PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

MARCH 1, 2019 to MARCH 31, 2019

I. ADMINISTRATIVE LAW

A. *Cabinet for Health and Family Services v. Appalachian Regional Healthcare, Inc.*

2016-CA-001140 03/29/2019 2019 WL 1411921

Opinion by Judge Dixon; Judges Combs and Taylor concurred.

Fifty-eight acute care hospitals participating in Medicaid petitioned the Franklin Circuit Court for a declaration of rights concerning the methodology used by the Cabinet for Health and Family Services to set reimbursement rates. The circuit court found the "budget neutrality adjustment" (BNA) in 907 KAR 1:825 invalid and contrary to the "relate to cost" provision in KRS 205.560(2). The court also enjoined the Cabinet to hold appropriate dispute resolution and administrative procedures so the Hospitals' appeals could receive a full and fair determination. The Court of Appeals affirmed, holding that the BNA ensured that the Cabinet never paid more than a preordained amount for Medicaid reimbursements to its contractual providers and was responsible for ensuring that provider costs were effectively divorced from reimbursement payments counter to KRS 205.560(2). Citing previous decisions, the Court reiterated that the Cabinet does not have carte blanche to set regulations in clear conflict with the legislature's mandate that Medicaid reimbursement rates reasonably relate to providers' costs. Because the BNA violated state and federal law, its imposition on Medicaid reimbursement rates was arbitrary and an abuse of the Cabinet's administrative powers. The Court further held that the Cabinet's refusal to hear the Hospitals' Medicaid reimbursement rate appeals, either through dispute resolution or in a formal hearing, denied them due process and was arbitrary; therefore, the Hospitals were entitled to administrative appeals. Finally, the Court held that despite the BNA's repeal, a "live" controversy still existed regarding the calculations of correct Medicaid reimbursement rates for the Hospitals as well as other contract remedies.

B. ***Kentucky Horse Racing Commission v. Motion***

2017-CA-001458 03/29/2019 2019 WL 1441854

Opinion by Judge L. Thompson; Judge Combs and Special Judge Henry concurred.

The Court of Appeals affirmed in part, reversed in part, and remanded a judgment of the Franklin Circuit Court in a case involving an administrative action by the Kentucky Horse Racing Commission. The Commission found that appellees had violated certain administrative regulations concerning drugs found in a horse's system. The circuit court, however, held that the regulations at issue were unconstitutional and that the Commission acted arbitrarily when it imposed sanctions against appellees. In affirming in part, the Court held that the circuit court had jurisdiction over the appeal from the administrative action even though appellees did not perfect the appeal within the 30-day time period set forth in KRS 13B.140. It was undisputed that appellees filed their petition for appeal with the circuit court before the deadline, but they failed to serve summonses on all required parties. Appellees argued that they were not required to issue or serve a summons on anyone because KRS 13B.140(1) sets forth the appeal requirements and does not mention the issuance of a summons. The Court held that CR 3.01 requires the issuance of summonses and that this rule does not conflict with the statutory requirements of KRS 13B.140. It concluded, though, that the circuit court correctly allowed the case to proceed because the case was commenced in good faith. However, the Court reversed the circuit court's holding that the administrative regulations at issue - 810 KAR 1:018, Section 2(2)(c); 810 KAR 1:018, Section 2(3); and 810 KAR 1:018, Section 15 - were unconstitutionally arbitrary and concluded that the penalties imposed on appellees by the Commission should be reinstated..

II. ADOPTION

A. ***A.F. v. L.B.***

2017-CA-001848 03/01/2019 2019 WL 984129

Opinion by Judge Acree; Judges Nickell and L. Thompson concurred.

After appellees filed an adoption action pursuant to KRS 199.502 (adoption without consent of biological parents), the family court bifurcated the proceedings and addressed the termination of parental rights issue. Applying KRS 199.502(1) to determine if "any" of the conditions thereunder were pleaded and proved, the family court found by clear and convincing evidence that not one, but three conditions were proved as to both Mother and Father. Abating the adoption portion of the proceeding, the family court entered an interlocutory judgment terminating Mother's and Father's parental rights and making that interlocutory judgment final and appealable pursuant to CR 54.02(1). The Court of Appeals affirmed. The Court first rejected appellants' argument that the thirty-day restriction set forth in KRS 625.090(6) for rendering judgment in involuntary termination of parental rights actions brought under KRS 625.050, *et seq.*, also applied to adoptions without the consent of parents brought under KRS 199.502. The Court also held that the family court did not err by preventing appellants from cross-examining the clinician who prepared the Cabinet's adoption report (pursuant to KRS 199.510) about the adequacy of the report. The Court noted that this portion of the bifurcated proceeding addressed only the issue of termination of parental rights. Because the substance of the report was the proposed adoption -not the termination of parental rights - the family court did not abuse its discretion in finding any testimony about the report to be irrelevant. The Court finally held that the family court did not clearly err when it found, by clear and convincing evidence, the existence of the conditions enumerated in KRS 199.502(1)(a), (e), and (g) with respect to Child as to both Mother and Father.

B. ***C.J. v. M.S.***

2018-CA-000425 03/29/2019 2019 WL 1412471

Opinion by Judge Jones; Judges Goodwine and Nickell concurred.

In this appeal, the Court of Appeals discussed the differences between an adoption petition (governed by KRS Chapter 199) and a petition for termination of parental rights (governed by KRS Chapter 625). Here, the prospective adoptive parents filed a dual petition seeking both termination of Child's biological parents' rights and adoption. The Court warned against the filing of such a dual petition and emphasized that when the petitioner is the person seeking to adopt a child, an adoption petition - not a petition for termination of parental rights - should be filed. If granted, the adoption itself terminates the parental rights of the biological parents. KRS 199.520(2). Therefore, no separate termination proceeding is required. The Court noted that when a lower court erroneously allows a dual petition to move forward and enters two judgments, the Court treats the judgments as one and reviews for compliance with KRS Chapter 199 - not KRS Chapter 625. Thus, if KRS Chapter 199's minimal jurisdictional requirements have not been satisfied, the judgment of adoption is void. Because the adoptive parents here had satisfied all statutory requirements governing adoption petitions, the Court held that the circuit court did not err in granting the subject petition.

C. ***E.K. v. T.A.***

2017-CA-001505 03/08/2019 2019 WL 1087276

Opinion by Judge Goodwine; Judges K. Thompson and L. Thompson concurred.

Father filed a petition for involuntary termination of parental rights against Mother pursuant to KRS 625.050. Later that year, the circuit court entered an agreed order allowing the filing of an amended petition seeking adoption under KRS 199.502 and the addition of Stepmother as a party. The amended petition set forth two counts: Count I was a petition for adoption under KRS 199.502, and Count II was a request for involuntary termination of parental rights under KRS 625.050. The circuit court subsequently dismissed the amended petition for its failure to name the Cabinet for Health and Family Services as an indispensable party. The Court of Appeals reversed and remanded. The Court first noted that when there is a dual petition involving an adoption and involuntary termination of parental rights, the adoption supersedes the termination because KRS Chapter 199 encompasses KRS Chapter 625. Therefore, the circuit court incorrectly applied KRS Chapter 625 to the amended petition. The Court then held that the Cabinet was not an indispensable party under KRS Chapter 199 because the case involved a stepparent adoption where the child was not in the care, custody, and control of the Cabinet. Finally, the Court held that the amended petition strictly complied with KRS Chapter 199's requirements at the time Mother filed a motion to dismiss even though the Cabinet had not been notified of the filing of the amended petition. The Court concluded that the Cabinet's participation pre-petition was unnecessary for an adoption by a stepparent pursuant to KRS 199.470(4)(a), but noted that, on remand, there were post-petition requirements for Stepmother to fulfill. Specifically, KRS 199.510(1) requires the Cabinet's post-petition notification and participation in every adoption.

III. CHILD CUSTODY AND RESIDENCY

A. ***G.P. v. Cabinet for Health and Family Services***

2018-CA-001469 03/15/2019 2019 WL 1213202

Opinion by Judge Nickell; Judge Maze concurred; Judge K. Thompson concurred in result only.

Appellant challenged an order committing his son (Child) to the Cabinet for Health and Family Services. Appellant urged that custody be awarded to Stepmother - the estranged wife whom he attempted to make Child's guardian by executing a Power of Attorney (POA) and whom the Cabinet approved and also proposed as Child's custodian. Alternatively, appellant suggested three blood relatives as potential custodians. The Court of Appeals affirmed. Child was removed from appellant's custody after he was arrested by federal authorities and jailed on charges of trafficking in heroin and fentanyl. While executing a search warrant of appellant's apartment, officers seized - from what appeared to be a child's bedroom - a large quantity of drugs and a handgun without a lock or device to prevent firing. Given these facts, the Court agreed with the family court that Child was in "immediate danger" under KRS 620.060(1)(c) and that his removal from appellant - who likely faced a lengthy prison sentence - was necessary. Child's guardian *ad litem* opposed Stepmother having custody of Child, stating a preference for the foster mother with whom Child had previously lived for twenty months and who was preparing to adopt Child when appellant acknowledged paternity. The Court held that appellant had not cited any authority by which Stepmother had standing to seek Child's custody. Stepmother was termed a "stranger" to Child who had a relationship with him only because of her now-soured relationship with appellant. Moreover, appellant had not established that the POA he purportedly executed made Stepmother Child's legal guardian. Thus, the Court agreed with the family court's exclusion of Stepmother as a potential custodian. The Court also held that appellant's three family members were not appropriate custodians because of their connections to drug activity.

IV. CONSTITUTIONAL LAW

A. ***Seum v. Bevin***

2017-CA-001695 03/29/2019 2019 WL 1428410 DR Pending

Opinion by Chief Judge Clayton; Judge Kramer and Special Judge Henry concurred.

Appellants, who used marijuana to treat various physiological and psychological conditions, alleged that KRS 218A.1421 and 218A.1422, which criminalize the possession and sale of marijuana without exemptions for medical use, are unconstitutional. They sought declaratory and injunctive relief against the Governor and the Attorney General, claiming that the failure to exempt marijuana for medical use was unconstitutionally arbitrary and violated their right to privacy. The Franklin Circuit Court dismissed their petition. The Court of Appeals affirmed, applying rational basis scrutiny and *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000), to hold that the statutes are not impermissibly arbitrary because they serve the valid public interest in controlling marijuana for reasons of health, safety, and criminal activity. The Court also held that the statutes do not violate the right to privacy because they do not stem from efforts to interfere in morality or private conduct. The Court further noted that assessing the potential medical benefits of marijuana is a matter squarely within the purview of the legislature.

V. CRIMINAL LAW

A. ***Cayton v. Commonwealth***

2018-CA-000238 03/22/2019 2019 WL 1302677

Opinion by Judge Maze; Judges Dixon and Goodwine concurred.

Appellant was convicted under KRS 510.155(1) on one count of unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities. The conviction was the result of text messages appellant sent to an undercover police officer posing as an adult woman offering her thirteen-year-old daughter for sex. Appellant argued that a finding of guilt is permissible under KRS 510.155(1) only if the defendant believed that they were communicating with a minor. The Court of Appeals held that direct communication with a minor or a police officer posing as a minor is not necessary for a conviction under KRS 510.155(1). A person is guilty under the statute when he or she uses electronic means to communicate with either a minor or an adult intermediary for the purposes of inducing a minor to engage in sexual or other prohibited activity.

B. ***Coursey v. Commonwealth***

2017-CA-001951 03/01/2019 2019 WL 984128

Opinion by Chief Judge Clayton; Judges Combs and K. Thompson concurred.

Appellant entered a conditional guilty plea to charges of tampering with physical evidence, ten counts of possession and viewing of matter portraying a sexual performance by a minor, and one count of distribution of matter portraying a sexual performance by a minor. Thereafter, he appealed the circuit court's denial of his motion to suppress testimony by his ex-wife pursuant to KRE 504(a) and (b). The Court of Appeals affirmed. The Court held that the "adverse testimony" privilege contained in KRE 504(a) does not survive divorce and was therefore inapplicable in this case because the parties were no longer married. The Court also held that the "confidential communications" privilege contained in KRE 504(b) was similarly inapplicable in this case, as appellant had not identified any specific confidential communications to his ex-wife that he sought to have excluded; therefore, he had failed to meet his burden of proving the privilege's applicability. The Court further noted that the record on appeal indicated that appellant was attempting to hide the evidence of his activities from his ex-wife rather than make any confidential communications to her about his activities. Thus, not only did the record fail to reflect any communications made by appellant to his ex-wife regarding anything to do with his activities, it failed to reflect that he had any "positive advantage" on his part of her maintaining such confidentiality.

C. ***Crowe v. Commonwealth***

2017-CA-001978 03/29/2019 2019 WL 1412474

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

Appellant entered a conditional guilty plea to manslaughter for the death of his wife. The circuit court denied his motion to be classified as a domestic violence victim pursuant to 439.3401(5), which would entitle him to exemption from the violent offender statute's requirement that he serve 85% of his sentence before becoming eligible for parole. In a 2-1 vote, the Court of Appeals reversed, holding that appellant had: (1) sufficiently demonstrated that he was a victim of domestic violence; and (2) shown a connection between the physical and verbal domestic abuse to which he was subjected and the crime for which he stood convicted.

D. ***Zanders v. Commonwealth***

2017-CA-001257 03/01/2019 2019 WL 984133

Opinion by Judge Dixon; Judges Combs and Goodwine concurred.

Appellant applied for and was granted diversion on a felony charge of first-degree wanton endangerment. After accepting appellant's plea, the circuit court judge discovered that the court had previously revoked appellant's probation on a separate unrelated charge. After the judge expressed his displeasure that diversion had been proffered by the Commonwealth under these circumstances, the Commonwealth moved to set aside the plea agreement permitting diversion. The circuit court granted the Commonwealth's motion. Appellant then pled guilty to the felony charge but appealed the circuit court's order setting aside the diversion agreement. The Court of Appeals vacated the order setting aside. The Court held that a trial court may only void a pretrial diversion in accordance with KRS 533.256 and KRS 439.3106. Revoking a pretrial diversion amounts to revoking probation and, as such, may only be done where a defendant has violated a specific statutory provision. As the circuit court here had not considered these statutes prior to voiding appellant's pretrial diversion, the case was remanded for such consideration.

VI. DISCOVERY

A. ***Bramblett v. Penske Truck Leasing Company, L.P.***

2016-CA-001891 03/08/2019 2019 WL 1087309

Opinion by Judge Combs; Judges Taylor and L. Thompson concurred.

This appeal concerned the imposition of sanctions in response to discovery abuses committed by appellee Penske Truck Leasing Company, L.P. during the course of a wrongful death action filed by the Brambletts. These sanctions included attorneys' fees totaling $166,624.83 and a $50,000 penalty. On appeal, Penske contended that its discovery dispute with the Brambletts warranted no sanction whatsoever and that the circuit court lacked jurisdiction to make the necessary findings of fact and conclusions of law in an order drafted by counsel and entered after the notice of appeal had been filed. It specifically challenged the propriety of the circuit court's decision to delegate to the Brambletts' counsel the task of preparing the court's findings of fact and conclusions of law. The Court of Appeals affirmed in all respects. Notably, the Court held that while a fair and reasonable resistance to discovery is not subject to sanction, the circuit court did not err in this case by concluding that Penske's actions during discovery were neither fair nor reasonable. The Court further held that the circuit court retained jurisdiction following the filing of the notice of appeal to consider the sanctions issue and that there was no evidence that the circuit court had abdicated its responsibility in allowing the Brambletts' counsel to prepare the sanctions order.

VII. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Cottrell v. Cottrell***

2018-CA-000627 03/08/2019 2019 WL 1087268

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant challenged an order extending a domestic violence order (DVO) against him for an additional three-year period. The Court of Appeals held that appellant was not entitled to attend the DVO extension hearing while incarcerated and that there was sufficient evidence to warrant extension of the DVO. The DVO was originally entered when, following a high-speed chase, appellant drove his truck into a house occupied by his wife, his young son, and two other people. He was immediately arrested and jailed on charges relating to the incident, and he subsequently pled guilty to felony counts resulting in a 20-year prison sentence. As to appellant's argument that he was entitled to a hearing and to appear to contest renewal of the DVO, the Court held that while due process requires an evidentiary hearing and a meaningful opportunity to be heard prior to entry of a DVO, a hearing is not required to extend a DVO. The Court also held that an incarcerated party does not have an automatic right to attend a hearing to extend a DVO. Since appellant filed a written response to the extension motion, the Court concluded that he was afforded a meaningful opportunity to be heard. The Court further rejected appellant's argument that there was no substantial evidence to support extension of the DVO. KRS 403.740(4) does not require proof of additional acts of domestic violence before a DVO may be extended. Rather, the court may consider all facts and circumstances, including the nature, extent, and severity of the original acts of domestic violence, in finding that there is a continuing need for the DVO. Given the severe and deliberate nature of appellant's prior acts of domestic violence, there was substantial evidence to support the family court's finding that appellee continued to have a reasonable fear of him. Therefore, the family court did not clearly err by extending the DVO even though appellant would likely remain in prison for most, if not all, of that period.

VIII. IMMUNITY

A. ***Albright v. Childers***

2017-CA-000669 03/29/2019 2019 WL 1412490

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

In 2015, brothers Cameron and Kyle Pearson were engaged in a physical altercation over a handgun in the parking lot of a gun store. Albright, the owner of the gun store, heard gunshots and took his own gun outside to investigate. Seeing the two fighting, he ordered them to drop the gun. When they failed to stop, Albright fired his gun, killing Cameron and wounding Kyle. As a result of the incident, Albright was charged with murder and first-degree assault. However, following a hearing, the circuit court found that Albright was immune from prosecution under the provisions of KRS 503.085. The Court of Appeals affirmed that ruling and the Supreme Court of Kentucky denied discretionary review. While the criminal matter was pending, Cameron's estate and Kyle brought civil actions against Albright and the gun store. After the criminal action was dismissed, Albright moved to dismiss the civil claims, arguing that collateral estoppel barred the estate and Kyle from re-litigating the issue of immunity. The circuit court disagreed and denied the motion for summary judgment. The Court of Appeals reversed, holding that a finding of criminal immunity under KRS 503.085 bars a civil action arising from the same conduct from going forward. The Court noted that collateral estoppel requires: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. While the parties were not identical, KRS 503.085 makes clear that the standard of liability is the same for both criminal and civil actions, creating a unique situation where collateral estoppel may apply between civil and criminal issues. Here, the Commonwealth fully litigated the issue of immunity in the criminal matter and had failed to meet its burden of going forward under the statute. While the parties were different in the civil claim, Cameron's estate and Kyle had the same interests as the Commonwealth and, therefore, were not prevented from a full and fair opportunity to present their case. Finally, with the Supreme Court's denial of discretionary review, the finding of immunity was now final. Consequently, the Court concluded that collateral estoppel barred Cameron's estate and Kyle from re-litigating the issue of immunity and that the circuit court erred by denying Albright's motion for summary judgment on that basis.

B. ***Ford Motor Company v. Sheets***

2018-CA-000044 03/22/2019 2019 WL 1302680

Opinion by Judge Combs; Judges Dixon and Goodwine concurred.

Stephen Ray Sheets filed suit against Ford Motor Company and multiple other defendants alleging that he had contracted mesothelioma as a result of his exposure to asbestos. After its motion for summary judgment was denied, Ford filed an appeal, arguing that it was entitled to "up-the-ladder" immunity under the Kentucky Workers' Compensation Act, KRS 342.690. The Court of Appeals first noted that although a motion denying summary judgment is usually interlocutory and non-appealable, under *Ervin Cable Constr., LLC v. Lay*, 461 S.W.3d 422 (Ky. App. 2015), it has jurisdiction to review an order denying summary judgment in a case where the circuit court has determined that the defendant is not entitled to up-the-ladder immunity as a matter of law. The problem here, though, was that the circuit court's order denying summary judgment consisted of one handwritten sentence that provided no basis or reasoning underlying the ruling. Thus, the Court could not ascertain the basis for the ruling, which was determinative of whether the Court could actually review it. Consequently, the Court vacated and remanded for an order specifically setting forth the basis for the circuit court's determination.

C. ***Noel v. Welch***

2018-CA-000187 03/15/2019 2019 WL 1213253 DR Pending

Opinion by Judge Nickell; Judges Kramer and Lambert concurred.

Appellant collided with a Lexington-Fayette Urban County (LFUCG) police cruiser driven by Officer Trevor Welch. Appellant sustained significant injuries and, alleging negligence, filed suit against Welch in his individual and official capacities and against multiple LFUCG entities. LFUCG moved to be dismissed from suit on grounds of sovereign immunity. In response, appellant claimed that LFUCG's purchase of third-party automobile liability insurance - as permitted by KRS 67.180(1) - waived sovereign immunity up to the policy limits. The circuit court granted the motion to dismiss, and the Court of Appeals affirmed. The Court noted that close inspection of LFUCG's retained limits policy confirmed that it was not the type of coverage contemplated by KRS 67.180(1). A liability policy in name only, it merely indemnified LFUCG for damages it had become legally obligated to pay, and it absolved the third-party carrier of any and all responsibility for defending claims against LFUCG - unlike a traditional "automobile liability policy." Consequently, the existence of this policy did not constitute an express waiver of LFUCG's sovereign immunity defense under KRS 67.180.

IX. INSURANCE

A. ***Peterson v. Grange Property & Casualty***

2017-CA-000870 10/26/2018 2018 WL 5310148 Released for Publication

Opinion by Judge K. Thompson; Chief Judge Clayton and Judge Maze concurred.

Appellant was severely injured in an automobile accident while riding as a passenger in one of the vehicles. She filed a claim for underinsured motorist (UIM) coverage against Grange Property & Casualty, the UIM insurer of the vehicle in which she was a passenger. Grange moved for summary judgment because appellant had her own UIM coverage through GEICO at the time of the collision. Grange asserted that because of this appellant did not qualify as an "insured" under its policy, which plainly excluded coverage for a non-family occupant insured for UIM coverage under another policy. Appellant conceded that she had UIM coverage through GEICO, which would pay regardless of what Grange did, but she sought to recover UIM benefits under both policies, claiming that otherwise she would not be fully compensated for her injuries. The circuit court granted Grange's motion for summary judgment and dismissed appellant's action. The Court of Appeals affirmed, holding that appellant did not qualify as an insured and that public policy considerations did not mandate a different outcome. The Court concluded that the Grange exclusion was enforceable because UIM coverage is fundamentally different than other motorist insurance coverage mandated under the Motor Vehicle Reparations Act. It is reasonable to limit optional coverage such as UIM coverage where the injured party is not the policyholder and has other primary coverage for her claims, and the provision is an unequivocally conspicuous, plain, and clear manifestation of the company's intent to exclude coverage.

X. NEGLIGENCE

A. ***Johnson v. Bond***

2017-CA-001150 03/22/2019 2019 WL 1302397 DR Pending

Opinion by Judge K. Thompson; Judge L. Thompson and Special Judge Henry concurred.

Tia Jonson, as Administrator of the Estate of Cristiano Waide, (the Estate) filed this wrongful death action against a number of Lexington-Fayette Urban County Government (LFUCG) employees after Cristiano fell from bleachers located in a public park owned by LFUCG. The employees raised the Recreational Use Statute, KRS 411.190, as a defense. The circuit court granted summary judgment to LFUCG and the Estate appealed. The Court of Appeals affirmed. The Court held that under the Recreational Use Statute, the employees could only be liable if they had acted willfully or maliciously. There was no such evidence here. The bleachers had been at the park for over three decades without any report of injury caused by the bleachers' condition. The Court also noted that the danger of a two-year-old child playing on a set of bleachers was obvious. Moreover, even if the bleachers did not comply with applicable building codes and were not grandfathered into those codes, the danger was obvious and there was no evidence that the employees had any knowledge that the bleachers were not compliant. The Court further held that the Estate could not maintain an action for negligent hiring and supervision against the employees. If any such claim existed, it would have to be brought against LFUCG, who hired and supervised the employees.

XI. ORIGINAL ACTIONS

A. ***Public Service Commission of Kentucky v. Shepherd***

2018-CA-001859 03/08/2019 2019 WL 1087266 N/A Filed in S. Ct.

Opinion and order by Judge Acree; Judges Jones and Kramer concurred.

In this original action involving a petition for a writ of prohibition, the Kentucky Public Service Commission argued that the circuit court lacked subject matter jurisdiction to entertain an interlocutory appeal of its decision not to permit intervention by certain persons in a rate-making case. The Court of Appeals agreed with the Commission and granted the petition, holding that the circuit court had no authority - statutory or otherwise - to address the appeal. In so doing, the Court noted that the parties in question did not have a right to intervene in the Commission's proceedings given the Commission's plenary authority to regulate and investigate utilities. Instead, a person who is neither an original party nor a utility has no more than a "right to *request* intervention" in Commission proceedings. Whether to grant intervention is a matter of discretion for the Commission. The Court held that when the circuit court ordered the Commission to grant intervention to the parties in question, it effectively violated the principle that mandamus is not an appropriate remedy to tell the administrative body how to decide or to interfere with its exercise of discretion. Kentucky law only authorizes that kind of judicial intervention in agency matters where the agency is obviously acting without jurisdiction as a matter of law or acting contrary to the constitution and intervention is necessary to avoid irreparable harm or injury - neither of which was the case here. The Court also took issue with the fact that the parties sought and obtained circuit court relief before the Commission could complete its ratemaking proceedings, noting that the Commission, as it moved the ratemaking process forward, could reconsider whether its interlocutory denial of intervention deprived it of a perspective inadequately represented by existing parties. In other words, if it deemed the interlocutory denial to have been a mistake, it could correct it.

XII. PREEMPTION

A. ***Lafferty Enterprises, Inc. v. Cabinet for Health and Family Services***

2017-CA-001803 03/22/2019 2019 WL 1302683

Opinion by Judge Dixon; Judges Kramer and Lambert concurred.

Jan-Care Ambulance Service (Jan-Care) contracted with the Veterans Administration (VA) to service parts of Kentucky. Jan-Care provided ambulance services in Kentucky without obtaining either a Kentucky Certificate of Need (CON) or Kentucky license, causing Lafferty Enterprises, Inc. d/b/a Trans-Star Ambulance Service (Trans-Star), as a competitor, to complain to the Cabinet for Health and Family Services. The Cabinet found that Jan-Care violated Kentucky CON laws and licensure requirements and was not exempt from compliance under federal preemption through its VA contracts. Jan-Care appealed to the Franklin Circuit Court, which reversed the Cabinet's order. Trans-Star appealed, asserting that the Cabinet's order should have been upheld because preemption did not apply. The Court of Appeals affirmed, concluding that the Cabinet erred as a matter of law by failing to consider the contract in effect at the time of the show cause proceedings and by subsequently failing to conduct a preemption analysis. The Court held that conflict preemption applied, relying on *Leslie Miller, Inc. v. State of Ark.*, 352 U.S. 187, 77 S.Ct. 257, 1 L.Ed.2d 231 (1956), where the United States Supreme Court was faced with a similar issue concerning whether state licensing laws applied to a federal contractor. The Court determined that enforcing Kentucky's CON and licensure laws would deprive the VA of the right to select a provider of choice and would effectively allow Kentucky to select the provider instead. Thus, requiring Jan-Care to meet Kentucky requirements would frustrate the VA's objectives. This clear conflict meant that federal procurement laws, as they pertain to VA contracts for ambulance services to veteran patients, preempt Kentucky's CON and licensing laws. The Court also noted that because regulation of VA contractors and their necessary and required licensure is preempted, neither Trans-Star nor the Cabinet had standing to enforce compliance with a 2017 contract between Jan-Care and the VA requiring compliance with Kentucky law, as neither were parties to the contract.

XIII. TORTS

A. ***Dickson v. Shook***

2017-CA-000023 03/29/2019 2019 WL 1412497

Opinion by Judge Acree; Judges Jones and K. Thompson concurred.

This case concerned an intra-family business dispute and a claim that a mother was interfering with her daughter's inheritance from her father. After a jury verdict and judgment on several counts against the mother and son and in favor of daughter and her solely-held limited liability company, the Court of Appeals reversed in part, vacated in part, and remanded. The Court held that: (1) the jury should not have been instructed on a cause of action not recognized in Kentucky (tortious/wrongful interference with devise/expectation of inheritance); (2) lawful estate planning by mother could not be the basis of a tort brought by daughter against mother; (3) the circuit court lacked subject matter jurisdiction to adjudicate a claim regarding settlements of fiduciaries or mismanagement other than as authorized by KRS 395.510; (4) daughter's claim of intentional infliction of emotional distress could not be affirmed in the absence of expert evidence of severe emotional distress; (5) punitive damages are not recoverable independently of the establishment of liability on an underlying claim; (6) when statutes establish a standard of care, the jury instruction must reflect that statutory language; (7) aiding and abetting verdicts must be reversed to the extent that the verdicts upon which they depend are reversed; and (8) a damages award based on a single aggregate damages instruction for multiple liability verdicts must be set aside when one or more of those liability verdicts is set aside.

XIV. WORKERS' COMPENSATION

A. ***R & T Acoustics v. Aguirre***

2018-CA-001277 03/29/2019 2019 WL 1411915

Opinion by Judge Dixon; Judges Goodwine and Maze concurred.

The Court of Appeals affirmed a decision of the Workers' Compensation Board that reversed and remanded an Administrative Law Judge's order dismissing Bernabe Aguirre's claim for workers' compensation benefits. Aguirre was injured when he fell from a ladder while working for R & T Acoustics. Aguirre received medical treatment, and a urine drug screen was positive for cocaine metabolites. The employer raised the affirmative defense of voluntary intoxication pursuant to the version of KRS 342.610(3) in effect at the time of the injury. The ALJ dismissed Aguirre's claim, concluding that the employer presented substantial evidence that Aguirre's injury was proximately caused primarily by his voluntary intoxication. On appeal, the Board vacated and remanded the decision for additional findings, and the ALJ issued an opinion and order on remand again dismissing the claim. This time the Board concluded that substantial evidence did not support the ALJ's decision and reversed and remanded the matter for a determination of the merits of Aguirre's claim. In affirming, the Court held that the Board properly concluded that the employer was not entitled to the affirmative defense because it failed to produce substantial evidence that Aguirre's injury was proximately caused primarily by voluntary intoxication.