PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

OCTOBER 1, 2019 to OCTOBER 31, 2019

I. APPEALS

A. ***Keco v. Ayala***

2018-CA-001078 10/18/2019 2019 WL 5275639

Opinion by Judge Spalding; Chief Judge Clayton and Judge Dixon concurred.

A contractor brought an action against a property owner, alleging breach of contract and unjust enrichment for the property owner's failure to pay the contractor for work performed, to which the property owner counter-claimed for indemnity, breach of contract, misrepresentation, and unjust enrichment. Following a jury trial, the contractor was awarded the sum of $125,373 plus pre-judgment interest. On appeal, the property owner argued that the jury was erroneously permitted to consider unjust enrichment and that the circuit court improperly awarded pre-judgment interest on unliquidated damages. The Court of Appeals affirmed. The Court held that appellant's failure to contemporaneously object to the circuit court allowing the jury to decide an issue of equity, unjust enrichment, foreclosed his ability to raise that issue successfully on appeal. Furthermore, appellant had waived his objection to the grant of pre-judgment interest in the matter because objections were not made in the circuit court to the award of interest. The Court held that neither the judgment and award upon the jury verdict nor the award of pre-judgment interest was manifestly unjust so as to allow the Court to vacate the awards despite the lack of objections made to the circuit court.

II. CHILD CUSTODY AND RESIDENCY

A. ***Warawa v. Warawa***

2018-CA-000963 10/18/2019 2019 WL 5275652

Opinion by Judge K. Thompson; Judges Dixon and Kramer concurred.

The Court of Appeals reversed and remanded a family court order adopting the recommendations, findings, and conclusions of a parenting coordinator. The Court held that the family court improperly delegated its judicial authority to the parenting coordinator. Although the Court noted that parenting coordinators may be used in high-conflict domestic relations cases to assist the family court, the family court could not delegate decision-making authority as to issues of the children's education, medical providers, and contempt motions against a party to the parenting coordinator. The Court pointed out that the family court has the sole statutory authority to make decisions in the children's best interest. In this case, issues concerning the children's education, dental provider, and contempt motions had been referred to a parenting coordinator who made recommendations. The husband objected to the issues being referred to the parenting coordinator and filed objections to the recommendations. The husband's request for a hearing was denied and the family court adopted the recommendations. The Court remanded with instructions that a hearing be conducted.

III. CIVIL PROCEDURE

A. ***H.E.B., LLC v. Jackson Walker, L.L.P.***

2018-CA-001175 10/11/2019 2019 WL 5089725

Opinion by Judge Nickell; Chief Judge Clayton and Judge Maze concurred.

Scott Haire started various companies - including VHGI, Inc. - a Delaware corporation. Haire stepped down from a leadership role in all entities and pled guilty to securities fraud in a federal sting. Before entering his plea, Haire revealed his anticipated indictment to a mentor/major investor during a meeting in Louisville. Richard Dahlson attended the Louisville meeting at Haire's request. Jackson Walker (JW) is a Texas law firm. Dahlson is a partner in the JW firm and practices nearly exclusively in Texas. When the value of VHGI stock diminished, HEB - and other VHGI shareholders, some of whom are Kentucky residents -alleged that JW and Dahlson committed legal malpractice by helping others (who were also shareholders) dilute the value of VHGI stock. Civil suit was filed in Fayette Circuit Court alleging various torts, including legal malpractice. The suit was dismissed against JW and Dahlson for lack of minimum contacts satisfying Kentucky's long-arm statute. The Court of Appeals affirmed. JW's only contact with Kentucky was the less-than-a-day Dahlson spent in the state for a reason not alleged in the complaint. The shareholders erroneously alleged that Kentucky had jurisdiction under KRS 454.210(2)(a)(1), (2) and (4), none of which applied because neither JW nor Dahlson had sufficient minimum contacts with the Commonwealth. Neither had an office or presence in Kentucky, and neither sought to conduct business in Kentucky. None of JW's 363 attorneys is licensed to practice in Kentucky. JW had 14 clients with ties to Kentucky but only on interests outside the state and none generating substantial revenue in Kentucky. The Court further noted that Dahlson lives in Texas, never owned property in Kentucky, never held a Kentucky license, never had a Kentucky bank account, and was never employed in Kentucky. Moreover, he never solicited business from Kentucky companies nor represented a Kentucky company.

IV. CRIMINAL LAW

A. ***Commonwealth v. Graham***

2017-CA-001831 10/04/2019 2019 WL 4892347

Opinion by Judge Maze; Judges Goodwine and Lambert concurred.

In the Commonwealth's appeal from the circuit court's grant of a new trial to the appellee pursuant to CR 60.02, the Court of Appeals affirmed. Appellee was found guilty in 2008 for the rape and murder of his girlfriend in Todd County, Kentucky, in 1980. Several years after appellee's conviction, two previously unknown witnesses came forward who had observed Roy Wayne Dean leaving the area of the victim's trailer on the night of the murder. Dean is a suspected serial killer who is currently incarcerated for two unrelated murders he committed of other women in Todd County in 1984. The Commonwealth presented four main arguments on appeal. First, the circuit court should not have considered this CR 60.02 motion because it was successive. Second, the circuit court abused its discretion when it concluded that appellee had exercised due diligence in locating the new witnesses. Third, the circuit court erroneously determined that a new trial with testimony from the newly discovered witnesses would probably result in a different outcome. Fourth, the circuit court erred because the facts involved in this case were fundamentally different from those of other cases which have warranted relief under CR 60.02. The Court of Appeals disagreed with the Commonwealth and held that the circuit court did not abuse its discretion in granting appellee's CR 60.02 motion. First, the Commonwealth failed to argue to the circuit court about whether the motion was successive, thus waiving the potential error on appeal. Second, the circuit court did not abuse its discretion in finding that appellee exercised due diligence; the witnesses did not previously come forward, and the witnesses were previously completely unknown to police and defense investigators. Third, the circuit court's evaluation of the effect of the witnesses' testimonies was not clearly erroneous, as it was supported by substantial evidence. Fourth, the circuit court correctly found that appellee was not required to prove "actual innocence" for CR 60.02 relief, as argued by the Commonwealth, but only that the result of a new trial would probably be different.

B. ***Commonwealth v. Milner***

2018-CA-001547 10/18/2019 2019 WL 5280800

Opinion by Judge Spalding; Judges Goodwine and Maze concurred.

Appellee, who had been charged with public intoxication, possession of a controlled substance, and possession of drug paraphernalia, moved to dismiss the possession charges pursuant to KRS 218A.133(2), known as the "Good Samaritan" law. The statute governs exemptions from prosecution for such offenses if an individual is seeking assistance with a drug overdose. The circuit court granted the motion and also suppressed evidence of the drugs and glass pipe that had been seized from appellee. The Court of Appeals vacated and remanded, first noting that immunity from prosecution - not suppression of evidence - is the remedy allowed by the statute. Although appellee may have been immune insofar as the criminal action pertained to possession, he was not immune to prosecution for other crimes. The suppressed items could have constituted evidence of other illegal activity. The Court further held that the statute requires the defendant to prove by a preponderance of evidence that each element of the statute applied to his particular case. The Court determined that the statute did not apply here because the circuit court found that appellee "was in fact not overdosing" and "did not need medical attention." Due to the non-existence of an overdose and the absence of a need for medical assistance, neither element of KRS 218A.133(2)(c) was met in this case. Therefore, appellee was not entitled to immunity, as both elements must be met for immunity to be granted.

C. ***Jones v. Commonwealth***

2019-CA-000172 10/11/2019 2019 WL 5089922

Opinion by Judge Kramer; Judges Goodwine and Jones concurred.

In 1998, appellant pled guilty in Jefferson Circuit Court to one felony count of theft by failure to make the required disposition of property. As a result, he spent several months incarcerated and five years on supervised probation. In August 2018, over twenty years after his guilty plea, Jones filed an application with the circuit court to have his record expunged, pursuant to KRS 431.073. However, he did not tender any filing fee with this petition but instead requested an adjudication of "poor person" status to be excused from paying the requisite expungement fees pursuant to KRS 453.190. The circuit court ultimately denied Jones's request, explaining that it viewed "the cost of this elective service as one that the legislature did not intend to be waived, and as one that is not necessarily incurred in the prosecution or defense of a legal claim, as contemplated by KRS 453.190." The Court of Appeals affirmed, explaining that expungement is not a constitutional right, but a legislative privilege, and that the circuit court's discretion to expunge appellant's record was accordingly governed solely by the plain terms of the expungement statute, KRS 431.073. Where, as here, the legislature has the authority to prescribe by whom and under what conditions an action may be maintained, the operative statute must be strictly observed to give the court jurisdiction. The court is not at liberty to apply a statute that generally waives costs for a "poor person" per KRS 453.190 when doing so would conflict with a statutory precondition for maintaining the action.

D. ***Taylor v. Commonwealth***

2018-CA-000617 10/25/2019 2019 WL 5460643

Opinion by Judge Maze; Judges Acree and Combs concurred.

Quandarious and Jevontaye Taylor were jointly tried and convicted on charges of first-degree robbery. Because Jevontaye's sentence was enhanced by his status as a PFO II, his appeal went directly to the Supreme Court of Kentucky, which affirmed the sentence but reversed the restitution order due to the circuit court's failure to conduct a restitution hearing. In Quandarious's appeal, the Court of Appeals held that he was not entitled to a directed verdict because any inconsistencies in witness testimony merely go to weight and credibility and not sufficiency of the evidence. But on the restitution order, the Court adopted the Supreme Court's reasoning that the failure to conduct a restitution hearing amounted to palpable error. Specifically, the Court held that when the issue of restitution under KRS 532.032 has not been resolved by agreement, constitutional due process requires an adversarial hearing including: reasonable notice in advance of the amount and nature of the restitution claimed; a hearing before an impartial judge with assistance of counsel; a reasonable opportunity to present evidence to rebut the claim or amount of restitution; and the burden on the Commonwealth to establish the validity of the claim and amount of restitution owed. In the absence of any evidence of record to support the amount of restitution ordered by the circuit court, the Court of Appeals remanded the matter for a hearing to determine restitution.

V. EMPLOYMENT

A. ***Vogt Power International, Inc. v. Labor Department of Workplace Standards***

2018-CA-001321 10/18/2019 2019 WL 5280802

Opinion by Judge Kramer; Judges Dixon and K. Thompson concurred.

Stephen Kapsalis was the type of "employee" classified as a "bona fide executive" as set forth in KRS 337.010(2)(a)2; to that end, he served as the President and CEO of Vogt Power International, Inc., from July 2009 until April 12, 2013. Months after his resignation, Kapsalis filed a complaint with the Kentucky Labor Cabinet alleging that Vogt had violated KRS 337.055 by failing to pay him $8,788.62 in wages, an amount representing 58 hours of his accrued annual leave claimed on his timesheets. After investigating Kapsalis's complaint, the Cabinet concluded Vogt had indeed violated KRS 337.055 by failing to pay Kapsalis for the accrued leave. Accordingly, the Cabinet directed Vogt to pay a civil penalty of $250 and to pay Kapsalis $8,788.62 in restitution. The Secretary of the Labor Cabinet ultimately affirmed the penalty and amount of restitution and, following a petition for judicial review, the Franklin Circuit Court likewise affirmed. In part of its appeal, Vogt argued no substantial evidence supported that it owed Kapsalis $8,788.62 in unpaid wages, or that it otherwise violated or should have been penalized for violating KRS 377.055. Disagreeing, the Court of Appeals noted that Vogt had no policy beyond the requirement of submitting a timesheet that required Kapsalis to prove the number of hours he worked while out of the office. Vogt also contended that Kapsalis's status as a "bona fide executive" employee precluded the Cabinet from ordering Vogt to pay a civil penalty or to make restitution to Kapsalis; from prospectively enforcing such an order; or from citing it for violating KRS 337.055. The Court again disagreed, explaining that Kapsalis's complaint to the Labor Cabinet had invoked the Secretary's authority to assess civil penalties for any violation of KRS 337.055 - a statute in no way relevant to Kapsalis's status as a "bona fide executive." Indeed, nothing exempts "bona fide executives" from the purview of KRS 337.055. Also, the source of the Secretary's authority to assess civil penalties for violations of KRS 337.055 is plainly stated in KRS 337.990(3), which authorizes the Secretary or his authorized representative to: (1) assess a civil penalty between $100 and $1000; and (2) demand "full payment to the employee" (*e.g.*, restitution) by reason of any violation of KRS 337.055. Here, the Commissioner - on behalf of the Secretary - acted well within that authority by assessing Vogt a $250 fine and an amount of restitution consistent with the evidence of record.

VI. FAMILY LAW

A. ***Herbener v. Herbener***

2017-CA-001642 10/11/2019 2019 WL 5089925

Opinion by Judge Lambert; Judges Goodwine and Maze concurred.

This appeal in a dissolution action related to the division of property and retirement benefits, an award of attorney's fees, and a contempt finding. The parties had entered into a prenuptial agreement in the days prior to the marriage, which addressed treatment of the parties' separate property. The Court of Appeals held that the transfer of the husband's separate real estate into an LLC after the marriage did not transform that property into marital property, and that the circuit court did not abuse its discretion in awarding attorney's fees to the husband based upon a provision in the prenuptial agreement addressing the result when a party lost a challenge to the other party's separate property. The Court also rejected the wife's argument related to her retirement benefits because the marital/non-marital split was the subject of an agreed stipulation.

B. ***K.S. v. Cabinet for Health and Family Services***

2018-CA-000172 10/25/2019 2019 WL 5460646

Opinion by Judge Combs; Judges Dixon and Goodwine concurred.

As a matter of first impression, the Court of Appeals held that an indigent parent's right to counsel in a juvenile dependency, neglect, or abuse action includes reasonably necessary expert assistance. Thus, indigent parents in such actions are entitled to seek funding for retention of an expert witness or for an independent medical evaluation in order to mount a meaningful defense within the spirit of due process and the Sixth Amendment. The Court construed KRS Chapter 31 to require such funding in light of the fact that parental rights are the most essential and basic of civil rights.

C. ***Tager v. Tager***

2018-CA-001661 10/25/2019 2019 WL 5460636

Opinion by Judge Maze; Judges Acree and Combs concurred.

Appellant challenged orders equally dividing the marital portion of his retirement plan and entering a Qualified Domestic Relations Order (QDRO) directing the plan administrator to divide the benefits based upon the value as of the date of the parties' dissolution decree (May 6, 2004). On appeal, he argued that the marital portion of the plan should be valued based upon the much later order providing for an equal division of the marital portion of his retirement plan (November 29, 2017). The Court of Appeals affirmed, holding that although the facts of this case were unusual, appellant failed to show that he was unfairly prejudiced by the circuit court's use of the dissolution date to value his retirement plan. The Court noted that the circuit court did not enter an order formally dividing appellant's military retirement for more than eleven years after it adopted the report of the Domestic Relations Commissioner. Neither party brought the oversight to the circuit court's attention in a timely manner. However, the parties clearly stipulated that the marital portion of the retirement plan was subject to division as of the date of the decree. Since appellant had not yet retired at the time the court adopted the DRC's report, the circuit court could use the delayed division method to allocate the benefits from the military retirement plan. In reaching this conclusion, the Court rejected appellant's argument that appellee should be estopped from asserting a claim to the benefits.

VII. INSURANCE

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

2018-CA-001424 10/04/2019 2019 WL 4892316

Opinion by Judge Spalding; Judges Goodwine and Maze concurred.

This appeal was brought in a declaration of rights action to resolve the question of whether a coverage limitation provision in an insurance contract was void for public policy. Specifically, appellants argued that a single $50,000 per accident limit was void against public policy when two individuals on the insurance policy committed separate torts to bring about the subject injury. Individually, each insured would have had $50,000 in liability coverage and appellants argued that limiting that to one recovery of $50,000 violated public policy. The Court of Appeals held that the provision was not void for public policy because in this matter there was only one vehicle involved driven by one of the policy's insureds while the other policy insured's negligence involved the loading of cargo on a trailer that the motor vehicle was pulling. Therefore, the policy limit of $50,000 for a single incident was not void for public policy reasons.

VIII. JUDGMENT

A. ***Estate of Reeder v. Ashland Police Department***

2018-CA-000322 10/18/2019 2019 WL 5275575

Opinion by Judge Goodwine; Judge Combs concurred; Judge Taylor concurred in result and filed a separate opinion.

The estate of the roommate of a defendant convicted of drug trafficking and possession brought an action against the Ashland Police Department seeking recoupment of money forfeited by the defendant following his conviction. The estate filed a motion to intervene in the defendant's criminal case, requesting to be made a party and asserting its interest in $120,050 of the seized funds. During the defendant's sentencing, the trial judge stated that the motion to intervene was not well-taken and - incorrectly - that the estate should file a separate civil action; the motion to intervene was later denied by order. The estate was never served with copies of the forfeiture orders subsequently entered. The estate filed a civil complaint, per the instructions of the judge in the criminal case, alleging that the court had jurisdiction to adjudicate the forfeiture issue. The police department responded by filing a motion for summary judgment on grounds that KRS 218A.460 vests exclusive jurisdiction to determine forfeiture issues in the court in which the forfeiture proceeding has been requested - *i.e.*, the court in the criminal case. The police department also noted that the funds in question were properly forfeited per the orders entered in the criminal case, and that those orders were never appealed by the estate. Realizing the quandary it faced, the estate filed a motion for an extension of time to file an appeal in the criminal case. This motion was denied, and the estate's subsequent appeal to this Court in the criminal case was dismissed. Meanwhile, the court in the civil case granted summary judgment to the police department, ruling that the action was not maintainable and that jurisdiction for the contest of the forfeited property rested in the criminal case - which was now final. Therefore, the estate's claim was barred by "res judicata." The Court of Appeals affirmed, holding: (1) the estate's avenue for a proper remedy would have been to appeal the order in the circuit court denying its motion to intervene, not file a separate civil action regarding the same issue; (2) the estate had no standing to file a separate civil action; and (3) the court in the criminal case did not err in denying the estate's motion for additional time to file a notice of appeal because no grounds for such existed under CR 6.02, CR 73.02, or CR 77.04. In his concurring opinion, Judge Taylor took the circuit court to task for multiple issues in the case and noted that a sound basis existed for CR 60.02 relief.

B. ***Wood Estate v. Young***

2018-CA-000716 10/04/2019 2019 WL 4892328

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

The Court of Appeals affirmed an order setting the amounts that appellant and another tax lien holder were entitled to recover after the judicial sale of a parcel of real property. Appellant argued that the order was improperly entered by the clerk because it did not contain the judge's handwritten or electronic signature as required by CR 58. The order had a signature block setting out the printed name "Timothy R Coleman," with the notation "Digitally signed by Timothy R Coleman, 38th Judicial Circuit," Judge Coleman's email address, and the statement: "[R]eason: I have reviewed this document" along with the date and time. Underneath the signature line were the notations "TIMOTHY R. COLEMAN, JUDGE" and "HANCOCK CIRCUIT COURT." The Court held that this was sufficient to meet the requirements of CR 58 because that rule is general and inclusive rather than limiting and restrictive. The Court noted that the drafters of CR 58 could have required a particular type of signature, but they did not. The signature in question effectively represented the name and authority of the signatory, the court from which that authority derived, the reason for the signature, as well as its date and time.

IX. LANDLORD/TENANT

A. ***Cole v. Vincent by Seabolt***

2019-CA-000218 10/25/2019 2019 WL 5460633

Opinion by Judge Goodwine; Judge Taylor concurred; Judge Spalding dissented and filed a separate opinion.

Hazel P. Cole appealed an opinion and order of the Edmonson Circuit Court affirming the Edmonson District Court's judgment finding her guilty of forcible detainer. Emma Jean Vincent, Cole's mother, maintained a life estate in property Cole owned through a remainder. Vincent filed the underlying forcible entry and detainer action because Cole kept cattle on the property without Vincent's consent. The district court adjudged Cole guilty of forcible detainer, finding Vincent retained the right to possession of the property, Cole received notice to vacate, and Cole failed to do so. The circuit court affirmed the district court's judgment, finding that a remainderman does not have a possessory interest in the property during the pendency of a life estate. The Court of Appeals determined that because the parties did not have a landlord-tenant relationship, the district court lacked subject matter jurisdiction over the case. The Court noted that longstanding precedent indicates such a relationship is necessary to maintain an action for forcible detainer or entry. The Court further noted that KRS Chapter 383 is titled "Landlord and Tenant," which is indicative of legislative intent for the statutes therein to apply only to parties with a landlord-tenant relationship. Thus, the Court reversed and remanded with instructions to vacate the judgment of the district court. In dissent, Judge Spalding indicated that he would affirm the circuit court's order and hold that a landlord-tenant relationship is not required to maintain a forcible entry action based on the plain language of KRS 383.200(2)(a).

X. MALICIOUS PROSECUTION

A. ***Wilson v. Clem***

2018-CA-000300 10/11/2019 2019 WL 5090397

Opinion by Judge Lambert; Judge Acree concurred; Judge K. Thompson concurred in result only and filed a separate opinion.

Appellant brought a malicious prosecution action against a sheriff's deputy in his individual capacity. The circuit court granted the deputy's motion for summary judgment and dismissed appellant's claim. The Court of Appeals affirmed. After discussing the holding of the Supreme Court of Kentucky in *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016), the Court held that appellant failed to present sufficient evidence to create a genuine issue regarding the material fact that his criminal prosecution was based on probable cause. Appellant only presented allegations, not evidence, that there was an absence of probable cause. In addition, the Court held that appellant's failure to list the issue of qualified immunity in his prehearing statement would ordinarily have been fatal to his appeal; however, it was ultimately harmless because of the superfluous nature of the circuit court's ruling on that issue based on *Martin*, which effectively eliminated the qualified immunity defense in malicious prosecution claims.

XI. STANDING

A. ***Cotton v. National Collegiate Athletic Association***

2018-CA-001665 10/11/2019 2019 WL 5100370

Opinion by Judge Nickell; Judges Goodwine and Spalding concurred.

Cotton and The University of Louisville Protection and Advocacy Coalition (ULPAC) filed suit against the National Collegiate Athletic Association (NCAA) and the University of Louisville alleging damages stemming from the NCAA's treatment of the U of L men's basketball program in the wake of numerous violations of NCAA regulations related to recruiting and improper benefits. The NCAA's disciplinary action against U of L resulted in the vacation of 123 wins and tournament appearances from 2011 to 2015, including its 2012 and 2013 trips to the Final Four and 2013 National Championship. Cotton and ULPAC asserted numerous claims for relief sounding in "tort, equity, breach of contract, trust, unjust enrichment and equitable and promissory estoppel." The circuit court granted appellees' motions to dismiss for failure to state a claim upon which relief could be granted pursuant to CR 12.02(f). The circuit court concluded that Cotton and ULPAC did not have third-party standing to pursue the action as they had no "injury in fact" or concrete interest in the outcome of the issue in dispute. Disappointment, no matter how sincere or strong, was insufficient to show a legally cognizable interest and no justiciable controversy existed. Cotton and ULPAC appealed. The Court of Appeals affirmed. The Court first noted severe deficiencies in Cotton and ULPAC's brief and its lack of compliance with the Civil Rules. The Court took the opportunity to once again point out the necessity of following the rules and the rationale for compliance. Based on failures of the brief, the Court disregarded any offending portions and reviewed only the single issue of whether a legally cognizable injury presenting a justiciable controversy existed. The Court found no showing of an "injury in fact" necessary to obtain standing. Cotton and ULPAC merely attempted to enforce rights belonging solely to U of L and which U of L had itself chosen not to pursue. Cotton and ULPAC were ultimately held not to have standing to challenge the NCAA's imposition of sanctions against U of L.

XII. TORTS

A. ***Shaw v. Handy***

2018-CA-001280 10/25/2019 2019 WL 5460640

Opinion by Judge Lambert; Judge Maze concurred; Judge Goodwine concurred in result only.

This appeal was taken from a CR 12.02(f) order dismissing Shaw's action against Handy for personal injury to Shaw when Handy was serving an eviction notice to her. The circuit court granted Handy's motion to dismiss, finding that Shaw's complaint failed to comply with the one-year statute of limitations set forth in KRS 413.140(1)(a). The Court of Appeals affirmed, holding that: (1) the five-year statute of limitations (KRS 413.120(6)) did not apply because one set of facts established the traditional torts alleged; therefore, intentional or negligent infliction of emotional distress could not be recovered separately (citing *Childers v. Geile*, 367 S.W.3d 576 (Ky. 2012)); and (2) Shaw's argument concerning the constitutionality of the one-year statute of limitations was not properly before the Court (citing KRS 418.075 and *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)).

XIII. WORKERS' COMPENSATION

A. ***Pine Branch Mining, LLC v. Hensley***

2018-CA-000433 10/18/2019 2019 WL 5275567

Opinion by Judge Dixon; Judges Combs and Taylor concurred.

Pine Branch Mining sought review of an opinion of the Workers' Compensation Board affirming in part, reversing in part, and remanding an Administrative Law Judge's award of permanent total disability benefits to Lonnie Hensley. The Court of Appeals affirmed the Board's decision in part, vacated in part, and remanded the matter to the ALJ for further proceedings. The Court held that substantial evidence supported the ALJ's finding of a work-related cumulative trauma injury to Hensley's low back, her finding of permanent total disability, and her determination of Hensley's disability onset date. Most notably, the Court addressed the newly-amended version of KRS 342.730(4) and whether it applied retroactively to Hensley's claim. In House Bill 2, the General Assembly expressly declared the amendment to KRS 342.730(4) applied retroactively to all claims where the injury occurred after December 12, 1996; the claim here was in the appellate process as of July 14, 2018. Thus, the Court concluded that the claim satisfied both conditions for retroactive application of the newly-amended version of KRS 342.730(4). Here, the ALJ erroneously applied the unconstitutional version of KRS 342.730(4) to Hensley's award. The Board correctly reversed that part of the ALJ's decision but erred by remanding the claim for entry of an award pursuant to the 1994 version of the statute. Accordingly, the Court vacated that portion of the Board's opinion and remanded this matter to the ALJ for entry of an award applying the 2018 version of KRS 342.730(4).