirmed the judicial sale, ordered pursuant to a junior mortgagee's foreclosure proceedings, without making it subject to appellants' senior mortgage lien of record. Per KRS 426.690's prohibition of sales prejudicial to any lienholder of record, property cannot be sold at a junior mortgagee's judicial foreclosure sale when the senior lienholder makes its claim known to the court prior to the judicial sale. While appellants failed to bring their claim until after default judgment had been entered against them, their presentation of the claim prior to the judicial sale was sufficient to prevent their senior mortgage from being extinguished. The case was remanded back to the circuit court with instructions to set aside the first foreclosure sale and to conduct another, this time subject to the senior mortgage.

X. OPEN RECORDS

A. ***Fiorella v. Paxton Media Group, LLC***

2012CA001093 02/21/2014 2014 WL 685482 Released for Publication

Opinion by Chief Judge Acree; Judges Lambert and Stumbo concurred. After certain discovery filed with the trial court was "sealed by agreement of the parties," that court entered an order granting intervening parties (news media members) access to the discovery. Appellants appealed, seeking reversal of the ruling. The Court of Appeals first held that no First Amendment right of access was in issue. The Court then discussed the presumption of access to discovery filed with the trial court which is inherent in the Kentucky Rules of Civil Procedure. Finally, the Court reviewed the trial court's order under the common law right of access to court records and affirmed the trial court's order allowing media access to the discovery.

XI. ORIGINAL ACTIONS

A. ***Purdue Pharma L.P. v. Combs***

2013CA001941 02/28/2014 2014 WL 794928 N/A Filed in S. Ct.

Opinion and Order Denying Petition for Writ of Prohibition by Judge Thompson; Judges Caperton and Jones concurred. The Commonwealth filed an action against a pharmaceutical company related to the company's marketing and advertisement of prescription pain medication. The company removed the action to federal court, but the Commonwealth's motion to remand the matter to state court was granted. On motion of the Commonwealth after remand, the circuit court deemed admitted the Commonwealth's requests for admission served on the company at the time the original complaint was filed and denied the company's subsequent motions to rescind the court's order and to withdraw or amend any deemed admissions. The company subsequently filed a petition for a writ of prohibition. The Court of Appeals held that the company's potential enormous financial liability and the fact that the trial court's ruling may have been decisive as to liability, and even incorrect, were insufficient to establish great and irreparable injury or inadequacy of remedy by appeal necessary for a writ of prohibition. Any concerns regarding litigation expense could not justify intervention into the trial court process, and concerns regarding prospective jury bias if the case was remanded by an appellate court following appeal of any jury verdict would be faced by any litigant in a high-profile case and would be curable by proper voir dire or change of venue.

XII. PROPERTY

A. ***Elsea v. Day***

2012CA000662 02/28/2014 2014 WL 793975 DR Pending

Opinion by Judge Dixon; Judges Caperton and VanMeter concurred. In a quiet title action brought by landowners against adjoining landowners, the Court of Appeals held that adjoining landowners adversely possessed the disputed tract even though the claim of title originated in a mistaken belief of ownership. The Court also held that landowners were estopped from contesting the boundary line. The Court further held, in a matter of first impression, that a surveyor who had 35 years' experience was qualified to provide expert testimony despite not having a license at the time of the events in question.

B. ***Lerner v. Mortgage Electronic Registration Systems, Inc.***

2012CA001484 02/14/2014 423 S.W.3d 772

Opinion by Judge Stumbo; Chief Judge Acree and Judge Maze concurred. The Court of Appeals affirmed an order vacating a judicial sale of real property. Counsel for appellee Mortgage Electronic Registration Systems, Inc. was present at the judicial sale and had been instructed to bid on the property. However, counsel negligently failed to do so. The trial court vacated the judicial sale after finding that the purchase price of the property - approximately 10% of the appraised value - was inadequate and "shocked the conscience." The Court held that the trial court did not abuse its discretion in vacating the sale even though, as a general rule, mere inadequacy of price is an insufficient ground for setting aside a judicial sale.

XIII. STANDING

A. ***Interactive Gaming Council v. Commonwealth ex rel. Brown***

2011CA001859 02/21/2014 2014 WL 685466 Released for Publication

Opinion by Judge Jones; Chief Judge Acree and Judge Maze concurred. Appellee sought forfeiture of 141 internet domain names it claimed were being used illegally for gambling in the Commonwealth. The trial court denied appellant - a trade association comprised of various entities involved in the internet gaming industry - the right to intervene on the ground that it could not establish associational standing because forfeiture actions require the participation of individual property owners. The Court of Appeals reversed and remanded for further proceedings. In so doing, the Court adopted the three-prong associational standing test established by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Specifically, the Court held that while the first two prongs of the *Hunt* test are constitutionally-mandated prerequisites, the third prong is prudential and should be applied by courts flexibly to achieve judicial economy. The Court concluded that appellant was raising legal claims that affected the validity of the entire forfeiture procedure and, therefore, the participation of individual property owners was not required. As such, the Court held that associational standing was proper.

XIV. TAXATION

A. ***Wood v. Tax Ease Lien Investments 1, LLC***

2013CA000274 02/28/2014 2014 WL 794773 Released for Publication

Opinion by Judge Dixon; Judges Combs and VanMeter concurred. In an appeal from an order denying appellant's motion to intervene in an action filed by appellee to enforce its certificates of delinquency for unpaid real estate taxes on property for which he had also purchased a tax lien, the Court of Appeals affirmed. The Court held that the lender's letter requesting a payoff amount from appellant for unpaid ad valorem taxes was not insufficient simply because it asked that the payoff amount be provided within three days. Moreover, the attestation form presented to the county clerk by the lender was not invalid on the basis that the lender's attorney had altered it and it was sworn to before a notary public, not the county clerk. The Court further held that appellant was not entitled to ignore the letter from the lender requesting a payoff amount on the basis that neither lender nor its attorney were members of the statutorily-delineated class set forth in KRS 134.127(3)(e) that are permitted to use the statutory remedy for persons unable to obtain a payoff amount. Finally, the Court held that the motion to intervene was rendered moot by taxpayers' payment of past due ad valorem taxes.

XV. WORKERS' COMPENSATION

A. ***McGuire v. Lorillard Tobacco Co.***

2012CA000845 02/14/2014 2014 WL 585626 Rehearing Denied

Opinion by Judge Moore; Judges Lambert and VanMeter concurred in part as to all issues but one. As to this issue, Judge VanMeter wrote the majority opinion, joined by Judge Lambert. Judge Moore dissented. In an appeal from a defense verdict on claims of negligence and product liability asserted by the estate of a decedent allegedly exposed to asbestos as a result of smoking asbestos-filtered cigarettes and working in a plant that manufactured the cigarettes, the Court of Appeals affirmed. The Court held that the Workers' Compensation Act provided the exclusive remedy for appellant's claim against Lorillard for workplace exposure to asbestos. KRS 342.690(1). Appellant's tort action stemming from decedent's smoking of asbestos-filtered cigarettes, on the other hand, was not barred by the exclusive remedy provision of the Act. Although Lorillard provided decedent with free cigarettes, smoking the cigarettes was not a required part of his employment. Judges VanMeter and Lambert held, however, that the trial court's ruling that the exclusive remedy provision of the Act applied to this claim merely qualified as harmless error and did not warrant reversing and remanding for a new trial. The Court also held that the trial court did not abuse its discretion by excluding evidence that other individuals who had worked at Lorillard's plant had contracted mesothelioma. Appellant failed to provide a foundation for this evidence by demonstrating a causal link between each individual's work at Lorillard and each individual's mesothelioma. The Court also noted that establishing such a causal link in each instance would lead to numerous collateral inquiries and result in jury confusion; moreover, any prejudice that may have resulted in excluding this evidence was mitigated by an admonition from the trial court that, in addition to the decedent, other individuals had worked at Lorillard's plant and had later contracted mesothelioma. The Court also held that the trial court did not abuse its discretion by allowing Lorillard and H & V to introduce deposition testimony of three deceased witnesses who had been called upon by Lorillard and H & V in prior litigation involving the filter at issue. Because the parties against whom the depositions were offered in the prior litigation had a motive similar to appellant's motive in confronting the deponents' testimony, and because those other parties had developed the deponents' testimony through appropriate objections and searching cross-examination, appellant qualified as a "predecessor in interest" of those other cross-examining parties within the meaning of KRE 804(b)(1).