

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
FEBRUARY 1, 2017 to FEBRUARY 28, 2017

I. BANKS AND FINANCIAL INSTITUTIONS

A. Ventura v. Central Bank

[2015-CA-001407](#) 02/03/2017 2017 WL 461256

Opinion by Judge Dixon; Judges Nickell and VanMeter concurred.

The Court of Appeals affirmed the trial court’s summary judgment in favor of appellee, which dismissed appellants’ claims for false light invasion of privacy, breach of fiduciary duty, and malicious prosecution. The Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318 *et seq.*, popularly known as the Bank Secrecy Act (“BSA”), provides financial institutions and their officers, employees, and agents absolute immunity under its safe harbor provision from lawsuits based on a financial institution’s report or disclosure of suspicious activity possibly related to money laundering. The Court determined that appellee’s communications to federal authorities were made in the context of an ongoing investigation of suspicious activity pertaining to appellants’ bank accounts and pursuant to appellee’s obligation under the BSA. It was irrelevant that the disclosure of information was not pursuant to a court order or subpoena, as the BSA immunizes banks for “voluntary disclosures,” or disclosures “pursuant to [the Act] or for disclosures pursuant to any other authority.” As such, whether appellee made the disclosures on its own or at the request of a federal agency was immaterial for purposes of immunity under the BSA. Further, the Court concluded that the safe harbor provision of the Act is unambiguous, unqualified, and does not limit immunity to disclosures made in good faith. Finally, the Court held that the plain language of the BSA provides immunity from state law claims as well as federal claims.

II. CIVIL PROCEDURE

A. *Bryant v. Allstate Indemnity Company*

[2015-CA-001451](#) 02/24/2017 2017 WL 728126 Rehearing Pending

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

Appellants challenged an order compelling them to participate in pre-litigation depositions and to produce documents to Allstate Property and Casualty Company. The order was based on CR 27.01, which allows pre-litigation depositions.

Appellants were involved in a car accident. The driver of the vehicle who struck Bryant's car was insured by Allstate. Appellants claimed insurance benefits from their insurance company. Their company then submitted the claims to Allstate for subrogation. The trial court granted Allstate's "Petition to Compel Pre-Litigation Depositions." Appellants received notice of the petition on the same day that the trial court signed the order granting the relief requested in the petition. Appellants did not have an opportunity to respond to the petition or to have a hearing. They argued that they were denied due process and that Allstate did not have standing to bring this action. The Court of Appeals reversed, holding that certain requirements must be met by Allstate before the petition can be granted. Those requirements include: (1) that the petition must establish an imminent cause of action by Allstate against appellants; (2) that without granting the petition, the testimony would be lost and must be preserved to forestall a failure of justice; (3) that the petition must be verified; and (4) that there must be notice and a hearing. Allstate did not meet any of those requirements; therefore, the trial court was in error when it granted the relief requested.

III. CONTRACTS

A. *Roscoe v. Angelucci Acoustical, Inc.*

[2012-CA-001933](#) 02/17/2017 2017 WL 655488

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

Appellant was owner of the general contracting firm responsible for construction of the Hewlett-Packard Building on the University of Kentucky Coldstream campus. Angelucci Acoustical, Inc. was one of several subcontractors hired to complete the project. After the building's completion, appellant refused to pay Angelucci beyond the initial contract price even though Angelucci incurred an additional \$88,000 in costs for change orders submitted by appellant. Angelucci filed claims for breach of contract, unjust enrichment, and a mechanic's lien. The circuit court granted partial summary judgment in Angelucci's favor, finding that appellant owed Angelucci the additional monies plus post-judgment interest. Appellant did not appeal from the partial summary judgment. In 2012, pursuant to the Supreme Court of Kentucky's then recent ruling in *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012), the circuit court revisited the remaining issue of piercing the corporate veil. It again ruled in Angelucci's favor. Appellant appealed (No. 2012-CA-001933-MR) but posted no supersedeas bond. Thus, during the pendency of appeal No. 2012-CA-001933-MR, in an effort to collect the judgment, Angelucci sought a charging order and an asset discovery deposition. CR 69.03. Appellant initially resisted, but eventually appeared for his deposition, where he interrupted questioning and requested settlement discussions. A settlement was reached, but appellant later breached its terms. The circuit court held him in contempt and awarded Angelucci compensatory and punitive damages, as well as attorney's fees. Appellant appealed that judgment as well (No. 2014-CA-000536-MR). The Court of Appeals affirmed both judgments in favor of Angelucci, finding no genuine issues of material fact regarding the summary judgment, no error in the circuit court's analysis of *Inter-Tel*, and no abuse of discretion in the circuit court's finding of contempt and concomitant award of damages and fees to Angelucci.

IV. CRIMINAL LAW

A. *Dixon v. Commonwealth*

[2016-CA-000036](#) 02/17/2017 2017 WL 655476

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

In a direct appeal from a conviction for manufacturing methamphetamine, the Court of Appeals affirmed the trial court. The Court considered and rejected appellant's arguments that: (1) the trial court erroneously permitted the Commonwealth to inquire into a defense witness's number of felony convictions; (2) the trial court erroneously permitted the Commonwealth to use evidence it had not provided to the defense until the day before trial; and (3) the Commonwealth's closing argument amounted to a denial of due process in improperly urging the jury to "send a message" by its verdict. With regard to the first issue, the Court ultimately found the associated errors to be harmless. The Court also found no error as to the second issue because the defense had never actually requested discovery from the Commonwealth; appellant did not contend the discovery was exculpatory in nature; and the discovery was given as a professional courtesy by the prosecutor. The Court did not consider appellant's third argument on the merits because the issue was not preserved and the appellant did not request palpable error review on the issue, as required by RCr 10.26.

V. CUSTODY

A. *Varney v. Bingham*

[2016-CA-000370](#) 02/24/2017 2017 WL 728125

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

This appeal arose from a child custody action in which the trial court awarded permanent sole custody to the father based on the mother's previous substance abuse problem and criminal history, both of which occurred prior to the mother's pregnancy and the child's birth. The Court of Appeals vacated and remanded, holding that it was error for the Domestic Relations Commissioner (DRC), and in turn the trial court, to rely on the mother's past conduct to support the conclusion that the child's best interests would be served by awarding sole custody to the father. The Court determined that it is improper for a trial court to rely on a parent's prior substance abuse problem where there is no evidence presented showing how the problem has had any impact on the parent's current relationship with the child or its likelihood to be an issue in the future. Here, the DRC found only that the mother had a drug problem and a criminal record that predated the child's birth; the DRC made no finding that the mother had actively abused drugs or had engaged in any criminal behavior since the child's birth or that she was likely to do so in the immediate future. Notably, the mother had completed an intensive drug court program, from which she graduated prior to the child's birth, and had submitted to a hair follicle test, which returned negative results for all substances tested. On remand, the Court directed the trial court to not consider the mother's prior substance abuse issues unless it made a determination supported by appropriate findings that such conduct was likely to affect her relationship with the child.

VI. INSURANCE

A. *Weird v. State Farm Mutual Automobile Insurance Company*

[2012-CA-000326](#) 02/10/2017 2017 WL 541083

Opinion by Judge Nickell; Judge Clayton concurred; Judge Acree concurred and filed a separate opinion.

Appellant was injured in a motor vehicle collision on December 24, 2007. At the time of the collision, appellant was insured by State Farm under a liability insurance policy including underinsured motorists (UIM) coverage. Just under two years after the final payment of basic reparations benefits (BRB) by State Farm, appellant filed suit against the tortfeasor. Six months later - eighteen months after the final BRB payment - the trial court granted appellant's motion to amend his complaint to add State Farm as a defendant so he could pursue a claim for UIM benefits. Based on the policy language requiring suit be brought within two years of injury, death, or the last BRB payment, State Farm requested and was granted summary judgment over appellant's contentions that the policy language contained an unreasonable time restriction on filing claims and that, in any event, the "relation-back" provisions of CR 15.03 were applicable and saved the action. Appellant's subsequent appeal was placed in abeyance pending a decision of the Supreme Court of Kentucky in *State Farm Mutual Automobile Ins. Co. v. Riggs*, 484 S.W.3d 724 (Ky. 2016). *Riggs* addressed policy limitation language identical to that at issue in the instant matter, concluding that it closely tracked statutory tort claims limitation language and thus constituted a reasonable restriction on filing claims under the policy. The Court of Appeals concluded that it was bound to follow applicable precedent and rejected appellant's challenge to the policy language pursuant to *Riggs*. Following a detailed analysis of CR 15.03 and its applicability, the Court concluded that the trial court correctly found that appellant's amended complaint adding State Farm as a defendant did not comply with CR 15.03 and was time-barred. In a concurring opinion, Judge Acree voiced criticism of *Riggs*, positing that its reasoning was flawed and effectively established a statute of repose potentially serving to extinguish contract claims before their discovery - and possibly before their accrual. The concurrence questioned the reasonableness of *Riggs* in real-world scenarios, suggesting that it would serve only to require an injured party to sue its UIM insurer prior to any breach by the carrier and before discovering whether or not the tortfeasor really was an uninsured or underinsured motorist.

VII. JURISDICTION

A. Worrell v. Stivers

[2015-CA-001114](#) 02/17/2017 2017 WL 655479

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

Worrell and Stivers are sisters. Neither sister lives in Kentucky. Their father had established two trusts and served as trustee of the trusts. After his death, his wife, the parties' mother, became trustee and made disbursements to herself from the trust. The mother died testate in Montana. Stivers was appointed the personal representative of her mother's estate in Montana. Stivers also filed an ancillary probate action in the Fayette District Court concerning real property located in Kentucky. Worrell filed a statement of claim in Fayette District Court, arguing that her mother improperly disbursed funds to herself, and sought recoupment of the funds from the estate. Stivers filed notice to disallow the claim. The parties attempted to resolve the dispute and drafted an agreement; however, the agreement was never signed. Worrell then filed a complaint in Fayette Circuit Court to enforce the settlement agreement. The circuit court declined to accept personal jurisdiction, finding that the acceptance of jurisdiction was discretionary. The Court of Appeals vacated and remanded, holding that Kentucky's Long Arm Statute, KRS 454.210, was controlling. KRS 454.210(2)(a) has nine provisions that permit a trial court to exercise in personam jurisdiction. Here, the circuit court declined to exercise in personam jurisdiction without clarifying whether the court had personal jurisdiction. The Court of Appeals, citing *Roos v Kentucky Education Association*, 580 S.W. 2d 508 (Ky. App. 1979), stated that absent compelling circumstances, the trial court is bound to hear cases within its vested jurisdiction. Therefore, the case was remanded for a determination as to whether personal jurisdiction existed in this matter.

VIII. LABOR AND EMPLOYMENT

A. *Secretary of Labor, Commonwealth of Kentucky v. United Parcel Service, Inc.*

[2015-CA-001376](#) 02/24/2017 2017 WL 728127

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

The Secretary of Labor filed a petition for judicial appeal of the Occupational Safety and Health Review Commission's decision and order dismissing a citation against UPS that was imposed under the Kentucky Occupational Safety and Health Act (KOSHA). The Commission concluded that the Secretary had failed to meet his burden of proof under KOSHA's general duty clause (KRS 338.031(1)). The circuit court and the Court of Appeals both affirmed. Because the language of the citation, which alleged that UPS was exposing employees to the hazard of being struck by runaway dollies, tied the hazard to malfunctioning E-hitches, the Secretary had to prove that the runaway dollies were caused by malfunctioning E-hitches in order to establish that UPS violated the general duty clause. Because there was no evidence that the hitches on the dollies were malfunctioning, the citation was properly dismissed.

IX. MORTGAGES

A. *Bowling v. Appalachian Federal Credit Union*

[2015-CA-000041](#) 02/03/2017 2017 WL 461258

Opinion by Judge Taylor; Judges Acree and Stumbo concurred.

In a foreclosure action in which the circuit court granted the mortgagee's motion for summary judgment, the Court of Appeals affirmed in part, reversed in part, and remanded. Notably, the Court held that the mortgagee's mortgages upon three acres of real property were insufficient to concomitantly place a lien upon a manufactured home located on the property. The Court noted that under Kentucky law, ownership of a manufactured home, even if situated upon real property, requires a certificate of title to be issued as indicia of ownership and that until permanently affixed to real property, a manufactured home is personal property, not real property. Under KRS 186A.190, the sole means of perfecting a security interest in personal property for which a certificate of title is issued is by placing a notation of the lien on the certificate of title. In this case, the mortgagee neither created, attached, nor perfected a security interest in the manufactured home by notation on its title. The Court further noted that under KRS 186A.297, a manufactured home may be converted from personal property and may be "permanently affixed to real estate" only if the owner thereof files an affidavit of conversion and surrenders the certificate of title to the county clerk. Thus, if a manufactured home is legally converted from personal property to a permanent improvement upon real property under KRS 186A.297, a valid lien upon such real property could, likewise, constitute a valid lien upon the manufactured home. In this case, however, the manufactured home was not converted to real estate, so the mortgages had no legal effect on the manufactured home.

X. NEGLIGENCE

A. *A.A. By and Through Lewis v. Shutts*

[2016-CA-000365](#) 02/17/2017 2017 WL 655472

Opinion by Judge Clayton; Judge J. Lambert concurred; Judge Acree concurred and filed a separate opinion.

Multiple children were placed in the foster care of their aunt and uncle. One of the children was abused and murdered by the same uncle. Their treating physician was sued for allegedly failing to report suspected child abuse. The circuit court granted the physician immunity from civil suit pursuant to KRS 620.050(1) because the trial court believed that the physician acted in good faith by not making a report of suspected abuse. The Court of Appeals reversed and remanded on that issue, holding that a person is only entitled to immunity under KRS 620.050(1) if the person “acts” by making a report of suspected child abuse. A person who does not report suspected child abuse is not entitled to KRS 620.050(1)’s immunity from civil suit. The circuit court alternatively found that summary judgment was proper because appellants could not prove that the physician breached her duty of care. The Court also reversed and remanded on that issue, holding that because the standard is simply whether it was unreasonable for a jury to find in appellants’ favor on the breach-of-duty issue, and because the facts were such that a jury could reasonably conclude both that the physician did or did not breach her duty, then summary judgment on this issue was inappropriate.

XI. REAL ESTATE

A. *Canewood Homeowners Association, Inc. Wilshire Investment Properties LLC*

[2015-CA-001779](#) 02/10/2017 2017 WL 541076

Opinion by Judge Taylor; Chief Judge Kramer and Judge D. Lambert concurred.

A subdivision homeowners association (HOA) brought an action against the owners and users of an adjacent clubhouse/golf course lot, alleging that they were violating lot restrictions by operating a lawn and landscaping business. The lot had been conveyed to the owners by the developers of the subdivision. Appellees moved for judgment on the pleadings, arguing that restrictions placed upon the clubhouse/golf course lot in 2007 were effectively rescinded by the adoption of more lenient restrictions in 2014. Appellees contended that the HOA ratified the 2014 restrictions by its execution of a January 23, 2014 deed to acquire an adjacent swimming facility lot. Appellees further argued that under the 2014 restrictions, the HOA was not empowered to enforce the use restrictions appurtenant to the clubhouse/golf course lot; rather, only the developer and owners possessed such authority under the terms of the restrictions. The circuit court granted the lot owners' motion for judgment on the pleadings, and the HOA appealed. The Court of Appeals reversed and remanded, holding that the association did not relinquish its right to enforce the 2007 use restrictions on the clubhouse/golf course lot when it executed the deed to acquire the adjacent swimming facility lot. The Court noted that under the 2007 restrictions, the use of the clubhouse/golf course lot was limited to the operation of a restaurant; moreover, the HOA was expressly empowered to enforce covenants or restrictions thereunder. The HOA was not a party to the 2014 restrictions, nor was there any explanation in the record as to why they were excluded. The Court concluded that under the terms of the January 23, 2014 deed, the HOA agreed to abide by the 2014 restrictions only as to the swimming facility lot and nothing more. The HOA did not surrender its rights under the 2007 restrictions to enforce the use restrictions on the clubhouse/golf course lot - especially since it was not a party to the 2014 restrictions. To conclude otherwise would completely undermine the entire restrictive scheme for the development from its creation, which was to promote a residential subdivision in conjunction with the use and enjoyment of a golf course.

XII. TAXATION

A. *Grand Lodge of Kentucky Free and Accepted Masons v. City of Taylor Mill*

[2015-CA-001617](#) 02/10/2017 2017 WL 541077 DR Pending

Opinion by Judge Taylor; Chief Judge Kramer and Judge D. Lambert concurred.

The primary question raised in this appeal was whether certain real property owned by Grand Lodge - a recognized public charity - and exclusively occupied by individual senior citizens was subject to ad valorem taxation by Kenton County or was entitled to the charitable exemption found in Section 170 of the Kentucky Constitution. Grand Lodge leased the real property in question to Masonic Retirement Village of Taylor Mill, Inc. (MRV), which built a retirement community consisting of 48 residential units on the property. MRV was incorporated as a nonprofit and is an affiliated corporation of Grand Lodge. In holding that the retirement community residents' possessory interests in the units were subject to ad valorem taxation, the Court concluded that the units were not "occupied" by either Grand Lodge or by MRV (the tax exempt entities). Rather, under the plain terms of the resident agreements and the undisputed facts, exclusive possession of the units was transferred to the residents in exchange for valuable consideration. Consequently, the residents were subject to ad valorem taxation under KRS 132.195(1). The Court further held that the residents' possessory interests in the units may be considered leaseholds for tax valuation purposes and that the tax value of the interests was to be determined by subtracting the fair market value of the unit with the resident's leasehold from the fair market value of the unit without the leasehold. The difference would constitute the fair market value of the resident's possessory interest in that specific unit for ad valorem taxation purposes.

XIII. WORKERS' COMPENSATION

A. Ford Motor Company (LAP) v. Curtsinger

[2016-CA-001423](#) 02/17/2017 2017 WL 655471

Opinion by Chief Judge Kramer; Judges Acree and Stumbo concurred.

An Administrative Law Judge (ALJ) dismissed a worker's claim for benefits due to an alleged work-related injury to the left shoulder. In doing so, the ALJ explained that the worker's alleged injury was, at most, an exacerbation of a pre-existing condition. Upon review, the Board of Workers' Claims vacated in part and remanded for a determination of whether the worker did indeed sustain an exacerbation of a pre-existing injury and, if so, whether the exacerbation was work related. Finding no error, the Court of Appeals affirmed. The Court explained that a work-related exacerbation of a pre-existing condition qualifies as a new and separate "injury" within the meaning of KRS 342.0011(1), even if it does not warrant an impairment rating. The work-related exacerbation supplies a basis for an award of medical benefits, per KRS 342.020(1), at least until the date the worker returns to his or her pre-exacerbation baseline state of health.