PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 1, 2023 to OCTOBER 31, 2023

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I. COMMERCIAL LAW

A. ***CUBBY ANGEL PROPERTIES, LLC v. CITIZENS BANK OF KENTUCKY***

2023-CA-0025-MR 10/27/2023 2023 WL 7094835
Opinion by CETRULO, SUSANNE M.; COMBS, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

This case arose from the hiring of a manager, James David Johnson, by a limited liability company, Appellant Cubby Angel Properties, LLC (Cubby Angel). Johnson had Cubby Angel's sole member and manager, Dr. Melissa F. Knuckles, sign a limited power of attorney and a financial power of attorney granting him power to establish bank accounts, manage the day-to-day business, and deposit funds. Johnson opened an account at Citizen's Bank, began to deposit rent proceeds from Cubby Angel's properties, and then, over the course of several months, began converting those funds for his personal use. When the conversion was discovered, Cubby Angel sued the bank. Dr. Knuckles admitted that she executed the powers of attorney; however, she claimed that she signed them outside the presence of witnesses or a notary and did not have them reviewed by legal counsel. The complaint alleged that the bank had committed (1) common law conversion; (2) common law negligence; and (3) statutory conversion. The circuit court granted dismissal on all counts, and this appeal followed.

The Court of Appeals affirmed and held that the circuit court properly found Cubby Angel's common law claims were preempted by the Uniform Commercial Code (UCC). The UCC provides that when a particular provision of the statute addresses an issue, that issue is "displaced" by the UCC and may not be addressed through common law claims. KRS 355.1-103(2); *see also Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 506 (Ky. 2014). Using the "comprehensive rights and remedies test," the Court concluded that Kentucky Revised Statute (KRS) 355.3-420 plainly provides a cause of action for conversion of an instrument. Second, the Court also found that the UCC disposes of Cubby Angel's common law negligence claim because the claim was contingent on Johnson's authority to sign the requisite documents to open the account. The UCC extensively discusses authorization of signatures. *See* KRS 355.1-201(2)(ao) (defining "unauthorized signature."); *Dean*, 434 S.W.3d at 498 (quoting KRS 355.3-402) ("[i]f a person acting . . . as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature[.]"). Third, Cubby Angel's statutory conversion claim, under KRS 355.3-420, failed as a matter of law because there was no genuine issue of material fact regarding Johnson's power to transact on behalf of Cubby Angel. Dr. Knuckles knowingly executed the documents granting Johnson the power to establish and operate bank accounts, to execute any documents necessary to do so, and specifically authorizing any party

dealing with Johnson to rely absolutely on the authority granted in the powers of attorney. As such, there existed no issue of fact regarding whether Johnson was entitled to enforce the instruments under KRS 355.3-420(1).

II. CONSTITUTIONAL LAW

A. ***DANIEL CAMERON, ATTORNEY GENERAL, ON BEHALF OF THE COMMONWEALTH OF KENTUCKY v. JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.***

2022-CA-0964-MR 10/06/2023 2023 WL 6522192
Opinion by KAREM, ANNETTE; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 03/06/2024

The Jefferson County Board of Education filed suit against the Commissioner of Education of Kentucky alleging that several provisions of Senate Bill 1, codified at KRS 160.370(2)), violated the prohibition against special and local legislation found in Sections 59 and 60 of the Kentucky Constitution. The legislation, which gives greater powers to the school superintendent at the expense of the board of education, applies only "in a county school district in a county with a consolidated local government," a description which currently fits only the Jefferson County school district. The Attorney General intervened to defend the constitutionality of the legislation, arguing that the Board lacked standing; failed to name a necessary party, the Jefferson County Public Schools (JCPS) Superintendent; and that the legislation was not special legislation because it applied to a class rather than to a specific individual, object, or locale. The Court of Appeals held that the Board had standing because the defendant Commissioner possessed the authority to enforce the legislation and that the Board's failure to name the Superintendent as a party was not fatal to the action. The Court applied the test in *Calloway County Sheriff's Department v. Woodall*, 607 S.W.3d 557, 571 (Ky. 2020), to conclude that the challenged legislative provisions violate Sections 59 and 60 because, even though the legislation did not expressly name JCPS, it was intended as a practical matter to apply to one specific locale, the Jefferson County school district.

III. CRIMINAL LAW

A. ***THOMAS RAIDER v. COMMONWEALTH OF KENTUCKY***

2022-CA-1070-MR 10/06/2023 2023 WL 6521602
Opinion by JONES, ALLISON; EASTON, J. (CONCURS AND FILES SEPARATE OPINION) AND LAMBERT, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 02/07/2024

In a direct appeal from the Estill Circuit Court's order revoking Appellant's pretrial diversion, the Court of Appeals reversed. Appellant was required to complete the drug court program as a condition of his diversion; however, Appellant absconded from the program and was terminated from it. For reasons that are not clarified by the record, the Commonwealth did not move to revoke Appellant's diversion. Over four years later, Appellant appeared before the trial court on new charges. The trial court *sua sponte* revoked diversion, despite Appellant's objections that the Commonwealth had not moved to

revoke and the diversionary period had expired. The trial court overruled the objections, stating a motion by the prosecutor was not required.

In its majority opinion, the Court of Appeals agreed with Appellant that a trial court's revocation of diversion requires a motion by the prosecutor to revoke, citing *Ballard v. Commonwealth*, 320 S.W.3d 69 (Ky. 2010), and *Tucker v. Commonwealth*, 295 S.W.3d 455 (Ky. App. 2009). Because it is undisputed that the Commonwealth never filed a motion to revoke in this case, prior precedents required reversal of the trial court's order and remand with instructions to dismiss the underlying case as diverted.

The concurring opinion agreed with the majority that *Tucker* and *Ballard*, interpreting the language in KRS 533.256(1), compelled the result in this case. However, the concurrence pointed out that KRS 533.258(1) states a diverted case can only be dismissed upon successful completion of the terms of the diversion. Appellant, having absconded for years and abandoning treatment, did not successfully complete the terms of his diversion. The concurrence suggested that legislative action may be necessary to clarify whether KRS 533.256(1) intended the absolute necessity of the prosecutor's motion to void diversion despite the condition of successful completion found in KRS 533.258(1).

B. ***COMMONWEALTH OF KENTUCKY v. BILLY LETNER***

2022-CA-1054-MR 10/20/2023 2023 WL 6932724
Opinion by McNEILL, J. CHRISTOPHER; CETRULO, J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant called 911 for emergency help after a female occupant of an apartment he was staying at overdosed. Appellant was later indicted on two counts of first-degree trafficking in a controlled substance in Pulaski Circuit Court based on methamphetamine and fentanyl later recovered pursuant to a search warrant on the apartment. Appellant moved to dismiss the indictment on the premise he was exempt from prosecution under Kentucky's Medical Amnesty Statute, KRS 218A.133. The trial court granted the motion on the reasoning that since one of the definitions of "trafficking" includes "possession with intent," and since trafficking in a controlled substance necessarily includes possession of the substance, KRS 218A.133 should be construed liberally to include trafficking within the statute's immunity from prosecution for possession of controlled substance crimes. The prosecution appealed, and the Court of Appeals reversed on the basis that KRS 218A.133's plain language only granted immunity from prosecution for criminal offenses prohibiting possession. The Court additionally reasoned that possession and trafficking were separate and distinct crimes, and if the legislature intended to exempt trafficking under the statute, "it could have easily done so." The Court concluded that even if the statute could be read ambiguously, the legislative history of the law supported the rationale that trafficking was not intended to be included in the exemption.

C. ***JAMES ROBERT BURDEN, JR. v. COMMONWEALTH OF KENTUCKY***

2022-CA-0739-MR 10/27/2023 2023 WL 7095312
Opinion by CALDWELL, JACQUELINE M.; COMBS, J. (CONCURS) AND KAREM, J. (CONCURS)

James Robert Burden, Jr. (Burden) appealed the Daviess Circuit Court's denial of his post-conviction motion seeking DNA testing pursuant to Kentucky Revised Statute (KRS) 422.285. In 1986, Burden

entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to charges of kidnapping and murder. In 2021, after advancements in DNA testing, Burden petitioned for DNA testing of evidence found at the crime scene of the victim's body. The trial court denied the motion on the basis "there was no 'unresolved' issue which might be resolved by the testing of the evidence" since a rape charge against Burden had been dismissed.

The Court of Appeals reversed and remanded on the basis that KRS 422.285(5) compelled Burden's motion be granted if a reasonable probability existed that a defendant would not have been prosecuted if exculpatory results were obtained through DNA testing. Even though ultimately dismissed, Burden was initially charged and prosecuted for rape, and he entered an *Alford* plea to a separate qualifying offense under KRS 433.285(1)(a) thus triggering the statute's mandatory testing requirement. The Court reasoned the statute only required he be prosecuted, not convicted, for the offense related to the DNA testing, and "though perhaps 'resolved' by the plea, [the rape charge] still would have been litigated had Burden not [pled.]" The Court concluded that had exculpatory DNA evidence been available at the time, Burden would not have pled to kidnapping and murder "as he would have had evidence of non-involvement in the rape, which occurred contemporaneously . . . ."

IV. DOMESTIC VIOLENCE

A. ***BRYAN SCOTT ALLEN v. VALERIE SUE EDER***

2023-CA-0267-MR 10/06/2023 2023 WL 6522190
Opinion by COMBS, SARA WALTER; DIXON, J. (CONCURS) AND ECKERLE, J. (DISSENTS AND FILES SEPARATE OPINION)

This case involved the interpretation of Kentucky's stalking statute (Kentucky Revised Statute (KRS) 508.140) as applied in conjunction with the issuance of an Interpersonal Protective Order (IPO) (KRS 456.010). At issue was the correct application of the term "implicit threat" as construed by the trial judge in light of the menacing circumstances perpetrated upon the petitioner. Where there was no abuse of discretion and substantial evidence supported the ample findings of the trial judge, the Court of Appeals upheld issuance of the IPO even though the perpetrator committed no explicitly violent acts. The perpetrator, who was employed as a police officer, communicated to the petitioner he was actively watching her residence and monitoring her activities as well as demonstrated the capability of using his authority as a police officer to obtain information as to her personal associations. All this together amounted to an implicit threat. The dissenting opinion reasoned that no implicit threat was made because none of the perpetrator's words or actions could be reasonably construed to communicate an intention to threaten violence as defined under the statute.

V. FAMILY LAW

A. ***S.S. v. COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.***

2023-CA-0379-ME 10/13/2023 2023 WL 6763943
Opinion by THOMPSON, LARRY E.; CETRULO, J. (CONCURS) AND COMBS, J. (CONCURS)

S.S. was accused of medically neglecting her child who had issues gaining weight. The child suffered from a condition which made it hard for him to swallow and caused vomiting. The Cabinet for Health and Family Services and the child's doctors believed the child was not receiving appropriate nutrition and that S.S. was not administering the child's medications as prescribed. During one hospitalization, S.S. refused a medical procedure for the child. Two neglect petitions were filed against S.S., one for the child's failure to gain weight and failure to receive medication and one for S.S.'s refusal to consent to the medical procedure. S.S. testified that she was caring for the child the best she could considering his medical condition. A doctor and two Cabinet workers testified that S.S. did not always follow the doctors' treatment plan and that the child would always improve once he was hospitalized. The trial court held that S.S. neglected the child due to her not always following the doctors' orders. The Court of Appeals affirmed the trial court's judgment holding that, while this case was a close call, the trial court chose to give more weight to the testimony of the Cabinet workers and doctor, and the court's decision was based on substantial evidence.

B. ***R.V.K.H. v. S.M.S., ET AL.***

2023-CA-0136-ME 10/27/2023 2023 WL 7095035
Opinion by DIXON, DONNA L.; ACREE, J. (CONCURS) AND McNEILL, J. (CONCURS)

Appellant biological mother appealed from the order of the Graves Circuit Court granting adoption of her child by a stepparent without her consent. The Court of Appeals affirmed in part, reversed in part, and remanded. Appellant argued the Kentucky courts did not have subject matter jurisdiction to hear the petition for adoption under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Affirming the circuit court, the Court held that the plain language of Kentucky Revised Statute (KRS) 403.800(4) and 403.802 provides that the UCCJEA does not apply to adoption proceedings governed by KRS Chapter 199. In reversing the circuit court and remanding for further proceedings, the Court also held that, in contravention of KRS 199.502(3), at no time did the circuit court inquire whether Appellant, who appeared *pro se* for the final hearing, was indigent; nor did it inform of her right to appointment of counsel in the contested adoption proceedings.

VI. INSURANCE LAW

A. ***CITY OF NEWPORT, KENTUCKY, ET AL. v. WESTPORT INSURANCE COMPANY, AS SUCCESSOR TO COREGIS INSURANCE COMPANY and JEREL COLEMON AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM VIRGIL v. WESTPORT INSURANCE COMPANY, AS SUCCESSOR TO COREGIS INSURANCE COMPANY***

2022-CA-0384-MR 10/06/2023 2023 WL 6522204
2022-CA-0415-MR
Opinion by EASTON, KELLY MARK; JONES, J. (CONCURS) AND LAMBERT, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 04/12/2024

The City of Newport and the Newport Police Department (collectively the Newport Insureds) were subject to a federal civil rights suit under 42 United States Code § 1983 relating to a wrongful arrest in

1987, which led to the conviction of an individual who served 28 years in prison. The Newport Insureds tendered a request to Westport Insurance Company (Westport), with whom they enjoyed a policy from July 1, 1997 to July 1, 2000, for defense and indemnification. Westport maintained the policy coverage was not triggered because a personal injury arising from a wrongful prosecution takes place at the time charges were filed, and the policy was not in place at that time. Westport filed a declaratory judgment action in Campbell Circuit Court, and the circuit court entered summary judgment in Westport's favor. On appeal, the Newport Insureds argued Westport's policy was an injury-based occurrence policy, triggered if any injury occurs during the policy period, and because an individual was wrongfully incarcerated during the coverage period, there existed a continuous and ongoing personal injury. At a minimum, the Newport Insureds contended Westport had a duty to defend them in litigation. The Court of Appeals affirmed on the reasoning that, in accordance with the language of Westport's policy, it could only be triggered by the occurrence of an injury while the policy was in effect. In this instance, the injury at issue was the wrongful arrest and charge which occurred in 1987 before the policy was in effect. The Court determined that a "civil rights violation for a wrongful prosecution is complete when the charges are brought, even though damages continue to be sustained. . . . Kentucky has long recognized a separation of the injury itself and the damages later sustained." Thus, the Court concluded Westport's policy was "not continuously triggered by damages accumulating over the years" from an event that occurred prior to the implementation of the policy.

VII. OPEN RECORDS

A. ***KENTUCKY OPEN GOVERNMENT COALITION, INC. v. KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES COMMISSION***

2022-CA-0170-MR 10/27/2023 2023 WL 7095744
2022-CA-0192-MR

Opinion by TAYLOR, JEFF S.; COMBS, J. (CONCURS) AND McNEILL, J. (CONCURS AND FILES SEPARATE OPINION)

DISCRETIONARY REVIEW GRANTED 06/05/2024

On August 10, 2021, the Kentucky Open Government Coalition (Coalition) filed an open records request with the Kentucky Department of Fish and Wildlife seeking all emails and text messages sent between certain present and past members of the Kentucky Department of Fish and Wildlife Resources Commission (Commission) from June 1, 2020 to August 10, 2021. The request was specifically "not limited to communications that took place on government-owned email accounts and cell phones[,]" expressly requested "public records . . . generated on private cell phones [and] on private email services[,]" and excluded any "[c]ommunications of a purely personal nature unrelated to any governmental function." In the last of three responses to the request, the Commission indicated that documents in possession of individuals on their personal devices and communications made outside of a quorum during a public meeting did not constitute public records subject to open records requests. The Coalition filed suit in Franklin Circuit Court to compel the production of the aforementioned private communications. The complaint alleged the "Commissioners are not provided with government devices or email addresses to conduct official Commission business[,]" and "the Commission's website lists each Commissioner's personal contact information, including non-governmental street and e-mail addresses and phone numbers." The complaint further alleged that

"[e]mails and text messages between Commissioners about the agency's business are public records within the meaning of [Kentucky Revised Statute (KRS)] 61.870(2) because they were 'prepared' and 'used' by the members of the Commission, regardless of where they are stored." Agreeing with the Coalition's argument regarding the Commission members' private email accounts, the circuit court ruled they were public records subject to disclosure while the requested communications sent to or received on the Commission members' private cell phones were not subject to disclosure because their production would be unreasonably burdensome or raise privacy concerns. The circuit court concluded there was no wilful withholding of public documents warranting statutory penalties. The Coalition filed an appeal while the Commission filed a cross-appeal.

In the appeal filed by the Coalition, the Court of Appeals reversed the circuit court's order in part. The Court held that the requested text messages qualified as public records because members of the Commission are bound by the Open Records Act, and "such messages [were] prepared by or used by the members of the Commission and relat[ed] to or concern[ed] Commission business." The Court reasoned that "to hold otherwise" would allow public officials to evade disclosure by using their personal devices and further determined that the Commission failed to demonstrate "that the text messages sought in the open records request contained personal information" thus exempting them from disclosure due to privacy concerns. The Court remanded with instructions for the circuit court to reconsider the particular facts of the underlying case for a determination of whether the request would create an unreasonable burden. The Court affirmed the circuit court's finding as to no wilful violation on the part of the Commission because the law relating to requests in connection with personal email accounts and text messages "was unsettled." As a result, the Commission's actions could not be demonstrated to be "'without plausible justification and with conscious disregard of the requester's rights.'" *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). In the Commission's cross-appeal, the Court affirmed the circuit court's ruling relating to the disclosure of the requested emails based upon the same rationale. The Court rejected the Commission's argument that official documents could only be generated during public meetings with a quorum because the Open Records Act did not define public records "so narrowly[.]"

The concurring opinion stated that the majority opinion's analysis of the private text messages was correctly limited to the exceptions of unreasonable burden and privacy due to those being the only exceptions invoked by the Commission. However, the concurrence noted that there are other statutory exemptions that could be considered in the context of private emails and text messages such as exemptions relating to "[p]reliminary drafts, notes, correspondence with private individuals . . ." and "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]"

VIII. PROPERTY LAW

A. ***ELIZABETH BURCH v. LOUIS BERTRAND THOMAS III, AND LAURA ELIZABETH THOMAS FRITZ, INDIVIDUALLY AND AS CO-EXECUTORS OF THE ESTATE OF LOUIS BERTRAND THOMAS, JR., ET AL.***

2023-CA-0005-MR 10/13/2023 2023 WL 6770995
Opinion by KAREM, ANNETTE; CETRULO, J. (CONCURS) AND McNEILL, J. (CONCURS)

This opinion addresses whether a provision in a sales agreement governing the future sale of property was extinguished upon the release of the underlying mortgage. Two sisters, Elizabeth Burch and Mary Ellen Thomas, received equal shares in a tract of real estate as a gift from their mother. The property had a fair market value of $80,600. Burch agreed to sell her share to Thomas for $40,300. Thomas executed a promissory note and mortgage in that amount. The agreement of sale of the property contained an article (Article III) which provided that the purchaser would fully account to the seller as to any future sale of the property: If the net proceeds of any future sale exceeded $80,600, the purchaser would receive 50% of this excess amount; if the future sale was less than $80,600, the seller agreed to reduce the purchase price proportionately. The note was paid in full eleven years later, and Burch executed a release of the mortgage. Twenty-five years later, Thomas's heirs sought a declaratory judgment to determine whether the article governing future sales of the property was still effective. The trial court entered a declaratory judgment ruling that any obligation in the agreement regarding future sales was extinguished upon the release of the mortgage. The Court of Appeals agreed, holding that the doctrine of merger applied, and that Article III was not a collateral agreement separate and distinct from the agreement for the purchase of the property. It held that the exceptions to the merger doctrine of fraud, mistake, or contractual agreement did not apply, and Article III was an integral part of the sale agreement which had no reason to exist once the sale took place.

B. ***FERGUSON ENTERPRISES, INC. v. DREAMLAND HOSPITALITY, LLC.***

2022-CA-0361-MR 10/27/2023 2023 WL 7094824

Opinion by DIXON, DONNA L.; CETRULO, J. (CONCURS) AND EASTON, J. (CONCURS IN RESULT AND FILES SEPARATE OPINION)

Ferguson Enterprises, Inc. (Ferguson) appealed from the Jefferson Circuit Court's grant of summary judgment to Dreamland Hospitality, LLC (Dreamland). Dreamland hired Huhn Plumbing Co., LLC (Huhn) for construction work on its real estate. Huhn contracted with Ferguson to provide materials. Dreamland paid Huhn for materials, but Huhn failed to pay Ferguson. Ferguson notified Dreamland of its intent to file a lien against real estate for its construction materials. Ferguson then filed a lien. Ferguson tried to reach a settlement with Dreamland but was never paid, so Ferguson sued Dreamland. Ferguson moved the trial court to enforce the settlement agreement, but the trial court denied the motion finding no valid settlement agreement existed. Ferguson moved the trial court for summary judgment, and Dreamland moved to dismiss the case, which was treated as a cross-motion for summary judgment. The trial court granted summary judgment to Dreamland, finding the materialman's lien was not perfected because it "was not the correct amount."

An appeal followed in which the Court of Appeals affirmed in part and reversed in part the summary judgment and remanded. The Court held the trial court erred because there was a factual dispute concerning whether the amount of the lien was correct at time it was filed. Kentucky Revised Statute (KRS) 376.080(1) requires a lien statement to include, "the amount due [the provider of the materials], with all just credits and set-offs known to [the provider.]" Kentucky law requires strict compliance with this statute. The key issue herein was whether credit that was given on the date the lien was filed was known to Ferguson prior to filing its lien. Because this was disputed, the trial court could not grant summary judgment to either party. The Court further held the trial court did not err in its determination that no settlement agreement had been created because the person with whom

Ferguson negotiated a settlement had no authority to bind Dreamland. The Court also held because there was no settlement agreement, Ferguson was not entitled to attorney fees.

The concurring opinion concurred in result "[b]ecause the amount of 'just credits and set-offs known to' Ferguson when it filed its lien was a disputed fact" and further noted there was a lack of Kentucky precedents applying KRS 376.080's "all just credits and set-offs" language. The opinion cited the Missouri case of *Almat Builders and Remodeling, Inc. v. Midwest Lodging LLC*, 615 S.W.3d 70, 79 (Mo. App. 2020) for guidance which addresses liens containing incorrect amounts due to mistake or error.

IX. WORKER'S COMPENSATION

A. ***JOSEPH LEE v. W.G. YATES & SONS CONSTRUCTION CO., ET AL.***

2023-CA-0695-MR 10/27/2023 2023 WL 7095038
Opinion by KAREM, ANNETTE; CETRULO, J. (DISSENTS AND FILES SEPARATE OPINION) AND McNEILL, J. (CONCURS)

Appellee employer, Yates & Sons, is a construction company based in Mississippi, which performs jobs all over the country and hires workers on a per-job basis. Appellant Joseph Lee is a permanent legal resident of Louisiana. In accordance with company practice, Lee was contacted via telephone by a representative of Yates about working as a foreman on a project in Maysville, Kentucky. Accordingly, Lee travelled to Kentucky in his pickup truck, towing his travel trailer and motorcycle, and was formally hired at the job site. He lived in the trailer at a nearby campsite in Ohio for the entirety of his employment on the job. Yates provided him with a $100 daily per diem in addition to his pay. Lee's family remained at his residence in Louisiana, and he maintained his Louisiana driver's license. Lee was seriously injured while driving his motorcycle to a restaurant for dinner, about two hours before the beginning of his evening shift. The administrative law judge (ALJ) found that Lee had relocated to Ohio and consequently his injury was not compensable under the "going and coming rule." The Workers' Compensation Board affirmed.

Relying on *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456 (Ky. 2012), and *Standard Oil Co. (Ky.) v. Witt*, 283 Ky. 327, 141 S.W.2d 271 (1940), the Court of Appeals reversed and remanded for further proceedings. The Court applied the "traveling employee" exception, which allows recovery of workers' compensation benefits if the employee is injured while traveling as required by his employment unless the travel is a significant departure from the purpose of the trip. The Court's majority found no legal basis that would allow Lee to be recruited as out-of-state talent; to work at a job hundreds of miles from his home that made commuting impossible and be paid a per diem for food and lodging; and then be denied workers' compensation benefits because he lodged in one location for eight months of work. The majority further held that Lee's injury was work-related under the "service to the employer" exception because he was acting in service to his employer throughout the time he was in Kentucky and Ohio, and eating dinner in a restaurant was a necessity of his employment because he was away from home.

The Court's dissent stated that the Board did not overlook or misconstrue controlling precedent. The dissent agreed with the ALJ and the Board that Lee was not required to travel in order to do the job he was hired to perform, and he was not coming or going to work when the accident occurred. The

dissent also held that Lee was not providing a service to his employer and at the time of the injury was engaged in an activity that was a distinct departure from work-related travel.